IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAKOTA RESOURCE COUNCIL *et al.*, Plaintiffs, v. **UNITED STATES DEPARTMENT OF THE INTERIOR** *et al*., Defendants, and **STATE OF NORTH DAKOTA** *et al.*, Intervenor-Defendants	Case No. 1:22-cv-1853-CRC

WESTERN ENERGY ALLIANCE'S CROSS-MOTION FOR SUMMARY JUDGMENT

Western Energy Alliance (the Alliance) respectfully submits this Cross-Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7(a), 7(h)(2), and 7(n) for the United States District Court for the District of Columbia. Alliance concurrently submits a Combined Statement of Points and Authorities in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, including a statement of facts with references to the administrative record, and a proposed order.

Alliance respectfully requests that this Court grant summary judgment in its favor and dismiss Plaintiffs' First Amended Complaint for Declaratory Judgment and Injunctive Relief (ECF No. 33).

Respectfully submitted this 8th day of April 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April 2023, I served a true and correct copy of the foregoing via the Court's CM/ECF filing system which will cause the foregoing to be served upon all counsel of record.

s/ Bret Sumner
Bret Sumner

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DAKOTA RESOURCE COUNCIL *et al.*, Plaintiffs, v. **UNITED STATES DEPARTMENT OF THE INTERIOR** *et al*., Defendants, and **STATE OF NORTH DAKOTA** *et al.*, Intervenor-Defendants	Case No. 1:22-cv-1853-CRC

WESTERN ENERGY ALLIANCE'S COMBINED STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Western Energy Alliance (the Alliance) submits this Statement of Points and Authorities in Support of its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and LCvR 7.

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INTRODUCTION

Under the confines of the Administrative Procedure Act (APA), Plaintiffs' NEPA claims collapse under the weight of BLM's robust administrative record that provides hundreds of pages of analysis and discussion regarding greenhouse gas (GHG) emissions and climate change. BLM exhaustively analyzed these issues to inform its leasing decisions and relied upon numerous studies and data compilations to provide further context for the complex issues of GHG emissions and potential climate effects. While Plaintiffs disagree with BLM's analyses and methods, mere disagreement is not enough to overcome the significant discretion afforded federal agencies under the APA, particularly for the complex technical matters at issue here.

Plaintiffs' legal arguments are premised on their belief that because climate change is such a significant global issue (indeed, a crisis in their words), any GHG emissions resulting from a federal action – here onshore lease sales – result in *per se* significant cumulative impacts under NEPA. Their legal theory turns NEPA on its head. Such a NEPA standard would have numerous unintended consequences, including paralyzing federal agencies from being able to fulfill their statutory mandates directed by Congress and rendering NEPA a superfluous, voluminous paperwork exercise that would not better inform agency-decision-making. Plaintiffs also fail to recognize that if production of oil and natural gas does not occur on federal lands, that production will be garnered from elsewhere, whether from nonfederal lands in the United States, or imported from overseas, including countries which produce with higher GHG emissions.

BLM's NEPA analyses fully comply with, and in fact exceed, the parameters provided under established legal precedent, including Judge Contreras' decisions in this District involving almost identical claims against federal oil and gas lease sales supported by far less extensive NEPA analyses. Plaintiffs have not met their burden to show that BLM's decisions are arbitrary, capricious, an abuse of discretion, or contrary to law, and their claims must be rejected.

Similarly, Plaintiffs' efforts to re-write FLPMA and circumvent long-standing legal precedent regarding FLPMA's unnecessary and undue degradation standard also carry no weight and must be dismissed.

At bottom, Plaintiffs assert a programmatic challenge to the very existence of the federal onshore oil and gas leasing program. Plaintiffs improperly seek legislative reform through the judicial and executive branches of the government. In their press release heralding this lawsuit, it is apparent that Plaintiffs' ultimate goal is to stop the leasing of federal oil and gas resources through litigation.[1] Yet, BLM does not have the statutory authority to stop leasing. Under the Mineral Leasing Act, Congress requires the U.S. Department of the Interior to hold competitive oil and gas lease sales "at least quarterly" to promote responsible development of this nation's energy resources. 30 U.S.C. § 181. In the BLM's organic statute – the Federal Land Policy and Management Act – Congress identifies federal oil and gas resources as a "major use" of federal lands. 43 U.S.C. § 1702(l). BLM is bound by the Congressional mandates of these two statutes until Congress legislates otherwise. Plaintiffs' ultimate stated goal—elimination of the federal oil and gas leasing program and leasing policy established by Congress—is not a valid pursuit in this forum.

Plaintiffs cannot use NEPA as a strawman to obtain the ultimate relief they seek: having the judicial branch promulgate, implement, and impose upon the executive branch federal energy and climate policies that unilaterally amend these federal statutes and prohibit the leasing of this country's abundant oil and gas resources that Congress has authorized through the Mineral Leasing Act. Plaintiffs' vigorous advocacy efforts should be turned to, and focused solely on, the legislative branch.

[1] https://biologicaldiversity.org/w/news/press-releases/lawsuit-challenges-bidens-resumption-of-oil-gas-leasing-on-public-lands-2022-06-29 (last visited May 2, 2023) ("The groups assert that the BLM has violated environmental laws by continuing to authorize fossil fuel leasing on public lands.").

BLM's leasing decisions comply with the law and Plaintiffs have not met their burden under the Administrative Procedure Act to show otherwise. Accordingly, this Court should grant summary judgment in favor of the Federal Defendants and Defendant-Intervenors.

LEGAL AND STATUTORY BACKGROUND

The Alliance adopts and refers the Court to the statutory and regulatory background provided in the Federal Defendants' brief and provides the following additional legal background to support the legal arguments advanced by Federal Defendants and the Alliance.

I. The Mineral Leasing Act and Federal Land Policy and Management Act

The Mineral Leasing Act (MLA) requires BLM to conduct quarterly competitive oil and gas lease sales for lands that are eligible and available for leasing. 30 U.S.C. § 181 *et seq.*; 43 C.F.R. § 3120.1-2(a). The Federal Land Policy and Management Act (FLPMA) identifies minerals as one of the "principal or major uses" of public lands. 43 U.S.C. § 1702(l). FLPMA contains an express declaration of Congressional policy that BLM manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals, [and other commodities] from the public lands…." 43 U.S.C. § 1701(a)(12).

Congress has not authorized or empowered BLM to establish a national energy or climate policy. While some may wish to see BLM limit the production of oil or natural gas as part of an overall strategy to curtail the use of fossil fuels, the agency has no authority to do so. Agencies may act only within the bounds of their enabling statutes. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Public Serv. Com v. FCC*, 476 U.S. 355, 374 (1986). Moreover, Congress has not directed BLM to restrict the nation's supply of fossil fuels. Instead, Congress has directed BLM to lease the nation's oil and natural gas resources for development and to manage public lands under principles of multiple use and sustained yield, with oil and gas resources being identified as a principle and major use of federal

lands under BLM's organic statute, the Federal Land Policy and Management Act. 43 U.S.C. § 1732(a).

