UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

STATE OF NORTH DAKOTA, Plaintiff, v. THE UNITED STATES DEPARTMENT OF INTERIOR; DEBRA ANN HAALAND, in her official capacity as Secretary of Interior; THE BUREAU OF LAND MANAGEMENT; NADA CULVER, in her official capacity as acting Director of the Bureau of Land Management; and JOHN MEHLHOFF, in his official capacity as the acting Director of the Montana-Dakotas Bureau of Land Management Defendants.	)	Civil No. 1:21-cv-00148-DMT-CRH

MEMORANDUM IN SUPPORT OF
MOTION FOR IMMEDIATE MANDAMUS RELIEF

The State of North Dakota ("State" or "North Dakota") respectfully submits this Memorandum in Support of its Motion for Immediate Mandamus Relief ("Motion") under 28 U.S.C. § 1361 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA") against Federal Defendants the United States Department of Interior, Debra Ann Haaland, in her official capacity as the Secretary of the Interior ("Secretary"), and the Bureau of Land Management ("BLM"), Nada Culver, in her official capacity as acting Director of the BLM, and John Mehlhoff, in his official capacity as the acting Director of the Montana-Dakotas BLM (collectively "Federal Defendants").

INTRODUCTION

North Dakota requests that this Court issue an order providing mandamus relief to North Dakota compelling the Federal Defendants to comply with their statutory obligations to hold quarterly oil and gas lease sales for public lands and also to comply with the nationwide preliminary injunction issued by the Federal District Court for the Western District of Louisiana enjoining the Federal Defendants from continuing their unilateral cancellation of the quarterly lease sales mandated by statute.

The Mineral Leasing Act ("MLA") requires that oil and gas "[l]ease sales **shall** be held . . . **at least quarterly** and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b)(1)(A) (emphasis added). Historically, the Federal Defendants have met this statutory requirement in North Dakota by holding four lease sales a year, with the sales typically taking place in March, June, September, and December.

The mandatory requirement to conduct these quarterly lease sales is further memorialized in mandatory land resource management plans ("RMPs") specific to North Dakota, that are developed under the Federal Land Policy Management Act ("FLPMA"). 42 U.S.C. §§ 1701 *et seq.* FLPMA imposes non-discretionary duties on the Federal Defendants, including mandating that the Federal Defendants act consistent with RMPs, and requiring that changes to an RMP (such as withdrawing lands available for leasing under the public domain) must undergo a public notice and comment process. *See* 43 U.S.C. § 1714; *see also* 43 C.F.R. §§ 1610.1-1610.8.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq*., imposes non-discretionary duties on the Federal Defendants when it takes "major actions," including requiring that Federal Defendants consider the environmental consequences of the cancellation of quarterly lease sales in the Montana/Dakotas regions, and provide the public, including North Dakota, notice

and opportunity to comment on the environmental consequences of any such action. Similarly, the APA, 5 U.S.C. § 551 *et seq*., imposes non-discretionary duties on the Federal Defendants, including requiring that the Federal Defendants provide a reasoned explanation for any "agency action" that results in a change or modification to existing RMPs. *See* 5 U.S.C. § 551(13) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.").

On January 27, 2021 President Biden issued Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, which provides in § 206 that "**[t]o the extent consistent with applicable law**, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review . . ." 86 Fed. Reg. 7619, at 7624 (Feb. 1, 2021) ("Executive Order 14008") (emphasis added). Despite the mandatory requirements of the MLA, FLPMA, NEPA, and APA, and ignoring Executive Order 14008's admonition to act consistent with applicable law, the Federal Defendants' have cancelled the statutorily mandated quarterly lease sales for March and June in 2021, and have further indicated that they intend to continue to cancel lease sales at least through 2021 (including, at minimum, the September lease sale) for an indefinite future period.

Federal Defendants have also thus far refused to comply with the nationwide preliminary injunction Order issued by the United States District Court of the Western District of Louisiana ("Louisiana Court") which enjoined the same Federal Defendants as are present in this case from cancelling any future quarterly oil and gas leases (including the September and December leases that would otherwise occur in 2021).

Federal Defendants' arbitrary cancellation of the statutorily mandated quarterly lease sales has already caused great harm to North Dakota and its citizens, and Federal Defendants' continuing

failure to comply with both the law and the Federal District Court's preliminary injunction will only increase that harm. North Dakota is the nation's second largest oil and gas producer. North Dakota produces over 500,000,000 barrels of oil per year ("bbl") and over 900,000,000 million cubic feet ("mmcf") of natural gas per year. Complaint, ECF No. 1, ¶ 9. Of those annual volumes, approximately 161 million bbl and 205 million mcf of natural gas are produced by mineral interests on federal and Indian lands located in the State. *Id.* Over fifty percent of North Dakota's general fund revenues are derived directly from oil and gas taxes, and sixty-six percent of the total of all tax and fee revenue received by the State comes from oil and gas extraction and production taxes. *Id.*, ¶ 10. Pursuant to the MLA, North Dakota receives 48 percent of the bonuses, production royalties, and other revenues from oil and gas leasing on federal lands. These funds are statutorily mandated to be paid to North Dakota under the MLA as a part of the quarterly leasing obligations of the Federal Defendants. *Id.*, ¶ 14; *see also* 30 U.S.C. § 191(a) & (b). In 2019, these federal payments added up to $93.65 million. *Id.* Federal mineral leasing revenues distributed to North Dakota support public schools, highways, local governments, and the State's budget reserve account. *Id*. The Federal Defendants' unilateral and unlawful cancellation of the March and June quarterly lease sales have already cost North Dakota and its citizens over $82 million. *Id.*, ¶ 53.

These harms are exacerbated in North Dakota due to the unique "split estate" arrangement in the state, whereby State and private mineral interests are frequently pooled with federal interests, and with all the mineral interests jointly managed through binding agreements. *Id.*, ¶ 16. Unlike many Western States with large blocks of land where the federal government owns both the surface and mineral estates, more than 97% of the surface and mineral estates in North Dakota were once owned either by the State or private interests as a result of the Congressional railroad and homestead acts of the late 1800s. *Id.*, ¶ 17. This separation of federal mineral ownership from

private/State surface ownership created North Dakota's unique "split estate" situation, with federal mineral interests impinging on over 30% of the spacing units in the State, creating a checkerboard of lands with private or state surface ownership and a mix of federal, state, and private mineral ownership. *Id.*, ¶ 19. This means that any refusal by Federal Defendants to lease federal mineral interests that are a part of a spacing unit impairs the non-federal mineral interests in that spacing unit, particularly if the federal, State, and private mineral interests have been pooled, subjecting the non-federal mineral interest development to Communitization Agreements. *Id.,* ¶ 16. North Dakota therefore has a vested interest in the Federal Defendants adhering to their statutory obligations under the MLA because the Federal Defendants' cancellation of lease sales of federal lands also impairs the development of State and private mineral interests. This circumstance compounds North Dakota's injuries directly tied to the Federal Defendants' cancellation of quarterly oil and gas lease sales.

Because the Federal Defendants are disregarding their mandatory statutory obligations under the MLA, FLPMA, NEPA, and APA, and are failing to comply with an existing nationwide preliminary injunction Order, this Motion is both appropriate and necessary to protect North Dakota's interests in requiring the Federal Defendants to hold the previously cancelled quarterly oil and gas leases, and ensure that those quarterly oil and gas leases continue into the future up to and until the Federal Defendants comply with their statutory obligations.

MATERIAL FACTS

The background of this action is more fully set forth in North Dakota's Complaint. ECF No. 1, at ¶¶ 9-58.

I. PROCEDURAL BACKGROUND.

North Dakota filed its Complaint in this action on July 7, 2021 (ECF No. 1), seeking to hold Federal Defendants accountable for their failure to comply with their statutory duty by cancelling quarterly lease sales. Separately, three actions have been filed by other State and industry plaintiffs in the Wyoming and Louisiana federal district courts. *See State of Wyoming v. the United States Department of Interior, et al.*, 21-cv-56 (D. Wy.) (the "Wyoming Action"); *State of Louisiana et al. v. Joseph R. Biden, Jr. et al.*, 2:21−CV−00778 (W.D. Li.) (the "Louisiana Action"); *American Petroleum Institute et al., v. United States Department of Interior et al.*, 2:21-cv-02506 (W.D. Li.) (the "Industry Action"). In the Louisiana Action, the court issued a nationwide preliminary injunction Order against the Federal Defendants on June 15, 2021, which "hereby **ENJOINED** and **RESTRAINED**" the Federal Defendants from cancelling any further "oil and natural gas leases on public lands or in offshore waters . . . as to all eligible lands." *State of Louisiana et al. v. Joseph R. Biden, Jr. et al.*, 2:21−CV−00778, ECF No.140, at 1 (Order Granting Motion for Preliminary Injunction) (emphasis in original) (**Exhibit 1**, hereto); *see also* Memorandum Ruling, ECF No. 139, at page 43 ("the scope of this injunction shall be nationwide. (**Exhibit 2**, hereto). The preliminary injunction Order does not require Federal Defendants to hold the cancelled March and June quarterly oil and gas lease sales in North Dakota.

Despite the standing preliminary injunction Order, the Federal Defendants have yet to hold any lease sales in 2021. On August 8, 2021, the plaintiffs in the Louisiana Action filed a Motion for Order to Show Cause requesting that the Louisiana Court issue an order "to show cause why

they should not be held in contempt for violating the Court's Preliminary Injunction Order and for an order directing Defendants to hold Lease Sale 257." *State of Louisiana et al. v. Joseph R. Biden, Jr. et al.*, 2:21−CV−00778, ECF No. 149, at 1 (Motion for Order to Show Cause and to Compel Compliance with Preliminary Injunction). The Federal Defendants' response to Motion for Order to Show Cause is due on August 24, 2021. *Id.*, ECF No. 150 (Minute Entry setting out response timelines). On August 16, 2021, the Federal Defendants filed a Notice of Appeal as to the Order on Motion for Preliminary Injunction, appealing the Order to the Fifth Circuit. *Id.*, ECF No. 152 (Notice of Appeal).

On the same day, the Federal Defendants issued a press release regarding their decision to appeal the preliminary injunction Order in the Louisiana action, noting cryptically that the "Interior will proceed with leasing consistent with the district court's injunction during the appeal. In complying with the district court's mandate, Interior will continue to exercise the authority and discretion provided under the law to conduct leasing in a manner that takes into account the program's many deficiencies." Interior Issues Statement on Oil and Gas Leasing Program (August 16, 2021) (available at: https://www.doi.gov/pressreleases/interior-issues-statement-oil-and-gas-leasing-program). Given that the Federal Defendants have yet to notice any quarterly lease sale in 2021, it is unclear to what extent the quarterly oil and gas lease sales will be resumed. Further, the Federal Defendants' press release gives no indication as to whether the previously cancelled lease sales, including the previously noticed March and June lease sales in North Dakota, will be held.

Separately, in the Wyoming action, the plaintiffs also sought a preliminary injunction, which the District Court dismissed as moot due to the existing nationwide preliminary injunction issued in the Louisiana Action. *State of Wyoming v. the United States Department of Interior, et al.*, 21-cv-56, at ECF No. 71 (Order Dismissing as Moot Without Prejudice Motion for Preliminary

Injunction) (**Exhibit 3**, hereto). In the Order, the District Court acknowledged that federal courts have authority to grant nationwide injunctions, and noted that since there was a standing nationwide preliminary injunction Order issued in the Louisiana Action, consideration of an additional preliminary injunction "would be a duplication and uneconomical use of judicial resources" as the standing preliminary injunction "granted the bulk of Petitioners' requested relief." *Id.*, page 2.

Finally, on a recent call between the leadership of the BLM Montana/Dakotas office and constituents from North Dakota, BLM official affirmatively stated that they are cancelling lease sales at least through the end of calendar year 2021, notwithstanding the preliminary injunction Order issued in the Louisiana Action. Congressional Record – Senate, Vol. 167, No. 140, S5926 (August 5, 2021) (**Exhibit 4**, hereto). During the call Director (and Defendant in this action) John Mehloff stated that "at earliest" the BLM "would be able to hold an oil and gas lease sale late first quarter of 2022." *Id.*

II. FEDERAL DEFENDANTS' MANDATORY STATUTORY DUTIES.

The MLA, FLPMA, NEPA, and APA all impose mandatory duties on the Federal Defendants to (1) hold quarterly lease sales; (2) provide royalties generated from production on those lease sales to states such as North Dakota; (3) comply with current RMPs; (4) provide public notice and opportunity for comment before deviating from their statutory duties to hold mandatory lease sales and thus modify RMPs; (5) assess the environmental impacts of any "major federal actions" such as amending RMPs; and (6) give a reasoned explanation before deviating from quarterly lease sales and modifying RMPs. These mandatory duties are owed to North Dakota, who as established above, has strong sovereign and economic interests in the Federal Defendants complying with their statutory duties for holding and continuing the quarterly lease sales.

A. The MLA Mandates that the Federal Defendants Hold Quarterly Oil and Gas Lease Sales.

The MLA requires that oil and gas "[l]ease sales **shall** be held for each State where eligible lands are available **at least quarterly** and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b)(1)(A) (emphasis added). The MLA further provides that for oil and natural gas leases on federal lands (which includes the mandated quarterly leases) 50 percent of bonuses, production royalties, and other revenues are granted to the State in which the lease is located, and 40 percent is granted to the Reclamation Fund, which maintains agricultural irrigation systems in several Western States, including North Dakota.[1] 30 U.S.C. §191(a). North Dakota therefore has a vested statutory right under the MLA in the quarterly lease sales, both through its direct interest in the bonuses, production royalties, and other revenues which are statutorily granted to North Dakota from those lease sales, as well as its interest in the split-estate nature of leases in North Dakota.

BLM's own regulations also reiterate the statutory requirement for conducting quarterly lease sales and state that "[e]ach proper BLM Sate office **shall** hold sales **at least quarterly** if lands are available for competitive leasing." 43 C.F.R. § 3120.1–2 (emphasis added). BLM state offices are in charge of identifying which specific parcels to offer for lease in a competitive lease sale. *See* 43 C.F.R. Subpart 3120. Lands available for leasing "shall be offered for competitive bidding" and include, but are not limited to, "[l]ands included in any expression of interest." 43 C.F.R. § 3120.1-1(e).

[1] Section 1 of the Reclamation Act of June 17, 1902 allocates funds to "California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, **North Dakota**, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming" for the "construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories." (Emphasis added)

BLM regulations further require that the lands available for a lease sale "shall be described in a Notice of Competitive Lease Sale" (43 C.F.R. § 3120.4–1), which notice "shall be posted" at least "45 days prior to conduction" (43 C.F.R. § 3120.4–2) of the lease sale. Typically, the BLM Montana/Dakotas Office posts those notices well before the 45-day deadline. *See* Complaint, ¶ 34. Once the BLM posts notice of a lease sale, the BLM allows for a 30-day protest period. *See* BLM Manual 3120 at .5(.53). If protests are not resolved before leasing, BLM can still accept bids for protested parcels at auction. *Id*.

BLM, without formal notice or explanation, cancelled the sales scheduled for March and June 2021, and has not provided the 45-day notice required by its own regulations for the September sales, indicating that BLM is also, again without explicit public notice, is canceling the September sale in North Dakota. At a more general national level, BLM has stated that it is cancelling all lease sales at least through the end of 2021. *See* **Exhibit 4,** Congressional Record – Senate, Vol. 167, No. 140, S5926 (August 5, 2021).

B. FLPMA Mandates that the Federal Defendants Provide for Notice and Comment Prior to Modifying North Dakota's Existing RMP.

Under FLPMA, the Secretary is required to "develop, maintain, and, when appropriate, revise land use plans which provide … for the use of public lands." 43 U.S.C. § 1712(a). The Secretary's land use planning objectives are adopted in RMPs, which are prepared and maintained by BLM state offices following public input. See 43 U.S.C. § 1712(a); 43 C.F.R. § 1610.1(b). FLPMA prohibits the Secretary from acting inconsistent with RMPs. *See Norton v. S. Utah Wilderness All*., 542 U.S. 55, 69 (2004); 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands … in accordance with the land use plans developed by him[.]"); 43 C.F.R. § 1610.5-3 ("All future resource management authorizations and actions … shall conform to the approved plan.").

