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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

WESTERN ENERGY ALLIANCE and
PETROLEUM ASSOCIATION OF WYOMING,

Petitioners,

v.

JOSEPH R. BIDEN, JR., in his official capacity as
President of the United States; DEB HAALAND, in her
official capacity as

**No. 21-CV-13-SWS
(Lead Case)**

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

Respondents, and

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

Intervenor-Respondents.

STATE OF WYOMING,

Petitioners,

v.

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

Respondents, and

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

Intervenor-Respondents.

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

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

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INTRODUCTION

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

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

BACKGROUND

I. LEGAL BACKGROUND

A. The Mineral Leasing Act (MLA)

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

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

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

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

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

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

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

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

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

B. The National Environmental Policy Act (NEPA)

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Colorado & Montana-Dakotas: On February 4, both BLM-Colorado and BLM-Montana-Dakotas sought approval by February 12 to post competitive sale notices for March 2021 sales. AR1150–55.⁴ Their respective submissions indicated that their EAs were ready for review as the agency had responded to public comments. AR1153 (“BLM responded to [public] comments [on a draft EA]”); AR1152 (referencing “response to comment section of the EA”).

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER WEA’S PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE COURT CANNOT COMPEL LEASE SALES

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

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

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

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

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

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

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

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

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

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

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

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

Third, WEA’s construction contradicts the legislative history of the 1987 Reform Act. Under the guise of interpreting the term “available,” WEA actually asks the Court to enact a policy change that Congress previously rejected. When considering the 1987 Reform Act, the oil and gas industry expressed its concern to Congress that the competitive sale provision placed Interior “under no obligation to nominate lands for lease.” Interior Hearing, No. 100-11, at 133.⁸ Industry then requested that Congress require the Secretary to promptly offer lands receiving an expression of interest (EOI), by adding the following underlined language to the competitive sale provision: “The public may make confidential expressions of interest about specific lands, and such lands shall be offered in the next scheduled sale in the area of such lands, if qualified under the provisions of this act.” *Id.* But Congress declined to adopt industry’s proposed revision, explaining instead that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The NEPA-Based Postponements Were Not Pretextual.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Instead, WEA claims that the additional Utah postponement decision is arbitrary and capricious for overlooking draft NEPA analysis that BLM-Utah had done. But the story is not that simple. When BLM-Utah sought approval to post its competitive sale notice, that approval package was returned to BLM because “the package needs an updated EA that responds to comments.” Gamper Decl. ¶ 10, Att. D.¹⁰ By February 12, BLM Utah had not provided an updated EA. *Id.* Because courts “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned,” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (internal citation omitted), the Court should affirm the second Utah postponement decision.

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

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

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

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

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

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

V. THE CHALLENGED LEASING POSTPONEMENTS WERE NOT PROCEDURALLY DEFECTIVE.

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

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

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

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

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

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

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

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

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

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

a water authority challenged the U.S. Fish and Wildlife Service’s acquisition of a conservation easement for a wetland that, if not for the easement, could potentially have been used to construct a reservoir. *See id.* at 671–72. The court rejected the argument that the acquisition of the conservation easement was a major federal action requiring the preparation of an EIS because it did not alter the environmental status quo. *See id.* at 679–80 (holding that NEPA did not require the agency to “discuss the environmental effects of continuing to use land in the manner which it is presently being used” because the agency was not “undertaking a project that changes the character or function of the land”); *accord Babbitt*, 137 F.3d at 1214. Likewise here, merely postponing lease sales for a temporary period “continu[es] to use land in the manner which it is presently being used” and thus is not a major federal action. *Sabine River*, 951 F.2d at 679.¹¹

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

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

VI. WEA IS NOT ENTITLED TO ANY RELIEF.

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

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

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

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

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

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

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

CONCLUSION

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

Submitted respectfully this 5th day of October, 2021,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

/s/ Michael S. Sawyer
MICHAEL S. SAWYER
Trial Attorney, Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 514-5273
Fax: (202) 305-0506
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L. ROBERT MURRAY
Acting United States Attorney
U.S. Attorney's Office,
District of Wyoming

/s/ Nicholas Vassallo
NICHOLAS VASSALLO
Assistant United States Attorney
Chief, Civil Division
P.O. Box 668
Cheyenne, WY 82003
Telephone: (307) 772-2124
Fax: (307) 772-2123
Email: nick.vassallo@usdoj.gov

Counsel for Respondents

CERTIFICATE OF COMPLIANCE

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

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

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

WESTERN ENERGY ALLIANCE and
PETROLEUM ASSOCIATION OF WYOMING,

Petitioners,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President
of the United States; DEB HAALAND, in her official capacity as
Secretary of the Interior; and THE UNITED STATES
BUREAU OF LAND MANAGEMENT,

Respondents, and

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

Intervenor-Respondents.

**No. 21-CV-13-
SWS (Lead Case)**

STATE OF WYOMING,

Petitioners,

v.

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

Respondents, and

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

Intervenor-Respondents.

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

Declaration of Merry Gamper

I, Merry Gamper, in accordance with the requirements of 28 U.S.C. § 1746, declare:

1. I am currently employed by the United States Department of the Interior, Bureau of Land Management (BLM), Headquarters Office in Grand Junction, CO, as the Senior Litigation Specialist, Office of the Director, a position that I have held since May 24, 2020.
2. In my role as Senior Litigation Specialist, I coordinate cases in active litigation, prepare administrative records for national-level cases, and provide training to staff regarding litigation.
3. The Department of the Interior uses a “Data Tracking System” (DTS) to facilitate the review of certain documents and to obtain approval and/or direction on certain decisions. When a decision of a BLM State Office must be reviewed or approved by the Assistant Secretary – Land and Minerals Management (ASLM), the DTS entry works its way up from the State Office, to the BLM Headquarters Office, then to the Office of the Assistant Secretary and, ultimately, to the Assistant Secretary or the person exercising the authority of the Assistant Secretary.
4. A DTS entry typically includes attached documents to be reviewed by the persons in the DTS routing. The “control slip” for a DTS entry catalogs the persons who reviewed the entry and what, if any, action they took.
5. I have reviewed the DTS entries and control slips for the proposed first quarter 2021 oil and gas lease sales for the following BLM State Offices: Montana/the Dakotas (DTS#

BLM0024521); Colorado (DTS# BLM0024808); Utah (DTS# BLM0024816); and, Wyoming (DTS# BLM0024800).

6. The DTS file for each proposed lease sale contained various documents as attachments, including the available environmental analysis documents generated pursuant to the National Environmental Policy Act (NEPA). The DTS file for a lease sale, including its supporting attachments, is referred to herein as a “lease sale package.”
7. The control slips for the lease sale packages evidence that, as of February 12, 2021, draft NEPA documents for the proposed Utah and Wyoming sales had not been presented to Laura Daniel-Davis for review/authorization under Secretarial Order No. 3395. At that time, Laura Daniel-Davis was serving as Senior Advisor to the Secretary, Exercising the Delegated Authority of the Assistant Secretary – Land and Minerals Management.
8. The control slip for the Wyoming lease sale package (Attachment A) shows that the sale package was entered into the DTS system on February 4, 2021. On February 7, 2021, Jill Moran (an Analyst in ASLM) re-routed the entry to BLM because there had not been time for Laura Daniel-Davis to make a decision before February 5, 2021, the stated posting date of the Notice of Competitive Lease Sale. See Attachment B. Jill Moran asked that the lease sale package be re-routed to the Wyoming State Office so that a new proposed posting date could be chosen and the documents updated accordingly. *Id.*
9. From February 8, 2021, through February 12, 2021 and beyond, the DTS control slip shows that the Wyoming lease sale package remained with the BLM Wyoming State Office in DTS, as they had not resubmitted it with updated documentation.
10. The control slip for the Utah lease sale package (Attachment C) shows that the sale package was entered into the DTS system on February 4, 2021. On February 8, 2021, Jill

Moran re-routed the entry to BLM, stating that “the package needs an updated EA that responds to comments.” See Attachment D. The control slip shows that, through February 12, 2021 and beyond, the package was not returned to ASLM with the requested updated EA.

11. The control slip for the Colorado lease sale package shows that the sale package was entered into the DTS system on February 4, 2021, and that the package was made available to Laura Daniel-Davis on February 5, 2021. See Attachment E.
12. The control slip for the Montana-Dakotas lease sale package (Attachment F) shows that the lease sale package was entered into the DTS system on January 21, 2021, and that the package was made available to Laura Daniel-Davis on February 9, 2021.
13. In October of 2020, a Notice of Competitive Oil and Gas Lease Sale was posted announcing an internet-based competitive lease sale for 20 parcels, totaling approximately 25,000 acres, in Nevada to be held in the December 2020. Subsequently, a decision was issued by the court in *WildEarth Guardians v. Bernhardt*, 16-cv-1724, (D.D.C.) (Nov. 13, 2020), that resulted in the NEPA analyses for previously-held lease sales in Wyoming being remanded to the BLM for corrective action. Based on the court’s ruling, the BLM determined that it was necessary to carefully review, reconsider, and potentially amend and/or supplement the NEPA analysis for the noticed 2020 Quarter 4 lease sale in Nevada. Therefore, on December 7, 2020, the BLM postponed the 2020 Quarter 4 Nevada lease sale indefinitely.
14. On January 8, 2021, a Notice of Competitive Oil and Gas Lease Sale was posted announcing an internet-based competitive lease sale for 17 parcels, totaling approximately 74,000 acres, in Nevada to be held on March 9, 2021. For the same

reasons that led the BLM to postpone the 2020 Quarter 4 Nevada lease sale in December of 2020, the BLM postponed the 2021 Quarter 1 Nevada lease sale in January of 2021.

The BLM's decision to postpone the 2021 Quarter 1 Nevada lease sale was originally announced on BLM's website on January 25, 2021.

15. Historically, the BLM has not held an oil and gas lease sale for every state in every quarter, as seen by Attachment G. That attachment reflects the frequency with which lease sales were held in selected states for the years 2017–2020. I supervised the collection and compilation of that data, which is based on competitive sale notices that were published and are publically available on BLM's website.
16. The BLM has published scoping notices to be held in the first quarter of 2022 for parcels of land administered by the following BLM State Offices: Colorado, Eastern States, Montana/Dakotas, New Mexico, Nevada, Utah, and Wyoming. The BLM has worked diligently to improve the NEPA analyses for the 2022 Quarter 1 lease sales relative to the NEPA analyses that were before the court in the above-referenced *WildEarth Guardians* case. This process has involved developing an inventory of greenhouse gas (GHG) emissions from fossil fuels produced on lands managed by the BLM in fiscal year 2020 and from reasonably foreseeable fossil fuel production and leasing over the next 12 months, as well as preparing an assessment of future GHG emissions trends from federal fossil fuel development and potential climate change impacts. The BLM is presently considering how to use any final assessments as a tool in evaluating the cumulative impact of GHG emissions from BLM's authorizations of fossil fuel energy leasing and development. The BLM is also considering how to exercise its discretion to incorporate and analyze carbon budgeting, after expending substantial personnel time considering

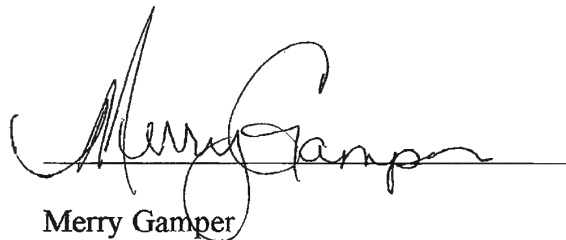
this issue since first-quarter lease sales were postponed. It is anticipated that draft NEPA analyses for the 2022 Quarter 1 lease sales will be published for public review and comment in late October or early November of this year.

17. On April 16, 2021, Secretary Haaland issued Secretary's Order Number 3399, "Department-wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-making Process" (SO 3399). SO 3399 provides guidance to the Department's Bureaus and Offices regarding the consideration of GHG emissions and the associated climate change impacts in NEPA analyses. SO 3399, Sec. 5.b. First, SO 3399 states that "Bureaus/Offices should use appropriate tools, methodologies, and resources available to quantify GHG emissions and compare GHG quantities across alternatives." Second, SO 3399 notes that estimates of the social cost of greenhouse gases (SC-GHG) "are estimates in dollars of the long-term damage done by these GHGs in a given year" and advises that SC-GHG "can be a useful measure to assess the climate impacts of GHG emission changes for Federal proposed actions."
18. Attached to my declaration as Attachment H is a true and correct copy of a memorandum from BLM-Wyoming to BLM Headquarters about how to proceed with its December 2020 sale following the *WildEarth Guardians* decision referenced above. Although the memo bears a draft watermark, this is the final version that was sent from BLM-Wyoming to BLM Headquarters.

The foregoing is based upon my personal knowledge and records kept in the ordinary course of the U.S. Department of the Interior's business by knowledgeable individuals. If called upon, I could testify competently to the matters set forth above.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 5, 2021 in Grand Junction, CO.

A handwritten signature in black ink, appearing to read "Merry Gamper", is written over a horizontal line. The signature is cursive and stylized.