Similarly, Congress did not grant BLM the jurisdiction or authority to regulate air quality or greenhouse gas emissions. Through the Clean Air Act, Congress conferred this authority upon the Environmental Protection Agency (EPA). 42 U.S.C. § 7401 *et seq.* EPA has promulgated robust air quality regulations, including GHG reporting requirements and emission controls to limit the primary GHG constituents, such as methane. *See, e.g.,* 49 C.F.R. 60, subpart OOOOa.

II. NEPA Compliance for the Multi-Phased Federal Onshore Oil and Gas Program

Courts have recognized that the three stages of the federal onshore oil and gas program (planning, leasing, and development) necessarily involves a correspondingly sequential NEPA analysis by BLM in which the nature and specificity of impacts at each step in BLM's approval process are analyzed at the time when the impacts from those decisions are best understood and can most accurately be quantified.

The D.C. Circuit has recognized that when analyzing the environmental impacts of multi-staged federal offshore oil and gas projects, an agency's NEPA obligations are relative to the particular activity being authorized and the availability of information at each stage in the process:

> The lease sale phase of the [Outer Continental Shelf] project here under review presents a record of facts and doubts that have not yet fully matured. . . . Drilling for commercial quantities of oil is in all likelihood at least two years away, even under a turn of events most favorable to the government and the oil companies. . . . It is more logical and efficient to ask certain questions when the truth of their premises is unveiled. It may eventuate that exploratory drilling is disappointing, or that severe environmental hazards become more clearly perceived. This perspective comports with the multistage approach mandated by Congress for this kind of oil and gas development.

N. Slope Borough v. Andrus, 642 F.2d 589, 606 (D.C. Cir. 1980).

Similarly, in a case involving NEPA analysis of an onshore oil and gas lease sale in Alaska, the Ninth Circuit held that development-level analysis at the leasing stage is not required. The court explained that oil and gas projects "generally entail separate stages of leasing, exploration and development. At the earliest stage, the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006) (*NAEC*).

The *NAEC* court correctly noted that "[a]ny later plan for actual exploration by lessees will be subject to a period of review before being accepted, rejected, or modified by the Secretary." *Id*.; *see also Park Cty. Res. Council v. Dep't of Agric*., 817 F.2d 609, 624 (10th Cir. 1987), *overruled on other grounds by Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) ("When BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When a [drilling permit] is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.").

STATEMENT OF FACTS

The Alliance adopts and refers the Court to the statement of facts provided in the Federal Defendants' brief.

STANDARD OF REVIEW

The Alliance adopts and refers the Court to the standard of review provided in the Federal Defendants' brief.

ARGUMENT

The Alliance adopts and incorporates by reference the legal arguments advanced by Federal Defendants and Defendant-Intervenors in their respective merits briefs and provides the following additional administrative record citations and arguments for consideration.

I. BLM Took a Hard Look at GHG Emissions and Potential Effects in Full Compliance with NEPA

BLM's Lease Sale EAs thoroughly describe the affected environment and analyze GHG emissions. The methods used to estimate GHG emissions and potential effects on climate are reasonable and entirely within BLM's discretion. The administrative record is replete with additional studies and analyses utilized by BLM to provide context for its analysis of GHG emissions and their effects on climate change.

BLM reasonably tiered to and relied upon analyses contained in the EISs for the underlying applicable federal land use plans; reasonably explained its basis for not conducting speculative analyses of climate impacts; provided reasonable qualitative analyses; and disclosed potential impacts to the extent feasible. BLM's approach fully satisfied NEPA's requirements and its governing rule of reason.

Furthermore, deference to the agency is particularly appropriate here for complex technical matters such as GHG emissions and climate affects stemming from BLM's administration and management of the federal oil and gas program. The technical data that BLM relies upon and presented in the Lease Sale EAs and administrative record is comprehensive and is more than sufficient to satisfy NEPA for purposes of informing BLM decision-making at the leasing stage of the federal onshore oil and gas program.

A. BLM's Robust Analysis of GHG Emissions is Fully Supported by the Administrative Record, and in Full Compliance with NEPA

1. BLM Used a Reasonable Approach to Take a Hard Look at GHG Emissions and Climate Change

BLM did not ignore global climate change in its NEPA analyses or otherwise seek to diminish the effect GHG emissions have on climate. In fact, BLM leaned into this important issue and provided the most detailed and comprehensive analysis of GHG Emissions and

potential effects on climate ever performed for a federal onshore oil and gas lease sale, in full compliance with the parameters provided by Judge Contreras in his decisions on claims involving the challenges to the NEPA documents that supported prior BLM lease sales in Wyoming. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019); *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020). In so doing, BLM complied with the "hard look" standard for its NEPA analysis.

As a starting point, in the Wyoming Lease Sale EA for example, BLM acknowledged that "[t]he continued increase of anthropogenic GHG emissions over the past 60 years has contributed to global climate change impacts." WY485715; WY485960 (explaining in its Finding of No Significant Impact (FONSI) that "BLM acknowledges that all GHGs contribute incrementally to climate change"); NM_P_0059840 (explaining in FONSI that "BLM acknowledges that all GHGs contribute incrementally to the climate change phenomenon").

In the Lease Sale EAs, BLM explained the limits of its analyses due to the uncertainty of numerous key variables to estimate GHG emissions from a leasing decision and the lack of any scientific model to estimate potential effects stemming from these emissions. *See, e.g.,* NM_P_0059677 (New Mexico Lease Sale EA); WY485713-714 (Wyoming Lease Sale EA). Specifically, BLM explained:

> The uncertainty that exists at the time the BLM offers a lease for sale includes crucial factors that would affect actual GHG emissions and associated impacts, including but not limited to the future feasibility of developing the lease, well density, geological conditions, development type (vertical, directional, horizontal), hydrocarbon characteristics, specific equipment used during construction, drilling, production, abandonment operations, production and transportation, and potential regulatory changes over the 10-year primary lease terms.

WY485713; *see also* NM_P_0059677.

BLM also explained the incredible complexity of estimating effects from individual agency actions upon global climate: "[c]limate change is a global process that is affected by the sum total of GHGs in the Earth's atmosphere" and that "[t]he incremental contribution to global GHGs from a single proposed land management action cannot be accurately translated into its potential effect on global climate change or any localized effects in the area specific to the action." WY485714; NM_P_0059677-678.

Moreover, BLM explained that from a NEPA standpoint, "[t]here is no established thresholds [sic] for NEPA analysis to contextualize the quantifiable GHG emissions or social cost of an action in terms of the action's propensity to affect the climate, incrementally or otherwise." NM_P_0059840; WY485960-961; CO_0119434.