Similarly, FLPMA imposes detailed procedural requirements on any substantial change in land management policy. *See, e.g.,* 43 U.S.C. §§ 1739(e); 1712(f); & 1714(h). This includes specific and express limitations on the authority of the Secretary to withdraw lands from leasing. 43 U.S.C. § 1714 ("[T]he Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section."). A "withdrawal" of lands from an RMP under FLPMA is defined as "withholding an area of Federal land from settlement, **sale**, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws . . ." 43 U.S.C. § 1702(j) (emphasis added). Therefore, the Secretary may only depart from an existing RMP after complying with a formal land use amendment process that includes public participation. *See* 43 U.S.C. § 1714(h) ("All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) shall be promulgated after an opportunity for a public hearing."); *see also* 43 C.F.R. §§ 1610.1-1610.8.

The closure of all federal mineral interests in North Dakota to oil and gas leasing is not provided for in the current North Dakota Resource Management Plan ("North Dakota RMP"), which specifies that hundreds of thousands of acres are available for oil and gas leasing in North Dakota. *See* North Dakota Resource Management Plan and Environmental Impact Statement, Record of Decision (April 1988), available at https://eplanning.blm.gov/public_projects/lup/68341/101098/123142/rod.pdf).[2] Federal

[2] The BLM issued a notice of a North Dakota RMP Revision and EIS on April 14, 2020, which was last updated on November 3, 2020. That notice did not include a withdrawal of all federal lands in North Dakota from the leasing program. The BLM has not noticed any changes in 2021 that would affect the conclusion that lands are available for leasing in North Dakota. *See* North Dakota Resource Management Plan Revision and EIS (available at https://eplanning.blm.gov/eplanning-ui/project/1505069/510).

Defendants' decision to cancel the statutorily-mandated lease sales and thus withdraw the federal lands available for lease under the North Dakota RMP for leasing violates the North Dakota RMP, and the requirements of FLPMA. At no time has BLM, as required by statute, proposed and made available for public comment any changes to the North Dakota RMP withdrawing all federal lands in the State from the leasing program for any period of time.

C. NEPA Mandates that the Federal Defendants Prepare an Environmental Assessment Prior to Amending the North Dakota RMP.

NEPA prescribes a set of "action -forcing" measures that require federal agencies to take a "hard look" at the environmental consequences of major federal actions before they are taken. *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 815 (8th Cir. 2006). NEPA therefore imposes "procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Department of Transportation v. Public Citizen,* 541 U.S. 752, 756 (2004). NEPA requires federal agencies to prepare an environmental impact statement ("EIS") prior to taking "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). RMP amendments are "major federal actions" with potential environmental impacts that must also be assessed under NEPA, 42 U.S.C. § 4332(2)(C). *See Norton*, 542 U.S. at 72 ("BLM *is* required to perform additional NEPA analyses if a [land use] plan is amended or revised." (emphasis in original)); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 689 (10th Cir. 2009) ("Amending a resource management plan is a 'major federal action' whose potential environmental impacts must be assessed under NEPA.").

"Injury under NEPA occurs when an agency fails to comply with that statute," such as failing to issue a required EIS. *Sierra Club*, 446 F.3d at 816. The injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making. *Id.*

The North Dakota RMP was, as required by law, developed and finalized through the public notice and comment process and was accompanied by an environmental assessment. The Federal Defendants cannot lawfully amend the North Dakota RMP, which provides that lands are "available for lease" in the State, without engaging in the same notice and comment process through which the RMP was adopted and providing an environmental assessment of the impact of the proposed amendment. However, that is precisely what they did here without complying with NEPA.

D. The APA Requires Federal Defendants to Provide a Reasoned Explanation for Cancelling Quarterly Lease Sales and Modifying RMPs.

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion." 5 U.S.C. §706(2)(A). Reasoned decision-making requires an agency, when departing from precedents or practices, to "offer a reason to distinguish them or explain its apparent rejection of their approach." *Sw. Airlines v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019) (internal quotation marks and citation omitted).

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). "In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* at 2126 (quoting *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009)). An agency provides a reasoned explanation for a policy change where it (1) displays "awareness that it *is* changing position," (2) shows the new policy is "permissible under the statute," (3) shows there are "good reasons for the new policy," and (4) shows "the agency *believes* [the new policy] to be better." *F.C.C. v. Fox Television Stations*, 556 U.S. at 515 (emphasis in original). When an agency's new policy "rests upon factual findings that contradict those which underlay its prior policy[,] or when

its prior policy has engendered serious reliance interests that must be taken into account," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-16; *see also Encino Motorcars,* 136 S. Ct. at 2125-26.

The Federal Defendants have not provided **any** explanation for reversing the longstanding practice of holding quarterly oil and gas lease sales. Nor have they provided **any** explanation for amending the North Dakota RMP which provides that lands are "available for lease" in the State. At a minimum the Federal Defendants were required to explain how the cancellation of quarterly oil and gas lease sales and effective amendment to the North Dakota RMP are "permissible under the [MLA and FLPMA]." *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. at 515.

E. The APA Vests this Court with Authority to Compel the Federal Defendants to Hold Quarterly Lease Sales.

The APA provides that the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. 706(1). The Supreme Court has held that a "failure to act" includes failure to take one of the agency actions defined in 5 U.S.C. § 551(13). *Norton*, 542 U.S. at 62-63 (noting that a failure to act includes, "for example, the failure to promulgate a rule or **take some decision by a statutory deadline**." (emphasis added)). Here, the Federal Defendants have failed to hold (and indeed affirmatively cancelled) **any** statutorily mandated quarterly lease sales in 2021.

III. THE FEDERAL DEFENDANTS' CANCELLATION OF QUARTERLY OIL AND GAS LEASE SALES.

A. Federal Defendants' Unlawful Actions Surrounding Executive Order 14008.

Prior to President Biden issuing Executive Order 14008, then acting Secretary of Interior Scott de la Vega issued Secretarial Order 3395 which temporarily removed authority for individual state BLM offices and other bureaus to "issue any onshore or offshore fossil fuel authorization, including not limited to a lease, amendment to a lease, affirmative extension of a lease, contracts, or other agreement, or permit to drill." U.S. Dep't of Interior, Secretarial Order 3395, Temporary Suspension of Delegated Authority at § 3 (Jan. 20, 2021) (available at https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf). By acting seven days before Executive Order 14008 was released, the acting Secretary initiated Federal Defendants' actions for cancelling quarterly oil and gas lease sales in violation of the Federal Defendants' statutory duties under the MLA, APA, FLPMA, and NEPA. Federal Defendants' actions were undertaken without any opportunity for North Dakota to participate via the statutorily mandated public notice and comment process.

The January 27, 2021 Executive Order 14008 directed the Secretary, consistent with applicable law, to evaluate a **potential** "pause" of new oil and gas leasing on public lands:

> **To the extent consistent with applicable law**, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters **pending completion of a comprehensive review** and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.
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> 86 Fed. Reg. at 7624-25 (emphasis added).

Executive Order 14008 did not direct the Secretary to indefinitely **cancel** new oil and natural gas lease sales in violation of federal law **prior to** completion of the "comprehensive review" mandated by FLPMA and NEPA, or prior to provide a reasoned explanation for such change as

mandated by the APA. Instead, Executive Order 14008 further provides that, in conducting the "comprehensive review", the Secretary:

> **shall complete that review in consultation with** the Secretary of Agriculture, the Secretary of Commerce, through the National Oceanic and Atmospheric Administration, and the Secretary of Energy. In conducting this analysis, **and to the extent consistent with applicable law**, the Secretary of the Interior shall consider whether to adjust royalties associated with coal, oil, and gas resources extracted from public lands and offshore waters, or take other appropriate action, to account for corresponding climate costs.
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> *Id.* at 7625 (emphasis added).

After Executive Order 14008 was issued, then acting Secretary Scott de la Vega promptly (through Secretarial Order 3395 and regional BLM offices) **cancelled** (not paused) all quarterly oil and gas lease sales scheduled for 2021. Specific to this action, on February 12, 2021, the Montana/Dakotas BLM State Office updated the posting for the March 23, 2021 lease sale to indicate that the scheduled sale was "paused" and/or "postponed," adhering to the direction of acting Secretary Scott de la Vega since the authority of the Montana/Dakotas to issue any lease sale was suspended by Secretarial Order 3395. *See* BLM National NEPA Register, 2021 March Oil and Gas Lease Sale for the Montana State office (available at https://eplanning.blm.gov/eplanning-ui/project/2002224/510). Despite the BLM's National NEPA Register page listing notice and protest deadlines for several other aspects of the March and June lease sales, including comment and protest periods for the previously issued notices of lease sale, there was **no** protest or comment period listed for the decision to cancel the March lease sale. *See id.*

Federal Defendant Secretary of Interior Deb Haaland was confirmed by the United States Senate and sworn into office on March 16, 2021. Press Release, Statement from Deb Haaland on Becoming the 54th Interior Secretary (Mar. 16, 2021) (available at

https://www.doi.gov/news/statement-deb-haaland-becoming-54th-interior-secretary). On March 19, 2021, senior Department of Interior officials clarified that, going forward, all oil and gas lease sale notices required review by the Office of the Assistant Secretary for Land and Minerals Management. Memorandum from Laura Daniel-Davis, Principal Deputy Assistant Secretary – Land and Minerals Management, to Bureau Directors (BLM, OSMRE, BSEE, BOEM) at 1-2 (Mar. 19, 2021) (available at https://www.eenews.net/assets/2021/03/23/document_gw_02.pdf). Similarly, on April 21, 2021, the BLM issued a public announcement stating that "the Bureau of Land Management is exercising its discretion to not hold lease sales in the second quarter of Calendar Year 2021." BLM Statement on Second Quarter Oil and Gas Lease Sales (available at https://www.blm.gov/press-release/statement-second-quarter-oil-and-gas-lease-sales). The public announcement noted that BLM was conducting an "ongoing review" of its decision to cancel quarterly lease sales, but provided no public *Federal Register* notice of the cancellation or review, and no opportunity for interested stakeholders such as North Dakota to comment on the cancellation or review.

To date, the Federal Defendants have not published a public notice in the *Federal Register* explaining or offering the public, including North Dakota, an opportunity to comment on, the official cancellation of the 2021 quarterly lease sales. Nor have the Federal Defendants published a notice in the *Federal Register* proposing changes to the North Dakota RMP reflecting Federal Defendants' withdrawal from the North Dakota any federal lands for lease sales. While the Federal Defendants issued a press release on August 16, 2021 saying that they would "proceed with leasing consistent with the" preliminary injunction Order issued in the Louisiana action, they have yet to notice **any** quarterly oil and gas lease sales in 2021, despite the preliminary injunction Order having been issued over two months ago, on June 15, 2021. *See* Interior Issues Statement on Oil

and Gas Leasing Program (August 16, 2021) (available at: https://www.doi.gov/pressreleases/interior-issues-statement-oil-and-gas-leasing-program).

B. Federal Parcels are Available for Leasing in North Dakota and Federal Defendants Continue to Violate Their Statutory Duty to Hold Quarterly Leases Under the MLA.

To date, BLM has cancelled, and thus failed to hold, any quarterly lease sales in 2021 **despite the availability of parcels for leasing in North Dakota**. For example, there were quarterly lease sales scheduled for both March and June 2021 for the BLM region that includes North Dakota. *See* Complaint, ¶¶ 35-43 (Noting that there are 811 pending nominated tracts in North Dakota, of which 245 tracts have fully completed the administrative nomination process (including the NEPA review process) and thus are available for leasing, of which nine were already formally scheduled for sale, six in March of 2021 and three in June of 2021); *see also* https://eplanning.blm.gov/eplanning-ui/project/2002224/510 (noting nominated parcels that have completed the notice and protest period). These lease sales were cancelled.

Rather than engaging in the process mandated by the MLA, FLPMA, NEPA, and APA which all require that North Dakota be afforded the opportunity to comment on a proposed plan to cancel lease sales, Federal Defendants released a "fact sheet" on their website claiming that Executive Order 14008 directed Federal Defendants to "pause new oil and natural gas leasing on public lands and offshore waters, concurrent with a comprehensive review of the federal oil and gas program." *See* BLM, Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future (Jan. 27, 2021), https://www.blm.gov/press-release/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands. The Federal Defendants' "fact sheet" ignored Executive Order 14008's mandate to act consistent with law, and the Federal Defendants have yet to engage

stakeholders such as North Dakota in any of the statutorily mandated notice and comment processes that must precede a cancellation of the statutorily required quarterly lease sales, or a modification of the North Dakota RMP to withdraw federal lands available for leasing.

No formal cancellation notice was released for the June 2021 lease sale, and that sale was cancelled. To hold a quarterly lease sale by the next regular sale in September of this year, BLM was required by its own regulations to post its Notice of Competitive Lease Sale no later than August 15, 2021 (45 days before the end of September). No such notice has been posted as of the filing of this Motion – and Federal Defendants have therefore constructively cancelled the September lease sale as they cannot comply with the 45-day statutory notice period and still hold a lease sale in September. Further, the Federal Defendants have indicated they do not plan to hold **any** quarterly lease sales in 2021. *See* **Exhibit 4,** Congressional Record – Senate, Vol. 167, No. 140, S5926 (August 5, 2021).

The Federal Defendants therefore continue to demonstrate (both through action and inaction) that they are not complying and **do not** intend to comply with their non-discrete statutory duties under the MLA, FLPMA, NEPA, and APA to hold quarterly oil and gas lease sales, nor the nationwide preliminary injunction Order issued in the Louisiana Action.

At every level of communication, North Dakota has urged Federal Defendants to continue with the required quarterly lease sales, but has yet to hear any clear indication from BLM officials (or any other Federal Defendants) that any Dakotas/Montana quarterly lease sale will be held this year. And, while the Federal Defendants have recently indicated that they plan to "proceed with leasing consistent with the" preliminary injunction Order in the Louisiana Action, they have given no timeline for that compliance over two months after the Order was issued. Further, they hedge that commitment by noting that they will only "conduct leasing in a manner that takes into account

the [leasing] program's many deficiencies." Regardless, if the Federal Defendants wish to revise the quarterly oil and gas leasing program consistent with the unspecified "deficiencies" in the program, the correct avenue for doing so is **after** providing for public notice and comment on the alleged deficiencies, and not by administrative fiat cancelling all 2021 quarterly oil and gas lease sales without opportunity for any public participation. Thus, in addition to violating the law, the Federal Defendants are also actively failing to comply with a Federal court injunction.

ARGUMENT

I. THE NATIONWIDE PRELIMINARY INJUNCTION APPLIES TO LEASE SALES IN NORTH DAKOTA.

The mandate of the preliminary injunction Order issued by District Court for the District of Louisiana court runs throughout the United States – including in the State of North Dakota. *Leman v. Krentler-Arnold Co.*, 284 U.S. 448, 451 (1932) (the decree was binding upon the respondent, not simply within the District . . . but throughout the United States."). When injunctions are nationwide in scope, they properly limit the defendants conduct throughout the country. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2924 n.1 (Thomas, concurring, noting that nationwide "injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties.").[3]

The Louisiana Action includes the same Federal Defendants common to this action, including Debra Haaland, in her official capacity as the Secretary, and John Mehlhoff, in his official capacity as the Director for the BLM Montana-Dakotas Office.[4] The preliminary

[3] The nationwide injunction at issue in *Trump v. Hawaii* was eventually invalidated on the grounds that the plaintiffs had not demonstrated a likelihood of success on their claims.