Merry Gamper

ATTACHMENT A



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 05/10/2021

DCN: BLM0024800		ES No:
Orig Office: WY-923-Adjudication	Input Date: 02/04/2021	Addressee: Michael Nedd
Due Date:	Signature Level: D	
Subject: SO 3395 Request for Authorization - WY OG Lease Sale in March 2021 - Sale dates changed		

Comments:Task Codes:

- | | |
|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
WY-923-Adjudication	2 - Appropriate Action	02/04/2021		02/04/2021
WY-920-MINERAL/LANDS	3 - Surname	02/04/2021		02/04/2021
WY-912-COMMUNICATIONS	3 - Surname	02/04/2021		02/04/2021
WY-910-STATE DIRECTOR	3 - Surname	02/04/2021		02/04/2021
HQ-100	3 - Surname	02/04/2021		02/04/2021
BLM-COS	2 - Appropriate Action	02/04/2021		02/04/2021
BLM-DD-OPS	4 - Signature	02/04/2021		02/04/2021
LM-ASLM CCU	2 - Appropriate Action	02/04/2021		02/09/2021
WY-923-Adjudication	8 - See Comments	02/08/2021		02/08/2021
WY-920-MINERAL/LANDS	3 - Surname	02/08/2021		
WY-912-COMMUNICATIONS	3 - Surname			
WY-910-STATE DIRECTOR	3 - Surname			
HQ-100	3 - Surname			



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 05/10/2021

DCN: BLM0024800		ES No:
Orig Office: WY-923-Adjudication	Input Date: 02/04/2021	Addressee: Michael Nedd
Due Date:	Signature Level: D	
Subject: SO 3395 Request for Authorization - WY OG Lease Sale in March 2021 - Sale dates changed		

Comments:Task Codes:

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|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
BLM-COS	3 - Surname			
BLM-DD-OPS	4 - Signature			
LM-ASLM CCU	2 - Appropriate Action			
HQ-100	15 - For Your Information			
WY-910-STATE DIRECTOR	10 - Prepare Final			
LM-Analyst Jill Moran	3 - Surname	02/05/2021		02/07/2021
HQ-600CC	2 - Appropriate Action	02/07/2021		02/08/2021
LM-Chief of Staff Cara Lee Macdonald	3 - Surname			
LM-P-DAS Laura Daniel-Davis	3 - Surname			
LM-ASLM CCU	9 - Mail/Distribute/Close/Post/File			

ATTACHMENT B



Data Tracking System (DTS)

Bureau of Land Management, U.S. Department of the Interior

Application: DTS | Username: mgamper@blm.gov | Office: HQ-100-SLS | Today's Date: 05/10/2021

Data Tracking Administration Training Forms Section 508 Help



Logout

DTS-Database-BLM-General-Items=16982

Help



Search for DCN: Go

DCN	<input type="text" value="BLM0024800"/>	Input Date	<input type="text" value="02/04/2021"/>	Orig. Office	<input type="text" value="WY-923-Adjudication"/>
In/Out	<input type="text" value="O-Outgoing document"/>	Inc Date	<input type="text"/>	Due Date	<input type="text"/>
		Received	<input type="text"/>		
Action	<input type="text" value="4-Signature"/>	External No	<input type="text"/>		
Doc Type	<input type="text" value="DT-Departmental Tasking"/>	ES No	<input type="text"/>		
Sig Level	<input type="text" value="D-BLM Director"/>	ES Due Date	<input type="text"/>		
Subject	<input type="text" value="SO 3395 Request for Authorization - WY OG Lease Sale in March 2021 - Sale dates changed"/>				
Synopsis	<input type="text" value="BLM Wyoming requests to conduct a quarterly oil and gas lease sale on May 30 - April 2, 2021. The full offering is for 383 parcels, covering 466,724.800 acres in Wyoming. Out of the 383 parcels, 17 parcels (4%) are considered to have special priority. Two parcels would"/>				
State/Center Office	<input type="text" value="WY-Wyoming"/>	Subject Code	<input type="text" value="3100"/>		
Ack Date	<input type="text"/>	Xref	<input type="text"/>	Sign Date	<input type="text"/>
Interim Date	<input type="text"/>	Medium	<input type="text" value="Select Medium"/>	Signed By	<input type="text"/>
Closed Date	<input type="text" value="05/10/2021"/>	<input type="checkbox"/> Lock Record <input type="checkbox"/> Work Flow Report Setup <input type="checkbox"/> NARA Retention <input type="checkbox"/> FOIA Request			

Comments

Comment Date
 Entered By
 Comment By

Please route to BLM-WY. ASLM received this request for review late on Feb. 4 and was unable to make a determination by Feb. 5; please provide new proposed lease sale date. (Sending this directly back to WY per direction from Jully McQuilliams)

Main Search Reports

Database: BLM-General General Database

02/09/2021 Jill Moran

- 02/08/2021_WY-923-Adjudication (8)
- 02/08/2021 Louis Brueggeman
- 02/08/2021 Christopher Hite
- 02/08/2021_WY-920-MINERAL/LANDS (3)
- WY-912-COMMUNICATIONS (3)
- WY-910-STATE DIRECTOR (3)
- HQ-100-McQuilliams (3)
- BLM-COS (3)
- BLM-DD-OPS (4)
- LM-ASLM CCU (2)
- HQ-100 (15)
- WY-910-STATE DIRECTOR (10)
- 02/05/2021 LM-Analyst Jill Moran (3)
- 02/07/2021 HQ-600CC (2)
- 02/07/2021 Jill Moran
- LM-Chief of Staff Cara Lee Macdonald (3)
- LM-P-DAS Laura Daniel-Davis (3)
- LM-ASLM CCU (9)
- 7 Attachments
- 02/04/2021 March 2021 Wyoming Oil and Gas Lease Sale EA draft.pdf
- 02/04/2021 March 2021 Wyoming Oil and Gas Lease Sale FONSI draft.pdf
- 02/08/2021 Request for Authorization Mike Nedd version w new sale dates.docx
- 02/04/2021 SO 3395 Request for Authorization - WY March 2021 Sale Final BLM Signed.pdf
- 02/04/2021 SO 3395 Request for Authorization - WY March 2021 Sale Final.docx
- 02/04/2021_GSC Prioritization Flowchart.docx
- 02/04/2021_GSG Prioritization Flowchart definitions explanations.docx
- 0 External Routings
- 1 Control Slips
- BLM-Control-Slip

Legend

ATTACHMENT C



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 05/10/2021

DCN: BLM0024816		ES No:
Orig Office: UT-920 LANDS AND	Input Date: 02/04/2021	Addressee: UT-920 LANDS AND MINERALS, Utah Lands and Minerals Division
Due Date:	Signature Level: SD	
Subject: SO 3395 BLM UT Request for Authorization - March Oil and Gas Lease Sale		

Comments:Task Codes:

- | | |
|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
UT-920 LANDS AND MINERALS	2 - Appropriate Action	02/04/2021		02/04/2021
UT-920 LANDS AND MINERALS	3 - Surname	02/04/2021		02/04/2021
UT-SD	4 - Signature	02/04/2021		02/04/2021
HQ-100	3 - Surname	02/04/2021		02/04/2021
BLM-COS	3 - Surname	02/04/2021		02/04/2021
BLM-DD-OPS	4 - Signature	02/04/2021		02/04/2021
LM-ASLM CCU	4 - Signature	02/04/2021		02/08/2021
HQ-100	2 - Appropriate Action	02/08/2021		02/08/2021
UT-920 LANDS AND MINERALS	6 - Revise	02/08/2021		02/19/2021
UT-SD	6 - Revise			
LM-ASLM CCU	4 - Signature			
UT-SD	9 - Mail/Distribute/Close/Post/File			
LM-Analyst Jill Moran	3 - Surname	02/05/2021		02/08/2021
HQ-600CC	2 - Appropriate Action	02/08/2021		02/08/2021



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 05/10/2021

DCN: BLM0024816		ES No:
Orig Office: UT-920 LANDS AND	Input Date: 02/04/2021	Addressee: UT-920 LANDS AND MINERALS, Utah Lands and Minerals Division
Due Date:	Signature Level: SD	
Subject: SO 3395 BLM UT Request for Authorization - March Oil and Gas Lease Sale		

Comments:Task Codes:

- | | |
|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
LM-Chief of Staff Cara Lee Macdonald	3 - Surname			
LM-P-DAS Laura Daniel-Davis	3 - Surname			
LM-ASLM CCU	9 - Mail/Distribute/Close/Post/File			
UT-920 LANDS AND MINERALS	2 - Appropriate Action	03/16/2021		03/17/2021

ATTACHMENT D

FormsSection 508Help

17807

Help

for DCN: Go

Input Date02/04/2021

Inc Date

Received

Orig. OfficeUT-920 LANDS AND N

Due Date

External No

ES No

ES Due Date

or Authorization - March Oil and Gas Lease Sale

Subject Code

Xref

MediumSelect Medium

Sign Date

Signed By

☒ Lock Record

☐ Work Flow Report Setup

☐ NARA Retention

☐ FOIA Request

Please route to HQ-100 (Jully McQuilliams); package needs updated EA that responds to comments. Related, will have to change memo that currently says, "The updated EA, responding to these comments, would be finalized..." to "The updated EA responds to these comments..."

←→

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X

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Database: BLM-Gen

02/04/2021 .BLM-COS (3)

02/04/2021 Mark Lawyer

02/04/2021 .BLM-DD-OPS (4)

02/04/2021 Mark Lawyer

02/04/2021 Mike Nedd

02/04/2021 .LM-ASLM CCU (4)

02/08/2021 .HQ-100 (2)

02/08/2021 Louis Brueggeman

02/08/2021 Jully McQuilliams

02/08/2021 .UT-920 LANDS AND MINERALS (6)

UT-SD (6)

LM-ASLM CCU (4)

UT-SD (9)

02/05/2021 .LM-Analyst Jill Moran (3)

02/08/2021 .HQ-600CC (2)

02/08/2021 Jill Moran

LM-Chief of Staff Cara Lee Macdonald (3)

LM-P-DAS Laura Daniel-Davis (3)

LM-ASLM CCU (9)

03/16/2021 .UT-920 LANDS AND MINERALS (2)

03/16/2021 DTS System Process

6 Attachments

02/04/2021 EA 2020-12-17_Mar2021-DOI-BLM-UT-0000-2021-00

02/04/2021 March 2021 lease 158 acre Parcel.pdf

02/04/2021 March 2021_Oil_Gas_DeferralMemo 2_4_21.docx

02/04/2021 SO 3395 BLM UTAH-Request for Authorization March 2

02/04/2021 March 2021_Oil_Gas_DeferralMemo 2_4_21 UT Sign

02/04/2021 SO 3395 BLM UTAH-Request for Authorization signatu

BLM Signed.pdf

0 External Routings

1 Control Slips

BLM-Control-Slip

ATTACHMENT E



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 05/10/2021

DCN: BLM0024808		ES No:
Orig Office: CO-SD	Input Date: 02/04/2021	Addressee: CO-AA, Appropriate Action in box for controlled correspondence referrals
Due Date:	Signature Level: A/S	
Subject: SO 3395 Request for Authorization - March 2021 Lease Sale - CO state office		

Comments:Task Codes:

- | | |
|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
CO-SD	2 - Appropriate Action	02/04/2021		02/04/2021
HQ-100	3 - Surname	02/04/2021		02/04/2021
BLM-COS	3 - Surname	02/04/2021		02/04/2021
BLM-DD-OPS	4 - Signature	02/04/2021		02/04/2021
LM-ASLM CCU	3 - Surname	02/04/2021		02/16/2021
CO-SD	9 - Mail/Distribute/Close/Post/File	02/16/2021		02/17/2021
LM-Analyst Jill Moran	3 - Surname	02/05/2021		02/05/2021
LM-Chief of Staff Cara Lee Macdonald	3 - Surname	02/05/2021		02/05/2021
LM-P-DAS Laura Daniel-Davis	3 - Surname	02/05/2021		02/16/2021
LM-ASLM CCU	9 - Mail/Distribute/Close/Post/File	02/16/2021		02/16/2021
SOL-DLR-BPL-Russell.g	2 - Appropriate Action	02/11/2021		02/11/2021
SOL-DLR Support Staff	3 - Surname	02/11/2021	02/18/2021	02/11/2021
SOL-DMR-BSM-McNeer.r	2 - Appropriate Action	02/11/2021		02/11/2021



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 05/10/2021

DCN: BLM0024808		ES No:
Orig Office: CO-SD	Input Date: 02/04/2021	Addressee: CO-AA, Appropriate Action in box for controlled correspondence referrals
Due Date:	Signature Level: A/S	
Subject: SO 3395 Request for Authorization - March 2021 Lease Sale - CO state office		

Comments:Task Codes:

- | | |
|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
SOL-SOL-Annatoyn	16 - Surname through DTS	02/11/2021	02/16/2021	02/16/2021
SOL-SOL-Front Office	3 - Surname	02/16/2021	02/18/2021	02/16/2021
SOL-DAD	3 - Surname	02/16/2021	02/18/2021	02/16/2021
LM-ASLM CCU	9 - Mail/Distribute/Close/Post/File	02/16/2021	02/16/2021	02/16/2021