In light of these scientific limitations, and the absence of defined thresholds that determine whether GHG emissions from a proposed action are significant for purposes of global climate impacts, BLM utilized GHG emissions as a proxy for assessing climate impacts. HQ_001869; NM_P_0059677; NM_P_0059840; WY485713-714; WY485960. In BLM's 2020 Specialist Report, incorporated by reference into each of the Lease Sale EAs, BLM explained that it adopted the GHG comparison approach "because of the lack of climate analysis tools and techniques that lend themselves to describing the physical climate or earth system responses, such as changes to sea level, average surface temperatures, or regional participation rates, that could be attributable to emissions associated with any single action or decision." HQ_001869.

Under this approach, BLM quantified and compared potential emissions from the proposed lease sale to "state, national and global GHG emission totals to provide context of their significance and potential contribution to climate change impacts." WY485714; NM_P_0059678. BLM also compared emissions from other existing and estimated foreseeable

federal oil and gas development to the estimated emissions for the life of the leases proposed to be offered for sale. WY485714-715; WY485960; NM_P_0059680-682.

Federal courts in the U.S. Court of Appeals for the D.C. Circuit and this District have upheld and endorsed BLM's methodology for evaluating GHG emissions and potential climate impacts using a comparative approach to give context to the scale of emissions from the proposed agency action being analyzed when compared to state-wide and nation-wide emissions. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309-10 (D.C. Cir. 2013); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77 (D.D.C. 2019).

After quantifying reasonably foreseeable GHG emissions to the extent practicable, BLM compared these emissions with other existing and reasonably foreseeable future emissions from federal oil and gas development. In New Mexico, for example, BLM used these comparisons to provide context for the GHG emissions that may occur from lease parcels proposed for competitive sale, explaining:

> estimated emissions for the life of the leases in the Proposed Action is between 0.017% and 0.036% of federal fossil fuel authorization emissions in the state and between 0.006% and 0.015% of federal fossil fuel authorization emissions in the nation.

NM_P_0059840; *see also* WY485960 (explaining in its FONSI that for the proposed lease parcels in Wyoming, "the estimated emissions for the life of the leases in the Proposed Action is between 0.153% to 0.389% of Federal fossil fuel authorization emissions in the state and between 0.086% to 0.217% of Federal fossil fuel authorization emissions in the nation").

Here, for the Lease Sale EAs at issue, BLM's methodology is rational, fully supported by the administrative record, and in full compliance with NEPA's "hard look" requirement.

2. BLM's Analysis of Climate Effects Complied Fully with NEPA

The administrative record reflects that BLM utilized relevant data, explained the limitations on its ability to quantify GHG emissions and potential effects on climate, developed and utilized methodologies to address and analyze to the extent possible, and provided additional context as to forecasted emission levels and potential climate effects through the presentation of additional data, and use of additional tools such as EPA's GHG Equivalency Calculator.

At its very essence, global climate change is necessarily a cumulative issue that involves emission sources from a wide range of human activities (*e.g.*, agriculture, mining, electricity generation, transportation, energy consumption) across the entire world. As BLM explains in the Lease Sale EAs, forecasting and predicting potential effects on climate from discrete agency actions, such as federal onshore oil and gas lease sales, is not possible given the absence of any scientific models to do so. *See, e.g.,* NM_P_0059678; WY485714. Still, BLM provided a rational method to estimate climate effects from GHG emissions and presented detailed analyses in the Lease Sale EAs to inform its decision-making and provide context to the public on this important issue, as required by NEPA.

a. BLM Relied on and Provided the Public with Extensive Materials and Data to Support its Analyses

The administrative record contains extensive materials and data that BLM relied on to analyze the potential effects of GHGs on changing climate in the Lease Sale EAs. In BLM's 2020 Specialist Report, relied upon and incorporated by reference into each of the Lease Sale EAs at issue, BLM described past and present climate impacts detailed by the Intergovernmental Panel on Climate Change (IPCC), including decreases in snow and ice, rising sea levels, and increased concentrations of greenhouse gases. HQ_001881. BLM also summarized region-specific impacts assessments from climate change from the National Climate Assessment report.

HQ_001881-182, including increased temperatures, increased frequency and intensity of extreme heat and heavy precipitation events, and increased average precipitation by 4% since 1901 across the entire United States. HQ_001882.

Moreover, in the Specialist Report, BLM provided an overview of climate impacts within "BLM Fossil Fuel States" including Colorado, Montana, North Dakota, New Mexico, Utah, and Wyoming. HQ_001883-190. These impacts included trends and data regarding temperatures and precipitation, drought, and snowpack levels for each state. *Id.* Similarly, BLM provided an overview of forecasted future climate change trends, HQ_001891-896, and climate change projections by state. HQ_001896-904.

For the New Mexico Lease Sale EA, for example, BLM also relied upon an extensively detailed analysis of air quality based on modeling and monitoring data, titled "BLM Air Resources Technical Report for Oil and Gas Development in New Mexico, Oklahoma, Texas, and Kansas (2020)." NM_P_0045762-878. This technical report included analysis of direct GHG emissions from oil and gas well development, NM_P_0045826-827, indirect GHG emissions, NM_P_0045827-828, and GHG emissions from downstream end use of oil and gas production, NM_P_0045828-829. This extensive technical report detailed reasonably foreseeable GHG emissions from the BLM New Mexico Pecos District where the lease parcels at issue from the Lease Sale EA are located. NM_P_0045831-832. The report also detailed cumulative GHG emissions by region and by state, including New Mexico, NM_P_0045848-852, and analyzed global climate change projections. NM_P_0045853-855.

To inform its Lease Sale EA analysis and GHG emission inventory comparison, BLM also utilized EPA's extensive report, totaling almost 800 pages, titled "Inventory of U.S.

Greenhouse Gas Emissions and Sinks." NM_P_0044845-45634.[2]

In addition, BLM utilized and relied upon an extensive report titled "New Mexico Greenhouse Gas Emissions Inventory and Forecast (October 27, 2020)." NM_P_0046063-131. BLM also relied upon several other climate studies and analyses to inform its leasing decisions under NEPA. For example, BLM utilized a report titled "Special Report on Climate Change and Land – Summary for Policymakers," NM_O_0012340-422, which addressed "greenhouse gas (GHG) fluxes in land-based ecosystems, land use and sustainable land management in relation to climate change adaptation and mitigation, desertification, land degradation and food security." NM_O_0012341. BLM also relied upon the United Nations' "Emissions Gap Report 2020," NM_O_0008492-619. which "assesses the gap between estimated future global greenhouse gas (GHG) emissions if countries implement their climate mitigation pledges and the global emission levels from least-cost pathways that are aligned with achieving the temperature goals of the Paris Agreement." NM_O_0008505.

b. BLM Analyzed Climate Effects in Full Compliance with NEPA

The Lease Sale EAs provided a methodical review, analysis, and explanation of potential effects of the proposed leasing actions upon climate. For example, in the New Mexico Lease Sale EA, BLM provided a qualitative analysis of changes to regional environmental conditions related to climate change. *See* Section 3.3.3 at NM_P_0059622. BLM acknowledged that the proposed leasing action could lead to greenhouse gas emissions, which contribute to global climate change, and explained the numerous variables uncertainties that confront BLM in the context of quantifying estimated GHG emissions at the leasing stage for future development of lease parcels eventually offered and sold at the competitive sale. NM_P_0059677.

