

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

THE STATE OF LOUISIANA,
By and through its Attorney General,
JEFF LANDRY, et al.,

Plaintiffs,

Civil Action No. 2:21-cv-778-TAD-KK

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants.

**BRIEF OF DAGGETT COUNTY, UT; RIO BLANCO COUNTY, CO;
UINTAH COUNTY, UT; AND WAYNE COUNTY, UT,
AS *AMICI CURIAE* IN SUPPORT OF
THE PLAINTIFF STATES' MOTION
FOR PRELIMINARY INJUNCTION**

Table of Contents

Table of Authorities	iii
Interest of <i>Amici Curiae</i>	1
Introduction	2
Argument	5
I. The oil and gas moratorium irreparably harms counties that rely on lease sales proceeding according to law.	5
II. The Administrative Procedure Act imposes strict limits on agency action.	8
III. Plaintiff States are likely to succeed on their claims that the oil and gas leasing moratorium following from EO 14008 violates the Administrative Procedure Act.	9
Conclusion	12
Certificate of Service	13

Table of Authorities

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967).....11

In re Aiken County,
725 F.3d 255 (D.C. Cir. 2013).....9

California v. Bernhardt,
472 F. Supp. 3d 573 (N.D. Cal. July 15, 2020).....11

Christensen v. Harris County,
529 U.S. 576 (2000).....9

Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020).....12

Dep’t of Transp. v. Ass’n of Am. Railroads,
135 S. Ct. 1225 (2015).....8

FCC v. Fox TV Stations, Inc.,
556 U.S. 502 (2009).....12

Franklin v. Massachusetts,
505 U.S. 788 (1992).....8, 11

Perez v. Mortgage Bankers Ass’n,
575 U.S. 92 (2015).....8, 9

W. Energy Alliance v. Jewell,
No. 1:16-CV-00912, 2017 U.S. Dist. LEXIS 5574 (D.N.M. Jan. 13, 2017).....9

WildEarth Guardians v. Bernhardt,
Civil Action No. 16-1724, 2020 U.S. Dist. 212928 (D.D.C. Nov. 13, 2020).....10

WildEarth Guardians v. Zinke,
368 F. Supp. 3d 41 (D.D.C. 2019).....10

Rules and Statutes

Administrative Procedure Act of 1946,
5 U.S.C. § 551.....4, 8, 10, 11

Colo. Rev. Stat. § 34-63-102(5.4)7

Federal Land Policy and Management Act,
43 U.S.C. §§ 1701-17875

Mineral Leasing Act of 1920,
30 U.S.C. § 181, *et seq.*.....1, 4, 5, 6, 9, 10, 12

ORS § 293.565.....7

ORS § 294.055.....7

5 U.S.C. § 70410

5 U.S.C. § 7064, 9, 11

5 U.S.C. § 706(2)(A)10

5 U.S.C. § 706(2)(C)10

30 U.S.C. § 191(a).....5

30 U.S.C. § 226(b)(1)(A)1, 5, 9

43 C.F.R. Part 16005

43 C.F.R. §§ 3120.....5

43 C.F.R. §§ 3160.....5

43 C.F.R. § 3210.1-25

Other Authorities

Bureau of Land Management,
Statement on Second Quarter Oil and Gas Lease Sales (Apr. 21, 2021)10

Dep’t of the Interior,
 Departmental Manual,
 235 DM 1 (effective Oct. 9, 2009)3

Erickson, Camille,
*Banning oil and gas development on federal lands could “devastate” Wyoming
 economy, industry study shows,*
 Casper Star Tribune (updated Jan. 26, 2021)7

Exec. Order 14008,
 Tackling the Climate Crisis at Home and Abroad,
 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021).....2, 3, 4, 9, 10, 12

“Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore
 Balance on Public Lands and Waters, Invest in Clean Energy Future,”
 Bureau of Land Management (Jan. 27, 2021).....2, 3

Locke, John,
 Second Treatise of Civil Government
 (John W. Gough ed., 1947) (1689).....8

Secretarial Order No. 3395 (Jan. 20, 2021).....