ATTACHMENT F



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

Attach to front of

Date 04/29/2021

DCN: BLM0024521		ES No:
Orig Office: MT-910 Controlled	Input Date: 01/21/2021	Addressee: HQ-100, Headquarters, entry point for all documents sent to the BLM Director, Deputy Directors, or Chief of Staff.
Due Date:	Signature Level: DD-POL	
Subject: SO 3395 Approval - Deferral of parcels for the March 23, 2021 Competitive Oil and Gas Lease Sale - MT/DK		

Comments:Task Codes:

- | | |
|-----------------------------|--|
| 0 - Prepare Draft | 8 - See Comments |
| 1 - Prepare Direct Response | 9 - Mail/Distribute/Close/Post/File |
| 2 - Appropriate Action | 10 - Prepare Final |
| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
MT-910 Controlled Correspondence	2 - Appropriate Action	01/21/2021		01/21/2021
MT-910 SD	3 - Surname	01/21/2021		01/22/2021
HQ-310 FLUIDS DIVISION	3 - Surname	01/22/2021		01/26/2021
HQ-300	2 - Appropriate Action	01/26/2021		02/03/2021
MT-910 Controlled Correspondence	2 - Appropriate Action	02/03/2021		02/03/2021
HQ-100	3 - Surname	02/03/2021		02/03/2021
BLM-COS	2 - Appropriate Action	02/03/2021		02/04/2021
BLM-DD-OPS	4 - Signature	02/04/2021		02/04/2021
LM-ASLM CCU	4 - Signature	02/04/2021	02/16/2021	02/16/2021
HQ-100	8 - See Comments	02/08/2021		02/08/2021
LM-ASLM CCU	4 - Signature	02/08/2021		02/16/2021
MT-910 Controlled Correspondence	2 - Appropriate Action	02/16/2021		02/24/2021
HQ-600CC	2 - Appropriate Action	02/08/2021		02/08/2021
LM-Analyst Jill Moran	3 - Surname	02/16/2021	02/16/2021	02/16/2021



BUREAU OF LAND MANAGEMENT DOCUMENT TRACKING CONTROL

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Date 04/29/2021

DCN: BLM0024521		ES No:
Orig Office: MT-910 Controlled	Input Date: 01/21/2021	Addressee: HQ-100, Headquarters, entry point for all documents sent to the BLM Director, Deputy Directors, or Chief of Staff.
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| 3 - Surname | 11 - Simultaneous Surnames |
| 4 - Signature | 13 - Advance Read |
| 5 - Review/Comment | 15 - For Your Information |
| 6 - Revise | 18 - Associate Deputy Secretary Approval |

Routing:

Assigned To	Task	Assigned Date	Due Date	Completed Date
LM-Chief of Staff Cara Lee Macdonald	3 - Surname	02/08/2021		02/09/2021
LM-P-DAS Laura Daniel-Davis	3 - Surname	02/09/2021		02/16/2021
LM-ASLM CCU	9 - Mail/Distribute/Close/Post/File	02/16/2021	02/16/2021	02/16/2021
SOL-SOL-Annatoyn	16 - Surname through DTS	02/11/2021	02/16/2021	02/16/2021
SOL-SOL-Front Office	2 - Appropriate Action	02/16/2021	02/16/2021	02/16/2021
SOL-DAD	3 - Surname	02/16/2021	02/10/2021	02/16/2021
LM-ASLM CCU	9 - Mail/Distribute/Close/Post/File	02/16/2021	02/16/2021	02/16/2021

ATTACHMENT G

ATTACHMENT G

LOUISIANA

Date	Number of LA Parcels Offered (Sale Notice)	Acreage Of Parcels Offered	Related Litigation
Q1 2017*	0	0	CBD v. Forest Service, BLM (2:17-cv-372) [No LA parcels]
Q2 2017*	0	0	
Q3 2017	3	50.15	
Q4 2017	2	834.70	
Q1 2018*	0	0	
Q2 2018*	0	0	
Q3 2018*	0	0	
Q4 2018*	0	0	
Q1 2019**	0	0	
Q2 2019	2	519.81	
Q3 2019	1	40.40	
Q4 2019*	0	0	
Q1 2020*	0	0	
Q2 2020**	0	0	
Q3 2020	2	485.80	
Q4 2020*	0	0	
Totals	10 parcels	1,931 ac	

MONTANA

Date	Number of MT Parcels Offered (Sale Notice)	Acreage Of Parcels Offered	Related Litigation
1/24/2017*	0	0	
6/13/2017 (moved from May 2017)	156	69,056	WEG II WWP Phase II
9/12/2017* (moved from July 2017)	0	0	
12/12/2017 (moved from October 2017)	204	99,266	MWF v Bernhardt
3/13/2018	109***	63,496***	MWF v Bernhardt
6/11/2018**	0	0	
9/11/2018*	0	0	
12/11/2018	23	12,517	WEG II WWP Phase II
3/25 thru 3/27/2019	302	166,559	WEG II
7/30/2019	15	7,645	WEG IV
9/24/2019	6	6,408	WEG IV
12/18/2019	16	17,785	WEG IV
3/24/2020	8	5180.84	WEG IV
6/23/2020**	0	0	
9/22/2020	12	11,713	WEG IV
12/15/2020**	0	0	
Totals	851 parcels	459,626 ac	

*No MT parcels in this sale.

**Sale postponed

***Sale list was amended to only offer 83 parcels involving 46,174.626 AC.

NEW MEXICO

Date	Number of NM Parcels Offered (Sale Notice)	Acreage Of Parcels Offered	Related Litigation
Q1 2017	4	843	
Q2 2017*	0	0	
Q3 2017	62	15,492	WEG I – No. 19-cv-00505 (D.N.M.)
Q4 2017	7	2,104	WEG I – No. 19-cv-00505 (D.N.M.)
Q1 2018**	0	0	
Q2 2018*	0	0	
Q3 2018	142	50,797	WEG I – No. 19-cv-00505 (D.N.M.)
Q4 2018	89	82,131	WEG II – No. 20-cv-56 (D.D.C.); Dine Care III – No. 20-cv-00673 (D.N.M.)
Q1 2019	36	10,535	WEG III – No. 21-cv-0175 (D.D.C.)
Q2 2019	47	38,790	WEG III – No. 21-cv-0175 (D.D.C.)
Q3 2019	12	2,808	WEG III – No. 21-cv-0175 (D.D.C.)
Q4 2019	14	6,254	WEG III – No. 21-cv-0175 (D.D.C.); Dine Care III – No. 20-cv-00673 (D.N.M.)
Q1 2020	56	14,672	WEG III – No. 21-cv-0175 (D.D.C.); Dine Care III – No. 20-cv-00673 (D.N.M.)
Q2 2020**	0		
Q3 2020	102	48,136	WEG III – No. 21-cv-0175 (D.D.C.)
Q4 2020	11	7,731	WEG III – No. 21-cv-0175 (D.D.C.)
Totals	582 parcels	280,293 ac	

*No New Mexico parcels in this sale.

**Sale postponed.

NORTH DAKOTA

Quarter	Number of ND Parcels Offered in Sale Notice	Acreage Of Parcels Offered	Related Litigation
Q1 2017	0	0	
Q2 2017	0	0	
Q3 2017	1	2.78	
Q4 2017	0	0	
Q1 2018	0	0	
Q2 2018	0	0	
Q3 2018	22	10,392.09	
Q4 2018	0	0	
Q1 2019	0	0	
Q2 2019	0	0	
Q3 2019	25	2881.36	<i>WEG v. BLM</i> , No. 21-cv-4 (D. Mont.)
Q4 2019	4	1096.56	<i>WEG v. BLM</i> , No. 21-cv-4 (D. Mont.)
Q1 2020	0	0	
Q2 2020	0	0	
Q3 2020	26	5589.43	<i>WEG v. BLM</i> , No. 21-cv-4 (D. Mont.)
Q4 2020	0	0	
Totals	78 parcels	19,962.22 acres	

TEXAS

Date	Number of TX Parcels Offered (Sale Notice)	Acreage Of Parcels Offered	Related Litigation
Q1 2017*	0	0	
Q2 2017	9	3,172	
Q3 2017*	0	0	
Q4 2017*	0	0	
Q1 2018**	0	0	
Q2 2018	1	596.7	
Q3 2018*	0	0	
Q4 2018	10	4,241.89	
Q1 2019*	0	0	
Q2 2019*	0	0	
Q3 2019*	0	0	
Q4 2019*	0	0	
Q1 2020*	0	0	
Q2 2020*	0	0	
Q3 2020	1	31.69	
Q4 2020*	0	0	
Totals	21 parcels	8,042.28 ac	

*No Texas parcels in this sale.

**Sale postponed

ATTACHMENT H

**INFORMATION/BRIEFING MEMORANDUM
FOR MICHAEL NEDD, BUREAU OF LAND MANAGEMENT**

DATE: November 18, 2020

FROM: Kimber Liebhauser
Acting State Director, Wyoming State Office

SUBJECT: Wyoming 4th Quarter Oil and Gas Lease Sale Options

BACKGROUND:

On November 13, 2020, the United States District of the District of Columbia issued a Memorandum Opinion and Order remanding supplemental NEPA completed in response to an earlier order of March 19, 2019 for additional analysis (see attachment 1 for more information). The supplemental NEPA has been carried forward for each lease sale since its completion in early May 2019. Thus, not only are previous leases that were analyzed in 2019 and through the 3rd quarter 2020 now at risk, we are at a critical point in going forward with completing the EA and resolving protests for the 4th quarter (December) 2020 sale. A summary of the primary issues cited in the latest order are as follows:

A. BLM failed to properly consider proposed and reasonably foreseeable BLM lease sales in the state, region, and nation. First, for Wyoming, BLM did not sufficiently explain its choice to treat only lease sales currently undergoing internal review to be reasonably foreseeable, or justify the position that no other planned actions are reasonably foreseeable—such as the RFDS projections. Further, in making its regional emission calculations, BLM did not evaluate any lease sales “currently undergoing internal review” in neighboring states or the region, or planned actions outlined in RFDSs or projections of drilling for previously sold leases—despite available information about recent or upcoming sales. BLM similarly did not analyze any proposed or reasonably foreseeable actions at the federal level.

B. BLM only used yearly emission rates for comparison of direct emissions, but should have prepared cumulative totals of direct emissions (the court acknowledged that BLM did provide cumulative totals of indirect [downstream] emissions).

C. BLM used internally inconsistent methods for calculating per-acre emissions for the leases and the region (in other words, while BLM adequately explained its methodologies, the emission factors were not directly comparable).

D. BLM did not either sufficiently explain why using a carbon budget analysis would not contribute to informed decision making or conduct an accurate and robust scientific analysis of the carbon budget.

E. The court found BLM's analysis "sloppy and rushed" due to a number of minor numeric and math errors (which BLM had acknowledged) that "undermine[d] the Court's confidence in the other calculations in the Supplemental EA."

The court concluded that an EIS is not needed, but BLM-WY must revisit its analysis, and its FONSI in light of that analysis. The court did not vacate the leases, but enjoined BLM from "issuing [approving] APDs for the Wyoming leases while it works to substantiate its Supplemental EA and FONSI."

The court found that BLM had adequately explained its methods for calculating per-acre emissions, and accepted BLM's explanation as to its choice not to use the social cost of carbon protocol. It also found no deficiency in the length of the public comment period. Finally the court rejected plaintiffs' contention that the uncertainties identified in the EA warranted an EIS, concluding "the uncertainty mentioned in the Supplemental EA with respect to forecasting GHG emissions levels is not of the type that would require an EIS on its own. . . . [T]he risks of GHG emissions are not 'unique or unknown,' and the [Supplemental EA] adequately summarized those risks."

DISCUSSION

The supplemental NEPA that was recently remanded, has been carried forward for each lease sale since its completion in early May 2019. The BLM Wyoming fourth quarter 2020 Oil and Gas lease sale is scheduled for December 15-17, 2020. The sale currently includes 261 parcels. Protests have been received from two groups and one individual requesting that all parcels be removed from the sale. Reasons cited in the protests are reflective of those GHG issues raised in the recent court decision remanding the supplemental NEPA. Given the short time frame between receipt of this new decision and the scheduled 4th quarter sale, options need to be explored for moving forward with offering the parcels or postponing the sale. Current options are outlined below.

Option 1: Postpone the December sale until remedial NEPA can be completed. The previous NEPA remand was done as an environmental assessment and took approximately 6 weeks to complete. The latest remand includes requirements to address all BLM O&G leasing on a nationwide basis which will require substantial time in determining the appropriate methodology as well as compiling BLM state specific RFD information and providing calculations of estimated direct emissions associated with development of the leases. As with the first remand, developing additional analysis can be an arduous process taking much longer than the approximately three weeks remaining before the December sale dates. Although, this is the lowest risk option, with parcels available it would not comply with the Mineral Leasing Act requirement to hold quarterly lease sales, nor meet the energy goals of the administration and the State of Wyoming. Postponing the sale would also create a large backlog of nominated parcels that would have to be addressed in a subsequent sale or sales.