[2] *See also, e.g.,* Wyoming Lease Sale EA at WY485719; and EPA Report at WY514125-514915.

In light of these uncertainties, BLM explained in the EA that it:

> evaluated the potential effects of the proposed leasing action on climate change by estimating and analyzing potential GHG emissions from projected oil and gas development on the parcels proposed for leasing using estimates based on past oil and gas development and available information from existing development within the state.

NM_P_0059677.[3] Next, BLM described global climate changes and the fact that there are not any current scientific models that can "forecast local or regional effects on resources." NM_P_0059678.[4] BLM addressed the contributions that GHGs have on climate, explaining that:

> GHGs influence the global climate by increasing the amount of solar energy retained by land, water bodies, and the atmosphere. GHGs can have long atmospheric lifetimes, which allows them to become well mixed and uniformly distributed over the entirety of the Earth's surface no matter their point of origin.

NM_P_0059678; *see also, e.g.,* Wyoming Lease Sale EA at WY485714.

Based upon these inherent complexities of predicting potential effects between the interaction of future GHG emissions that may result from leasing and global climate, BLM then explained that "potential emissions from the Proposed Action can be compared with state, national, and global GHG emission totals to provide context of their significance and potential contribution to climate change impacts." NM_P_0059678; WY485714. This approach is entirely in line with the parameters provided by Judge Contreras in a case involving similar challenges to BLM Wyoming lease sales in this District. *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2019).

Consistent with this legal precedent, in the New Mexico Lease Sale EA for example, BLM presented and compared global and United States GHG emissions from fossil fuels (coal, oil and gas) (EA Table 3.18), and also compared calculated GHG emissions for all federal fossil fuels (offshore and onshore) and "the percent contribution from federal fossil fuels to total U.S.

[3] *See also, e.g.,* Wyoming Lease Sale EA at WY485713.
[4] WY485714.

fossil fuel GHG emissions." NM_P_0059678.[5] BLM also presented the state of New Mexico's GHG emissions from "fossil fuel use across all sectors (residential, commercial, industrial, transportation, and electricity generation)." NM_P_0059678-679.

BLM then acknowledged that "[t]he continued increase of anthropogenic GHG emissions over the past 60 years has contributed to global climate change impacts." NM_P_0059679. Next, BLM incorporated by reference the impacts analyses contained in the 2020 Specialist Report, explaining that the report describes "currently observed climate impacts globally, nationally, and in each state, and present a range of projected impact scenarios depending on future GHG emission levels." NM_P_0059679.

Next, in the Lease Sale EA, BLM detailed the environmental consequences of the proposed action (the decision to offer parcels for lease) and utilized the BLM Lease Sale Emissions Tool to forecast GHG emissions from well development (well site construction, well drilling, and well completion), production operations (processing, storage, and transportation/distribution), and end-use (combustion) of the oil and gas forecasted to be produced. NM_P_0059679-682. Based upon these emission inventories, BLM presented estimated life of lease direct and indirect GHG emissions, including on an annual basis and a life-of-lease basis. NM_P_0059680-681.

To provide additional context on the levels of estimated GHG emissions, BLM utilized the EPA GHG equivalency calculator "to express the potential average year GHG emissions on a scale relatable to everyday life (EPA 2021p), explaining that average annual GHG emissions from forecasted development would be the "equivalent to 7,096 gasoline-fueled passenger vehicles driven for 1 year, or the emissions that could be avoided by operating seven wind

[5] *See also, e.g.,* Wyoming Lease Sale EA at WY485714-721.

turbines as an alternative energy source or offset by the carbon sequestration of 39,804 acres of forest land." NM_P_0059681.[6]

Next, in the Lease Sale EA, BLM compared the lease sale annual emissions with emissions from other sources, including "existing state GHG emissions, federal BLM fossil fuel (oil, gas, and coal) emissions, and U.S. fossil fuel and total GHG emissions reported in the EPA Inventory of U.S. GHG Emissions and Sinks: 1990-2019 (EPA 2021q)." NM_P_0059681-682; *see also, e.g.,* Wyoming Lease Sale EA at WY485719. Then, in Table 3.25, BLM compared the forecasted lease sale annual emissions with other federal oil and gas emissions from existing wells, development, and other leasing actions in New Mexico and the United States. NM_P_0059682.

Based upon these analyses and comparison, BLM explained:

> Compared with emissions from other existing and foreseeable federal oil and gas development, the life of lease emissions for the Proposed Action is between 0.017% and 0.035% of federal fossil fuel authorization emission in the state and between 0.006% and 0.015% of federal fossil fuel authorization emission in the United States.

NM_P_0059682. BLM concluded by stating:

> In summary, potential GHG emissions from the Proposed Action could result in GHG emissions of 0.653 Mt CO_2e over the life of the lease.… As detailed in the Annual GHG Report (BLM, 2022), which BLM has incorporated by reference, the BLM also examined other tools to inform its analysis, including the MAGICC model [Model for the Assessment of Greenhouse Gas Induced Climate Change] (see Section 7.0 of the Annual GHG Report). This model run suggestion that '30-plus years of projected federal emissions would raise average global surface temperatures by approximately 0.0158 °C., or 1% of the lower carbon budget temperature target.'

NM_P_0059682; *see* BLM GHG Specialist Report, Section 7, at HQ_001869-876.

BLM's analysis of GHG emissions and climate effects did not end there. Next, in the Lease Sale EA, BLM provided a detailed analysis of the monetized impacts from GHG

[6] *See also, e.g.,* Wyoming Lease Sale EA at WY485719.

Emissions, as provided for in administrative policy detailed in Presidential Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 Fed. Reg. 7307 (January 20, 2021). *See* NM_P_0059683-684.[7] Following this analysis, BLM then provided analysis of estimated GHG emissions for reasonably foreseeable environmental trends and planned actions. NM_P_0059685-686,[8] and a discussion of mitigation strategies for GHG emissions, including regulations promulgated by EPA, and the State of New Mexico. NM_P_0059687-688.[9]

In its Findings of No Significant Impact for the Lease Sale EAs, BLM discussed the degree of both short-term and long-term effects, as required by NEPA's implementing regulations. *See, e.g.,* NM_P_0059840; WY485961. BLM explained:

> There are no established thresholds for NEPA analysis to contextualize the quantifiable GHG emissions or social cost of an action in terms of the action's propensity to affect the climate, incrementally or otherwise.