[4] The Louisiana Action also includes President Joseph R. Biden, Jr.; Michael Nedd , in his official capacity as the Deputy Director of the BLM; the BLM Directors for the various other BLM Offices of the plaintiffs to that action, including the Arizona, California, Colorado, Eastern States, Idaho,

injunction Order issued in the Louisiana Action states that it is as enforceable against "[t]he United States Department of the Interior, Deb Haaland, Secretary of the Department of Interior, the United States Bureau of Land Management, Michael Nedd, Deputy Director of the Bureau of Land Management, . . . the United States Bureau of Ocean Energy Management, . . . the United States Bureau of Safety and Environmental Enforcement, . . . **and all their respective officers, agents, servants, employees, attorneys and all other persons who are in active consent [sic] or participation with the above** . . ." **Exhibit 1**, Order Granting Motion for Preliminary Injunction, at 1 (emphasis added).

When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. *Inland Steel Co. v. United States*, 306 U.S. 153 (1939). North Dakota is clearly a beneficiary of the Order issued by the District Court for the District of Louisiana, which stated that:

> "This Court does not favor nationwide injunctions unless absolutely necessary. However, it is necessary here because of the need for uniformity. *Texas*, 809 F.3d at 187–88. The Agency Defendants' lease sales are located on public lands and in offshore waters across the nation. Uniformity is needed despite this Court's reluctance to issue a nationwide injunction. Therefore, the scope of this injunction shall be nationwide.
>
> **Exhibit 2**, Memorandum Ruling, at pages 42-43.

The subject matter of the Louisiana Action and preliminary injunction is also the same as the subject matter of this case: the unlawful and arbitrary cancellation by the Federal Defendants of quarterly lease sales. Therefore, the Louisiana Court's order enjoining the Federal Defendants to conduct quarterly lease sales also directs the Federal Defendants to conduct such sales in North Dakota.

Nevada, New Mexico, Oregon-Washington, Utah, and Wyoming offices, and various officials in the Bureau of Ocean Energy Management.

As of the date of the filing of this motion, the Federal Defendants appear to be defying the Louisiana Federal Court's preliminary injunction Order. *See State of Louisiana et al. v. Joseph R. Biden, Jr. et al.*, 2:21−CV−00778, ECF No. 149, at 1 (Motion for Order to Show Cause and to Compel Compliance with Preliminary Injunction). Federal Defendants have missed the deadlines for making the requisite regulatory filings necessary to conduct the statutorily mandated quarterly lease sale in September. In conflicting messaging, the Federal Defendants have publicly stated that they do not intend to conduct any lease sales in 2021 (*see* **Exhibit 4**, Congressional Record – Senate, Vol. 167, No. 140, S5926 (August 5, 2021)), while also saying they would "proceed with leasing consistent with the district court's injunction during the appeal" of that very same injunction (*See* Interior Issues Statement on Oil and Gas Leasing Program (August 16, 2021) (available at: https://www.doi.gov/pressreleases/interior-issues-statement-oil-and-gas-leasing-program). The fact remains that to date, Federal Defendants have not noticed any quarterly oil and gas lease sales in 2021, including the previously cancelled March and June lease sales in North Dakota.

North Dakota brings the same essential causes of action against the Federal Defendants as were alleged in the Louisiana Action, and similarly has a high likelihood of success. Further, as set forth in North Dakota's Complaint, North Dakota has been and continues to be irreparably injured by the Federal Defendants' continued cancellation of quarterly lease sales through the loss of bonuses, production royalties, and other revenues from oil and gas leasing on federal lands. Complaint, ¶¶ 9-14,58 50-56 (noting the bonuses, production royalties, and other revenues North Dakota is being deprived of by cancelled lease sales, including detailing specific damages amounts attributable to the previously scheduled March and June lease sales); *id.*, ¶ 58 (noting the harms to

North Dakota's sovereign rights and authority to regulate, manage and develop the State's natural resources, including those owned by either State or private interests).

The unlawful cancellation of the March quarterly oil and gas lease sale has already cost North Dakota an estimated $470,000 loss in federal royalties, $1,601,000 of North Dakota Trust Lands and Missouri Riverbed royalties, $97,000 in in lost personal income tax from private royalties, and $1,140,000 in lost state sales taxes. *See* Complaint, ¶ 51. Similarly, cancellation of the June quarterly oil and gas lease sale will cost North Dakota an estimated $1.9 million of North Dakota Trust Lands royalties, federal royalties of $8.9 million of which North Dakota's lost share is $4.3 million, $17.3 million privately owned land royalties of which North Dakota's share of lost personal income tax would be $352,000, and $1.9 million in lost state sales tax. *Id.* at ¶ 52. Taken together, and adding lost sales and personal income taxes, the total loss to North Dakota from cancelling the March and June quarterly oil and gas lease sales is over $82 million. These losses will be compounded by the cancelled September quarterly oil and gas lease sale.

These injuries and losses are further compounded by the unique "split estate" regime in North Dakota where federal mineral interests impinge on over 30% of the spacing units in the State, and any refusal by Federal Defendants to lease federal mineral interests that are a part of a "split-estate" spacing unit impairs the non-federal mineral interests in that spacing unit. Federal Defendants' refusal to comply with their statutory duties to hold quarterly oil and gas lease sales therefore directly obstructs North Dakota's sovereign right to manage the state and private interests pooled with federal interests that were withheld from those quarterly sales. *See Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) ("States have a legally protected sovereign interest in the exercise of sovereign power over individuals and entities within the relevant jurisdiction, which involves the power to create and enforce a legal code." (citation and

internal quotations omitted)); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("Regulation of land use is a function traditionally performed by local governments.").

II. MANDAMUS RELIEF IS AN APPROPRIATE REMEDY TO WHICH NORTH DAKOTA IS ENTITLED.

A. Standard for Compelling Agency Action.

Separate analyses determining whether the Court has jurisdiction under a mandamus action and/or the APA have been considered by other courts to be unnecessary because the two are coextensive. *Sharadanant v. Uscis*, 543 F. Supp. 2d 1071, 1075 (D.N.D. 2008). A district court may grant a writ of mandamus if: (1) "the defendant has a nondiscretionary duty to" take the actions the petitioner seeks to compel; (2) "the petitioner can establish a clear and indisputable right to the relief sought," and (3) the petitioner has no other adequate remedy." *Castillo v. Ridge,* 445 F.3d 1057, 1060 (8th Cir. 2006).

Similarly, to invoke jurisdiction under the APA, a party must show (1) the agency had a nondiscretionary duty to act and (2) the agency unreasonably delayed in acting on that duty. *Sharadanat*, 543 F. Supp. 2d, at 1075 (citing to *Qijuan Li v. Chertoff*, 2007 WL 2123740, *2 (D. Neb., July 19, 2007) (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004))). That is because the APA affords judicial review to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. The APA provides relief not only from agency action taken, but also for "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The APA "empowers a court to compel an agency only to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (citation and quotation marks omitted). Further,

"[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

The MLA imposes discrete, non-discretionary obligations upon Federal Defendants to hold quarterly oil and gas lease sales. To meet those non-discretionary duties, BLM must take certain discrete actions and must perform those actions within certain deadlines. Further, the preliminary injunction issued in the Louisiana Action further mandates that Federal Defendants stop cancelling and renew quarterly oil and gas lease sales. Separately, FLPMA, NEPA, and the APA require that Federal Defendants provide the opportunity for notice and comment prior to departing from the statutorily mandated quarterly oil and gas lease sales and amending the North Dakota RMP, including providing an environmental assessment of the impact of that deviation and a reasoned explanation for the amendment.

Federal Defendants' failure to carry out their mandatory duties, and their affirmative actions in cancelling the statutorily required quarterly lease sales, also constitute final agency actions under the APA, 5 U.S.C. §§ 551(13). The Supreme Court has confirmed that a "failure to act" includes a failure take one of the agency actions defined in 5 U.S.C. § 551(13). *Norton*, 542 U.S. at 62 (noting that agency action includes decisions made or outcomes implemented by an agency such as an agency rule, order, license, sanction, or relief). "When agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates." *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin*., 740 F.2d 21, 32 (D.C. Cir. 1984); s*ee also Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500

(10th Cir. 1991) (holding that "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform").

Because Federal Defendants have failed to discharge mandatory duties that Congress requires, and that the Louisiana Court ordered in a nationwide preliminary injunction, this Court should award North Dakota mandamus relief and direct Federal Defendants to immediately hold quarterly lease sales, including remedying the unlawfully cancelled lease sales from March and June, pursuant to 30 U.S.C. § 226(b)(1)(A).

B. Federal Defendants Have Clear and Non-Discretionary Duties to Act.

The MLA requires that oil and gas "[l]ease sales **shall** be held for each State where eligible lands are available **at least quarterly** and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b)(1)(A) (emphasis added). The plain language of 30 U.S.C. § 226(b)(1)(A) – assigning duties with the use of the word "shall" – confirms Federal Defendants clear obligation and discrete duty to hold the quarterly oil and gas lease sales under the MLA when lands are available for leasing.

"There is no question that [30 U.S.C. § 226] imposes mandatory duties on BLM, and that BLM failed to satisfy those duties in this case." *Brigham Oil & Gas*, *LP*, 181 IBLA 282, 286 (2011) (determining similar mandatory provisions in 30 U.S.C. § 226(p) impose nondiscretionary, mandatory obligations on BLM field offices). Similarly, there is no question that the preliminary injunction Order issued by the District Court in the Louisiana Action also requires that Federal Defendants to hold quarterly lease sales. **Exhibit 2**, at page 43 (Federal Defendants "are hereby ENJOINED and RESTRAINED from [cancelling] new oil and natural gas leases on public lands . . . as to all eligible lands.").

FLPMA imposes non-discretionary duties on Federal Defendants to provide for public notice and comment when modifying RMPs and withdrawing lands from the availability for leasing. *See* 43 U.S.C. § 1714(h) ("All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) **shall** be promulgated after an opportunity for a public hearing.") (emphasis added); *see also* 43 C.F.R. §§ 1610.1-1610.8.

The North Dakota RMP specifies that hundreds of thousands of acres are available for oil and gas leasing. *See* North Dakota Resource Management Plan and Environmental Impact Statement, Record of Decision (April 1988), available at https://eplanning.blm.gov/public_projects/lup/68341/101098/123142/rod.pdf. The Federal Defendants confirmed this fact by previously noticing the March and June 2021 lease sales. The Federal Defendants may only depart from the North Dakota RMP and cancel those lease sales after complying with a formal land use amendment process that includes public participation under FLPMA – and they have failed to do so here.

NEPA imposes non-discretionary duties on Federal Defendants to assess the environmental impact of any "major federal actions," including modifying RMPs. 42 U.S.C. § 4332(2)(C); *Norton*, 542 U.S. at 72 ("BLM *is* required to perform additional NEPA analyses if a [land use] plan is amended or revised." (emphasis in original)); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 689 (10th Cir. 2009) ("Amending a resource management plan is a 'major federal action' whose potential environmental impacts must be assessed under NEPA."). Federal Defendants have not released any environmental assessment of their plan to deviate from and amend the North Dakota RMP, either through an EIS or otherwise.

Finally, the APA imposes non-discretionary duties on Federal Defendants to engage in reasoned decision making by explaining changes to existing policy. This includes providing a

reasoned explanation for changes to quarterly oil and gas lease sales, and amendments to the North Dakota RMP. This is especially true when those changes in policy "engender[] serious reliance interests that must be taken into account." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2125. That reasoned analysis must show how any change in policy is "permissible under the statute." *F.C.C. v. Fox Television Stations*, 556 U.S. at 515. North Dakota relies on the quarterly oil and gas sales in order to continue the development of State and private mineral interests under its unique "split-estate" regime. This includes relying on lands noted as "available for leasing" in the North Dakota RMP. Federal Defendants had a non-discretionary duty to provide a reasoned explanation for departing from the statutorily mandated quarterly oil and gas lease sales and the North Dakota RMP – and they failed to do so.

Because the Federal Defendants have failed to discharge their clear duties to act under the MLA, FLPMA, NEPA, and APA, a mandamus order requiring Federal Defendants to immediately resume quarterly lease sales (including making up the previously cancelled June and March lease sales) until they complete the mandatory notice and comment process for deviating from the quarterly oil and gas lease sales and North Dakota RMP, and provide an environmental assessment and reasoned justification for the same, is both necessary and appropriate.

C. North Dakota Has a Clear Right to Mandamus Relief.

Because the MLA imposes specific, non-discretionary duties on Federal Defendants to hold quarterly oil and gas lease sales in North Dakota, including the non-discretionary procedures for posting notices for lease sales when there are parcels available for leasing in North Dakota, North Dakota has a clear right to the relief sought; i.e., the mandated quarterly lease sales. BLM's own National NEPA Register confirms that parcels were available for leasing in North Dakota for the March, June, and September quarterly oil and gas lease sales. *See* BLM National NEPA

Register, 2021 March Oil and Gas Lease Sale for the Montana State office (available at https://eplanning.blm.gov/eplanning-ui/project/2002224/510); *see also* **Section II.A.**, *supra*; Complaint, ¶¶ 37-38, 42. The Federal Defendants have deprived North Dakota of its statutory right under the MLA to participate in and benefit from the quarterly oil and gas lease sales.

FLPMA, NEPA, and the APA also impose specific, non-discretionary duties on the Federal Defendants to notify, and allow North Dakota to comment on, changes to the established North Dakota RMP or deviations from the quarterly lease sales mandated under the MLA. This includes providing an environmental assessment of changes to the North Dakota RMP, and a reasoned justification for that significant change. The Federal Defendants materially changed the North Dakota RMP by withdrawing all federal lands in North Dakota from the lease sales program without first providing North Dakota notice and an opportunity to comment on significant proposed changes on North Dakota's own plan. The Federal Defendants failed to provide any environmental assessment of the impact of that change, and failed to provide any reasoned justification for the change, in violation of NEPA and the APA. The Federal Defendants have therefore deprived North Dakota of its right to participate in the public notice and comment process required by FLPMA, NEPA, and the APA. *See Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016) (explaining that "the violation of a procedural right granted by statute" can constitute the injury in fact required for a plaintiff to establish standing).

D. No Other Adequate Remedy Exists.

The Interior Board of Land Appeals ("IBLA") has recognized that, in cases such as this one, no other adequate remedy exists for North Dakota to vindicate its rights. In *Brigham Oil*, the IBLA upheld penalties against an operator who proceeded to drill a well without a permit, rejecting the operator's argument that BLM's failure to perform the mandatory duties under a similar section

of 30 U.S.C. § 226 could be overlooked. The IBLA observed that the operator's remedy for agency's failure was to institute a "'court action' to require BLM to fulfill its statutory obligation, either through a mandamus action or through provisions of the [APA] authorizing actions to compel a federal official to perform a nondiscretionary duty." *Brigham Oil*, 181 IBLA at 288 (observing that "clearly a court could order BLM to perform its nondiscretionary duties").

North Dakota is in a similar situation here. It has been excluded from and cannot participate in the mandatory statutory notice and comment process required before the Federal Defendants cancel quarterly oil and gas lease sales or modify the North Dakota RMP because the Federal Defendants have already unlawfully and unilaterally cancelled the March, June, and now September lease sales, and effectively amended the North Dakota RMP. Federal Defendants' delay has already cost North Dakota over $82 million in lost bonuses, royalties, and taxes, which North Dakota cannot ever fully recover.

As evidenced by the Order denying the preliminary injunction in the Wyoming Action, seeking a preliminary injunction in this action would be duplicative of the relief already granted by the preliminary injunction in the Louisiana Action. Even if North Dakota sought a preliminary injunction here, the Federal Defendants have **yet to comply** with the preliminary injunction issued in the Louisiana Action. Further, because the preliminary injunction in the Louisiana Action does not mandate that the Federal Defendants hold the previously cancelled March and June lease sales (but rather prohibits any further cancellations), a mandamus action is appropriate here to require the Federal Defendants to complete their non-discretionary duties and hold the cancelled March and June quarterly oil and gas lease sales in North Dakota, in addition all future quarterly oil and gas lease sales if and until the Federal Defendants comply with the procedural requirements of FLPMA, NEPA, and the APA for halting those sales and amending the North Dakota RMP. This

is true even if the Federal Defendants resume quarterly oil and gas lease sales in the remainder of 2021, as their recent August 16, 2021 press release indicates they **may choose to do**, over two months after the preliminary injunction Order was issues in the Louisiana Action, and after the time period for noticing the September 2021 quarterly oil and gas lease sale had already passed.