Statement on Second Quarter Oil and Gas Lease Sales,
 Bureau of Land Management (Apr. 21, 2021)3

State of Utah Comprehensive Annual Financial Report
 (June 30, 2020)7

Utah Tax Commission
 FY2020 Annual Report7

Interest of *Amici Curiae*

Amici curiae Daggett County, UT; Rio Blanco County, CO; Uintah County, UT; and Wayne County, UT, are counties in the western United States that have significant federal lands managed by the Bureau of Land Management (“BLM”).¹ Because counties cannot collect property taxes from the federal government on federal lands, they require funds from other sources to provide public services to their inhabitants. Federal minerals leases and the development of oil, gas, and mineral resources on BLM lands fill this role for many western counties, including *amici curiae*. The oil, gas, and mining industries pay hundreds of millions of dollars in direct production taxes, mineral royalties, and property taxes to counties where that development occurs, while also providing critical economic activities, including jobs, to county residents. Energy jobs on BLM land in western counties are typically the highest paying jobs in those counties, with high wages supporting other sectors of the economy such as retail and residential real estate. And because of the comingled nature of federal, private, tribal, and state-owned lands in western states, mineral, oil, and gas development is possible only if the leasing opportunities also include adjoining federal parcels. *Amici* thus have a keen interest in ensuring that the federal government continues to meet its statutory obligation to hold regular, quarterly mineral, oil, and gas lease sales on eligible federal lands located within their boundaries.

¹ *Amici Curiae* affirms that no counsel for a party authored this brief in full or in part, and that no person or entity other than *Amici* or their counsel financially contributed to preparing or submitting this brief.

Introduction

The Mineral Leasing Act of 1920, 30 U.S.C. § 181 (the “MLA”), requires the Bureau of Land Management (“BLM”) to hold quarterly lease sales for each state in which eligible lands are available. 30 U.S.C. § 226(b)(1)(A). The only reason BLM can fail to hold such quarterly lease sales under the statute is a lack of eligible lands. Here, however, there were eligible lands available for lease sales in March and April—because they were already scheduled for auction when BLM canceled them. BLM’s January 27 implementation of President Biden’s January 27 executive order was *ultra vires*, and arbitrary and capricious. The states are entitled to an injunction.

Executive Order 14008, issued by President Biden just a week after he took office, upends the economy in counties with federal lands eligible for oil and gas leases under the MLA. *See* Exec. Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021) (“EO 14008”). EO 14008 directs 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 and reconsideration of Federal oil and gas permitting and leasing practices...” The Secretary did just that.

The same day that President Biden signed EO 14008, BLM—an agency located within the Department of the Interior responsible for managing federal land—issued a “Fact Sheet” discussing the “pause” directive with respect to “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* “Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean

Energy Future,” Bureau of Land Management (Jan. 27, 2021).² A week earlier, the Secretary of the Interior had issued Order No. 3395, which temporarily suspended issuing any fossil fuel-related lease, amendment to a lease, affirmative extension of a lease, contract, or other agreement, or permit to drill. Secretarial Order No. 3395 (Jan. 20, 2021).³ Previously, the Interior Department had delegated authority to BLM to approve permits and administer oil, gas, and mineral leases on federal lands. *See* Dep’t. of the Interior, Departmental Manual, 235 DM 1 at 2-3 (effective Oct. 9, 2009).

The government issued EO 14008, BLM’s “Fact Sheet,” and the Secretary’s Order No. 3395 with no notice or comment period nor even any informal process for affected counties, states, and other entities to provide input. Yet the Secretary and directors of BLM have already acted to implement EO 14008’s directive to “pause” new oil and gas leasing on public lands to the detriment of the *amici* counties and many others. Upon issuing the Fact Sheet in accordance with the directive of EO 14008, BLM’s state offices immediately cancelled or postponed all pending quarterly lease sales scheduled for March and April 2021. BLM subsequently issued a statement confirming that it had decided “not to hold lease sales in the 2nd quarter of Calendar Year 2021.” Statement on Second Quarter Oil and Gas Lease Sales, Bureau of Land Management (Apr. 21, 2021).⁴ The result of EO 14008 and BLM’s cancellation of this quarter’s lease sales will be to deny

² Available at <https://www.blm.gov/press-release/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands>.

³ Available at <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf>.

⁴ Available at <https://www.blm.gov/press-release/statement-second-quarter-oil-and-gas-lease-sales>.

amici counties significant revenue that they rely on to provide public services on a timely and predictable schedule.