NM_P_0059840; WY485961. BLM explained further that:

> The BLM acknowledges that all GHGs contribute incrementally to climate change and has displayed the greenhouse gas emissions and social cost of greenhouse gas in the EA in comparison to a variety of emissions sources and metrics…. Although future potential development of proposed lease parcels could add incrementally to oil and gas development, the EA did not identify any significant effects beyond those already analyzed in the RMPs and their EISs.

WY485961; *see also* NM_P_0059840.

In the absence of defined significance thresholds to guide it, BLM provided a comparison of the reasonably foreseeable GHG emissions from the lease parcels proposed for sale with existing and reasonably foreseeable GHG emissions from existing and other reasonably foreseeable federal oil and gas development. *See, e.g.,* NM_P_0059840 (explaining for New

[7] WY485721-724.
[8] WY485724-725.
[9] WY485725-726.

Mexico the "estimated emissions for the life of the leases in the Proposed Action is between 0.017% and 0.036% of federal fossil fuel authorization emissions in the state and between 0.006% and 0.015% of federal fossil fuel authorization emissions in the nation"); WY485960 (explaining in its FONSI that for the proposed lease parcels in Wyoming, "the estimated emissions for the life of the leases in the Proposed Action is between 0.153% to 0.389% of Federal fossil fuel authorization emissions in the state and between 0.086% to 0.217% of Federal fossil fuel authorization emissions in the nation").

Moreover, Plaintiffs also fail to recognize that if production of oil and natural gas does not occur on federal lands, that production will be garnered from elsewhere, whether from nonfederal lands in the United States, or imported from overseas, including countries which produce with higher GHG emissions. BLM recognized this important point in the Lease Sale EAs, relying on recent U.S. Energy Information Administration (EIA) energy outlook reports, explaining:

> EIS studies and recent U.S. activities regarding short-term domestic supply disruptions or sudden increases in demand suggest that reducing domestic supply (in the near-term under the current supply/demand scenario) would lead to the import of more oil and natural gas from other countries with lower environmental and emission control standards than in the United States, or even cause a release from the current U.S. stockpile to meet consumer demand and maintain stable prices.

WY485715 (Wyoming Lease Sale EA); *see also, e.g.,* NM_P_00596987 (analysis under the No Action Alternative in the New Mexico Lease Sale EA).

In sum, the administrative record documents that BLM did not shirk from its responsibilities under NEPA to analyze GHG emissions and potential effects. Indeed, BLM leaned into the issue, providing the most detailed and comprehensive analyses ever performed at the lease sale stage of the federal onshore oil and gas program. While Plaintiffs' perspective is

that any and all GHG emissions have a significant impact on climate, that is not a valid starting point for scientific analysis or a valid justification to reach a pre-determined outcome that potential impacts from GHG emissions are *per se* significant under NEPA and require preparation of an EIS.

At bottom, Plaintiffs disagree with BLM's findings and methods, but disagreement is not enough to overcome the deferential standard of review afforded by under the Administrative Procedure Act. BLM's NEPA analyses far exceed the requirements of NEPA, and thus the Court must affirm BLM's Lease Sale EAs and leasing decisions.

3. BLM Analyzed Cumulative Impacts of the Challenged Lease Sales in Full Compliance with NEPA

The Lease Sale EAs provide extensive information on cumulative GHG emissions, at the state, national, and global levels. BLM's 2020 Specialist Report, utilized and incorporated by reference for each Lease Sale EA, provides a detailed discussion and cumulative assessment of federal oil and gas emissions and climate change impacts at the state, national, and global levels. HQ_001806-001918. This report also presents the range of projected climate change effects across the states where these lease sales originate. *See* 2020 Specialist Report at Section 8.3, HQ_001881-1883, Section 8.4, HQ_001883-1890, and Chapter 9, HQ_001891-1904, including state level impact analyses, *e.g.,* New Mexico at HQ_001888 and HQ_001899, and Wyoming at HQ_001889, and HQ_001900-1901.

BLM also performed a model run of the MAGICC model to provide the cumulative effect from projected emissions from the lease parcels offered for sale, explaining that:

> This model run suggests that '30-plus years of projected federal emissions would raise average global surface temperatures by approximately 0.0158 °C., or 1% of the lower carbon budget temperature target.'

WY485721. In addition, BLM evaluated the cumulative impacts of projected lease sales based on a 5-year average in the Specialist Report, which encompasses the leasing proposed and analyzed in the Lease Sale EAs at issue. NM_P_0059685-686.

The scope of analysis for cumulative impacts is necessarily bounded by the rule of reason. *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (explaining that the "Rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decisionmaker.). Here, BLM properly considered cumulative impacts at the state-level for each lease sale. BLM explained the limits of its forecasting and analytic efforts, provided rational methods to develop as much cumulative analyses as possible, and compared reasonably foreseeable emissions from the leases against past, present and reasonably foreseeable emissions from other sources. BLM complied fully with NEPA, and given the significant technical and scientific complexities of these issues, BLM should be afforded significant deference in how it conducted these analyses.

B. BLM's Methodologies to Evaluate and Provide Context to Potential Climate Impacts from GHG Emissions are Rational and Must be Afforded Significant Discretion

Plaintiffs disagree with BLM's methodologies to evaluate GHG emissions and effects on climate but do not meet their burden under the APA to show that BLM's decisions and methods were arbitrary, capricious, an abuse of discretion, or not rationally supported by the administrative record.

At the outset, it is well settled "[w]hen an agency is evaluating scientific data within its technical expertise, an extreme degree of deference to the agency is warranted." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (internal quotations omitted). This judicial deference extends to an agency's choice of methodology, to which a court "must defer . . . so long as it bears a rational relationship between the method and that to which it is

applied." *Pub. Empls. for Envtl. Responsibility v. U. S. Dep't of the Interior*, 832 F. Supp. 2d 5, 26 (D.D.C. 2001) (internal quotations and alteration omitted).

Under this deferential standard, BLM's methodologies for addressing the uncertainties of climate impacts, and providing context for potential effects, are in full compliance with NEPA.

1. Methodology for Social Cost of Carbon and GHGs

While BLM performed social cost of GHG analyses to provide monetized impacts from GHG emissions from the proposed leasing actions pursuant to Presidential Executive Order, NEPA does not require BLM to perform such analysis. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 78 (D.D.C. 2019) (upholding agency decision to decline to apply social cost of carbon protocol). As explained in a recent decision regarding another challenge to a BLM oil and gas lease sale:

> NEPA does not require 'that agencies weigh the economic costs and benefits of a proposed action. To the contrary, 40 C.F.R. § 1502.23 specifically provides that agencies need not do so, and in fact should avoid such comparisons when, as here, the NEPA analysis in question involves important qualitative considerations.' While certain quantitative data needs analyzing, the 'regulations preserve ample decision space for federal agencies to use the metrics and methodologies best suited to the issues at hand, consistent with the broad discretion typically afforded to an agency's choice of methodology.'