Every day that the Federal Defendants refuse to comply with their statutory obligations to hold quarterly lease sales inflicts new harms on North Dakota – both procedural and financial. Because no remedy other than mandamus is available to North Dakota, the Court should grant this Motion.

REQUEST FOR ORAL ARGUMENT.

North Dakota respectfully requests an in person oral argument on the relief requested in its Motion for Writ of Mandamus and this Memorandum in Support of the same. This case raises complex issues regarding the mandamus authority of this Court and the Federal Defendants' mandatory duties under several federal statutes. Given the importance of these questions to the determination of this case and the complexity of this area of law, North Dakota believes that the Court's decision-making process would be significantly aided by oral argument.

CONCLUSION

For the reasons set forth above, North Dakota respectfully request that the Court:

(1) Hold oral argument on the Motion for Immediate Mandamus Relief; and

(2) Enter an ORDER providing immediate mandamus relief to North Dakota compelling the Federal Defendants to comply with the preliminary injunction issued in the Louisiana Action and their statutory duties under the MLA, FLPMA, NEPA, and APA to hold the previously cancelled March, June, and September quarterly oil and gas lease sales, and hold all future lease

sales until the Federal Defendants comply with the procedural process under the MLA, FLPMA, NEPA, and APA for modifying the North Dakota RMP.

Dated: August 23, 2021

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 2:21-CV-00778**
VERSUS	**JUDGE TERRY A. DOUGHTY**
JOSEPH R. BIDEN, JR. ET AL	**MAG. JUDGE KATHLEEN KAY**

ORDER

For the reasons set forth in the Memorandum Ruling,

IT IS ORDERED that the Plaintiff States' Motion for Preliminary Injunction [Doc. No. 3] is **GRANTED.**

IT IS THEREFORE ORDERED that The United States Department of the Interior, Deb Haaland, Secretary of the Department of Interior, the United States Bureau of Land Management, Michael Nedd, Deputy Director of the Bureau of Land Management, Chad Padgett, Raymond Suazo, Kevin Mouritsen, Jamie Connell, Mitchell Leverette, John Ruhs, John Mehlhoff, Jon Raby, Steve Wells, Barry Bushue, Greg Sheehan, Kim Liebhauser, the United States Bureau of Ocean Energy Management, Amanda Lefton, Director of the Bureau of Ocean Energy Management, Michael Celata, the United States Bureau of Safety and Environmental Enforcement, Lars Herbst, Mark Fesmire, and all their respective officers, agents, servants, employees, attorneys and all other persons who are in active consent or participation with the above, are hereby **ENJOINED** and **RESTRAINED** from implementing the Pause of new oil and natural gas leases on public lands or in offshore waters as set forth in Section 208, Executive Order 14008, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021) and as set forth in all documents implementing the terms of said Executive Order by said defendants, as to all eligible lands.

IT IS FURTHER ORDERED that the said Agency Defendants shall be **ENJOINED** and **RESTRAINED** from implementing said Pause with respect to Lease Sale 257, Lease Sale 258 and to all eligible onshore properties.

IT IS FURTHER ORDERED that the scope of this injunction shall be nationwide.

IT IS FURTHER ORDERED that this Preliminary Injunction shall remain in effect, pending the final resolution of this case, or until further orders from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

IT IS FURTHER ORDERED that no security bond shall be required under Federal Rule of Civil Procedure 65.

MONROE, LOUISIANA, this 15th day of June, 2021.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 2:21-CV-00778**
VERSUS	**JUDGE TERRY A. DOUGHTY**
JOSEPH R. BIDEN, JR. ET AL	**MAG. JUDGE KATHLEEN KAY**

MEMORANDUM RULING

The issue before this Court is whether the Plaintiff States[1] are entitled to a preliminary injunction against the Government Defendants[2] as a result of the implementation of a "pause" of new oil and natural gas leases on public lands or in offshore waters ("Pause") after Executive Order 14008 was signed by President Joseph R. Biden, Jr. ("President Biden") on January 27, 2021.

The Plaintiff States alleged the Government Defendants[3] violated provisions of the Administrative Procedure Act, ("APA") entitling Plaintiff States to a preliminary injunction.

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[1] The Plaintiff States consist of the States of Louisiana, Alabama, Alaska, Arkansas, Georgia, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia.

[2] Government Defendants consist of 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; Michael Nedd, in his official capacity as Deputy Director of the Bureau of Land Management; Chad Padgett, in his official capacity as Director of the Bureau of Land Management Alaska Office; Raymond Suazo, in his official capacity as Director for the Bureau of Land Management Arizona Office; Karen Mouristen, in her official capacity as Director for the Bureau of Land Management California Office; Jamie Connell, in his official capacity as Director for the Bureau of Land Management Colorado Office; Mitchell Leverette, in his official capacity as Director for the Bureau of Land Management Eastern States Office; John Ruhs, in his official capacity as Director for the Bureau of Land Management Idaho Office; John Mehlhoff, in his official capacity as Director for the Bureau of Land Management Montana – Dakotas Office; Jon Raby, in his official capacity as Director for the Bureau of Land Management Nevada Office; Steve Wells, in his official capacity as Director for the Bureau of Land Management New Mexico Office; Barry Bushue, in his official capacity as Director for the Bureau of Land Management Oregon-Washington Office; Greg Sheehan, in his official capacity as Director for the Bureau of Land Management Utah Office; Kim Liebhauser, in her official capacity as Director for the Bureau of Land Management Wyoming Office; Amanda Lefton, in her official capacity as Director of the Bureau of Ocean Energy Management; Michael Celata, in his official capacity as Regional Director of the Bureau of Ocean Energy Management Gulf of Mexico Office; Lars Herbst, in his official capacity as Regional Director of Bureau of Safety and Environmental Enforcement Gulf of Mexico OCS Office; and Mark Fesmire, in his official capacity as Regional Director of the Bureau of Safety and Environmental Enforcement Alaska and Pacific Office.

[3] With the exception of President Biden, who is not an "agency" under the Administrative Procedures Act.

A Motion for Preliminary Injunction [Doc. No. 3] was filed by Plaintiff States on March 31, 2021. An Opposition [Doc. No. 120] was filed by Government Defendants on May 19, 2021. A Reply [Doc. No. 126] was filed by Plaintiff States on May 28, 2021.

Having considered the pleadings, the record, the applicable laws, evidence, and oral arguments of counsel, for the reasons set forth herein, this Court finds Plaintiff States have satisfied the requirements for a preliminary injunction. Accordingly, Plaintiff States' Motion for Preliminary Injunction is GRANTED.

I. BACKGROUND

The factual statements made herein should be considered as findings of fact regardless of any heading or lack thereof. Similarly, the legal conclusions should be taken as conclusions of law regardless of any label or lack thereof.

On March 24, 2021, Plaintiff States filed a Complaint [Doc. No. 1] against Government Defendants asking for declaratory and injunctive relief as to Section 208 of Executive Order 14008, which ordered the Secretary of the Interior to pause new oil and gas leases on public lands, or in offshore waters pending completion of a comprehensive review. This allegedly resulted in the halting of new oil and gas leases on public lands and offshore waters in violation of the United States Constitution, the APA, the Outer Continental Shelf Lands Act ("OCSLA"), and the Mineral Leasing Act ("MLA").

The Motion for Preliminary Injunction was filed by Plaintiff States on March 31, 2021. Briefs have been filed by Plaintiff States and by Government Defendants. Amici Curiae briefs were filed by the County of Daggett, County of Rio Blanco, County of Uintah and County of Wayne [Doc. No. 116] and by Center for Biological Diversity, Cook Inletkeeper, Defenders of Wildlife, Friends of the Earth, Healthy Gulf, National Resources Defense Council, Oceana,

Sierra Club and Wilderness Society [Doc. No. 123]. Per a status conference held on June 3, 2021 [Doc. No. 127], the court set oral arguments on these issues to be heard on June 10, 2021. The oral arguments were heard on that day in Lafayette, Louisiana.

1. Executive Order 14008

On January 27, 2021, President Biden issued Executive Order 14008[4], entitled "Tackling the Climate Crisis at Home and Abroad." At issue in this proceeding is Section 208 of the Executive Order, which reads as follows:

> Sec. 208. Oil and Natural Gas Development on Public Lands and in Offshore Waters. To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters. The Secretary of the Interior shall complete that review in consultation with the Secretary of Agriculture, the Secretary of Commerce, through the National Oceanic and Atmospheric Administration, and the Secretary of Energy. In conducting this analysis, and to the extent consistent with applicable law, the Secretary of the Interior shall consider whether to adjust royalties associated with coal, oil, and gas resources extracted from public lands and offshore waters, or take other appropriate action, to account for corresponding climate costs.

Id.

The implementation of Section 208 of Executive Order 14008 by the remaining Government Defendants ("Agency Defendants") is at issue based upon the alleged violation of the APA by the government agencies. 5 USC 551, et seq.

A court may review a Presidential Executive Order. A President's authority to act, as with the exercise of any governmental power, must stem either from an act of Congress, or from the Constitution itself, or a combination of the two. Medellin v. Texas, 552 U.S. 491, 128 S. Ct.

[4] Tackling the Climate Crisis at Home and Abroad, 86 FR 7619

1346, 170 L. Ed. 2d 190 (2008); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952); California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019), aff'd, 963 F.3d 926 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618, 208 L. Ed. 2d 227 (2020); and Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019), aff'd, 963 F.3d 874 (9th Cir. 2020), cert. granted, 141 S. Ct. 618, 208 L. Ed. 2d 227 (2020).

Plaintiff States have based their Motion for Preliminary Injunction on violations by the Government Agencies pursuant to the APA. Although President Biden is not an agency subject to the APA, whether Section 208 of the Executive Order 14008 would be consistent with applicable law is at issue. California, 379 F. Supp. 3d 928. In reviewing the lawfulness of the defendants' conduct, the Court begins each inquiry by determining whether the disputed action exceeds statutory authority. *Sierra Club v. Trump*, 379 F.Supp. 3d 883 (N.D. Cal. 2019).

A President may not transgress constitutional limitations. Courts determine where constitutional boundaries lie. Indigenous Env't Network v. Trump, 428 F. Supp. 3d 296 (D. Mont. 2019).

The case of League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019), vacated and remanded sub nom. League of Conservation Voters v. Biden, 843 F. App'x 937 (9th Cir. 2021) involved issues centered on OCSLA, which is one of the acts at issue in this proceeding. President Trump issued an Executive Order, (EO 13795) which purported to revoke previous Executive Orders involving a prior land withdrawal from OCSLA.[5] The Court found OCSLA allowed the President to withdraw lands from disposition, but it did not allow a President to revoke a prior withdrawal. The Court held that since OCSLA does not give the President specific authority to revoke a prior withdrawal, the power to revoke a prior withdrawal

[5] 43 U.S.C. 1341(a) allows a President of the United States to withdraw from disposition any of the unleased lands of the Outer Continental Shelf.

lies solely with Congress under the Property Clause of the United States Constitution. U.S. Const. art. IV, § 3, cl. 2.

Similarly, since OCSLA does not grant specific authority to a President to "Pause" offshore oil and gas leases, the power to "Pause" lies solely with Congress. Therefore, Plaintiff States have made a showing that there is a substantial likelihood that President Biden exceeded his powers in Section 208 of Executive Order 14008.

2. Administrative Procedure Act

Plaintiff States' Motion for Preliminary Injunction centers upon alleged violations of the APA by the Agency Defendants, which includes the U.S. Department of the Interior ("DOI"), the U.S. Bureau of Land Management ("BLM"), the U.S. Bureau of Ocean Energy Management ("BOEM"), the U.S. Bureau of Safety and Environmental Enforcement and named officials.

The APA allows judicial review of certain agency actions. The Plaintiff States allege that in implementing Section 208 of Executive Order 14008, the Agency Defendants violated the following provisions of the APA:

i. Acted contrary to law in violation of 5 USC 706(2)(A) and (C);

ii. Acted in an arbitrary and capricious manner in violation of 5 USC 706(2)(A);

iii. Failed to provide notice and comment required by 5 USC 553(a); and

iv. Unreasonably withheld and unreasonably delayed agency required activity in violation of 5 USC 706(1).

Each of these allegations will be discussed in greater detail herein.

3. The Outer Continental Shelf Lands Act

Congress passed the OCSLA more than 70 years ago. OCSLA declares "the outer Continental Shelf" o be "a vital national resource reserve held by the Federal Government for the

public." 43 U.S.C. §1332(3). To maximize the benefit of that resource, OCSLA directs the Secretary of the Interior to make the Shelf "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." Ensco Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 339 (E.D. La. 2011) (noting "OCSLA's overriding policy of expeditious development").

OCSLA facilitates the Shelf's expeditious development by directing the Secretary to administer a leasing program to sell exploration interests in portions of the Shelf to the highest bidder. 43 U.S.C. §§1334(a), 1337(a)(1). To this end, OCSLA sets out a four-step process in which the Secretary must (1) create a Five-Year Leasing Program, (2) hold lease sales, (3) grant or deny exploration permits and plans, and (4) grant or deny final development and production plans. Hornbeck Offshore Servs., L.L.C. v. Salazar, 696 F. Supp. 2d 627, 632 (E.D. La. 2010) (citing Sec'y of the Interior v. California, 464 U.S. 312, 337, 104 S. Ct. 656, 78 L. Ed. 2d 496 (1984)). Each step must follow stringent administrative requirements designed to maximize the chances for the public – including affected states and industry—to provide input on those lease sales.

Current lease sales in the Outer Continental Shelf are governed by the 2017-2022 Five-Year Oil and Gas Leasing Program ("Five-Year Program"). The process of creating the Five-Year Program began in 2014 during the Obama Administration. The BOEM published a Request for Information ("RFI") in the Federal Register and sent a letter to all Governors, Tribes, and interested federal agencies requesting input on the Program. 79 Fed. Reg. 34349 (June 16, 2014). BOEM received over 500,000 comments in response to the RFI, allowing it to discharge its obligation under OCSLA to take into account economic, social, and environmental values in making its leasing decisions. 43 U.S.C. § 1344(a); Five-Year Program [Doc. No. 3, Exh 1]. In

2015, BOEM published the Draft Proposed Program. That published draft incorporated responses to the RFI comments and set out a draft schedule of potential lease sales. That started a 60-day comment period in which BOEM received over one million comments. 80 Fed. Reg. 4941 (Jan. 29, 2015). After considering those comments, BOEM next published the Proposed Program, thereby starting a new 90-day comment period. 81 Fed. Reg. 14881 (Mar. 18, 2016). Again, BOEM received over one million comments, held public meetings, and created environmental impact statements in compliance with the National Environmental Policy Act (NEPA).

After that, BOEM published the Proposed Final Program ("PFP") November 2016. In it, the Secretary determined which areas to include in the lease sales. The PFP schedules ten (10) region-wide lease sales in the areas of the Gulf of Mexico that are not under the Congressional moratorium or otherwise unavailable for leasing. Final Program S-2. The PFP also observed that "[i]n the Gulf of Mexico, infrastructure is mature, industry interest and support from affected states and communities is strong, and there are significant oil and gas resources available." Thus, "[t]o take advantage of these incentives to OCS activity, the region-wide sale approach makes the entire leasable Gulf of Mexico OCS area available in each lease sale." *Id.*

On January 17, 2017—60 days after the Final Program was transmitted to President Obama and Congress—the Secretary approved the Final Program, "which schedules 11 potential oil and gas lease sales, one sale in the Cook Inlet (Alaska) Program Area and 10 sales in the GOM Program Areas," with "one sale in 2017, two each in 2018-2021, and one in 2022." Record of Decision and Approval of the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program 3 (Jan. 17, 2017).