The oil and gas leasing moratorium brought about by EO 14008 doesn't just pull the financial rug out from under the *amici* counties. It is also illegal. Under the Administrative Procedure Act of 1946, 5 U.S.C. § 551, *et seq.* (the "APA"), courts exercise judicial review of agency action and may compel agency action unlawfully withheld or unreasonably delayed or hold unlawful agency action it finds to be arbitrary or capricious or not in accordance with law or statutory limitations. *See* 5 U.S.C. § 706. The leasing moratorium is all of these. And the Court has a duty to provide independent review of the agency actions implementing the leasing moratorium because of the agencies' general freedom from democratic accountability and the separation of powers issues raised by actions that conflict with laws properly enacted by Congress. *See* Section II.

BLM cited only EO 14008 as the reason for "pausing" March and April sales, and its state offices that directly cancelled or postponed the quarterly sales provided no other reason for their actions. The oil and gas leasing moratorium is thus contrary to the governing statute, and BLM established it without any reasoned decisionmaking. *See* Section III.

Amici therefore files this brief in support of the Motion for Preliminary Injunction filed by the State of Louisiana and twelve other states also affected by the unlawful executive order and agencies' response with respect to oil and gas leasing sales required by the MLA. *See* Dkt. 3.

Argument

I. The oil and gas moratorium irreparably harms counties that rely on lease sales proceeding according to law.

The MLA requires that the Secretary of the Interior hold lease sales “for each State where eligible lands are available at least quarterly.” 30 U.S.C. § 226(b)(1)(A); *see also* 43 C.F.R. § 3210.1-2 (“Each proper BLM S[t]ate office shall hold sales at least quarterly if lands are available for competitive leasing.”). BLM has the authority to lease public lands with oil and gas reserves to private industry for development under the MLA, as well as the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1787, and regulations issued by BLM. *See* 43 C.F.R. Part 1600; 43 C.F.R. §§ 3120, 3160. For oil and gas leases on federal lands, half of all bonuses, production royalties, and other revenues are granted to the state where the lease is located. Another 40 percent is directed to the Reclamation Fund, which maintains irrigation systems in certain western states. 30 U.S.C. § 191(a).

The lease sale process begins with public nominations of available lands to include in quarterly lease sales. After BLM state offices consider the nominations from their state and conduct an environmental review, the offices then issue a notice of the tracts that will be available for sale. A public comment period then follows, followed by publication of the final list of tracts available for the sale that quarter. *See* 43 C.F.R. § 3120.

Of the around 245 million surface acres managed by BLM, nearly all of this land is in mostly rural counties in the western United States. In many western counties, particularly in Utah and Nevada, and parts of Oregon, California, New Mexico, Wyoming, and Colorado, BLM manages more than half of the counties’ land area. Western counties cannot collect property taxes from the federal government on federal

lands, and thus face difficulties in providing government services when large amounts of land are in federal ownership.

Federal mineral leases and the development of oil, gas, and mineral resources on BLM lands are vital to many western counties. The oil, gas, and mining industries pay hundreds of millions of dollars in direct production taxes, mineral royalties, and property taxes to western counties where that development occurs, while also providing critical economic activities to county residents. Federal leases themselves generate employment opportunities, often in counties facing high unemployment. Energy jobs on BLM land in western counties are typically the highest paying jobs in those counties, with high wages supporting other sectors of the economy such as retail and residential real estate.

BLM lands in western counties are often comingled with private lands, tribal lands, and state-owned lands, particularly state trust land dedicated to generate revenue for public schools and other public institutions. Because of the comingled nature of the lands, mineral leases on private, tribal, and trust parcels are often grouped with federal mineral leases on adjoining federal parcels. Mineral, oil, and gas development on such land is often not feasible without the inclusion adjoining federal parcels.

Mineral, oil, and gas leasing and development on these federal, private, tribal, and trust lands generate significant economic benefits for western counties. In Utah, for example, nearly all MLA revenues realized from development of leasable minerals on federal lands are directed to counties and other subdivisions of the state. In fiscal year 2020, Utah received \$58.6 million in revenues from federal mineral leases, which it

directed by statute to counties and other political subdivisions.⁵ Utah counties also collected \$124.4 million in natural resources property tax assessed by the State.⁶ Similarly, in Wyoming, where almost half of its 60 million acreage is federal land, lease sales delivered about \$117 million, much of which supports public services.⁷ It is not unusual for western states with significant federal lands to direct MLA revenues to counties and other small political subdivisions that provide direct services to their citizens. *See, e.g.*, ORS § 293.565 (apportioning funds collected from MLA to counties); ORS § 294.055 (directing MLA funds distributed to counties to support public schools and public roads); Colo. Rev. Stat. § 34-63-102(5.4) (apportioning funds collected from federal mineral leasing).