WildEarth Guardians v. Bernhardt, No. 1:19-cv-00505-RB-SCYY, 2020 U.S. Dist. LEXIS 149785, at *34-35 (D.N.M. Aug. 18, 2020); *see also Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145, 1159-60 (D. Colo. 2018) (finding that BLM "chose not to [apply the social cost of carbon], provided sufficient support in the record to show this, and thus satisfied NEPA in this respect."); *W. Org. of Res. Councils v. BLM*, CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, 2018 WL 1475470, at *14 (D. Mont. March 26, 2018) (explaining that "despite the benefits of the social cost of carbon protocol, NEPA does not require a cost-benefit analysis under these circumstances.").

Given that BLM's SC-GHG analyses is required by Executive Order, but not mandatory under NEPA legal precedent, courts should grant BLM significant discretion as to the parameters for this analysis. For the reasons explained in the Federal Defendants' merits brief, Plaintiffs arguments carry no weight and must be rejected.

2. BLM is Not Required to Use a Carbon Budget to Frame and Inform its NEPA Analyses

BLM is not required to analyze GHG emissions under the rubric of a global carbon budget. Significantly, at the national level, Congress has not enacted legislation to establish a carbon budget for the United States. Nor has the Executive Branch attempted to establish one either, or otherwise require federal agencies to utilize a carbon budget to frame NEPA analyses.

The administrative record reflects that BLM examined carbon budgets generally and explained why a carbon budget is not an appropriate or reliable tool for use by BLM in its NEPA analyses to inform agency decision making. *See, e.g.,* BLM Specialist Report, Section 7.2, Carbon Budgets and Carbon Neutrality, HQ_001872-74 (explaining carbon budgets and their key assumptions and limitations, and further explaining that global carbon budgets "are not useful for BLM decisionmaking as it is unclear what portion of the budget applies to emissions occurring in the United States."); WY485553 (BLM response to public comments filed by Plaintiffs on draft lease sale EA for Wyoming); NM_P_0059736; NM_P_0059741 ("At this time, BLM has not developed a standard or emissions budget that can apply uniformly to make a determination of significance based on climate change.").

As BLM explained in its response to Plaintiffs' comments on the draft Lease Sale EAs, "there is no established carbon budget pertaining to the U.S. share of the global carbon budget, and any assertion to the contrary is simply conjecture." WY485553. BLM explained further that "despite ratification of the Paris Agreement, there is no political or scientific consensus on

precisely how to allocate global budget targets into national decarbonization trajectories, which is most likely due to the competing approaches for downscaling that exist." *Id.*

BLM also explained the challenges to trying to utilize a carbon budget analytic framework for individual agency actions:

> a carbon budget set at a national scale, for example the whole of the U.S., would not be solely applicable to the federal emissions scope (onshore and/or offshore). Further downscaling of such a budget to agency authority levels would be wholly inappropriate and potentially ineffective in terms of trying to manage an entire economies worth of emissions during transition.

WY485553; *see also* HQ_001873-74.

As another Court in this District held in a similar challenge to BLM lease sales in Wyoming:

> BLM did not act arbitrarily and capriciously in not utilizing the global carbon budget . . . [b]ecause current climate science is uncertain (and does not allow for specific linkage between particular GHG emissions and particular climate impacts) . . . evaluating GHG emissions as a percentage of state-wide and nation-wide emissions . . . is a permissible and adequate approach.

WildEarth Guardians v. Zinke, 368 F. Supp. 3d at 79 (citing *WildEarth Guardians v.* BLM, 8 F. Supp. 3d 17, 35 (D.D.C. 2014) and *WildEarth Guardians v. Jewell*, 738 F.3d at 309) (internal quotations omitted)).

Moreover, as reflected in the Tenth Circuit's recent decision in *Diné Citizens,* BLM is not required to use a carbon budget as an analysis tool in NEPA. Rather, BLM must simply explain why it would not be appropriate to do so. *Diné Citizens Against Ruining Our Env't v. Haaland,* 59 F.4th 1016, 1042 (10th Cir. 2023). Here, the administrative record reflects that BLM provided an adequate explanation as to why a carbon budget analysis is "wholly inappropriate" at the agency level. WY485553; HQ_001873-74. NEPA does not require BLM to do more.

3. BLM Utilized the MAGICC Model to Provide Additional Context for Potential Climate Impacts

The administrative record demonstrates that BLM also examined other tools to inform its analyses of GHG emissions and potential climate impacts, including the Model for the Assessment of Greenhouse Gas Induced Climate Change (MAGICC Model). *See, e.g.,* NM_P_0000035; WY485721. BLM utilized the MAGICC Model in preparing its Specialist Report to inform potential climate impacts. *Id.*; HQ_001875-76. As BLM explained in the Lease Sale EAs, the MAGICC Model run results "suggest that 30-plus years of projected federal emissions would raise average global surface temperatures by approximately 0.0158 °C., or 1% of the lower carbon budget temperature target." HQ_001876; NM_P_0000035; WY485721.

Thus, while BLM was not required to utilize a carbon budget or another model to estimate potential climate impacts from climate change that may result from GHG emissions, the record reflects that BLM nonetheless made good faith efforts to use these additional tools to provide additional context and information for the Lease Sale EAs, and explained why a carbon budget analysis would not inform agency decision-making. Indeed, BLM even sought to frame these modeling results in the context of a carbon budget to respond to comments from the public, including those submitted by Plaintiffs. Given the complexity and scientific limitations of these various tools, BLM complied with NEPA by explaining why use of the carbon budget was not feasible or helpful and providing context to the public on the shortcomings of its potential use.

II. BLM's Decision to Issue a FONSI Complied with NEPA

Plaintiffs argue that BLM erred in issuing a FONSI for each challenged lease sale because BLM failed to further aggregate GHG emissions and provide more detailed analyses of potential impacts to global climate. Significantly, however, "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether

and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Pub. Citizen,* 541 U.S. at 767. BLM's decision to issue FONSIs for its Lease Sale EAs complies fully with NEPA and the rule of reason standard.

A. Legal Framework

The legal standard governing judicial review of an agency's decision not to prepare an EIS is well established. A court's "role in reviewing an agency's decision not to prepare an EIS is a limited one, designed primarily to ensure that no arguably significant consequences have been ignored." *Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017) (internal quotations and citation omitted). A court "cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.,* 281 F. Supp. 2d 1, 9 n.13 (D.D.C. 2003). "An agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Pub. Citizen*, 541 U.S. at 763 (quoting 5 U.S.C. § 706(2)(A)).