Option 2: Issue a special lease notice highlighting the recent Contreras decision and the need to do additional NEPA prior to issuing sold leases and hold the December sale. Protests would be addressed after the remedial NEPA is completed. As mentioned above, the protests are

reflective of the most recent court order. The leases must be issued within 60 days after they are paid for. The BLM would have approximately 80 days to complete the supplemental NEPA, resolve the protests, and issue the leases. This should allow sufficient time to thoroughly address the remaining issues raised by the court. High bidders would be given the option to wait on completion of additional NEPA prior to lease issuance or to request a refund. This option would comply with quarterly leasing requirements and meet national and state energy goals. No parcels would need to be added to later sales to make up for postponing the sale. Development of the leases could proceed upon issuance.

Option 3: Move forward with sale, dismiss GHG protests based upon current NEPA and issue leases. We should anticipate that future litigation will result in this lease sale being challenged for not complying with the latest order and the leases being vacated, suspended, and/or remanded for supplemental NEPA. This option may hold the greatest litigation risk in moving ahead with the sale.

NEXT STEPS

The Acting State Director must provide direction to the Division of Minerals and Lands on the course to be taken in moving forward or postponing the December sale.

The Division of Minerals and Lands recommends proceeding with Option 2.

Corrective NEPA must be initiated as soon as possible to comply with the most recent order of the court and avoid further litigation or the potential that the court would order vacatur of the leases.

ATTACHMENTS

1 – Litigation timeline

ATTACHMENT 1

Litigation Timeline

- Initial suit (Phase I) filed August 25, 2016 (not properly analyzing, at the programmatic or project lever, direct, indirect and cumulative impacts to climate – May 2015 thru August 2016 Lease Sales containing 282 Wyoming Leases)
- March 19, 2019 NEPA Remanded to BLM
 - EAs failed to quantify and forecast drilling-related GHG emissions
 - EAs failed to adequately consider GHG emissions from downstream use of oil and gas produced on leased parcels
 - EAs failed to compare those GHG emissions to state, regional and national GHG emissions forecasts and other foreseeable regional and national BLM projects
- BLM WY complete Supplemental EA (DOI-BLM-WY-0000-2019-0007-EA) May 5, 2019
- Additional suit (Phase II) filed January 9, 2020 (same reason as first) covering November 2016 thru March 2019 Lease Sales
- Judge issued voluntary Remand without Vacatur (Phase II) on October 13, 2020
 - Regional SOL recommended Attorney-Client Privilege
- Judge issued Remand without Vacatur (Phase I) on November 13, 2020
 - BLM arbitrarily ignored reasonably foreseeable development scenarios when evaluating cumulative effects
 - BLM improperly analyzed only yearly emission rates instead of total emissions
 - BLM calculated emission rates by making the arbitrary assumption that all federal lands open to leasing would produce oil and gas
 - BLM conducted an incomplete carbon budget analysis
 - mathematical errors throughout the Supplemental EA render BLM's analysis arbitrary and capricious
 - Enjoined from issuing APDs or other drilling related activities on affected leases

EXHIBIT 1

LEGISLATION TO REFORM THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM

HEARING BEFORE THE SUBCOMMITTEE ON MINING AND NATURAL RESOURCES OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS HOUSE OF REPRESENTATIVES ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

H.R. 933

**TO ESTABLISH COMPETITIVE OIL AND GAS LEASING AND MODIFY
LEASING PROCEDURES FOR ONSHORE FEDERAL LANDS**

H.R. 2851

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

**HEARING HELD IN WASHINGTON, DC
JULY 28, 1987**

Serial No. 100-11

Printed for the use of the Committee on Interior and Insular Affairs



U.S. GOVERNMENT PRINTING OFFICE

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H 441-23

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 STEPHEN J. BUCKNER, *Republican Consultant on Mining and Natural Resources*

NOTE.—The first listed minority member is counterpart to the subcommittee chairman.

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TUESDAY, JULY 28, 1987

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LEGISLATION TO REFORM THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM

TUESDAY, JULY 28, 1987 -

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MINING AND NATURAL RESOURCES,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to call, at 9:45 a.m., in room B-318, Rayburn House Office Building, Hon. Nick Joe Rahall II (chairman of the subcommittee) presiding.

Mr. RAHALL. The Subcommittee on Mining and Natural Resources will come to order.

The subcommittee is meeting today to conduct a hearing on H.R. 933, introduced by our colleague, Representative George Miller, and H.R. 2851, introduced by the chairman. Both bills seek to reform the Federal onshore oil and gas leasing system.

This subcommittee has held extensive hearings on all aspects of the current leasing program as well as on legislation introduced during the last Congress.

In my view, and based on the record we have established, a legislative remedy to correct the many deficiencies of the existing leasing system is in the public interest. The program is not only in dire need of greater stability, but its integrity must be reestablished.

At this point, most of us with an interest in this matter can agree on at least two items. First, there is almost universal agreement on the need to get the BLM out of the business of making KGS determinations.

Secondly, there appears to be increased sentiment toward subjecting all tracts available for leasing to a competitive test. Both of the pending bills would achieve these goals.

There are, of course, many differences of opinion on the fine points of exactly what type of leasing mechanism, lease terms and conditions should be adopted. This is as much reflective of the lack of agreement within the oil and gas industry itself as it is of the traditional divergence of views we so often see between the environmental community and industry.

Aside from issues relating to the leasing mechanism, both bills contain language dealing with BLM and Forest Service land use planning as it relates to oil and gas development. For my part, I view the language of H.R. 2851 as a moderate approach to solving those problems which exist in many of the current plans.

In effect, the land use planning language of this bill seeks to enforce the desire of the Congress to gain greater consistency in, and

ensure a better quality of, land use plan consideration of oil and gas leasing activities.

This subcommittee has been proceeding with caution on this issue. As I noted, we have already conducted a number of hearings. Drafting on H.R. 2851 began last October, and it was introduced in late June after extensive meetings and negotiations with any party willing to discuss the issue.

I would also note that we have scheduled a subcommittee field trip in August to visit several oil and gas sites in Wyoming and Montana.

We are conducting ourselves in this deliberative fashion due to the importance of the matter at hand. I think we all recognize that the stakes are high, and I can assure my colleagues that every effort will be made to arrive at a consensus position.

As the ranking minority member, Mr. Craig, has not yet arrived, I will reserve him time upon his arrival for an opening statement, and pending that, I think we should proceed with the list of witnesses we have scheduled to appear today.

I would ask unanimous consent that copies of H.R. 933 and H.R. 2851, the two bills which are the subject matter of today's hearing, be made a part of the record at this point.

[The bills H.R. 933 and H.R. 2851 follow:]

1 cally allowed to continue by the statute designating the
2 study area.

3 “(4) Lands within areas allocated for wilderness
4 or further planning in Executive Communication 1504,
5 Ninety-sixth Congress (House Document numbered
6 96-119), unless such lands are allocated to uses other
7 than wilderness by a land and resource management
8 plan complying with the provisions of section 41 of this
9 Act, or have been released to uses other than wilder-
10 ness by an Act of Congress.

11 “(b) OIL AND GAS EXPLORATION.—In the case of any
12 area of National Forest or public lands subject to this section,
13 nothing in this section shall affect any authority of the Secre-
14 tary of the Interior (or for public domain National Forest
15 Lands, the Secretary of Agriculture) to issue permits for ex-
16 ploration for oil and gas by means not requiring construction
17 of roads or improvement of existing roads if such activity is
18 conducted in a manner compatible with the preservation of
19 the wilderness environment.”.

20 **SEC. 7. EFFECTIVE DATE; REGULATIONS.**

21 (a) **IN GENERAL.**—Except as provided in subsection (c),
22 after enactment of this Act all oil and gas leasing pursuant to
23 the Mineral Lands Leasing Act of 1920 (30 U.S.C. 181 et
24 seq.) shall be conducted in accordance with the amendments
25 made by this Act.

1 Policy Act of 1976 or the Forest and Rangeland Renewable
2 Resources Planning Act of 1974, whichever is applicable.

3 “(c) DEFINITIONS.—For purposes of this section—

4 “(1) The term ‘land use plans’ means those plans
5 required under provisions of the Federal Land Manage-
6 ment Policy Act of 1976 or the Forest and Rangeland
7 Renewable Resources Planning Act of 1974.

8 “(2) The term ‘public lands’ means those lands
9 identified by section 103(e) of the Federal Land Man-
10 agement Policy Act of 1976.”.

11 **SEC. 6. LANDS NOT SUBJECT TO OIL AND GAS LEASING.**

12 The Mineral Lands Leasing Act of 1920 (30 U.S.C. 181
13 et seq.) is amended by adding the following at the end
14 thereof:

15 **“SEC. 42. LANDS NOT SUBJECT TO OIL AND GAS LEASING.**

16 “(a) PROHIBITION.—The Secretary shall not issue any
17 oil and gas lease under this Act on any of the following Fed-
18 eral lands:

19 “(1) Lands recommended for wilderness allocation
20 by the surface-managing agency.

21 “(2) Lands within Bureau of Land Management
22 wilderness study areas.

23 “(9) Lands designated by Congress as wilderness
24 study areas, except where oil and gas leasing is specifi-

1 plan, shall include, but is not limited to, each of the
2 following for the area subject to such plan:

3 "(A) The potential oil and gas resources in-
4 cluding a map or narrative description indicating
5 those areas with known oil and gas reserves as
6 well as lands already under lease for oil and gas.

7 "(B) An analysis of reasonably foreseeable
8 social, economic, and environmental consequences
9 of exploration and development for oil and gas re-
10 covery, including the potential consequences of
11 exploration and development of tracts already
12 leased or for which lease applications are pending.

13 "(C) An identification of those specific pro-
14 tective stipulations to be applied to oil and gas
15 leases, and the specific areas to which each such
16 stipulation shall apply. The Secretary of the Inte-
17 rior concerned is authorized to use stipulations
18 which reserve the right to prohibit surface occu-
19 pancy of the lease area only where the Secretary
20 determines that recovery of oil and gas from such
21 area is feasible without surface occupancy.

22 "(b) MULTIPLE USE.—Nothing in this section shall be
23 construed to be in violation of the principles of multiple use
24 management as set forth in Federal Land Management

1 forest lands, the Secretary of Agriculture) determines
2 that completion and subsequent amendment of the plan
3 would better serve the purposes of this section than re-
4 starting the planning process, the Secretary concerned
5 shall take appropriate steps to amend the plan to
6 comply with the provisions of this section. An amend-
7 ment to a land use plan made pursuant to this section
8 shall not cause initiation of a new land planning cycle.

9 “(3) INTERIM PERIOD AND PLAN COMPLETION
10 DATE.—Within 60 days after the enactment of this
11 section, the Secretary of the Interior and the Secretary
12 of Agriculture shall each publish a notice in the Feder-
13 al Register indicating the plans affected by this subsec-
14 tion and specifying the dates for completion or amend-
15 ment of each plan affected by this section. Nothing in
16 this section shall preclude the issuance of oil and gas
17 leases during the period prior to the date specified by
18 the Secretary concerned for plan completion or amend-
19 ment. After the specified date no oil and gas lease may
20 be issued until the completion of the plan or until a
21 plan amendment in compliance with this section is
22 effective.

23 “(4) CONSIDERATIONS.—Consideration of oil and
24 gas leasing in a land use plan, or amendments to such

1 “(2) the lease is committed to an approved coop-
2 erative or unit plan or communitization agreement
3 under section 17(j) of this Act which contains a well
4 capable of production of unitized substances in paying
5 quantities.”.

6 **SEC. 5. LAND USE PLANS.**

7 The Mineral Lands Leasing Act of 1920 (30 U.S.C. 181
8 et seq.), is amended by adding the following new section after
9 section 40:

10 **“SEC. 41. LAND USE PLANS.**

11 **“(a) OIL AND GAS LEASES.—**

12 **“(1) IN GENERAL.—**Oil and gas leases issued pur-
13 suant to this Act on public lands or public domain na-
14 tional forest lands on which the public has expressed
15 substantial interest in oil and gas leasing or which the
16 Secretary of the Interior, in his discretion, finds there
17 is a high potential for recovery of oil and gas, may be
18 issued only if leasing of the affected lands for oil and
19 gas has been evaluated and approved in a land use
20 plan meeting the requirements of this section, as well
21 as other applicable laws.

22 **“(2) AMENDMENTS.—**Where a land use plan has
23 been completed, or where substantial progress has been
24 made toward the completion of such a plan and the
25 Secretary of the Interior (or for national public domain

1 SEC. 3. ASSIGNMENTS.

2 Sections 30(a) and 30(b) of the Mineral Lands Leasing
3 Act of 1920 (30 U.S.C. 187a) are redesignated as sections
4 30A and 30B, respectively, and the third sentence of section
5 30A is amended by striking out the colon and all that follows
6 and substituting a period and the following: "The Secretary
7 may, in his discretion, disapprove an assignment of any of the
8 following, unless the assignment constitutes the entire lease
9 or is demonstrated to further the development of oil and gas:

10 "(1) A separate zone of deposit under any lease.

11 "(2) A part of a legal subdivision.

12 "(3) Less than 640 acres outside Alaska or less
13 than 2,560 acres within Alaska.