Thus, the delay, cancellation, or other impediments to federal leasing affects other leasing opportunities and imposes job losses and other severe economic effects on western counties, including to their education systems, public roads, and other public services and institutions.

⁵ State of Utah Comprehensive Annual Financial Report at 42 (June 30, 2020), <http://apps.finance.utah.gov/nxt/gateway.dll?f=templates&fn=default.htm&vid=nxtpub:cafr>; *see* Utah Code §§ 59-21-1, 35A-8-303, 59-21-2.

⁶ Utah Tax Commission FY2020 Annual Report at 67-68, *available at* <https://tax.utah.gov/commission/reports/fy20report.pdf>.

⁷ *See* Camille Erickson, *Banning oil and gas development on federal lands could "devastate" Wyoming economy, industry study shows*, Casper Star Tribune (updated Jan. 26, 2021), *available at* https://trib.com/news/state-and-regional/banning-oil-and-gas-development-on-federal-land-could-devastate-wyoming-economy-industry-study-shows/article_d8be59b5-a1ab-5fc3-8290-8c4ae257edae.html.

II. The Administrative Procedure Act imposes strict limits on agency action.

Article I of the Constitution empowers only Congress to make laws, and it sets restrictions on how Congress may exercise its legislative powers. Congress cannot transfer the power to make laws to anyone else: “for it being but a delegated power from the people, they who have it [cannot] pass it over to others.” *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1244 (2015) (quoting John Locke, *Second Treatise of Civil Government* at 71 (John W. Gough ed., 1947) (1689)) (Thomas, J., concurring in the judgment). To help prevent unelected officials in the diffuse executive branch from exercising legislative power by making new laws or amending existing laws through agency action, the APA “sets forth procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.” *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

The APA provides that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action.” 5 U.S.C. § 706. Such judicial review of agency action promotes the rule of law and the separation of powers inherent in our constitutional structure by helping to ensure that agencies follow the laws passed by Congress. Indeed, “[t]he [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment). In this context, courts have held fast to the principle that “the President and federal

agencies may not ignore statutory mandates or prohibitions merely because of policy disagreements with Congress.” *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013).

Here, the statutory command could not be clearer. *See* Section III. And this Court has a duty under the APA to “exercise its independent judgment in interpreting and expounding upon the laws” under Article III’s Vesting Clause. *See Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment). As relevant here, the Court must “compel agency action unlawfully withheld or unreasonably delayed”; “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; ... [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706. And while there has been much debate surrounding the degree of judicial deference due to agency interpretations, courts accord any interpretations in opinion letters, policy statements, guidelines, and other informal issuances that “lack the force of law” no deference other than consideration as potentially persuasive. And there is no persuasion to be had when the law is as unambiguous as the one here. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

III. Plaintiff States are likely to succeed on their claims that the oil and gas leasing moratorium following from EO 14008 violates the Administrative Procedure Act.

The MLA requires the Secretary of the Interior to hold lease sales “for each State where eligible lands are available at least quarterly.” 30 U.S.C. § 226(b)(1)(A). This is “a discrete, non-discretionary duty contained in a single statutory provision” subject to challenge under the APA. *See W. Energy Alliance v. Jewell*, No. 1:16-CV-00912, 2017 U.S.

Dist. LEXIS 5574, at *42 (D.N.M. Jan. 13, 2017). The command to the Secretary of the Interior to hold lease sales at least quarterly is not ambiguous. *See, e.g., WildEarth Guardians v. Bernhardt*, Civil Action No. 16-1724, 2020 U.S. Dist. 212928, at *4 (D.D.C. Nov. 13, 2020) (quarterly “oil and gas leasing is mandatory” under § 226(b)(1)(A)); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 54 (D.D.C. 2019) (“BLM must sell leases for those [authorized] parcels on a quarterly basis”).