An agency must prepare an EIS for a major federal action "significantly affecting" the quality of the human environment. 42 U.S.C. § 4332(C); *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d at 257. When determining whether an action is "significant" for NEPA purposes, BLM is only obligated to consider the impacts from the federal agency action under review. *See Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1247 (D. Wyo. 2005).

NEPA gives agencies the authority to tier NEPA documents, which allows for the incorporation by reference of prior environmental analyses, and tiering is particularly appropriate for a multi-staged federal program such as the federal onshore oil and gas program. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 511–12 (D.C. Cir. 2010); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 474 (D.C. Cir. 2009) (explaining

that NEPA's implementing regulations allow an agency to utilize a tiered approach when preparing EAs "[w]hen faced with a multi-stage, pyramidic program such as the Leasing Program at issue here."); 40 C.F.R. § 1508.28; *see also* discussion on the three stages of the federal oil and gas program in Federal Defendants' Merits Brief at 10-11, Dkt. 61.

B. BLM's Lease Sale EAs Comply with NEPA; No Substantial Questions Arise that Trigger the Need for an EIS

Here, as discussed in detail in Section I above, the administrative record underscores that BLM did not ignore greenhouse gas emissions or potential effects on climate. Indeed, in the face of uncertainty regarding GHG emissions and climate effects, BLM leaned into the issue by relying on numerous studies, data, and models to inform its analyses, and provided context to these complex issues to foster informed public participation and agency decision-making. BLM tiered to existing EISs prepared for the applicable Resource Management Plans, and relied upon the substantial cumulative analyses contained in BLM's Specialist Report on GHG Emissions and Climate Trends. BLM explained that a significance threshold has not been established for GHG emissions and given the limits inherent in quantification of GHG emissions and potential effects on climate, additional analyses in an EIS would not further inform BLM's decision-making.

As detailed in the Lease Sale EAs, BLM did not identify any significant impacts from the proposed leasing actions, and the uncertainties regarding climate effects from GHG emissions stemming from lease sales that BLM explained in detail do not otherwise warrant preparation of an EIS. BLM explained that the preparation of an EIS would not alleviate these uncertainties – the same complex issues regarding forecasting of emissions and effects would still exist; and additional analysis of these uncertainties would not better inform BLM decision-making.

BLM explained in its FONSIs, "preparation of an EIS solely for the sake of analysis of the issue of climate change is not warranted as any disclosure in such an EIS would be the same as that prepared for this EA and would not better inform decision-makers or the public." NM_P_0059840; NM_P_0059844; *see also* WY485961 ("the EA did not identify any significant effects beyond those already analyzed in the RMPs and their EISs"); CO_0119434 ("the EA did not identify any significant cumulative effects beyond those already analyzed in the RMP/FEISs").

Plaintiffs' claim that substantial questions exist regarding GHG emissions and potential effects on climate necessitate preparation of an EIS. But these resource issues are not unique and do not raise substantial questions that BLM has not already examined and analyzed. As Judge Contreras explained in evaluating a similar claim for a 2019 Supplemental Lease Sale EA for Wyoming lease sales: "the uncertainty mentioned in the [Lease Sale] EA with respect to forecasting GHG emissions levels is not of the type that would require an EIS on its own. The risks of GHG emissions are not 'unique or unknown,' and the [Lease Sale EA] adequately summarized those risks." *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d at 258 (Contreras, J.). Similarly, as explained by the U.S. Court of Appeals for the Tenth Circuit:

> To require a cumulative EIS contemplating full field development at the leasing stage would thus result in a gross misallocation of resources, 'would trivialize NEPA and would 'diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.'

Park County Resource Council, Inc. v. Forest Service, 817 F.2d 609, 623 (10th Cir. 1987) (citation omitted).

Moreover, for the Lease Sale EAs, BLM tiered to and relied upon the EISs for the governing RMPs that contained extensive greenhouse gas analyses. *See, e.g.,* WY485692; NM_P_0059608-609. The accompanying EISs analyze the environmental impacts, including

GHG impacts, of the RMP's proposed management decisions, including the decision to make parcels available for oil and gas leasing. As BLM explained in its FONSIs "the EA did not identify any significant effects beyond those already analyzed in the RMPs and their EISs." WY485961; NM_P_0059844; *see also* CO_0119434-435 ("the EA did not identify any significant cumulative effects beyond those already analyzed in the RMP/FEISs").

As discussed in Section I above, in the Lease Sale EAs, BLM specifically looked at the impact of GHG emissions from leasing the parcels in the context of other state, regional, and national emissions. GHG emissions from the leases in question represent a very small percentage of the GHG emissions resulting from the state and national federal oil and gas production. BLM fulfilled its NEPA obligations by considering the environmental effects of GHG emissions and a FONSI is appropriate to summarize the identified risks.

C. BLM's Decision Not to Prepare an EIS is Harmless Error

Even if BLM were required to prepare an EIS for the leasing decisions at issue due to substantial questions arising from the absence of any quantitative threshold to assess the significance of the impacts of GHG emissions on climate, BLM's inability to do so is, at worst, a harmless error.

Courts reviewing agency action under section 706(2)(A)'s "arbitrary and capricious" standard must take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706. The harmless error rule applies to agency action because "[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004). The burden to demonstrate prejudicial error is on the party challenging agency action. *See Air Canada v. DOT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998).

Here, Plaintiffs have not met their burden to demonstrate that any of the alleged errors were prejudicial. *Jicarilla Apache Nation v. U.S. DOI*, 613 F.3d 1112, 1121 (D.C. Cir. 2010). The administrative record reflects that BLM explained in its FONSIs why preparing an EIS would not change the outcome of its decision: "preparation of an EIS solely for the sake of analysis of the issue of climate change is not warranted as any disclosure in such an EIS would be the same as that prepared for this EA, and would not better inform decision-makers or the public." NM_P_0059840; NM_P_0059844; *see also* WY485961 ("the EA did not identify any significant effects beyond those already analyzed in the RMPs and their EISs"); CO_0119434 ("the EA did not identify any significant cumulative effects beyond those already analyzed in the RMP/FEISs").

Accordingly, BLM should not be required to prepare an EIS and Plaintiffs should not be given a second bite at the apple based on a harmless error that would not have changed the outcome of BLM's finding of no significant impacts or its decisions to offer lease parcels for competitive sale.

III. BLM Complied Fully with the Federal Land Policy and Management Act

Plaintiffs argue that BLM's decision to offer lease parcels for competitive sale under the federal onshore oil and gas leasing program creates a *per se* violation of FLPMA's requirement that BLM prevent "unnecessary or undue degradation" of federal lands. This argument is premised solely on Plaintiffs' own subjective opinion that any federal action that may contribute GHG emissions that may contribute to global climate effects will automatically create "unnecessary and undue degradation." It is not based on any law or legal precedent.