14 Requests for approval of assignment or sublease shall be
15 processed promptly by the Secretary."

16 SEC. 4. LEASE CANCELLATION.

17 The first sentence of section 31(b) of the Mineral Lands
18 Leasing Act of 1920 (30 U.S.C. 188(b)), is amended to read
19 as follows: "Any lease issued after August 21, 1935, under
20 the provisions of section 17 of this Act shall be subject to
21 cancellation by the Secretary of the Interior after 30 days
22 notice upon the failure of the lessee to comply with any of the
23 provisions of the lease, unless—

24 "(1) the leasehold contains a well capable of pro-
25 duction of oil or gas in paying quantities, or

1 timely reclamation of the lease tract, and the restoration of
2 any lands or surface waters adversely affected by lease oper-
3 ations after the abandonment or cessation of oil and gas oper-
4 ations on the lease.

5 “(h) PUBLIC DOMAIN FOREST LANDS.—The Secretary
6 of the Interior may not issue any lease on public domain
7 national forest lands without the concurrence of the Secre-
8 tary of Agriculture.”.

9 (2) CONFORMING AMENDMENT.—Section 31(h) of
10 such Act is amended by striking out “section 17(j)”
11 and substituting “section 17(m)”.

12 (e) LEASE MANAGEMENT.—Section 2 of the Mineral
13 Lands Leasing Act of 1920 (30 U.S.C. 201(a)) is amended by
14 adding a new subsection as follows:

15 “(e) The Secretary shall not issue a competitive coal
16 lease or leases under the terms of this section to any person,
17 association, or corporation engaged in the extraction or pro-
18 duction of coal reserves in a foreign country and the importa-
19 tion of such reserves into the United States or to any affiliate
20 of any such entity, nor may the Secretary consent to the
21 assignment of any such lease. For purposes of this subsection,
22 the term ‘affiliate’, when used with respect to any entity,
23 means any person which controls, is controlled by, or is
24 under common control with, such entity. The term includes
25 any subsidiary of the entity.”.

1 subsections (i) through (n) and by adding the following
2 new subsections (f) through (h):

3 “(f) MAPS AND DESCRIPTIONS.—At least 30 days
4 before offering lands for lease under this section, and at least
5 10 days before approving a permit to drill on an oil and gas
6 lease issued under this Act, the Secretary of the Interior
7 shall make available maps or narrative descriptions of the
8 affected lands to the public. Such maps or narrative descrip-
9 tions shall indicate the location of all tracts to be leased, and
10 of all leases already issued in the general area.

11 “(g) SURFACE-DISTURBING ACTIVITIES.—The Secre-
12 tary of the Interior, or for national public domain forest
13 lands, the Secretary of Agriculture, shall regulate all surface-
14 disturbing activities conducted pursuant to any lease issued
15 under this Act, and shall determine reclamation and other
16 actions as required in the interest of conservation of surface
17 resources. No permit to drill on an oil and gas lease issued
18 under this Act may be granted without the analysis and ap-
19 proval by the Secretary concerned of a plan of operations
20 covering proposed surface-disturbing activities within the
21 lease area. The Secretary concerned shall, by rule or regula-
22 tion, establish such standards as may be necessary to ensure
23 that an adequate bond, surety, or other financial arrangement
24 will be established prior to the commencement of surface-
25 disturbing activities on any lease, to ensure the complete and

1 year period referred to in subsection (b)(1), no lease applica-
2 tion is pending for the lands under paragraph (1) of this sub-
3 section, the lands shall again be available for leasing in ac-
4 cordance with subsection (b)(1). When any lease issued under
5 paragraph (1) or under subsection (b)(1) terminates, expires,
6 is cancelled, or is relinquished, the land covered by such lease
7 shall again be available for leasing in accordance with sub-
8 section (b)(1).”.

9 (c) RENTALS.—Section 17(d) of the Mineral Lands
10 Leasing Act of 1920 (30 U.S.C. 226(d)) is amended to read
11 as follows:

12 “(d) RENTALS.—All leases issued under this section
13 shall be conditioned upon payment by the lessee of a rental of
14 not less than \$1 per acre per year for the first through fifth
15 years of the lease and not less than \$3 per acre per year for
16 each year thereafter. Each year’s lease rental shall be paid in
17 advance. A minimum royalty of not less than \$3 per acre in
18 lieu of rental shall be payable at the expiration of each lease
19 year beginning on or after a discovery of oil or gas in paying
20 quantities on the land leased.”.

21 (d) NOTICE AND RECLAMATION.—

22 (1) ADDITIONAL PROVISIONS.—Section 17 of the
23 Mineral Lands Leasing Act of 1920 (30 U.S.C. 226) is
24 amended by relettering subsections (f) through (k) as

1 least \$75 shall be required to be paid by any person to bid on
2 any lease offered under the provisions of this subsection. A
3 lease under this paragraph shall be conditioned upon the pay-
4 ment of a royalty at a rate of not less than 12½ percent in
5 amount or value of the production removed or sold from the
6 lease. The Secretary of the Interior shall accept the highest
7 bid from a responsible qualified bidder. Lands for which no
8 bids are received shall become available for leasing under
9 subsection (c) for a period not to exceed one year after the
10 lease sale.”.

11 (b) NONCOMPETITIVE LEASING.—Section 17(c) of the
12 Mineral Lands Leasing Act of 1920 (30 U.S.C. 226(c)), is
13 amended to read as follows:

14 “(c)(1) If lands initially required to be leased under sub-
15 section (b)(1) become available for leasing under this subsec-
16 tion, the person first making application for the lease after
17 the lands become available under this subsection who is
18 qualified to hold a lease under this Act shall be entitled to a
19 lease of such lands without competitive bidding, upon pay-
20 ment of a non-refundable application fee of at least \$75. A
21 lease under this subsection shall be conditioned upon the pay-
22 ment of a royalty at a rate of 12½ per centum in amount or
23 value of the production removed or sold from the lease.

24 “(2) If lands become available for noncompetitive leas-
25 ing under this subsection, and if at the expiration of the 1-

Mr. RAHALL. I thank my colleague.

At this point I would ask unanimous consent that the pre-hearing questions that we had submitted prior to today's hearing and the Interior Department responses be made part of the record. It is lengthy responses to a series of questions that were presented to the Interior Department, and they have responded forthwith, and that will be made part of the record without objection.

[EDITOR'S NOTE.—The above-mentioned pre-hearing questions and the Department's response follow:]

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUL 27 1987

Honorable Nick J. Rahall, II
Chairman, Subcommittee on Mining
and Natural Resources
Committee on Interior and Insular Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of July 3, 1987, enclosing a number of pre-hearing questions relating to H.R. 933 and H.R. 2851. I am pleased to enclose our responses to your questions.

Your interest in this matter is appreciated.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Steven Griles", is written over the typed name and title.

J. Steven Griles
Assistant Secretary - Land
and Minerals Management

Enclosures

1. Q. H.R. 2851 would maintain current law production royalty rates under its two-tier leasing mechanism. Does the Department believe this to be appropriate? Please provide reasons supporting the expressed view.

A. The Department prefers a flat 12 1/2 percent royalty rate because it provides certainty and does not discourage production. Although the amount of royalty ultimately paid might be somewhat less, the up front bonus bid would be greater.
2. Q. H.R. 2851 would maintain current law lease terms under its two-tier leasing mechanism. Does the Department believe this to be appropriate? Please provide reasons supporting the expressed view.

A. The Department has no objection to current procedures, i.e., a 5-year term for competitive leases and a 10-year term for noncompetitive leases. A 5-year term for competitive leases will cause lands to turn over more rapidly and provides sufficient time for exploration. A 10-year term for noncompetitive leases will provide lessees with additional time to explore those lands that are more speculative in nature.
3. Q. Under the two-tier leasing system envisioned by H.R. 2851, would there be any need to continue the SIMO leasing system under Tier II or would leasing only need to be conducted on an over-the-counter basis?

A. H.R. 2851 is silent on a minimum bid requirement. Assuming that a \$1 minimum bid is established, then it follows that the SOG system would no longer be used. Because there is only a small savings to the lessee between a \$1 per acre minimum bid and no minimum, we would expect virtually all leases to be issued competitively. The cost of maintaining an SOG system to lease the few remaining highly speculative leases would not be warranted. While there have been problems associated with the SOG system, it nevertheless made lands continually available for leasing which ultimately resulted in more exploration and production.

4. Q. Does the Department support the acreage limitations of H.R. 933 and H.R. 2851, and if so, why?
- A. H.R. 2851 specifies acreage limits of 2,560 for the lower 48 and 5,120 for Alaska. H.R. 933 specifies 2,560 acres with no difference for Alaska. The Department supports the acreage limits in H.R. 2851, i.e., 2,560 acres for the lower 48 and 5,120 for Alaska. These acreage requirements result in leases that are large enough to allow adequately sized plays to be assembled.
5. Q. What are the Department's views on the rental requirements of H.R. 933 and H.R. 2851?
- A. The Department supports a \$1 rental minimum with discretion provided to the Secretary to adjust rents through regulation. In this way the Department would be able to adjust rents when economic conditions change, thereby keeping more lands under lease.
6. Q. Does the Department see a need for the lease assignment and lease cancellation provisions of H.R. 2851?
- A. The Department strongly supports the lease assignment and cancellation provisions of H.R. 2851. We have periodically experienced the subdivision of leases into small parcels for resale by unscrupulous parties to the public. The subdivision of leases into parcels that are uneconomic in size could hinder the development of a legitimate play is not presently a serious problem. However, to reach the point we are at today has necessitated a moratorium on assignments approval, and investigations of unscrupulous lease merchants. Greatly depressed oil prices also played a role in discouraging abuses. This cumbersome approach to solving the problem was necessary because we did not have the authority to disapprove small assignments where abuse was present. The results were costly to the taxpayer, legitimate lessees, and the investing public. Venture capital which might otherwise have been available to oil and gas developers has been siphoned off by the fraud that was perpetrated or scared away by the investigations. This provision is definitely needed in order to prevent this sham from recurring when oil prices begin to rebound.

Without the ability to cancel leases for violation of the lease terms and conditions, the government is forced to seek costly, protracted and uncertain relief while a lessee fails to protect the public's resources. An example would be the inability to cancel a lease which is being drained of its oil and gas reserves.

7. Q. Does the Department see any value in grandfathering current OTC lands from a two-tier leasing system as envisioned by H.R. 2851?
- A. Yes, all pending applications should be processed and leases should be issued, if appropriate, under the Mineral Leasing Act of 1920 before its amendment by H.R. 2851.
8. Q. Currently, the Secretary has the discretion to reject a lease offer after a reasoned determination that leasing is not in the public interest. In general, please provide some of the most common reasons why a lease offer would be withdrawn for both competitive and noncompetitive leases.
- A. The Department strongly supports Secretarial discretion to reject competitive and noncompetitive lease offers. Some examples of why a lease offer would be rejected would include land management considerations such as wilderness areas, compliance with NEPA protection of the environment, and orderly development of other resources.
9. Q. If not discussed in question number 8, please describe current procedures used to conduct tract valuations in establishing fair market value for the purpose of devising minimum bids as well as post lease valuation procedures.
- A. This question has relevance to the previous question. Under the present competitive leasing system, a process is in place to conduct economic evaluations both before the lease sale as well as after. The two methods used to establish fair market value are 1) the discounted cash flow method; and 2) the comparable sales method (similar to real estate appraisals). If the bid offered is below the value determined adequate by the Bureau, the lease offer is rejected.

10. Q. Section 17(a) of the MLA states that lands "which are known or believed to contain oil and gas deposits may be leased by the Secretary." (emphasis added). Section 17(b)(1) in describing competitive leasing states that lands shall be leased to the highest qualified responsible bidder "upon the payment by the lessee of such bonus as may be accepted by the Secretary..." (emphasis added).

As I understand these provisions, section 17(a) says that lands "may" be offered for leasing and section 17(b) says that the Secretary "may" accept the highest bid, which provides him with the discretion to withdraw the lease (as noted in question 8). Is this understanding correct?

- A. The Secretary does not "offer" lands for lease and he does not "withdraw" lease offers. Rather, he makes land available for the filing of lease offers, applications, or bids, as appropriate. Your understanding of the Secretary's authority is correct, i.e., the Secretary does have discretion to reject offers for noncompetitive lands; he also has discretion to decline offers on competitive land or to reject bonus bids as being insufficient in the context of fair market value.

11. Q. H.R. 2851 does not amend section 17(a) of the MLA but does modify Section 17(b)(1) by stating that the "Secretary of the Interior shall accept the highest bid from a responsible qualified bidder." (emphasis added). Does the Department view this language change as removing its discretion to withdraw an offered lease? If so, would this remove the Department's ability to conduct lease valuations and the establishment of minimum bids?

- A. Changing the provision from "may" to "shall" will not change the Secretary's discretion to not lease lands as provided in section 17(a) even though they had been offered and a bid received. We would interpret the bill as not requiring tract evaluations. However, H.R. 2851 is not clear on that question, and we believe the bill should make clear that tract evaluations are not required.