The Final Program approved and scheduled two lease sales relevant in this proceeding. The first is GOM OCS Oil and Gas Lease Sale 257. Lease Sale 257 would have comprised the Western and Central Planning Areas of the Gulf of Mexico. The second is Lease Sale 258 in Cook Inlet, Alaska.

4. The Mineral Leasing Act

The Federal Government also holds energy-producing lands onshore. Congress has likewise made those lands available for development. Under the MLA, the Secretary of the Interior is required to hold lease sales "for each State where eligible lands are available at least quarterly." 30 U.S.C. §226(b)(1)(A). MLA provides that for oil and natural gas leases on federal lands, in States other than Alaska, 50 percent of bonuses, production royalties, and other revenues are granted to the State in which the lease is located, and 40 percent is granted to the Reclamation Fund, which maintains irrigation systems in several Western States. 30 U.S.C. §191(a). For leases in Alaska, 90 percent of revenues are granted to the State. *Id.*

BLM has the authority to lease public lands with oil and gas reserves to private industry for development under MLA, the Federal Land Policy and Management Act, 43 U.S.C. §§1701-1787, and the BLM's own regulations and plans, see 43 C.F.R. Part 1600 (Planning, Programming, and Budgeting); 43 C.F.R. §§3120 (Competitive Leases) and 3160 (Onshore Oil and Gas Operations). BLM's regulations also provide for quarterly lease sales, 43 C.F.R. §3120.1-2(a) ("Each proper BLM office shall hold sales at least quarterly if lands are available for competitive leasing.")

II. STANDING

At issue in this proceeding is whether the Agency Defendants exceeded their statutory and/or constitutional authority in implementing a pause on new oil and natural gas leases on

public lands and in offshore waters. However, this Court must first determine whether it has judicial power to hear the case. The United States Constitution limits exercise of judicial power to certain "cases" and "controversies." U.S. Constitution Article III Section 2.

Under the doctrine of "standing," a federal court can exercise judicial power only where a plaintiff has demonstrated that it (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that it is likely to be redressed by a favorable decision. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing these elements. Id. at 561.

1. Plaintiff States' Argument

The Plaintiffs in this case are thirteen (13) states. States are not normal litigants for purposes of invoking federal jurisdiction. Massachusetts v. E.P.A., 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). Rather, a state is afforded "special solicitude" in satisfying its burden to demonstrate the traceability and redressability elements of the traditional standing inquiry whenever its claims and injury meet certain criteria. Id. at 520; Texas v. United States, 809 F.3d 134, 151–55 (5th Cir. 2015), as revised (Nov. 25, 2015). Specifically, a state seeking special solicitude standing must allege that a defendant violated a congressionally accorded procedural right that affected the state's "quasi-sovereign" interests in, for instance, its physical territory or lawmaking function. Massachusetts, 549 U.S. at 520–21; Texas, 809 F.3d at 151–55.

Plaintiff States allege they have standing under the normal inquiry, and because they are entitled to special solicitude. Plaintiff States aver they have standing to challenge the Pause because the Government Defendants' actions harm Plaintiff States' sovereign, proprietary, and *parens patriae* interests.

Plaintiff States allege the Pause deprives Plaintiff States of a substantial share of the proceeds from leasing sales under OCSLA, the Gulf of Mexico Energy Security Act ("GOMESA") and MLA. Plaintiff States attach the Declarations of Jerome Zeringue ("Zeringue") [Doc. No. 3, Exh. 6], Professor David E. Dismukes ("Dismukes") [Doc. No. 3, Exh. 4], and Professor Timothy J. Considine ("Considine") [Doc. No. 3, Exh. 2].

Declaration of Jerome Zeringue

Zeringue is a member of the Louisiana State Legislature representing LaFourche and Terrebonne Parishes. He is Chairman of the Appropriations Committee and was previously a member of the Natural Resources Committee. Zeringue is familiar with the Coastal Master Plan, which is the Louisiana coastal restoration plan. He declared that the Coastal Master Plan is funded primarily by revenue from oil and gas proceeds from the Outer Continental Shelf under OCSLA. The current Coastal Master Plan is based upon $389 million in GOMESA expenditures over the next three years.

Zeringue declares that the cancellation of Lease 257 caused an immediate short-term loss for projected funds under OCSLA. He further declares that if the funds vanish or are reduced, Louisiana will essentially be left without a major source of funding for a $50 billion coastal recovery and restoration program.

Declaration of David E. Dismukes

Dismukes is a Professor, Executive Director, and Director of the Policy Analysis at the Center for Energy Studies at LSU. He is also a Professor in the Department of Environmental Sciences and Director of the Coastal Marine Institute in the College of the Coast and Environment at LSU.

He additionally is a Consulting Economist with Acadian Consulting Group, L.L.C., a research and consulting firm that specializes in the analysis of regulatory, economic, financial, accounting, statistical, and public policy issues associated with regulated and energy industries. Dismukes is an expert in the analysis of economic, statistical, and public policy issues in energy and regulated industries. He has testified as an energy expert on energy issues on over 150 occasions and has testified as an expert before the U.S. Senate, the U.S. House of Representatives, and several state legislatures.

Dismukes gave his opinion as to the harm he believes will occur due to the Pause on new oil and gas leasing and drilling permits. He believed Louisiana would be harmed by the Pause due to the reduction in oil production, economic activity and state revenues resulting from the cancellation of Oil and Gas Lease Sale 257 and from Planned Lease Sales 259 and 261.

Dismukes further declared the Pause will cause a reduction in oil production, economic activity and state revenues due to foregone drilling under existing federal oil and gas leases and by reduced production by, and investment in, Louisiana's refining and chemical manufacturing industries caused by higher oil and gas prices.

He further believes the Pause will impact drilling in the Permion Basin, which will directly and immediately harm the States of Texas and Louisiana by resulting in fewer jobs for Louisiana and Texas gas sector workers and lower production of oil and gas, which will result in higher oil and gas prices.

Dismukes further declared the Pause would also affect revenues from initial lease payments, royalties, and rentals, which would immediately harm the States of Alabama, Louisiana, Mississippi, and Texas, who receive 37.5% of revenues under GOMESA. In 2020, nearly $95.3 million was dispersed to Texas, $156 million to Louisiana, $50 million to Alabama,

and $51.9 million to Mississippi. Dismukes projected that based upon BOEM estimates, the three cancelled or suspended lease sales (257, 259 and 261) will result in a decline in GOMESA funding of more than $1 billion.

Dismukes also declared the Pause would result in reduced funding for the Coastal Master Plan, which is used to fund the continuing loss of land mass along Louisiana's coast.

Further Dismukes testified the Pause would result in a substantial number of lost jobs in the oil and gas industry (which accounted for $6.8 billion in wages in 2019). These job losses would result in reduction of Louisiana's energy export economy, and the loss of 114 jobs for each deep-water well not drilled as a result of the Pause. He additionally noted losses to state and local government revenues as a result of the Pause.

Declaration of Timothy J. Considine

Considine is a Professor of Energy Economics with the School of Energy Resources and the Department of Economics at the University of Wyoming. He earned a B.A. in Economics from Loyola University in 1975, an M.S. from Purdue University in Agricultural Economics in 1977, and a Ph.D. from Cornell University in Natural Resources Economics in 1981. He is an expert in the analysis of economic, statistical, and public policies in energy and regulated industries.

Considine gave an opinion in regard to the economic impact a leasing moratorium and a drilling ban would have on the States of Wyoming, New Mexico, Colorado, Utah, North Dakota, Montana, and Alaska. Under a leasing moratorium over the next 5 years (2021-2025), the average annual investment loss to Wyoming would be $2.3 billion; the average annual investment loss to New Mexico would be $2.6 billion; to Colorado $586 million; to Utah $248 million; to North Dakota $279 million; to Montana $56 million; and to Alaska $412 million.

Considine also opined these States would lose a combined average of 58,676 jobs annually for the years 2021-2025.

Considine further estimated costs to said states under a drilling ban, and all would have significant annual investment losses for the years 2021-2025.

Considine estimates harm to state revenue for the said states if a leasing moratorium were imposed. Under his estimates, for the years 2021-2025, the annual revenue losses to Wyoming would be $304 million; to New Mexico $946 million; to Colorado $59 million; to Utah $27 million; to North Dakota $136 million; to Montana $40 million; and to Alaska $100 million.

2. Government Defendants' Argument

In opposition, the Government Defendants attack Plaintiff States standing for its 5 U.S.C.A. § 706(2) APA Claims.[6] Government Defendants do not attack Plaintiff States' standing with regard to their failure to provide notice and comment, and their unreasonably withheld and unreasonably delayed claims. The Government Defendants object to Plaintiff States' standing on its APA 706(2) claims on the basis of redressability.

Government Defendants argue that setting aside the individual lease sale postponements will not redress Plaintiff States alleged injuries (reduction in income, job losses and overall economic losses) because a favorable decision would not redress those injuries. Government Defendants argue that if the individual sale postponements were set aside, that relief would not compel the agency to hold a lease sale because the agency has discretion to "implement another postponement with a different rationale." [Doc. No. 120 page 23].

In other words, Government Defendants maintain they cannot be compelled to actually sell the lease, instead, the Court can only remand the lease sales back for further consideration in

[6] Contrary to law and arbitrary and capricious.

which the Government Defendants could admittedly "come up with another reason" to postpone the lease sales. The lease sales would never go through, and Government Defendants argue that the Plaintiff States would not receive any proceeds.

Additionally, Government Defendants argue the Plaintiff States will not be harmed by the Pause because development activity from exploration through drilling and production has continued at the same levels as the preceding four years and because no existing lease has been cancelled as a result of the Pause. Government Defendants attach the Declaration of Walter D. Cruickshank ("Cruickshank") [Doc. No. 120-1], the Declaration of Peter Cowan ("Cowan") [Doc. No. 120-4] and the Declaration of Mustafa Haque ("Haque") [Doc. No. 120-3].

Declaration of Walter D. Cruickshank

Cruickshank is a Deputy Director of BOEM in the United States Department of the Interior. He declared that under OCSLA, the DOI is responsible for the administration of energy and mineral exploration and development on the Outer Continental Shelf ("OCS"). Many of the DOI responsibilities for implementing OCSLA have been delegated to BOEM. These delegated responsibilities include conducting oil and gas lease sales, issuing leases on the OCS, and approving exploration and development plans under those leases. As part of his duties, Cruickshank supervises the BOEM Regional Directors.

Cruickshank denies that any existing OCS leases have been cancelled as a result of the Pause, or the comprehensive review. He also denies there is a drilling ban in existence. He states Gulf of Mexico development activity from exploration through drilling and production has continued at the same levels as the preceding four years.

Cruickshank also denies President Biden has "banned all new domestic oil and gas production by imposing a drilling moratorium." He declares that BOEM has approved 13 exploration plans from January 20, 2021 to March 24, 2021.

He further declares the effects of the actions related to Lease Sales 257 and 258 will not have an immediate impact on royalty revenues during the pending litigation. Royalty-generating production on a new lease does not typically begin sooner than five years from the date the lease was issued.

Cruickshank further declares that the United States' interests would be harmed by a preliminary injunction as it would frustrate the DOI's ongoing process of determining how best to carry out OCS leasing responsibilities and the mandated comprehensive review.

Declaration of Peter Cowan

Cowan is employed by the U.S. DOI, BLM, in Grand Junction, Colorado, as Senior Mineral Leasing Specialist. In his role, Cowan coordinates and develops leasing policy and guidance, analyzes the effectiveness of leasing oil and gas, and oversees manuals, handbooks, and procedural guidance to implement BLM's mineral leasing program.

Cowan lists several lawsuits against BLM under the NEPA. Due to numerous lawsuits and adverse decisions in several lawsuits, BLM's NEPA workload has been growing. He declares that because the existing NEPA analysis was found to be inadequate, BLM is obligated to do additional NEPA for at least seven lease sales involving over 200 leases and 200,000 acres of land.

Cowan declared that in light of this growing accumulation of NEPA analysis and adverse decisions, BLM postponed lease sales in the first quarter of 2021 to do additional NEPA analysis. He stated that the lease sale deferrals that BLM undertook in the first quarter of 2021

were not the first time BLM has deferred sales to perform additional NEPA analysis, as it occurred under the prior administration.

Cowan also denied that BLM has implemented a drilling or production moratorium as BLM continues to review and approve drilling permits at rates similar to the prior administration. He further stated BLM has interpreted the statutory phrase "eligible lands are available for leasing" to mean, at a minimum, that "all statutory requirements and reviews, including compliance with NEPA have been met."

Declaration of Mustafa Haque

Haque is employed by the U.S. DOI, BLM, Division of Fluid Minerals ("DFM") in the Headquarters office in Grand Junction, Colorado, as a Petroleum Engineer. He oversees BLM's reservoir management program, including determining whether the wells are capable of producing oil and gas of a sufficient value to exceed direct operating costs.

Haque examined the Declarations of Considine and Dismukes and believes both fail to consider important facts. He first states that the Declarations fail to account for the significant amount of federal leased acreage that is not yet producing oil and gas. He attaches a chart which shows that over half of leased federal land (13.89 million acres) is leased but not yet producing oil and gas. Therefore, there is no reason to expect an imminent drop off in production from a temporary pause on leasing.

Second, Haque states that jobs will not be lost because a Federal Reserve Bank study shows jobs will just move across state borders with a shift in drilling from federal acreage.

Third, Haque disputes that a leasing pause would result in higher costs from having to purchase more costly crude from foreign sources.

3. Injury in Fact

A plaintiff seeking to establish injury in fact must show that it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." Id. at 1548. A "concrete" injury must be "de facto," that is, it must "actually exist." "Concrete" is not, however necessarily synonymous with "tangible." Intangible injuries can nevertheless be "concrete." *Id.*, at 1548-49.

This Court finds the Plaintiff States' alleged injuries are both particularized and concrete. They have alleged loss of proceeds as a result of the Pause for new oil and gas leases on federal lands and waters, from bonuses, land rents, royalties, and other income. Plaintiff States have also alleged loss of jobs and economic damage as a direct result of the Pause. These alleged damages are concrete, particularized, and imminent.

4. Traceability

Plaintiff States must now show a "fairly traceable" link between their alleged injuries and the Pause of new oil and gas leases on federal lands and in federal waters. As a general matter, the causation required for standing purposes can be established with "no more than de facto causality." Dep't of Com. v. New York, 139 S. Ct. 2551, 2556, 204 L. Ed. 2d 978 (2019). The plaintiff need not demonstrate that the defendant's actions are "the very last step in the chain of causation." Bennett v. Spear, 520 U.S. 154, 169–70, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

Plaintiff States must establish the Pause would result in the damages they allege. They have. The Declaration of Jerome Zeringue [Doc. No. 3-6], the Declaration of Professor Timothy J. Considine [Doc. No. 120-2], and the Declaration of Professor Davie E. Dismukes [Doc. No. 3-

4] are sufficient to establish the Pause at issue would result in damages including, funding for the Coastal Master Plan (which funds Louisiana's coastal restoration and recovery), reduction in State revenues, damages to the economy, loss of jobs, higher oil and gas prices, and reduction in the energy export economy.

Therefore, Plaintiff States can prove traceability.

5. Redressability

The redressability element of standing to sue requires a plaintiff to demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." El Paso Cty., Texas v. Trump, 982 F.3d 332, 341 (5th Cir. 2020).

Government Defendants attack this element with the Declaration of Walter D. Cruickshank [Doc. No. 120-1], the Declaration of Peter Cowan [Doc. No. 120-4], and the Declaration of Mustafa Haque [Doc. No. 120-3]. Government Defendants argue that there has been no pause in drilling and permits for "existing" leases because drilling in federal lands is still proceeding at approximately the same rate as the prior four years, and therefore, a favorable ruling for Plaintiff States will not redress their alleged injuries. However, these declarations only address "existing leases," not "new leases." Just the cancellation of Lease Sale 257 itself has had immediate impact due to loss of bonus payments and ground rents.