BLM complied with FLPMA's requirement that BLM prevent "unnecessary or undue degradation" of public lands. 43 U.S.C. § 1732(b). At its most basic level, as BLM explained in policy guidance, "[p]reventing unnecessary or undue degradation does not mean preventing all

adverse impacts upon the land. . . . [A] certain level of impairment may be necessary and due under a multiple use mandate" under FLPMA. BLM Instruction Memorandum (IM) 2019-018.

Legal precedent from the Interior Board of Land Appeals (IBLA) has long provided the contours of the FLPMA unnecessary and undue degradation standard. "The broad language in FLPMA directing BLM to prevent unnecessary or undue degradation 'leaves [the] BLM a great deal of discretion in deciding how to achieve' this objective." *Wildlands Defense*, 192 IBLA 383, 405 (2018) (quoting *Gardner v. United States*, 638 F.3d 1217, 1222 (9th Cir. 2011) (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004)).

By following FLPMA's multiple-use and sustained-yield mandates, the BLM will inherently fulfill its requirement to prevent unnecessary or undue degradation as those mandates already require the BLM to manage and balance multiple uses of federal lands, including potentially degrading uses. *Western Watersheds Project Defenders of Wildlife*, 188 IBLA 250, 263 (2016). As IBLA has explained:

> Congress thus recognized that the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA, and that something more than the usual effects anticipated from such development, subject to appropriate mitigation, must occur for degradation to be 'unnecessary or undue.'

Intrepid Potash – New Mexico, LLC, 176 IBLA 110, 123 (2008) (emphasis added); *see also Biodiversity Conservation Alliance, et al.*, 174 IBLA 1, 5 (2008) (explaining that under FLMPA's multiple use mandate and recognition of the need for oil and gas resources, "Congress thus recognized that the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA").

To qualify as unnecessary or undue degradation, a lessee's operations must be "conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not

undertake that action pursuant to a valid existing right." *Colorado Envtl. Coal.,* 165 IBLA 221, 229 (2005). The D.C. Circuit has recognized these legal contours of FLPMA's unnecessary and undue degradation standard provided by IBLA. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011).

Furthermore, the legal authority and jurisdiction to regulate air quality and GHGs resides exclusively with the Environmental Protection Agency (EPA) and EPA-authorized state programs under the Clean Air Act and individual state statutory authority. 42 U.S.C. § 7401 *et seq.*; 40 C.F.R. Parts 50–99; 40 C.F.R. §§ 52.320–52.353. BLM does not have direct authority over air quality, air emissions, or GHG emissions under the Clean Air Act. Congress did not grant to BLM the jurisdiction to regulate downstream end uses and combustion of hydrocarbons produced from federal oil and gas leases, and the U.S. Supreme Court has held that that NEPA does not require an agency to analyze the environmental impacts of actions that are outside the agency's jurisdiction. *Public Citizen*, 541 U.S. at 767. Courts have held that an administrative agency's power to regulate must be grounded in a valid grant of authority from Congress, and any agency action that exceeds the scope of those delegated duties and powers are void. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 162 (2000).

BLM acknowledges this jurisdictional limitation in its Lease Sale EAs, explaining:

> The majority of GHG emissions resulting from federal fossil fuel authorizations occur outside of the BLM's authority and control. These emissions are referred to as indirect emissions and generally occur off-lease during the transport, distribution, refining, and end-use of the produced federal minerals. The BLM's regulatory authority is limited to those activities authorized under the terms of the lease, which primarily occur in the "upstream" portions of natural gas and petroleum systems.

WY485726; NM_P_0059688.

FLPMA, which grants BLM authority to manage public lands, states that BLM should provide for compliance with applicable pollution control laws, including state and federal air

standards or implementation plans. 43 U.S.C. § 1712(c)(8). BLM has done so as all federal oil and gas leases contain terms that require the lessee to comply with all applicable environmental laws. Moreover, as BLM explained in the Lease Sale EAs, lessees must comply with a suite of state and federal statutes and regulations governing air quality and GHGs:

> The EPA is the Federal agency charged with regulation of air pollutants and establishing standards for protection of human health and the environment. EPA has issued regulations that will reduce GHG emissions from any development related to the proposed leasing action. These regulations include the New Source Performance Standard for Crude Oil and Natural Gas Facilities (49 CFR 60, subpart OOOOa) which imposes emission limits, equipment design standards and monitoring requirements on oil and gas facilities.

WY485726; NM_P_0059688 (also providing information on the State of New Mexico's regulations that will decrease certain GHG emissions); *see also* BLM Specialist Report, Chapter 2, HQ_001815-1821 (providing a detailed discussion on current federal and state laws and regulations that apply to oil and gas development that limit GHG emissions, as well as applicable Presidential Executive Orders).

In sum, BLM complied fully with its statutory mandates under FLPMA and the MLA and its decision to offer lease parcels for competitive sale did not result in any "unnecessary and undue degradation" in violation of FLPMA. At bottom, Plaintiffs disagree with the fundamental underpinnings of the federal oil and gas leasing program detailed in the MLA, and the contours of BLM's management obligations under FLPMA. Plaintiffs have not met their burden under the APA to show any violation of law or that BLM's decisions were otherwise arbitrary, capricious, or an abuse of discretion. BLM's leasing decisions and the exercise of its management authority under FLPMA should be affirmed.

CONCLUSION

BLM's Lease Sale EAs and leasing decisions comply fully with NEPA and FLPMA. The Court should deny Plaintiffs' claims and grant summary judgment in favor of the Federal Defendants, the Alliance, and the Defendant-Intervenor States.

Respectfully submitted this 8th day of May 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May 2023, I served a true and correct copy of the foregoing via the Court's CM/ECF filing system which will cause the foregoing to be served upon all counsel of record.

s/ Bret Sumner
Bret Sumner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAKOTA RESOURCE COUNCIL, *et al.*, Plaintiffs, v. **U.S. DEPARTMENT OF THE INTERIOR,** *et al.*, Federal Defendants and **WESTERN ENERGY ALLIANCE,** Proposed Defendant-Intervenor.	Case No. 1:22-cv-01853-CRC

[PROPOSED] ORDER GRANTING WESTERN ENERGY ALLIANCE'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the Cross-Motion for Summary Judgment filed by Western Energy Alliance (the Alliance). Having considered the Motion and the Statement of Points and Authorities in Support of the Motion, the Court hereby finds that the Motion is GRANTED.

It is therefore ordered that Plaintiffs' claims are denied and summary judgment is granted in favor of the Alliance.

SO ORDERED.

DATED: _____

_____
Christopher R. Cooper
United States District Judge