12. Q. If the response to question number 11 is in the affirmative, within the context of H.R. 2851, would the Department favor the retention of some type of discretion to withdraw a lease after it is offered, and if so, on what basis?

- A. Once again, the action is to "reject" not "withdraw." The Department favors and feels it is necessary to retain Secretarial discretion to reject lease offers if land management purposes should arise warranting such rejections.

Mr. RAHALL. Steve, let me begin by congratulating you on the fairly good progress that has been made. Since the last time we had these hearings, during the time that has intervened, I think has shown that the Interior Department under your guidance has made good-faith progress toward resolving some of the outstanding issues.

I note that you have said, and to my knowledge for the first time, that you think we should proceed forthwith with legislation. I note that as an encouraging sign for the Administration.

You also have stated in your testimony, in referring to the Tenth Circuit Court's decision with regard to the Palisades case that it conflicts with the Park County decision, as well as two other cases before the Ninth Circuit. I point that out to show that there is no judicial uniformity at this time. I think you were trying to allude to the fact that there is such uniformity and that we should reside in the court's opinion.

Mr. GRILES. Well, Mr. Chairman, what I am alluding to, I think, is the planning process we put in place last November as a result, as I say, of lessons learned and comments made and consultations that ensued with both the environmental groups and with the industry.

We think we have found, as we have tried to within the administrative process, a reasonable ground to move forward. Specifically what the Tenth Circuit decision indicates, however, is to require a cumulative environmental impact statement for full field development before you ever drill a hole doesn't make sense.

Neither H.R. 933 nor your bill would propose that. There are some who will testify and suggest we do that. My only reason for putting that in the record is to point out that others recognize that is not, in fact, a good way to move forward in terms of NEPA.

As to moving forward with the bill, Mr. Chairman, we would like to see a market test-driven program that recognizes that a noncompetitive aspect of the program would be in place. A bill that has been agreed to in the Senate and reported to the Senate Floor, in effect, meets many of those tests.

So, we would be encouraged and would hope you would look toward that kind of language, that kind of bill so that there can be some unanimity as we move forward with the two bodies.

Mr. RAHALL. In the various meetings that have taken place on this bill, and the hearings that this subcommittee has already conducted, there has been good progress made but there are still questions which exist out there in the unresolved column, and one of these issues involves the Secretary's discretionary authority to reject lease offers and whether the Department should be relieved of responsibility to conduct tract evaluations.

This was addressed to some extent in the pre-hearing questions, but as I understand your responses, the Department favors continued discretion to reject competitive and non-competitive lease offers under certain limited circumstances.

This authority is currently used according to your responses for land management considerations and if a bid is below fair market value. However, your response indicates support for statutory language making it clear that tract evaluations are not required.

Currently, these evaluations are conducted to establish fair market value for the leases. I note that economic and not geological considerations are used in this formulation. According to your responses it appears you are looking for discretion to reject lease offers only on the basis of land management consideration.

Obviously, you would have no basis to reject a bid on economic considerations, such as it being below market value, if you are not allowed to conduct tract evaluations. Is that a correct interpretation?

Mr. GRILES. That is correct, Mr. Chairman. First of all, we do need, I think, and should retain the authority to reject bids or leases at a later stage as additional information arises.

At times, we find there is a conflict on previous leasing decisions that have come up after the lease maybe was to be offered, so we need that authority. But specifically, we would encourage you to consider as we evaluate these very, very speculative tracts, and try to establish "a fair market value" that in fact could result in a misunderstanding of what the real value, or the liability determines what the real value of these tracts are.

So, that is our response to the questions that have been made.

Mr. RAHALL. Let me make sure I understand. Why exactly does the Interior Department want to be relieved of these tract evaluations?

Mr. GRILES. First of all, in the majority of leases, 95 to 99 percent are very speculative. We have no knowledge, except in those areas which previously have been known geological structures, of any potential ability for that tract to produce oil and gas. To indicate, that on these very speculative lands, we should go out and do an economic analysis of what the lands would be valued at, would be administratively not necessary. It would just result in additional personnel requirements with no return, in our opinion, to the public.

Mr. RAHALL. Both of the pending bills envision a market-based leasing system rather than one based on geology. It is not the intention of my bill, H.R. 2851, for minimum bids to be established. Yet, from your responses to the pre-hearing questions, it appears that the Department would establish an acceptable minimum bid at \$1 per acre.

Is that a correct reading and if so, by what authority would you establish this acceptable minimum bid?

Mr. GRILES. Mr. Chairman, if it is the intent of your bill to allow the Secretary to establish the minimum bid, if \$1 minimum is the intent, the Department would be looking toward assuring that a large portion or a portion of the very speculative acres in fact is in a noncompetitive status so we can have a longer lease term so plays—geological plays and industry plays—can be put together on these very speculative lands. If that is the reading, the intent of your bill then would give the Secretary the authority to set that higher minimum.

The support that we have been able to generate from a lot of those who in the past have opposed a change to the system has been on the basis that the minimum bid would be higher than \$1.

The original intent, which is what has been used on the Senate side in S. 66, in fact was at \$20 an acre. Anything less than that

Mr. HOLLAND. Mr. Chairman, I am Tom Holland from Dallas, Texas, land department manager for ARCO Oil and Gas Company, which is a division of the Atlantic Richfield Company. I will summarize my testimony and submit the written testimony for the record.

Basically, ARCO feels that any reorganization of the onshore oil and gas leasing system needs to contain three principles.

First, that it is market-sensitive and it recognizes the impacts on different sectors of the oil and gas industry.

Competitive bidding along with increased rentals and royalties, while reflecting the highest market value for acreage, will have an inflationary impact on land costs to industry, which could preclude the many competent, smaller operators from participating.

This will result in fewer wells being drilled, because the independents drill far and away more exploratory wells than do the major companies. In this regard, the two-tiered system contained in Chairman Rahall's H.R. 2851 is the more palatable approach of the measures under consideration.

Second, the legislation should not attempt to impose additional land use or environmental restrictions on the Department of Interior or the industry. I agree with what was said this morning by the gentleman from the Department that there are adequate laws and rules in place right now.

Third, the legislation should focus on oil and gas leasing. Regarding other matters, such as protection of domestic coal production, these are issues which should be debated but which do not correct inadequacies in the current oil and gas leasing system, and should not, in our view, be a part of this leasing legislation.

ARCO does not favor enactment of H.R. 933 because it meets none of the principles I just described.

The remaining measure under consideration, H.R. 2851, contains several provisions which, if modified, would address the current problems in the leasing system.

We are concerned in section 2(a)(1) of H.R. 2851, the Secretary is under no obligation to nominate lands for lease. We recommend that the seventh sentence of proposed amended section 17(b)(1) be further amended to read as follows:

The public may make confidential expressions of interest about specific lands, and such lands shall be offered in the next scheduled sale in the area of such lands, if qualified under the provisions of this act.

This would add a degree of certainty to the statute currently lacking in H.R. 2851 and would thus serve the national interest in orderly exploration and development.

We are also concerned that H.R. 2851 is silent on the question of Government tract evaluation. We interpret this silence as congressional intent to rely strictly on the market test associated with competitive oral bidding in the first-tier leasing round, but we fear that others may consider this as vulnerable.

Accordingly, we recommend that the 10th sentence of proposed amended section 17(b)(1) be further amended to read as follows:

"The Secretary of the Interior shall accept the highest bid from a responsible qualified bidder without evaluation of the lands proposed for lease and for which such bid was made."

This would clarify congressional intent to rely strictly on a market test at this phase of the leasing process.

As regards the acreage restrictions on record title assignments proposed by section 3 of H.R. 2851, we are concerned not so much by the new statutory language but by its potential implementation through regulation.

We recognize and support the Interior Department's long-standing policy against "the Balkanization of oil and gas leases by assignment of parts of legal subdivisions." On the other hand, there are many areas in which 40-acre or less spacing occur, and it is common practice that record title assignments could be made.

We now assign operating rights and working interests, and Interior has referred to this; however, flexibility is necessary here because of the frequent changes in tax laws.

So long as that proviso is interpreted in the spirit of the plain language, we can support the new acreage restrictions. We would oppose, however, an absolute ban on record title assignments in less than 640 acres outside Alaska, or less than 2,560 acres within Alaska.

We firmly believe that the land use plan prerequisite to leasing proposed by section 5 of H.R. 2851 will add little, if any, discernible improvement to the integrity of environmental protection for the lands to which it applies, and we strongly urge that this section be stricken from the bill.

In our view, section 5 constitutes another impediment to orderly exploration of the Federal estate.

Finally, although we do not oppose the statutory imposition of sanctions against these "boiler room" operators, we do oppose State enforcement of these sanctions as proposed in subsection 43(g) by section 8 of H.R. 2851.

We believe that infractions of Federal law should be prosecuted by the Federal Government and infractions of State law by the State government.

I, too, would like to respond to some of the issues brought up by some of the earlier witnesses, and that is the end of my prepared statement.

[The prepared statement of Mr. Holland follows:]

**STATEMENT OF
ATLANTIC RICHFIELD COMPANY
REGARDING
FEDERAL ONSHORE OIL AND GAS LEASING LEGISLATION
JULY 28, 1987 HEARING
SUBCOMMITTEE ON MINING AND NATURAL RESOURCES
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC**

Good afternoon, Mr. Chairman. I am Thomas L. Holland, Land Department Manager for ARCO Oil and Gas Company, the domestic oil and gas exploration and production division of Atlantic Richfield Company (ARCO) operating in the contiguous United States and headquartered in Dallas, Texas. ARCO appreciates this opportunity to participate in the Congressional debate on proposed amendments to the Mineral Leasing Act dealing with the leasing of Federal lands for oil and gas, and we respectfully request that our testimony be incorporated in the official record of today's hearing.

In crafting a legislative solution to the perceived problems in onshore leasing, we recommend that three tenets be considered. First, any reordering of onshore leasing should be market sensitive and recognize the impacts on different sectors of the oil and gas industry. Competitive bidding along with increased rentals and royalties, while reflecting the highest market value for acreage, will have an inflationary impact on land costs to industry, which could preclude the many competent, smaller companies from participating. This will result in fewer wells being drilled because the independents drill far and away more exploratory wells than do the major companies. In this regard, the two-tiered system contained in H.R. 2851 is the more palatable approach of the measures under consideration.

Second, the legislation should not attempt to impose additional land use or environmental requirements either on the Department of Interior or on the industry. The reason is clear: there already exist adequate laws, rules and procedures which address these concerns; placing new ones in legislation designed to improve leasing mechanics constructs additional barriers to exploration and production with little, if any, additional benefit to environmental and land use planning objectives.

Third, the legislation should focus on oil and gas leasing. Regarding other matters, such as protection of domestic coal production, these are issues which should be debated but which do not correct inadequacies in the current oil and gas leasing system. In our view, such issues should not be a part of the leasing legislation.

ARCO does not favor enactment of H.R. 933 because, in its present form, this bill meets none of the principles I just

described. The remaining measure under consideration, Chairman Rahall's H.R. 2851, contains several provisions which preclude our endorsement but which, if modified, might represent an acceptable alternative to the current leasing system. We are encouraged that H.R. 2851 clearly demonstrates responsiveness to several of the concerns about which we testified during debate on this issue in the 99th Congress, and we welcome the opportunity to continue working with you to craft a measure which equitably addresses the Nation's needs.

We are concerned that, although public nominations of specific lands for leasing are provided for in Section 2.(a)(1) of H.R. 2851, the Secretary is under no obligation to offer such nominated lands for lease. We recommend that the seventh sentence of proposed amended Section 17(b)(1) be further amended to read as follows:

The public may make confidential expressions of interest about specific lands, and such lands shall be offered in the next scheduled sale in the area of such lands, if qualified under the provisions of this Act.

This addition would add a degree of certainty to the statute currently lacking in H.R. 2851 and would, thus, serve the national interest in orderly exploration and development of our remaining oil and gas resources.

We are also concerned that H.R. 2851 is silent on the question of government tract evaluation. We interpret this silence as Congressional intent to rely strictly on the market test associated with competitive oral bidding in the first-tier competitive leasing round, but we fear that others may consider the bill vulnerable to challenge on this issue. Accordingly, we recommend that the tenth sentence of proposed amended Section 17(b)(1) be further amended to read as follows:

The Secretary of the Interior shall accept the highest bid from a responsible qualified bidder without evaluation of the lands proposed for lease and for which such bid was made.

This addition would clarify Congressional intent to rely strictly on a market test at this phase of the leasing process.

For the reasons stated above, we also oppose the rental and minimum royalty rate increases proposed by Section 2.(c) of H.R. 2851.

As regards the acreage restrictions on record title assignments proposed by Section 3 of H.R. 2851, we are concerned not so much by the proposed new statutory language but by its potential implementation. We recognize and support the Interior Department's long-standing policy against "the Balkanization of oil and gas leases by assignments of parts of legal subdivisions," and we support the desire of many in the

Congress to put unscrupulous "40-acre merchants" out of business. On the other hand, there are many areas in which 40-acre (or less) well spacing is common practice and in which such record title assignments would clearly "further the development of oil and gas." So long as that proviso is interpreted in the spirit of its plain language, we can support the proposed new acreage restrictions. We would oppose, however, an absolute ban on record title assignments of less than 640 acres outside Alaska or less than 2,560 acres within Alaska.