Additionally, a Pause for any significant length of time would allegedly result in other losses. Professor Considine [Doc. No. 3-2] noted that most oil and gas produced in the U.S. in the last decade has used technology known as hydraulic fracturing and horizontal drilling. Considine stated that oil and gas wells that use this technology produce at high rates just after initial production, but face steep production declines thereafter, raising the importance of drilling new wells to offset the production declines from previously completed wells.

This Court believes that Plaintiff States have also satisfied the redressability element.

6. Special Solicitude

Although this Court has found the Plaintiff States have proven standing through the normal inquiry, they also can establish standing as a result of special solicitude. Plaintiff States assert a congressionally bestowed procedural right (the APA), and the government action at issue affects the Plaintiff States' quasi-sovereign interests (damage to economics, loss of jobs, coastal erosion funding, funding for state and local governments). Massachusetts, 549 U.S. at 519–20.

Therefore, any infirmity in Plaintiff States' demonstration of traceability or redressability are remedied by Plaintiff States' special solicitude.

III. JUDICIAL REVIEW

Although Plaintiff States have standing, the Court must additionally examine whether Plaintiff States' causes of action are reviewable. This question requires the determination of the meaning of the congressionally enacted provision creating a cause of action. The Court applies the traditional principles of statutory interpretation to determine whether Congress did in fact authorize the causes of action alleged by Plaintiff States. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

Plaintiff States' Complaint sets forth ten Claims for Relief. Counts I, II, III, IV, V, VI, VII, and VIII are claims under the APA for unreasonable delay pursuant to 5 U.S.C. 706 (Counts I and VI), failure to employ notice and comment in violation of 5 U.S.C. 706 (Counts II and VIII), for acting contrary to law in violation of 5 U.S.C. 706 (Counts III and V) , and for acting in an arbitrary and capricious manner pursuant to 5 U.S.C. 706 (Counts IV and VII).

Count IX is a citizen suit under OCSLA pursuant to 43 U.S.C. 1349 and Count X is an ultra vires claim which alleges that the President and the applicable agencies violated the U.S.

Constitution and statutory authority and/or did not have authority to enact or implement a Pause on new oil and gas leases on federal land and in federal waters.

Eight of Plaintiff States' claims are under the APA. The APA imposes four requirements that must be satisfied before a federal court can review agency action. First, it must be demonstrated by plaintiffs that it is within the "zone of interests" to be protected by the statutes allegedly violated by the defendants. Second, no statute may preclude judicial review. Third, the Pause must constitute a "final agency action." And fourth, the Pause must not be "committed to agency discretion by law." Texas v. United States, No. 6:21-CV-00003, 2021 WL 2096669, at *21 (S.D. Tex. Feb. 23, 2021).

Government Defendants maintain that the Pause (and lease cancellation/postponements) are not "final agency actions," and that the Pause is "committed to agency discretion by law" under OCSLA and under MLA.

1. Zone of Interests

Congress, through the APA, has provided a cause of action for persons seeking redress against the federal government for violating other federal laws. 5 U.S.C. 702, 706. Congress has limited the availability of an APA cause of action to persons who allege an injury that is "arguably" within the "zone of interests" to be protected or regulated by the relevant statute. Collins v. Mnuchin, 938 F.3d 553, 573–74 (5th Cir. 2019), cert. granted, 141 S. Ct. 193, 207 L. Ed. 2d 1118 (2020), and cert. granted, 141 S. Ct. 193, 207 L. Ed. 2d 1118 (2020). The benefit of any doubt goes to the plaintiff. The test is not "especially demanding" and the test forecloses suit only when the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress authorized that plaintiff to sue. Collins, 938 F.3d at 574.

This element does not need extended discussion. Clearly, the Plaintiff States are within the "zone of interest" of all eight of their causes of action against Government Defendants under the APA. Plaintiff States' interests are within the purposes of the APA for their contrary to law, failure to provide notice and comment, arbitrary and capricious, and unreasonably withheld or unreasonably delayed claims. Additionally, Plaintiff States' claims for a citizen suit under OCSLA and ultra vires claim are also within the "zone of interests".

2. Statutory Preclusion to Judicial Review

5 U.S.C. 701(a)(1) excepts the application of the APA to the extent that statutes preclude judicial review. Government Defendants have cited no statutes which preclude judicial review of Plaintiff States' claims. This Court has found no statutes which preclude Plaintiff States' APA claims. Therefore, the Court concluded there is no statutory preclusion to judicial review of the Plaintiff States' claims.

3. Final Agency Action

5 U.S.C. 704 provides that "final agency actions" for which there is no other adequate remedy in a court are subject to judicial review. The Government Defendants argue that the Pause and/or the lease cancellations/postponements are not "final agency actions."

To determine whether an agency action is final, two conditions are required to be satisfied. First, the action must mark the consummation of the agency's decision-making process. It must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1813, 195 L. Ed. 2d 77 (2016); Bennett, 520 U.S. at 177–78.

Government Defendants argue the challenged decisions are merely interim postponements of lease sales, not decisions to forego the sales entirely, citing Am. Petroleum Inst. v. U.S. E.P.A., 216 F.3d 50, 68 (D.C. Cir. 2000), as amended (Aug. 18, 2000) and Shawnee Trail Conservancy v. Nicholas, 343 F. Supp. 2d 687, 701 (S.D. Ill. 2004), for the proposition that interim postponements are not "final agency action."

In American Petroleum Institute, 216 F.3d at 68, the court stated that a decision to defer taking action is not a final action reviewable by the courts. The court went on to say the announcement of an agency's intent to establish law and policy in the future is not the actual promulgation of a final regulation. In Shawnee Trail Conservancy, 343 F. Supp. 2d at 701, the court held that the Forest Service's decision about how and when to conduct an all-terrain vehicles and off-highway motorcycles use review was not a final agency action.

The Plaintiff States maintain that the Pause itself is a final agency action, as is each cancellation and postponement. The label "pause" is not dispositive of whether the agency action is final. State of La. v. Dep't of Energy, 507 F. Supp. 1365, 1371 (W.D. La. 1981), aff'd sub nom. Dep't of Energy v. State of Louisiana, 690 F.2d 180 (Temp. Emer. Ct. App. 1982). As long as an agency has completed its decision-making on a challenged rule—even one interim in nature – the rule satisfies the first prong of the finality test. Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 79–80 (D.C. Cir. 2020).

There is no real question that Plaintiff States have met the second prong of the *Bennett* test, because the Pause and/or Lease cancellations are actions from which legal consequences will flow. The only real question is whether the Pause and/or lease cancellations mark the consummation of the decision-making process.

Numerous analogous cases support Plaintiff States' position: Texas v. United States, No. 6:21-CV-00003, 2021 WL 723856, at *32 (S.D. Tex. Feb. 23, 2021), opinion amended and superseded, No. 6:21-CV-00003, 2021 WL 2096669 (S.D. Tex. Feb. 23, 2021), (a 100 day pause of deportations was final agency action); Ensco Offshore Co., 781 F. Supp. 2d at 334–36, (a blanket moratorium on deepwater drilling in the Gulf of Mexico was a final agency action); Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt., No. CV168418PSGFFMX, 2018 WL 5919096, at *5 (C.D. Cal. Nov. 9, 2018), (a document that effectively lifted a moratorium constituted final agency action); Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv., No. CIV.A.V 06 59, 2007 WL 1032346, at *5 (S.D. Tex. Mar. 31, 2007), (a plan that effectively closed an area to drilling operations was final agency action); Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988), (portions of the Five-Year Plan under OCSLA could be reviewed so a decision to "Pause" the 5-year plan should also be able to be reviewed.); Texas, 809 F.3d 134, (a DACA memo which made millions more persons eligible for the DAPA program and extended the employment authorization for three years, instead of two, was a final agency action); Wilbur v. U.S. ex rel. Barton, 46 F.2d 217 (D.C. Cir. 1930), aff'd sub nom. U.S. ex rel. McLennan v. Wilbur, 283 U.S. 414, 51 S. Ct. 502, 75 L. Ed. 1148 (1931) (the temporary withdrawal of public lands by the Secretary of the DOI was found to be a final agency action); *Al Otro Lado, Inc. v. McAleenan*, 349 F. Supp 3d 1168 (S.D. Cal. 2019), (an unwritten policy of limiting asylum seekers at ports of entry from accessing the asylum process by based on false claims of capacity restraints was final agency action); Amadei v. Nielsen, 348 F. Supp. 3d 145 (E.D.N.Y. 2018), (an unwritten policy of searching travelers for identification documents after disembarking from domestic flights was a final agency action); BNSF Ry. Co. v. Equal Emp. Opportunity Comm'n, 385 F. Supp. 3d 512 (N.D. Tex. 2018); (the issuance by EEOC of a right to sue letter was a final

agency action); Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017), (a decision to stay, pending reconsideration, of the implementation of a final rule was a final agency action); Velesaca v. Decker, 458 F. Supp. 3d 224 (S.D.N.Y. 2020), appeal withdrawn sub nom. Velesaca v. Wolf, No. 20-2153, 2020 WL 7973940 (2d Cir. Oct. 13, 2020), (a no-release policy was found to be a final agency action); Gomez v. Trump, 485 F. Supp. 3d 145 (D.D.C.), amended in part, 486 F. Supp. 3d 445 (D.D.C. 2020), and amended in part sub nom. Gomez v. Biden, No. 20-CV-01419 (APM), 2021 WL 1037866 (D.D.C. Feb. 19, 2021) (State Department's Policy suspending VISA processing and adjudication due to COVID-19 was a final agency action); Natural Resources Defense Council, 955 F.3d 68, (EPA's rule suspending a prior rule was a final agency action); Becerra v. United States Dep't of Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017), (the postponing of the application of a rule was final agency action); and W. Energy All. v. Jewell, No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740 (D.N.M. Jan. 13, 2017), (BLM's practice of cancelling or deferring lease auction sales less frequently than quarterly, for reasons other than lack of eligible parcels under MLA, was a final agency action).

These cases show that a "final agency action" does not have to be permanent. Additionally, there is a strong presumption of judicial review. Establishing unreviewability is a heavy burden. Texas, 809 F.3d at 163–64.

This Court has determined that the Pause in new oil and gas leases on federal lands and in federal waters, as well as the cancellation of Lease Sale 257, the stoppage of Lease Sale 258, and the cancellation or postponements of "eligible lands" under the MLA, are final agency actions that are reviewable under the APA.

4. Committed to Agency Discretion by Law

Under 5 U.S.C. 701(a)(2), a court is unable to review an agency decision that is committed to agency discretion by law. Government Defendants argue that the decision to pause new oil and gas leases under MLA or under OCSLA are within its discretion. The Government Defendants cite several statutes in which the agency is granted discretion. Additionally, the Government Defendants argue that they have the discretion to reconsider a decision.

However, there is a huge difference between the discretion to stop or pause a lease sale because the land has become ineligible for a reason such as an environmental issue, and, stopping or pausing a lease sale with no such issues and only as a result of Executive Order 14008.

The discretion to pause a lease sale to eligible lands is not within the discretion of the agencies by law under either OSCLA or MLA. OSCLA directs the Secretary of the DOI to make the OSC available for expeditious development. Ensco Offshore Co., 781 F. Supp. 2d at 339. OCSLA also directs the Secretary of the DOI to administer a leasing program to sell exploration interests in portions of the OSC to the highest bidder. 43 U.S.C.A. § 1334(a) and 1337(a)(1).

OCSLA sets up a four-step process to set up a Five-Year Program. Currently, the Five-Year Program in effect is from 2017-2022. At least one (Lease Sale 257) of the lease sales to be sold in the Five-Year Program has been cancelled due to the Pause. Another (Lease Sale 258) was halted at the selling stage due to the Pause. The Five-Year Program currently in effect went through a substantial vetting process, which included millions of comments, approval from affected Governors, publishing of a Final Program that was sent to the President and Congress, and final approval by the Secretary of the DOI.

Congress, through MLA, has also made energy-producing lands onshore available for development. Under MLA, the Secretary of DOI is required to hold lease sales for each state where eligible lands are available at least quarterly. 30 U.S.C. 226(b)(1)(A).

In Western Energy Alliance, 2017 WL 3600740, the court held a BLM policy, in which BLM cancelled or deferred eligible lands and did not have the lease sales quarterly was a final agency action that violated the APA. The court denied defendant's Motion to Dismiss the plaintiff's claims that BLM was required to hold lease sales for eligible lands quarterly and did not have the discretion to do less, as long as there were eligible lands. In other words, the plaintiffs had a cause of action based on these allegations.

The fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance to how that discretion is to be exercised. Texas, 809 F.3d at 168.

That is not the case here. Both MLA and OCSLA set forth requirements to hold lease sales of eligible land and sets forth how it is to be conducted.

The agencies could cancel or suspend a lease sale due to problems with that specific lease, but not as to eligible lands for no reason other than to do a comprehensive review pursuant to Executive Order 14008. Although there is certainly nothing wrong with performing a comprehensive review, there is a problem in ignoring acts of Congress while the review is being completed.

Additionally, two previous rulings from the Office of the Solicitor on February 12, 1996, [Doc. No. 14, PR 61] and on January 5, 1981, [Doc. No. 121 PR 56] confirm that any significant revisions of an existing Five-Year OCSLA Plan would require the Secretary of the Interior to

revise it "in the same manner that it was originally developed." In other words, the Secretary of the DOI cannot make any significant changes to the Five-Year Plan without going through the same procedure by which the Five-Year Plan was developed. The Pause and/or cancellation of one of the Lease Sales set out in the Five-Year Plan is subject to review. This Court finds the agency actions at issue are not barred from APA review as actions committed to agency discretion by law. The claims of Plaintiff States are reviewable by this Court.

IV. IS THERE A PAUSE?

Before addressing whether the implementation of a Pause by Agency Defendants violates the APA, a determination must be made whether there is one. Government Defendants concede that Lease Sale 257 and Lease Sale 258 were postponed/delayed because of Section 208 of Executive Order 14008. However, with respect to the lease sales under MLA, Government Defendants maintain the Pause in Section 208 had nothing to do with the six to seven new oil and natural gas lease sales cancelled in the first quarter of 2021, and with the new oil and natural gas lease sales cancelled in April, 2021.

The Government Defendants conceded at oral argument that zero (0) new sales have been completed by the Government Defendants under MLA during both the first and second quarters of 2021. (With the exception of a lease sale that received no bids in the last quarter of 2020 but it was purchased in the first quarter of 2021).

Agency action need not be in writing to be final and judicially reviewable pursuant to the APA. An unwritten policy can still satisfy the APA's final agency action requirement. *Al Otro Lado, Inc. v. McAleean,* 349 F.Supp. 3d 1168 (S.D. Cal. 2019)*;* Amadei, 348 F. Supp. 3d 145; Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin., 972 F.3d 83 (D.C. Cir. 2020); Velesaca, 458 F. Supp. 3d 224.

It is the effect of the agency rule that is most relevant. (A personnel manual letter implemented the executive order). Nat'l Treasury Emps. Union v. Reagan, 685 F. Supp. 1346 (E.D. La. 1988).

In order for Plaintiff States to obtain a preliminary injunction against a new oil and natural gas lease Pause, they would need to demonstrate they have a substantial likelihood of proving on the merits that a Pause based upon Executive Order 14008 was implemented by Agency Defendants.

The first evidence of a Pause is Section 208 of Executive Order 14008, which states: "To the extent consistent with applicable law, the Secretary of the Interior shall **pause** new oil and natural gas leases in public lands or in offshore waters pending a comprehensive review…". 86 Fed. Reg. 7619 (emphasis added). By its own terms, the Pause applies to both onshore and offshore new oil and natural gas leases.

As to leases under OCSLA, there is strong evidence of a Pause. There is not much doubt that Lease Sale 257 and Lease Sale 258 were rescinded/postponed because of the Pause. The Record of Decision ("ROD") scheduling Lease Sale 257 was rescinded to comply with Executive Order 14008. 86 Fed. Reg. 10132 (February 18, 2021). The public review period previously published for Lease Sale 258 was rescinded in response to Executive Order 14008. 86 Fed. Reg. 10994 (February 23, 2021). On February 9, 2021, BOEM Acting Director, Walter D. Cruickshank sent a Request for Authorization [Doc. No. 121, PR 45] to Laura Daniel-Davis, Senior Advisor to the Secretary, recommending the rescission of the previous ROD with regard to Lease Sale 257, due to Executive Order 14008. The ROD as to Lease Sale 257 was immediately rescinded [Doc. 121, RP 47-48] due to Executive Order 14008.