Here, there were eligible lands for leasing because BLM’s regional offices scheduled quarterly sales of eligible lands for March and April 2021.⁸ The BLM state office websites listed specific parcels eligible for this quarter’s lease sales. BLM provided no reason for cancelling or postponing the sales other than EO 14008 directing it to do so, and the state BLM offices generally provided no reason at all for cancelling and postponing their lease sales.⁹

The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U. S. C. § 704. The actions by BLM and its state

⁸ *See, e.g.,* March 2021 Oil & Gas Lease Sale, Bureau of Land Management National NEPA Register, <https://eplanning.blm.gov/eplanning-ui/project/2002581/510> (lease sale of 83 parcels of more than 111,000 acres on March 25, 2021); Notice of Competitive Oil and Gas Internet Lease Sale, BLM Nevada State Office (Jan. 8, 2021), https://www.blm.gov/sites/blm.gov/files/docs/2021-01/NV_OG_20210109_Sale_Notice_Signed_0.pdf (offering 17 parcels for oil and gas leasing on sale date of March 9, 2021); 2021 March Oil and Gas Lease Sale, BLM National NEPA Register, <https://eplanning.blm.gov/eplanning-ui/project/2002224/510> (sale of available parcels in Montana and the Dakotas scheduled for March 23, 2021).

⁹ *See* Bureau of Land Management, Statement on Second Quarter Oil and Gas Lease Sales (Apr. 21, 2021), <https://www.blm.gov/press-release/statement-second-quarter-oil-and-gas-lease-sales>.

offices are final: they failed to hold the lease sales scheduled for March and April; the sales definitively were cancelled or postponed as publicly announced by BLM. The action had a “direct and immediate” impact and directly altered the “day-to-day business” of BLM’s lease sales to the detriment of *amici* counties. *See Franklin*, 505 U.S. at 796-97 (1992) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)).

Under the APA, an agency action must be vacated if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or in excess of statutory authority. 5 U.S.C. § 706(2)(A) & (C). The cancellation and postponement of the oil and gas lease sales were not in accordance with the MLA. The MLA does not allow BLM—or any agency or official in the executive branch or even the President himself—to decide not to hold lease sales quarterly if there are lands eligible for lease. Nor does it allow the President to issue executive orders cancelling statutorily mandated lease sales based on campaign promises or policy preferences. *See California v. Bernhardt*, 472 F. Supp. 3d 573, 605 (N.D. Cal. July 15, 2020) (“BLM’s [statutory] duty could not be eliminated by [the] Executive Order.”). The *only* reason BLM can decline to hold quarterly lease sales is a lack of eligible leases for sale. And because there were leases eligible for sale as evidenced by the notices of lease sales posted by BLM state offices, the law requires BLM to permit those quarterly lease sales to go forward.

The leasing moratorium flouts statutory authority and unreasonably withholds agency action, which independently are grounds for this Court to enter the preliminary injunction. *See* 5 U.S.C. § 706. Yet the moratorium also fails as arbitrary and capricious because of the lack of any explanation for BLM’s cancellation of the quarterly sales. “The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and

reasonably explained.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1933 (2020). The action here is neither. Instead, BLM and its state offices departed from the law “*sub silentio*” and “disregard[ed] [laws] that are still on the books.” See *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009). They offered no reason other than EO 14008 for changing course on the quarterly lease sales that they had planned under the MLA; they failed to consider the detrimental economic impact to western counties and their citizens from the loss of revenues and jobs attributable to the predictable and timely lease sales on eligible lands in their territories.

Conclusion

For all these reasons, the *amici* counties respectfully ask this Court to grant the Motion for Preliminary Injunction filed by the States and thereby protect them from the irreparable harm that the oil and gas leasing moratorium imposes.

Date: May 12, 2021

Respectfully submitted,

/s/ Anna St. John

Anna St. John (LBN 36034)
Hamilton Lincoln Law Institute
1629 K St. NW, Suite 300
Washington, DC 20006
(917) 327-2392
anna.stjohn@hlli.org

*Counsel for Amici Curiae
Daggett County, UT; Rio Blanco County,
CO; Uintah County, UT; and Wayne
County, UT*

Certificate of Service

I hereby certify that on this day I filed the foregoing with the Clerk of the Court by ECF, thus effectuating service on all counsel who are registered as electronic filers in this case.

Date: May 12, 2021

/s/ Anna St. John
Anna St. John