We firmly believe that the land use plan prerequisite to leasing proposed by Section 5 of H.R. 2851 will add little, if any, discernible improvement to the integrity of environmental protection for the lands to which it applies, and we strongly urge that this section be stricken from the bill. In our view, Section 5 constitutes but another impediment to orderly exploration of the Federal estate and virtually guarantees a new wave of time-consuming and costly litigation.

Finally, although we do not oppose the statutory imposition of sanctions against unscrupulous "boiler room" operators, we do oppose state enforcement of these sanctions as proposed in new Subsection 43.(g) by Section 8 of H.R. 2851. We believe that infractions of Federal law should be prosecuted by the Federal government and infractions of state law by the state government. The precedential invitation to civil action by the states against alleged violations of Federal law proposed by this section is both inappropriate and unnecessary in our view. It will open the door to a potential flood of litigation in the already overloaded Federal court system as states seek to assert their interests, while providing no further discernible deterrent to the unscrupulous activity this statute is designed to discourage.

ARCO appreciates your consideration of our views on this important issue. I will be happy to respond at this time to any questions you might have, and I want to thank you again for the opportunity to participate in today's hearing.

EXHIBIT 2

S. HRG. 100-464

FEDERAL ONSHORE OIL AND GAS LEASING

HEARING **BEFORE THE** **SUBCOMMITTEE ON MINERAL RESOURCES** **DEVELOPMENT AND PRODUCTION** **OF THE** **COMMITTEE ON** **ENERGY AND NATURAL RESOURCES** **UNITED STATES SENATE**

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 66

TO PROVIDE FOR COMPETITIVE LEASING FOR ONSHORE OIL AND GAS

S. 1388

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

JUNE 30, 1987



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

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5311-33

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J. BENNETT JOHNSTON and **JAMES A. McCLURE** are Ex Officio Members of the Subcommittee

PATRICIA J. BENEKE, *Senior Counsel*

(II)

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FEDERAL ONSHORE OIL AND GAS LEASING

JUNE 30, 1987

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

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

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

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

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

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

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

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

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

Now I believe it is about time that Congress do something about production of our own domestic supplies. So I drafted a bill that I think would bring that about. In our case in Montana, we probably

now, we will have to clean that up when we go to markup on that to make sure everybody is clear on that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

They could lose a whole lot every year.

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

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

It is to the advantage of the Federal Government, as trust holders for the people of this country, to get those leases out, get them

drilled and explored for, and get production established on those leases.

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

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

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

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

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

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

Senator BUMPERS. Why should we not?

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

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

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

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

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

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

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

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

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

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

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

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

Senator BUMPERS. A hundred mile radius?

Mr. WONSTOLEN. That is very possible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT 3

Nos. 21-5006, 21-5020, 21-5021, 21-5023, 21-5024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILDEARTH GUARDIANS, *et al.*,
Plaintiffs/Appellees,

v.

DEBRA HAALAND, *et al.*,
Defendants/Appellants,

&

STATE OF WYOMING, STATE OF UTAH, WESTERN ENERGY ALLIANCE,
PETROLEUM ASSOCIATION OF WYOMING, AMERICAN PETROLEUM
INSTITUTE,
Intervenor Defendants/Appellants.

**STIPULATION FOR DISMISSAL UNDER FEDERAL RULE OF
APPELLATE PROCEDURE 42(B)**

It is hereby stipulated and agreed by and between the parties that the above-captioned consolidated appeals are voluntarily dismissed pursuant to Federal Rule of Appellate Procedure 42(b).

Each party shall bear its own costs on appeal.

Respectfully submitted,

/s/ Allen M. Brabender

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2021, the foregoing Stipulation of Voluntary Dismissal was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system and served electronically on all counsel of record.

/s/ Allen M. Brabender

EXHIBIT 4

Form 1221-2
(June 1969)



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
MANUAL TRANSMITTAL SHEET

Release	3-337
Date	2/18/13

Subject

3120 – COMPETITIVE LEASES (P)

1. Explanation of Material Transmitted: This release transmits a revised Manual Section which sets forth the policy and procedures required for competitive oil and gas leasing in accordance with the Federal Onshore Oil and Gas Leasing Reform Act of December 22, 1987, and the regulations in the Competitive Leases Rule, 43 CFR Subpart 3120 (2011).
2. Reports Required: None.
3. Materials Superseded: The Manual pages superseded are listed under “REMOVE” below. All other expired directives applicable under the Subject Function Code 3120 which have been issued since enactment of the Federal Onshore Oil and Gas Leasing Reform Act have been appropriately incorporated into this Manual Section.
4. Filing Instructions: File as directed below.

REMOVE:

All of 3120 (Rel. 3-280, 11/26/93)

INSERT

3120
(Total: 16 Sheets)

Michael D. Nedd

Assistant Director
Minerals and Realty Management

MS-3120 COMPETITIVE LEASES (P)

TC-1

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MS-3120 COMPETITIVE LEASES (P)

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Glossary of Terms (See Handbook 3100-1)

Handbooks

H-3100-1 - Oil and Gas Leasing
 H-3102-1 - Qualifications of Lessees
 H-3110-1 - Noncompetitive Leases
 H-3120-1 - Competitive Leases

MS-3120 COMPETITIVE LEASES (P)

.01

.01 Purpose. This Manual Section contains guidance and procedures for Federal onshore competitive oil and gas leasing, except for the National Petroleum Reserve in Alaska (NPR-A).

.02 Objectives. See Manual Section 3100.02.

.03 Authority. Competitive leases for public domain and acquired lands minerals are issued under the Mineral Leasing Act (MLA) of February 25, 1920, as amended and supplemented (30 U.S.C. 181 *et seq.*) and the Mineral Leasing Act for Acquired Lands of August 7, 1947, as amended (30 U.S.C. 351-359). In accordance with the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 *et seq.*), competitive leases are issued for lands for which the authority to lease has been delegated from the General Services Administration to the Department of the Interior. Lands which are otherwise unavailable for leasing but which are subject to drainage (protective leasing) are leased in accordance with the Attorney General's Opinion of April 2, 1941 (40 Op. Atty. Gen. 41). See 43 CFR 3109.1 for leasing of oil and gas in accordance with the Act of May 21, 1930 (30 U.S.C. 301-306), within certain rights-of-way; 43 CFR 3130 for leasing of oil and gas within the NPR-A; and 43 CFR 3141 for leasing of combined hydrocarbon resources within Special Tar Sand Areas.

.04 Responsibility. See Manual Section 3100.04.

.05 References. See Manual Section 3100.05 and Handbook 3120-1.

.06 Policy. It is the Bureau of Land Management's (BLM) policy to encourage the orderly development of Federal onshore oil and gas resources by offering lands for oil and gas leasing by competitive oral bidding when eligible lands are available. It is also BLM's policy to exercise its discretionary authorities, including its oil and gas leasing authority, through the use of an informed, deliberative process that includes:

- Communication with the public, tribal governments, and Federal, state, and local agencies;
- Consideration of current science and other available data;
- Compliance with existing laws, regulations, and policies; and
- Consideration of important resources and values.

As a land management agency with a multiple-use mission, the BLM will make land use decisions that sustain the health and productivity of the public lands for the use and enjoyment of present and future generations. The BLM recognizes that, in some cases, leasing of oil and gas resources may not be consistent with protection of other important resources and values, including units of the National Park System; national wildlife refuges; other specially designated areas; wildlife; and cultural, historic, and paleontological values. Under applicable laws and policies, there is no presumed preference for oil and gas development over other uses. In making its oil and gas leasing and development decisions, the BLM will consult and coordinate with other land and resource managers (Federal and non-Federal), as appropriate.

MS-3120 COMPETITIVE LEASES (P)

.06

In accordance with the Federal Onshore Oil and Gas Leasing Reform Act of 1987, eligible lands which are available for lease may be competitively offered by oral auction on a quarterly basis. All eligible lands available for lease that receive expressions of interest, or noncompetitive presale offers filed in accordance with 43 CFR 3110.1(a) (1) may be offered for competitive leasing when such lands have not been competitively offered during the previous 2-year period.

Eligible lands available for lease which receive expressions of interest or noncompetitive presale offers will be processed for lease offer in an expeditious manner. Lands available for competitive leasing that are being drained or are subject to drainage also will be offered by competitive leasing as expeditiously as possible. Lands offered competitively for which no bids were received and which become subject to drainage during the 2-year period following the last day of the oral auction continue to be available for noncompetitive leasing for the remainder of such 2-year period (see .1 and Handbook 3120-1).

It is BLM policy that the total bonus bid made on any competitive parcel will be deemed as submitted for the entire parcel, despite any subsequent acreage adjustments that may be necessary for the parcel after the oral auction and lease issuance.

.07 File and Records Maintenance. All oil and gas lease records and case files, including records contained in the Legacy Rehost 2000 System (LR2000), will be accurately and timely maintained to ensure that the BLM can properly identify and track competitive leasing actions. All lease actions will be entered in the LR2000 automated system within 5 working days of completion of the action.

MS-3120 COMPETITIVE LEASES (P)

.1

.1 General.

.11 Lands Eligible and Available for Competitive Leasing. Lands eligible for leasing include those identified in 43 CFR 3100.0-3 as being subject to leasing, i.e., lands not excluded from leasing by a statutory or regulatory prohibition. Lands are available for leasing when they are open to leasing in the applicable resource management plan, and when all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA). The following types of lands, if eligible and available for lease, may be offered for competitive bidding: lands contained in expressions of interest; lands contained in parcels formally nominated (see 43 CFR 3120.3); lands in certain noncompetitive offers filed prior to the official posting of the Notice of Competitive Lease Sale (see 43 CFR 3110.1(a)(1) and 43 CFR 3120.1-1(e); lands selected for offering by BLM motion; lands which have not been offered for competitive leasing within the preceding 2-year period (see 43 CFR 3120.1-2(e); lands in which the oil and gas mineral rights will vest in the United States in the future (future interest lands) (see 43 CFR 3120.7-1); lands for which the authority to lease has been delegated from the General Services Administration (GSA) to the Department of the Interior; underlying interests in cancelled or forfeited leases (see 43 CFR 3120.1-1(c)); and lands which are otherwise unavailable for lease but which are subject to drainage (protective leasing)(see 43 CFR 3100.2-1). Lands declared by the GSA as excess or surplus and those lands subject to drainage under the protective leasing provisions in accordance with the Attorney General's Opinion of April 2, 1941, are available only by competitive leasing, and will not be available for noncompetitive lease offers. (For competitive leasing in the NPR-A, see 43 CFR 3130.)

.12 Requirements.

A. Quarterly Competitive Sales. Each BLM state office will hold sales at least quarterly if lands are available for competitive leasing. When a state office has only a small number of parcels to offer for sale, such parcels may be offered as part of the competitive sale in a nearby state office. Each state office must offer for oral auction the available lands contained in an expression of interest or noncompetitive offer which is filed in accordance with 43 CFR 3110.1(a)(1).

B. Oral Bidding. A competitive oral bidding process must be used to conduct oil and gas lease sales.

C. Minimum \$2 per Acre Bonus Bid. A national minimum acceptable bonus bid of \$2 per acre or fraction thereof, as prescribed by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, must be remitted by a person or entity as compensation for a lease parcel in a competitive oral auction. The bonus bid amount is payable on the gross acreage and cannot be prorated for any lands in which the United States owns a fractional interest.

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.13

.13 Protests and Appeals. No competitive lease sale under the regulations of 43 CFR Subpart 3120 can be suspended due to a protest or an appeal from a decision by the authorized officer to hold the lease sale. The offering of a specific parcel may be suspended while the authorized officer considers a protest or an appeal concerning the inclusion of the parcel in a Notice of Competitive Lease Sale. The holding of a competitive lease sale may be suspended only by the Assistant Secretary for Land and Minerals Management after a review by the Assistant Secretary of the merits of the protest or appeal. (see Handbook 3120-1 for specific guidelines and procedures for handling such protests and appeals.)

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.2

.2 Lease Terms

.21 Duration of Lease. Effective October 24, 1992, competitive leases are issued for a primary term of 10 years, in accordance with Section 2509 of the Energy Policy Act of 1992, which amended the Mineral Leasing Act. Prior to October 24, 1992, competitive leases had a primary term of 5 years.

.22 Dating of Leases. Competitive leases, except future interest leases, are effective the first day of the month following the date they are signed by the authorized officer, or if a prior written request is made by the prospective lessee, the first day of the month in which the lease is signed by the authorized officer. Leases for future interest are issued to be effective as of the date the mineral interests vest in the United States.

.23 Lease Size. Competitive lease parcels will not exceed 2,560 acres outside Alaska, or 5,760 acres within Alaska outside the NPR-A, and must be as nearly compact in form as possible. Competitive future interest leases are subject to these same acreage restrictions.

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.3

.3 Nomination Process..31 General.

A. Formal Nomination. Following publication of a notice in the *Federal Register* concerning election to consider implementing the formal nomination procedures provided in 43 CFR 3120.3, and upon reviewing comments received at the end of a 30-day public comment period, the BLM Director may elect to accept formal nominations. Currently, the BLM Director has elected not to use the formal nomination provisions contained in 43 CFR 3120.3-1 through 3120.3-7.