Additionally, on January 20, 2021, (the day President Biden was sworn in), Walter Cruickshank sent an email to Loren Thompson [Doc. No.121, PR 17], in which he stated they had received instructions to withdraw any notices that were pending at the Federal Register, which included the Final Notice of Sale for Lease Sale 257 and the Notice of the Record of Decision for Lease 257. (The Notice of the Record of Decision was evidently withdrawn too late because it was published). Cruickshank told Thompson in the email that the withdrawals do not signify anything more than the new leadership team wanting to evaluate the pending items. This email was sent one week prior to Executive Order 14008 being signed on January 27, 2021.

As to on-land leases under MLA, the Executive Order, by its own terms, applies the Pause to both new oil and natural gas leases in public land, or in offshore waters. On January 20, 2021, Scott de la Vega, Acting Secretary of the Interior, issued Order No. 3395, which withdrew delegation of authority to Department Bureaus and offices (including the Asst. Secretary of Policy, Management and Budget, Asst. Secretary of Land and Minerals Management, the Secretary and Deputy Secretary of the DOI) to issue any onshore or offshore fossil fuel authorization, including leases. [Doc. No. 121, PR 13-14].

On the same day the Executive Order was issued (January 27, 2021), the U.S. DOI, BLM published a "Fact Sheet" about the Executive Order President Biden was signing that day. One section was entitled "HITTING PAUSE ON NEW OIL AND GAS LEASING." It discussed the Executive Order directing the DOI to "pause" new oil and gas leasing on public lands and offshore waters. Nothing in the Fact Sheet indicated that the Agency Defendants were not going to pause new oil and gas leases on public lands. Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy

Future (Jan. 27, 2021), https://www.blm.gov/press-release/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands.

Since the date of Executive Order 14008, no new oil and gas leases on federal lands have taken place. None of the scheduled sales for the first quarter took place. A March 9, 2021 Nevada lease sale was postponed [Doc. No. 121, PR 72]. (No reason given.) On February 17, 2021, a March 25, 2021 Colorado sale was postponed [Doc. No. 120, PR 73]. (No reason given.) On February 12, 2021, lease sales in Colorado, Montana, Wyoming and Utah scheduled for March 2021 were postponed [Doc. No. 120, PR 74]. (Project status was listed as "Paused"). The reason listed was to confirm the adequacy of underlying environmental analysis [Doc. No. 120, PR 76].

Also, on February 12, 2021, a Utah oil and gas lease sale scheduled for March 30, 2021 was postponed. The reason listed was to determine whether additional NEPA needed to be conducted to determine if parcels were suitable to be offered [Doc. No. 120, PR 77]. On January 27, 2021, the DOI, BLM published Errata #1 with regard to an internet-based competitive oil and gas lease in Nevada, which consisted of 17 parcels containing approximately 73,600 acres. The Notice stated the March 9, 2021, sale had been postponed [Doc. No. 120, PR 78]. (No additional reasons given.)

On February 12, 2021, a Memorandum [Doc. No. 12, PR 79-80] from Travis Annatoyn to Laura Daniel-Davis stated it was Annatoyn's opinion that lease sales set in Colorado or Montana and the Dakotas be postponed due to lack of analysis on greenhouse gas emissions due to a 2020 lawsuit. The Memorandum also recommended cancelling lease sales scheduled in Utah and Wyoming due to lack of an environmental analysis.

Also, on February 12, 2021, [Doc. No. 120, PR 81-82], Mitchell Leverette sent a Memorandum to Michael D. Nedd of BLM, recommending postponing the scheduled March 18, 2021 lease sales in Alabama and Mississippi (14 parcels, 5,439 acres) and rescheduling the sale for June 17, 2021. The reasons given were to complete additional air quality analysis to comply with the *Wild Earth Guardians* opinion.

On February 11, 2021, in a Memorandum to Michael Nedd by Gregory Sheehan, a March 30, 2021 competitive lease sale in Utah was recommended to be postponed in order to re-evaluate the parcels due to an opinion in the *Rocky Mountain Wild* Case [Doc. No. 120, PR 83-84].

On March 1, 2021, in an email from Laura Daniel-Davis to Michael Nedd, [Doc. No. 120, PR 86], Daniel-Davis told Nedd that Department officials, with delegated authority to approve onshore lease sales, are postponing further consideration of Quarter Two Sales (including authorization of the sales) pending decisions on how the Department will implement the Executive Order on Tackling the Climate Crisis at Home and Abroad with respect to onshore sales. Daniel-Davis told Nedd to post on the relevant website: "The oil and gas lease sales scheduled for April 2021 have been postponed."

The Plaintiff States allege the postponements based on an additional need for further environmental analysis is pretextual in order to give a reason (other than Executive Order 14008) for the Pause. Some of these will need to be explored on the merits of this lawsuit. However, based upon Agency Defendants' own records, no reasons were given for many of these cancellations, and the April, 2021 cancellations were as a direct result of the Executive Order 14008. Therefore, this Court believes the Plaintiff States have a substantial likelihood of success

on the merits on proving the Agency Defendants have implemented the Executive Order Pause to both on land sales under MLA and to offshore sales under OCSLA.

V. PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy never awarded of right. Benisek v. Lamone, 138 S. Ct. 1942, 1943, 201 L. Ed. 2d 398 (2018). In each case, the courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

The standard for a preliminary injunction requires a movant to show (1) the substantial likelihood of success on the merits, (2) that he is likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. Benisek, 138 S. Ct. at 1944. The party seeking relief must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary restraining order or preliminary injunction can be granted. Clark v. Prichard, 812 F.2d 991, 993 (5th Cir. 1987). None of the four prerequisites has a quantitative value. State of Tex. v. Seatrain Int'l, S. A., 518 F.2d 175, 180 (5th Cir. 1975).

1. Likelihood of Success on the Merits

(a) Contrary to law 5 U.S.C. 706 (2)(A) and (C)

Title 5 U.S.C. 706 (2)(A) and (C) authorizes courts to hold unlawful and set aside agency actions not in accordance with law, or in excess of statutory authority. Plaintiff States assert that the Pause on new oil and gas leases on federal land and in federal waters pending a comprehensive review is not in accordance with law and exceeds the agencies authority under both the OSCLA and under MLA.

The Court must first determine whether Plaintiff States' challenges are programmatic challenges or discrete agency actions. Government Defendants cite Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890–93, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) in support of its argument that the Plaintiff States are making a programmatic APA challenge, rather than to discrete agency actions. In Lujan, 497 U.S. 871, the plaintiff sought review of a land withdrawal review program. The court found requests for wholesale improvement of the entire program, rather than discrete agency actions, cannot be reviewed under the APA.

Plaintiff States argue this is not a programmatic challenge, but a challenge as to discrete agency actions—the Pause itself, the cancellation of Lease Sale 257, the stoppage of Lease Sale 258, and the cancellation of other leases. This Court agrees. Plaintiff States are not challenging the entire program. They are attacking a Pause of federal oil and gas leasing allegedly in violation of two Congressional statutes—MLA and OCSLA.

Next, the Court will determine whether Plaintiff States have a substantial likelihood of success on the merits that the Government Defendants' Pause is contrary to law. The Pause is in violation of both OCSLA and of MLA. As previously discussed, both statutes require the Agency Defendants to sell oil and gas leases. OCSLA has a Five-Year Plan in effect, in which requires eligible leases to be sold. As noted in the previously discussed opinions of the Office of the Solicitor, the Agency Defendants have no authority to make significant revisions in OCSLA Five-Year Plan without going through the procedure mandated by Congress. MLA requires the DOI to hold lease sales, where eligible lands are available at lease quarterly.

By pausing the leasing, the agencies are in effect amending two Congressional statutes, OCSLA and MLA, which they do not have the authority to do. Neither OCSLA nor MLA gives the Agency Defendants authority to pause lease sales. Those statutes require that they continue

to sell eligible oil and gas leases in accordance with the statutes. Therefore, the Plaintiff States have a substantial likelihood of success on the merits of this claim. The legislative powers are granted to the legislative branch. U.S. Const. art. I, § 1.

(b). Arbitrary and Capricious 5 U.S.C. 706(2)(A)

Federal administrative agencies are required to engage in reasoned decision-making. Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 374, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998). Plaintiff States allege the Pause is arbitrary and capricious under 5 U.S.C. 706(2)(A) both as to MLA and OCSLA claim.

If an administrative agency does not engage in reasoned decisionmaking, a court, under the APA, shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A).

The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

Neither Executive Order 14008, nor the cancellation of sale of Lease Sale 257, offers any explanation for the Pause (other than to perform a comprehensive review). It also gives no explanation for the postponement of Lease Sale 257, other than reliance on Executive Order 14008.7.[7] A command in an Executive Order does not exempt an agency from the APA's reasoned decisionmaking requirement. California v. Bernhardt, 472 F. Supp. 3d 573, 600–01 (N.D. Cal. 2020). A decision supported by no reasoning whatsoever in the record cannot be saved merely because it involves an Executive Order. Texas, 2021 WL 2096669, at *39–41.

[7] 86 Fed. Reg. 10132

The recission of Lease Sale 257 and the Executive Order itself[8] provides no rationale for departing from OCSLA or MLA requirements.

As to Lease Sale 258, BOEM cancelled both the public comment and public meetings with regard to Lease Sale 258. No explanation was given, other than to rely on Executive Order 14008.[9]

BLM did not publish a formal notice in the Federal Register halting MLB quarterly land sales but did publish a Fact Sheet which noted the President's Executive Order. No explanation (other than the Executive Order) was given. After that, the regional BLM offices began posting postponement or cancellation notices for March and April 2021 lease sales, again, without explanation.

The omission of any rational explanation in cancelling the lease sales, and in enacting the Pause, results in this Court ruling that Plaintiff States also have a substantial likelihood of success on the merits of this claim.

(c) Failure to Provide Notice and Comment

Plaintiff States also claim they are entitled to injunctive relief under the APA because the Pause and lease cancellations are substantive rules that required notice and comment pursuant to 5 U.S.C. 553. The APA requires rules to undergo notice and comment unless they are exempt. 5 U.S.C. 553(a)(b). The two exceptions set forth in 5 U.S.C. 553 are (1) interpretive rules, general statements of policy, or rules of agency organization, procedure, and practices, and (2) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

[8] 86 Fed. Reg. 7624-25
[9] 86 Fed. Reg. 10994

The only exception which could possibly apply is the first. These exceptions are to be narrowly construed. Texas, 809 F.3d at 171. Section 553 was enacted to give the public an opportunity to participate in the rule-making process. U.S. Dep't of Lab. v. Kast Metals Corp., 744 F.2d 1145, 1153 n.17 (5th Cir. 1984).

Is the implementation of the Executive Order Pause an interpretive rule, general statement of policy, or a rule of agency organization, procedure, or practice? In analyzing whether an agency pronouncement is a statement of policy or a substantive rule, the starting point is the agency's characterization of the rule. Pros. & Patients for Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995). As to the offshore leases, there is no classification, just reference to Executive Order 14008. As to the land leases, the Government Defendants deny there is any pause at all, so the language in Executive Order 14008 should also be referenced. In reading Section 208 of Executive Order 14008, there is no classification. The Executive Order language states: "To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review"…*Id.*

In looking closely at an agency's actions, the Fifth Circuit instructs district courts to evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) imposes any rights and obligations, and (2) genuinely leaves the agency and its decisionmakers free to exercise discretion. Texas, 809 F.3d at 171. In evaluating the first criteria, the Executive Order effectively commands that the DOI stop performing its obligations under OCSLA and MLA to sell oil and natural gas leases. The impact is legal in nature, effectively stopping the scheduled sale of Lease Sale 257, putting the brakes on Lease Sale 258, and stopping the quarterly lease sales, under MLA. In evaluating whether the rule leaves the agency and its

decisionmakers free to exercise discretion, the Court notes the wording in the Executive Order, which states, "To the extent consistent with applicable law," but also notes the wording "shall pause." This does not leave the agency free to exercise discretion unless they disobey a Presidential Executive Order.

This Court believes that the Pause in Executive Order 14008 is a substantive rule as implemented by the DOI and MLB, and the exceptions to 5 U.S.C. 553 do not apply.

The "Pause" is also not procedural, because it modifies substantive rights and interests under the "substantial impact test". Texas, 809 F.3d at 176. Therefore, the exceptions in 5 U.S.C. 553 do not apply and notice and comment was required under 5 U.S.C. 553 (b) and (c).

It is uncontested that no notice and comment was conducted by the Agency Defendants pursuant to 5 U.S.C. 553. Since there was no notice and comment, there is a substantial likelihood of success on the merits by Plaintiff States on this claim. Texas, 809 F.3d at 177–78; Natural Resources Defense Council, 955 F.3d at 85.

(d) Unreasonably Withheld and Unreasonably Delayed

5 U.S.C. 706(1) provides that the reviewing court under the APA shall compel agency action unlawfully withheld or unreasonably delayed. In Norton v. S. Utah Wilderness All., 542 U.S. 55, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004), an environmental group brought an action against the DOI, BLM and others seeking to compel agency action under 5 U.S.C. 706(1) in light of the defendants' alleged failure to manage off-road vehicle use in federal lands classified as wilderness study areas. The Supreme Court held that a claim under 5 U.S.C. 706(1) to compel agency action unlawfully withheld or unreasonably delayed can only proceed where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.

Plaintiff States are asking this Court to compel the Government Defendants to complete the sale of Lease Sale 257 and to compel the Government Defendants to re-start the procedure for Lease Sale 258, and to compel the Government Defendants to conduct sales of eligible onshore leases under the MLA. These are "discrete agency actions." The question is whether these are actions the Government Defendants are "required to take."

The Government Defendants argue that they have discretion to determine whether to go forward with Lease Sale 257, Lease Sale 258, and lease sales under the MLA. Additionally, the Government Defendants argue that they also have the right to reconsider their decisions and therefore, those are not actions that the Government Defendants are "required to take."

However, both Lease Sale 257 and Lease Sale 258 were in the Five-Year Program that was approved in accordance with law under OCSLA. Lease Sale 257 was actually scheduled for sale on March 17, 2021. The Secretary of DOI approved the Notice of Sale in a Record of Decision.[10] In the ROD, the Secretary of DOI, in relying on the Final Supplemental Impact Statement determined that Alternative A – a regionwide lease sale with minor exclusions – would be in the best interest of the Nation and meets the purposes of OCSLA.[11] When the sale of Lease Sale 257 was postponed, the only reason given was Executive Order 14008[12] As it has been previously determined that there is a substantial likelihood of success on the merits that Section 208 of Executive Order 14008 is contrary to law, and in excess of authority, the reliance on nothing but Executive Order 14008 results in a substantial likelihood of success on the merits of the unreasonably withheld claim under 5 U.S.C. 706(1) as to Lease Sale 257. Without any

[10] 86 Fed. Reg. 6365 (January 21, 2021)
[11] Approval 5, 8, 10 and 11
[12] 86 Red. Reg. 10132 (Feb. 18, 2021)

other reason to delay the sale, the Government Defendants were legally required to go through with the sale of Lease Sale 257.

Lease Sale 258 was included in the Five-Year Program, but the sale had not been set or approved by the Secretary of the DOI. BOEM released a Call For Information and Nominations, in the Federal Register to allow parties to indicate interest in parcels of the sale area.[13] BOEM also released a Notice of Intent to prepare an Environment Impact Statement, which provided the public with an opportunity to comment on the scope of the lease sale.[14] In January, 2021, after accounting for comments, BOEM published a Notice of Availability indicating the area proposed for sale in the Cook Inlet and a draft environmental impact statement.[15] The reason for the cancellation or the stoppage of the procedure for the ultimate sale of Lease Sale 258 was also Executive Order 14008.

As discussed previously, the Office of the Solicitor's two opinions, [Doc. No. 121, PR-56 and PR 62] to the DOI show that the Secretary of the DOI and other Agency Defendants do not have the authority to make significant revisions to OCSLA Five-Year Plan without Congressional approval. In this Court's opinion, pausing, stopping and/or cancelling lease sales scheduled in OCSLA Five-Year Plan would be significant revisions of the plan.

Without a valid reason to stop Lease Sale 258, the Agency Defendants were also required to complete the statutorily required procedure for the sale of Lease Sale 258.

Additionally, at least some of the onshore leases were cancelled due to the Pause, without any other valid reason. Some were cancelled to do additional environmental analysis, (which

[13] 85 Fed. Reg. 55859 (Sept. 10, 2020)
[14] 85 Fed. Reg. 55861 (Sept. 10, 2020)
[15] 86 Fed. Reg. 4116 (Jan. 15, 2021)

Plaintiff States maintain is pretextual), but the Pause has obviously been implemented by Agency Defendants for some of the lease sales.

Therefore, this Court finds that the Plaintiff States are substantially likely to prevail upon the merits under 5 U.S.C. 706(1) with regard to Lease Sale 257, with regard to Lease Sale 258, and with regard to eligible lands under the MLA.

2. Irreparable Injury

This issue is also contested by Government Defendants. Plaintiff States must demonstrate "a substantial threat of irreparable injury" if the injunction is not issued. Texas, 809 F.3d at 150. For the threat to be sufficiently "substantial," plaintiff must show it is likely to suffer irreparable harm in the absence of preliminary relief. Winter, 555 U.S. at 20. For the injury to be sufficiently "irreparable," plaintiffs need only show it "cannot be undone through monetary remedies." Burgess v. Fed. Deposit Ins. Corp., 871 F.3d 297, 304 (5th Cir. 2017).

As shown by the Declarations of Professor Timothy J. Considine, Professor David E. Dismukes and Jerome Zeringue, Plaintiff States are alleging they would sustain damages due to reduced funding for bonuses, ground rent, royalties, and rentals as a result of the Pause of new oil and gas leases in federal waters or on federal land. Additionally, Louisiana is also claiming damage for reduced funding to the Coastal Master Plan, which would reduce proceeds that are used in Louisiana's coastal recovery and restoration program. Plaintiff States are also claiming damages through loss of jobs in the oil and gas sector, higher gas prices, losses by local municipalities and governments, as well as damage to Plaintiff States' economy. Additionally, Plaintiff States argue that they will not be able to recover money damages against the Government Defendants due to sovereign immunity. Texas, 809 F.3d at 186 and Texas, 2021 WL 2096669, at *47.

Government Defendants maintain, through the Declaration of Peter Cowan, Declaration of Mustafa Haque and Declaration of Walter P. Cruickshank that drilling permits and drilling is continuing at the same level as it did previously as to existing leases. However, just with the loss of proceeds from Lease Sale 257, which would have been already completed, Plaintiff States would have been entitled to ground rents and bonuses that they will not receive. The Plaintiff States have alleged very substantial damages from Government Defendants, which would be difficult, if not impossible to recover, due to sovereign immunity. Even though existing leases are proceeding, the fact that new oil and gas leases on federal lands and in federal waters are paused will ultimately result in losses to Plaintiff States which they will likely not be able to recover.

Accordingly, this Court finds the Plaintiff States have demonstrated a substantial threat of irreparable injury.

3. The Balance of Equities and The Public's Interest

Plaintiff States have satisfied the first two elements to obtain a Preliminary Injunction. The final two elements they must also satisfy are that the threatened harm outweighs any harm that may result to the Government Defendants, and, that the injunction will not undermine the public interest. Valley v. Rapides Par. Sch. Bd., 118 F.3d 1047, 1051 (5th Cir. 1997). These two factors overlap considerably. *Texas,* 809 F.3d at 187. In weighing equities, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Winter, 555 U.S. at 24. The public interest factor requires the court to consider what public interests may be served by granting or denying a preliminary injunction. Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978, 997–98 (8th Cir. 2011).

Both sides argue equity and public interest favor their side. This Court believes both the factors weigh in favor of Plaintiff States. If the Pause were enjoined, the Government Defendants would simply be doing what they had already been doing and doing what they were statutorily required to do under OCSLA, the Five-Year Program, and MLA. The Government Defendants even maintain there is no Pause with regard to MLA, so there would not be any harm in enjoining the Government Defendants from implementing a Pause, which they deny even exists.

The Plaintiff States' claims are substantial. Millions and possibly billions of dollars are at stake. Local government funding, jobs for Plaintiff State workers, and funds for the restoration of Louisiana's Coastline are at stake. Plaintiff States have a reliance interest in the proceeds derived from offshore and on land oil and gas lease sales.

Additionally, the public interest is served when the law is followed. Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C., 710 F.3d 579, 585 (5th Cir. 2013). The public will be served if Government Defendants are enjoined from taking actions contrary to law.

Therefore, this Court finds that Plaintiff States have satisfied all four elements required for a preliminary injunction to be issued.

VI. CONCLUSION

The Plaintiff States have satisfied all four elements required for a preliminary injunction to be issued. After considering all factors, this Court has determined that a preliminary injunction should be issued by Plaintiff States against the Government Defendants.

The Court will now address the geographic scope. This Court does not favor nationwide injunctions unless absolutely necessary. However, it is necessary here because of the need for uniformity. Texas, 809 F.3d at 187–88. The Agency Defendants' lease sales are located on

public lands and in offshore waters across the nation. Uniformity is needed despite this Court's reluctance to issue a nationwide injunction. Therefore, the scope of this injunction shall be nationwide.

Additionally, this Court will address security under FED. R. CIV. P. 65. The requirement of security is discretionary. Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996). Plaintiff States are thirteen sovereign states. The Government Defendants pay a substantial amount of proceeds under the MLA and OCSLA to Plaintiff States. The Court will not require Plaintiff States to post security for this Preliminary Injunction.

For the foregoing reasons, the Court GRANTS Plaintiff States' Motion for Preliminary Injunction [Doc. No. 3]. Therefore, the U.S. Department of the Interior, the United States Bureau of Land Management, the United States Bureau of Ocean Energy Management, and the United States Bureau of Safety and Environmental Enforcement, along with their directors, employees and Secretary are hereby ENJOINED and RESTRAINED from implementing the Pause of new oil and natural gas leases on public lands or in offshore waters as set forth in Section 208 of Executive Order 14008, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021) as to all eligible lands, both onshore, and offshore.

Additionally, said Agency Defendants shall be ENJOINED and RESTRAINED from implementing said Pause, with respect to Lease Sale 257, Lease Sale 258, and all eligible lands onshore.

This preliminary injunction shall remain in effect pending the final resolution of this case, or until further orders from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

No security bond shall be required under Federal Rule of Civil Procedure 65.

MONROE, LOUISIANA, this 15th day of June, 2021.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
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,

Petitioner,

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)

ORDER DISMISSING MOTIONS FOR PRELIMINARY INJUNCTION AS MOOT WITHOUT PREJUDICE TO REFILING

This matter comes before the Court following the parties' briefing (Docs. 58, 59, 60, 61, 63), as requested by the Court (Doc. 55), on the issue of whether to stay this case due to the nationwide preliminary injunction recently ordered by the Western District of Louisiana. Having considered the parties' positions and reviewed the records herein, the Court agrees with the parties that a complete stay is not warranted and the case should proceed toward a final resolution on the merits. The Court additionally finds, though, that the nationwide preliminary injunction issued on June 15, 2021, by Judge Terry Doughty of the Western District of Louisiana, *State of Louisiana v. Joseph R. Biden, Jr.*, No. 2:21-CV-00778, --- F. Supp. 3d ---, 2021 WL 2446010 (W.D. La. June 15, 2021), renders the current motions for preliminary injunction filed here materially moot. This Court finds that consideration of the pending motions for preliminary injunction would be a duplication and uneconomical use of judicial resources that risks inconsistent non-final rulings by different federal district courts. "As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). The current preliminary injunction does not provide Petitioners here all the relief their motions requested, but it granted the bulk of Petitioners' requested relief, and the Court finds the remaining issues in this case should be considered and determined in the briefing on the merits.

Additionally, several parties expressed concern over or disagreement with nationwide injunctions. (*See, e.g.*, Doc. 58 pp. 5-6; Doc. 59 p. 3.) The issuance of nationwide injunctions is a subject of debate. *See, e.g., Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-601 (2020)

(Gorsuch, J., concurring). Nonetheless, at least at the current time, there is no binding precedent precluding their issuance, *see Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, --- F. Supp. 3d ---, 2020 WL 7640460, at *19 (N.D. Cal. Dec. 22, 2020) ("federal district courts have authority to grant nationwide injunctions"), and federal courts of appeal have upheld them, *see, e.g., Santa Cruz Lesbian and Gay CommPennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019) (affirming the district court's permanent, nationwide injunction), *reversed and remanded on other grounds sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The debate concerning the propriety of issuing nationwide injunctions is an interesting legal question that need not be answered by this Court.

IT IS THEREFORE ORDERED that Petitioners Western Energy Alliance and Petroleum Association of Wyoming's Motion for Preliminary Injunction (21-CV-13 Doc. 41) and the State of Wyoming's Motion for Preliminary Injunction (21-CV-56 Doc. 44) are hereby **DISMISSED AS MOOT WITHOUT PREJUDICE**. Petitioners may renew their requests for preliminary relief if the current preliminary injunction issued by the Western District of Louisiana is vacated, withdrawn, or otherwise altered in a material manner. This judicial review of administrative action is not stayed, and the parties should continue to proceed in accordance with Local Civil Rule 83.6.

ORDERED: June 30th, 2021.

Scott W. Skavdahl
United States District Judge

learned of the success of the Ghost Army from my constituent, Caleb Sinnwell of Nashua, IA. He won first place in the National History Day Project for his website about the Ghost Army and has been tirelessly advocating for this legislation to award the unit a Congressional Gold Medal. I thank him for his advocacy and for his admirable dedication to ensuring that those who sacrificed to ensure that the freedom and rights that we prize in America were protected are always remembered.

CONFIRMATION OF ROBERT PETER SILVERS

Mr. HAWLEY. Mr. President, had there been a recorded vote, I would have voted no on the confirmation of Executive Calendar No. 158, Robert Peter Silvers, of the District of Columbia, to be Under Secretary for Strategy, Policy, and Plans, Department of Homeland Security.

THE NATIONAL DEBT

Mr. PAUL. Mr. President, the Senate is considering an infrastructure bill, and I am glad we are. For too long, Americans have been compelled to send their tax dollars overseas to improve the infrastructure of other countries. I have been fighting, for several years, to invest in infrastructure here at home, which is why I find it frustrating that the very people who celebrate this package today actually opposed my efforts in the past.

We have a short memory here in the Senate. Only 2 years ago, I offered my Penny Plan for Infrastructure for a vote. My plan would have invested nearly $40 billion in infrastructure over those 2 years. In those 2 years, nearly 20,000 miles of roads could have been resurfaced. Instead, those investments weren't made and 2 additional years of wear and tear passed by.

The parade of Senators coming to the floor and expounding upon the urgency of this package is nothing less than shocking, particularly when those same Members voted against 20,000 miles of resurfaced roads only a short time ago.

The Penny Plan was not my only effort to invest in infrastructure. Six years ago, I worked on a bipartisan package that would have made $ 130 billion available for infrastructure. Had my plan been enacted into law, Americans would now be driving on 130 thousand miles of new roads.

So, why for more than 5 years have my infrastructure proposals been stifled? For only one reason: each of my proposals were paid for.

And if there is only one thing Congress always agrees on: never pay for any new spending. Ever.

Proponents of this bill claim it is paid for. And by using budgetary gimmicks, they hope they will erect enough smoke and mirrors to obscure this bill's enormous price tag. But this $1.2 trillion bill is not paid for. And, perhaps the most alarming part of the cost, is the authors of this bill know it is not paid for. And we know that because they wrote the bill so as to exempt it from rules that require the bill be paid for.

You see, Congress passed a law back in 2010 mandating that new spending has to be paid for. That law is called statutory pay-go, or pay as you go. And if Congress can't help itself and refuses to offset the cost of new spending, pay-go is enforced by an automatic cut to spending elsewhere.

But Congress rarely adheres to its own rules. Instead, Congress waived pay-go more than 60 times over the past decade and added over $10 trillion to our debt.

This time is no different. This bill, which its proponents say is paid for, also carries a provision that says pay-go won't apply to it.

The only way to ensure Congress adheres to pay-go is through a point of order. If this bill is actually paid for, then you should have no trouble supporting the point of order. But if you vote to waive the point of order, if you vote to exempt Congress from its own rule requiring that we be good stewards of taxpayer dollars, then stop telling people something you know is not true. The truth is, this bill is not paid for.

And every American should ask a simple question: Why won't Congress obey its own rules?

This bill plus the next pork-laden bill will add trillions of dollars of new debt. We are adding debt at an unprecedented pace. There will be repercussions. A day of reckoning awaits.

But today there is a choice to make. A vote for the point of order is a vote not to keep adding debt.

I urge my colleagues to vote with me to stop the bleeding, to stop the red ink that threatens our country's future.

OIL AND GAS LEASES MORATORIUM

Mr. CRAMER. Mr. President, I rise today in support of North Dakota Attorney General Wayne Stenehjem filing a lawsuit against the Biden administration's continued cancelation of oil and gas leases on Federal lands and its impact on State and private mineral owners.

In addition to being a foolish idea, I believe President Biden's moratorium is illegal. It increases Federal and State budget shortfalls, hampers State and private mineral owners' rights, and makes the United States less energy independent and more reliant on foreign producers.

My State of North Dakota is uniquely harmed by this action, given what is commonly referred to as the split estate issue. For roughly 100 years, the Federal Government has retained Federal mineral rights on land near where State and/or private entities also hold surface and mineral rights. About 30 percent of the spacing units in North Dakota have interspersed federal mineral interests and therefore must go through the leasing process of the Bureau of Land Management—BLM—regardless of its size.

Accordingly, since the moratorium, it is estimated our State has lost $4.77 billion in tax revenues and $1.2 billion in private royalties. We are grateful the Louisiana Federal District Court Order agreed the Biden administration's actions are illegal, but unfortunately, we are being given no reason to think the near of this harmful policy is near.

On a recent call between the leadership of the BLM Montana/Dakotas office and constituents from the region, BLM officials stated that they are canceling quarterly lease sales at least through the end of calendar year 2021. Citing the administration's plans to appeal the district court ruling, State Director John Mehloff said, ''We'll probably, at earliest, would be able to hold an oil and gas lease sale late first quarter of 2022.''

That is disappointing, to say the least. Thankfully, North Dakota is taking action to protect our producers and America's energy security. I support the State's efforts in court and hope they are successful.

RECHARGE ACT

Mr. HICKENLOOPER. Mr. President, I recently introduced the RECHARGE Act, S. 2241, with my friend and colleague, Senator WHITEHOUSE, and we are very pleased that this bill, as amended, is included in the Infrastructure Investment and Jobs Act as Section 40431.

Section 40431 amends section 111(d) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2621(d) in order to establish a new requirement that all public utilities—investor-owned utilities, customer-owned cooperatives, and public power utilities—must consider establishing EV-specific rates for residential customers, EV drivers, and commercial customers, who operate public and fleet EV charging stations, to promote greater electrification in the transportation sector.

Lowering emissions in the transportation sector will hinge upon the electrification of our country's motorized vehicles. Large investments in electric vehicle, or EV, charging infrastructure of the type included in other sections of this legislation will provide a catalyst for mass EV adoption.

The successful adoption of EVs will depend not only upon modernizing America's grid and charging infrastructure, but also upon updating our electricity sector rates, so that the infrastructure funded by this act can operate in an economically sustainable manner for decades to come. The commercial rates present today were not designed with the unique electricity load profile of a growing EV fleet in mind.