B. Informal Expression of Interest. Anyone interested in obtaining a lease for eligible lands that are available for lease through the competitive leasing process may submit an informal expression of interest in writing to the proper BLM office requesting that the lands be offered for oral auction. The expression of interest should ideally describe the lands by the legal description or other adequate description (such as the previous lease serial number, if any) consistent with the lease size and land description requirements of the law and regulations. The expression of interest must also include for each parcel, the names and addresses of the surface owners of split estate lands. If the expression of interest does not conform to the size or land description provisions of the law and regulations, state office lease adjudication personnel should contact and work with the party submitting the expression of interest in an effort to get the party to adjust the parcel description. However, if a noncompetitive presale offer filed in accordance with 43 CFR 3110.1(a)(1) and a conflicting expression of interest occurs, state office lease adjudication personnel have the discretion to configure the parcels in a manner that will meet the needs of the interested public as well to encourage maximum competition. No specific forms are required for submission of an informal expression of interest. The BLM should not reveal the name of the party making an expression of interest if the party has requested that this information be kept confidential. All EOIs are to be held as confidential until the second business day following the last day of the competitive lease sale. Requests for the names of such parties are to be handled in accordance with the Freedom of Information Act.

C. BLM Motion. On its own motion or action, the BLM may list lands for competitive oral bidding.

.32 Filing of Formal Nomination for Competitive Leasing.
[Reserved]

.33 Minimum Bid and Rental Remittance.
[Reserved]

.34 Withdrawal of Nomination.
[Reserved]

.35 Parcels Receiving Nominations.
[Reserved]

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.36

.36 Parcels Not Receiving Nominations.
 [Reserved]

.37 Refunds.
 [Reserved]

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.4

.4 Lease Sale Parcel Review Process..41 General.

A. Purpose. The lease parcel review process determines the availability and conditions under which leasing and eventual development should occur if allowed to proceed. The goal of the process is to: (1) determine parcel availability; (2) evaluate existing stipulations; (3) identify new stipulations, if applicable; (4) provide for public involvement; and (5) develop detailed background information for the NEPA compliance process.

B. Parcel Review Timeframes. State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, Section 226(b)(1)(A), and 43 CFR 3120.1-2(a), when eligible lands are determined by the state office to be available for leasing. However, state offices will develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year (as needed) to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review policy.

C. Public Participation. State and field offices will provide for public participation as part of the review of parcels identified for potential leasing through the NEPA compliance documentation process. State and field offices will identify groups and individuals having an interest in local BLM oil and gas leasing, including surface owners of split estate lands where Federal minerals are being considered for leasing. Interested groups, individuals, and potentially affected split estate surface owners will be kept informed of field office leasing and NEPA activities through updated Web sites and email lists, and will be invited to comment during the NEPA compliance process.

.42 State Office Parcel Review.

A. Initial Review. The state office will conduct an initial review to confirm the availability of lands for competitive listing. The preliminary parcel sale list will be sent to the field office for review and confirmation.

B. Request for Environmental Compliance Documentation. The state office will request the NEPA compliance documentation from the field office.

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.43

.43 Field Office Parcel Review.

A. Interdisciplinary Review. Field offices will form an Interdisciplinary Parcel Review Team (IDPR Team) of resource specialists to review lease sale parcels and ensure land use plan conformance and compliance with NEPA and other legal and policy requirements. The IDPR Team will include subject matter experts for the resources potentially affected by leasing. When appropriate, the IDPR Team should consider including staff specialists from other agencies when lands and/or resources that are administered by those agencies could be impacted by future development on the lease parcels under review.

The IDPR Teams responsibilities will include:

- Gathering and Assessing Existing Information
- Ensuring Plan Conformance and Adequacy
- Considering Program-Specific Guidance
- Conducting Parcel Site Visits
- Performing Internal and External Coordination
- Performing NEPA Compliance Documentation
- Providing for Public Participation and a 30-day Public Comment Period

B. Leasing Recommendation. The Field Manager or District Manager will forward the finalized Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) (or finalized Determination of NEPA Adequacy (DNA), if appropriate) and a recommendation for each parcel reviewed to the State Director. The state office will post the NEPA compliance documentation on their leasing Web site and make the documentation available in the Information Access Center (formally known as the public room).

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.5

.5 Notice of Competitive Lease Sale..51 General.

A. Contents of Notice. The Notice of Competitive Lease Sale must contain a legal land description of each lease parcel being offered for oral auction, identification of the stipulations for each parcel, and all other pertinent, specific information concerning unique factors applicable to each parcel and the Web site address of the NEPA compliance documentation. The sale notice also must state the time, date, and place of the competitive sale and all information on the terms and conditions of the leases, including the form of remittance required, rental and royalty rates, and bid and lease forms (see Handbook 3120-1, Section II).

B. Applicable Stipulations. The sale notice must contain the complete language of each stipulation that is applicable to each of the parcels being offered at the oral auction. The language of each information notice applicable to a lease parcel also is to be included in the sale notice.

.52 Posting of Notice. The Notice of Competitive Lease Sale must be officially posted in the Information Access Center of the BLM state office having jurisdiction over the lands at least 90 calendar days prior to conducting a competitive auction. Each sale notice will include a link to the NEPA compliance documentation. The sale notice will also be made available for the public on the external Web site and will provide applicable lease sale information. The sale notice will also be made available for posting at all surface management agencies having jurisdiction over any of the lands included in the auction, including each BLM district office and field office. The sale notice is not to be published in the *Federal Register*, and publication in oil and gas journals or other similar publications is not required (see Handbook 3120-1, Section II). Paper copies of the sale notice must be made available to the public for the specified cost recovery rate. However, on the day of the sale, at the sale location, copies of the sale notice will be made available without charge.

.53 Protests. A 30-day protest period will begin the day the sale notice is posted. The posting of the sale notice will provide the state and field offices with at least 60 days to review protests before the oil and gas lease sale. Protests that are not resolved do not prevent bidding on protested parcels at the auction.

State offices should attempt to resolve protests before the sale of the protested parcels. State offices should be confident that the protests will be resolved and the leases issued within 60 days after receipt of the balance of monies owed prior to offering the parcels for sale.

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.6

.6 Competitive Sale.

.61 Oral Auction (see 43 CFR 3120.5-1). As required by the Federal Onshore Oil and Gas Leasing Reform Act, parcels will only be offered by oral bidding unless other methods of offering/selling parcels are approved by legislation.

A. Oral Bidding. Those parcels included in the Notice of Competitive Lease Sale which received noncompetitive offers made in accordance with 43 CFR 3110.1(a)(1) filed prior to the official posting of the sale notice in the Information Access Center of the BLM state office are to be identified in the sale notice (see Handbook 3120-1, Section II). If any such noncompetitive presale offer is withdrawn subsequent to the official posting of the sale notice, identification of the withdrawal of such offer will be made at the oral auction prior to the oral bidding for that parcel. If the BLM Director elects to use the formal nomination, those parcels receiving nominations must be identified in the sale notice and prior to the oral bidding for such parcels. For parcels offered competitively in response to informal nominations, requests, or expressions of interest, no special identification or notation is to be made in the sale notice or prior to the oral bidding for such parcels.

B. Bid Award. The highest oral bid equal to or exceeding the national minimum acceptable bid will be the winning bid. The decision of the auctioneer will be final.

.62 Payments Required (see 43 CFR 3120.5-2). On the day of the sale, the high bidder must submit at least the minimum bonus bid of \$2 per acre or fraction thereof, the total amount of the first year's advance rental at the rate of \$1.50 per acre or fraction thereof, and a nonrefundable administrative fee, in an acceptable form of remittance as specified by 43 CFR 3103.1-1, for each parcel successfully bid on. Cash is not an acceptable form of payment. The balance of the bonus bid must be paid within 10 working days after the last day of the oral auction.

.63 Recurrent Nonpaying Bidders

A. Day of Sale Monies not Paid. Any bidder who has not paid the minimum monies owed on the day of sale is not a "responsible qualified bidder," and is therefore to be barred from registering for any oil and gas lease auction until the debt to the United States is settled. Any bidder who does not timely pay the minimum monies owed for a total of three sales is to be permanently barred from registering for any oil and gas lease auction at any BLM office.

B. Day of Sale Monies Paid Remainder of Bonus Bid not Paid. Any party that fails to submit the balance of the bonus bid within 10 working days of the oral auction on three occasions will be prohibited from bidding at any future sale conducted by that BLM state office. For example, a party that forfeits monies for three parcels at a single oral auction, or forfeits monies for parcels at different sales totaling three times in a BLM state office will be prohibited from bidding at any future sale in that state.

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.64

.64 Award of Lease (see 43 CFR 3120.5-3).

A. Execution of Bid Form. A bid cannot be withdrawn. A properly signed bid on a BLM-approved lease bid form constitutes a legally binding lease offer and acceptance of a lease, including all terms and conditions of the lease. Submission of the signed bid form will be required on the day of the oral auction when payment is made. Failure to comply will result in rejection of the bid and forfeiture of all monies submitted. The parcel will be reoffered for competitive lease at a subsequent oral auction.

B. Lease Award. The highest responsible qualified bidder is awarded a lease. Signature by the bidder on the BLM-approved bid form constitutes the signature on the lease. Separate signature by the lessee on the lease form is no longer required (see Handbook 3120-1, Section II). However, if a bid is received meeting or exceeding the minimum national bid amount, even if it is the only bid, it will be deemed to be the high bid and the lease may be issued. Only responsible qualified bidders will be permitted to register and bid at any lease sale as noted in .63 (A) above.

C. Bid Rejection. Failure to make complete and timely payments or failure to qualify to hold a lease (see 43 CFR 3102) will result in rejection of the oral bid. A parcel must be re-offered competitively if a bid is rejected, including when a bid is rejected for a parcel on which a presale noncompetitive offer was filed pursuant to 43 CFR 3110.1(a)(1). If no bid is received at a subsequent competitive sale for a parcel having such a presale offer, the presale offer retains its priority and a noncompetitive lease may be issued.

D. Lease Issuance. Issuance of a lease must be consistent with 43 CFR 3110.7(a) and 3110.7(b) with respect to actions required on any previous lease that may still be valid for the lands, including lands covered by an earlier lease which terminated within less than 90 calendar days.

Before issuing a lease, the authorized officer at the state office will (1) sign decisions resolving all protests concerning the parcel, and (2) sign a decision record (or record of decision for an environmental impact statement (EIS) supporting issuance of the lease(s) that provides a rationale for the leasing decision, taking into account, among other things, the NEPA analysis. If a particular parcel or parcels are not the subject of a protest, sale or issuance of such parcels should not be delayed pending resolution of protests on any other parcels proposed for sale. Field or state offices will post the NEPA compliance decision documents and protest decisions on the appropriate Web site and make the documentation available in the Information Access Center.

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.7

.7 Parcels Not Bid on at Auction.

.71 Lands for which No Bids are Received. Lands for which no bids are received at an oral auction will be available for filing of noncompetitive offers in accordance with 43 CFR 3110.1(b) for a 2-year period beginning the first business day following the end of the oral auction. However, a presale noncompetitive offer properly filed prior to the official posting of the Notice of Competitive Lease Sale will have priority over any noncompetitive offer filed after the end of the oral auction. If a noncompetitive presale offer filed pursuant to 43 CFR 3110.1(a)(1) is withdrawn either before or after the oral auction, the lands contained in the offer continue to be available for noncompetitive lease in accordance with 43 CFR 3110.1(b) for any remaining portion of the 2-year period after the end of the auction.

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.8

.8 Future Interest.

.81 Nominations to Make Lands Available for Competitive Lease. Nominations for future interest leases must be filed in accordance with 43 CFR 3120.7-1. If the BLM Director elects to use formal nominations, the requirements of 43 CFR 3120.3-1 through 3120.3-7 are to be followed. Otherwise, an informal expression of interest may be submitted for future interest lands. All future interest lands will be offered competitively at an oral auction to the highest bidder regardless of whether the lands are in a producing status.

.82 Future Interest Terms and Conditions.

A. Rental and Royalty; Acreage Chargeability. No rental or royalty is due until the minerals vest in the United States. The lease rental and royalty rates and acreage chargeability requirements must be as provided in 43 CFR 3103 and 43 CFR 3101.2 upon vesting of the minerals in the United States.

B. Other Future Interest Lease Terms and Conditions. Each future interest lease shall include conditions or stipulations to the following effect: If the future interest lessee becomes the holder of any present interest operating rights in the lands and those present interest rights are assigned, the future interest lessee must file an assignment of the future interest lease of the same type and proportion as the transfer of the present interest rights. If the present interest lessee's rights cease, the future interest lease rights also will cease.

.83 Compensatory Royalty Agreements. The terms and conditions for compensatory royalty agreements involving acquired lands in which the United States owns a future or fractional interest will be established on a case-by-case basis. Such agreements are required when leasing is not possible in situations where the interest of the United States in the oil and gas deposits includes both a present and a future fractional interest within the same tract containing a producing well.