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

NATIONAL AUDUBON SOCIETY
et al.,

Plaintiffs,

v.

DAVID BERNHARDT, in his official
capacity as Secretary of the Interior, et
al.,

Defendants.

No. 3:20-cv-00205-SLG

**STATES' AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

The undersigned states ("State Amici") file this brief in support of Plaintiffs' Motion for Preliminary Injunction to halt implementation of an oil and gas leasing program on the Coastal Plain of the Arctic National Wildlife Refuge ("Arctic Refuge"), including issuance of oil and gas leases and authorization of seismic activities. Defendant

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Bureau of Land Management’s (“BLM”) sudden rush to lease unlawfully more than one million acres of the Coastal Plain to oil and gas development and authorize seismic activity would cause irreparable harm to this fragile and wild landscape that sustains unparalleled biological diversity and is sacred to Gwich’in people. Allowing this damaging and unlawful conduct to proceed without full adjudication of the underlying claims would unnecessarily undermine the conservation of a national treasure and be contrary to the public interest. Conversely, preliminarily enjoining the unlawful Leasing Program will not harm Defendants, who engaged in a stalled process before rushing to announce a lease sale more than a year before the statutory deadline to do so. For the reasons discussed herein and in Plaintiffs’ motion, the Court should grant the Motion for Preliminary Injunction.

I. ARGUMENT

A. Defendants’ Unlawful Conduct Undermines National Interests in Conserving the Arctic Refuge.

The Arctic Refuge is our nation’s largest and wildest refuge, and the Coastal Plain serves as the Refuge’s hub of vital wildlife activity. The Coastal Plain is a national treasure, unmatched in its biological significance for hundreds of species, including caribou, threatened polar bears, and millions of migratory birds, many thousands of which migrate to all 48 lower states. With the Arctic Ocean’s Beaufort Sea to the north and the Mollie Beattie Wilderness to the south, the Coastal Plain’s fragile ecosystem on the northeastern edge of the 19 million-acre Arctic Refuge is particularly vulnerable to environmental stressors, including climate change. The area is also essential for

subsistence and the cultural identity of Gwich'in people. It is no wonder that for nearly 40 years, Congress prohibited oil and gas development on the Arctic Refuge.

Although Congress opened the Coastal Plain to the possibility of development through a provision in the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 (“Tax Act”), it did not discharge Defendants from their obligations to comply with governing environmental laws, including the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”); the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487 (“ANILCA”); the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd-668ee (“Refuge Act”); and the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* As alleged in the complaints filed in this case and related cases, Defendants failed to satisfy the requirements of these bedrock environmental laws in their development of the Final Environmental Impact Statement (“FEIS”) and Record of Decision authorizing the Coastal Plain Oil and Gas Leasing Program (“Leasing Program”). And now, before this Court can fully adjudicate those claims, Defendants are rushing with unprecedented haste to implement the program by issuing leases and authorizing seismic activity that will exact irreparable harm and violate our nation’s conservation values and interests in the Arctic Refuge.

The Refuge Act upholds those national interests by dictating the management of the Arctic Refuge to fulfill the mission of the National Wildlife Refuge System and the specific purposes for which the refuge was established under ANILCA and the public land order establishing the Arctic Refuge. *See* 16 U.S.C. §§ 668dd(a)(3)(A), 668ee(10).

Accordingly, the Interior Department must manage the Arctic Refuge “for the conservation, management, and where appropriate, restoration of fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations.” *Id.* § 668dd(a)(2). The Arctic Refuge’s purposes are to preserve wildlife, wilderness, and recreational values; to conserve fish and wildlife populations and habitats in their natural diversity, including migratory birds; to fulfill international treaty obligations with respect to fish and wildlife and their habitats; to provide subsistence use by local residents; and to ensure water quality and quantity within the Refuge. ANILCA § 303(2)(B); Public Land Order 2214, at 1 (Dec. 6, 1960). Without altering these conservation purposes, the Tax Act added “to provide for an oil and gas program on the Coastal Plain” as a purpose of the Arctic Refuge. Tax Act § 20001(b)(2)(B).

These national conservation values reflected in the Arctic Refuge’s purposes are particularly important to State Amici, which will share in shouldering the adverse environmental impacts of the Leasing Program. As pled in their related case, State Amici have a particular and specified interest in the many thousands of migratory birds that breed, molt, and rest in the Coastal Plain and annually fly to amici states. State Amici participate in intergovernmental Flyway Councils that recognize the reality of cross-border impacts in their efforts to coordinate migratory bird conservation and population

management. Moreover, migratory birds have a measurable economic impact in amici states where bird and wildlife watchers collectively spent over \$20 billion in 2011.¹

The rushed and reckless Leasing Program, through its greenhouse gas emissions, will disrupt ecosystems on state sovereign lands; threaten human health, safety, and quality of life of state residents; damage state infrastructure; and hinder economic growth throughout the United States, including in Amici states. For example, coastal State Amici share over 15,000 shoreline miles impacted by the rise of sea levels from melting ice sheets and glaciers and thermal expansion. Sea level rise has led to more frequent storm surges and frequent flooding that cause billions of dollars in damage to public infrastructure, homes, businesses, wildlife habitat, and tourism in Amici states.

BLM's race to issue leases and authorize seismic activities without compliance with fundamental environmental statutes will permanently scar one of our nation's most treasured places and trample core conservation values. State Amici respectfully urge this Court to uphold these laws and principles for the benefit of present and future generations by granting a temporary stay while Plaintiffs' claims are adjudicated.

¹ James Caudill, U.S. Fish and Wildlife Service, *Wildlife Watching in the U.S.: The Economic Impacts on National and State Economies in 2011*, Report 2011-2, 9 (Feb. 2014), <https://www.fws.gov/economics/divisionpublications/Wildlife%20Watching%202011.pdf>.

B. Halting Implementation of the Leasing Program Will Serve the Public Interest and the Balance of Hardships Tip Strongly in Favor of a Preliminary Injunction.

Given the environmental significance of the Coastal Plain and the harms that will flow from implementing the Leasing Program as authorized, maintaining the status quo until this Court reviews the full merits of the legal challenges to the FEIS and Record of Decision will serve the public interest and properly balance the harms.

1. An Injunction Will Serve the Public Interest.

Granting Plaintiffs' motion for an injunction will serve the public interest. The public interest prong of the preliminary injunction analysis "primarily addresses" impact on non-parties to the preliminary injunction motion. *W. Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1026 (D. Or. 2019) (quotation omitted). Here, granting the injunction will serve the public interest by halting unlawful agency action and preserving the environmental status quo in the crown jewel of our National Wildlife Refuge System.

First, the public interest is served by halting BLM's unlawful program, including lease issuance and seismic activity. "When the alleged action by the government violates federal law, the public interest factor weighs in favor of the plaintiff." *W. Watersheds Project*, 391 F. Supp. 3d at 1026 (granting injunction to halt grazing where Interior violated NEPA). Here, Plaintiffs have raised claims with a high likelihood of success about Defendants' compliance with NEPA, ANILCA, and the Refuge Act in authorizing the Leasing Program. The leases that BLM seeks to issue and the seismic activity that BLM seeks to authorize depend on the FEIS and Record of Decision challenged as unlawful by four related lawsuits pending before this Court. Halting lease issuance until

BLM complies with federal law “comports with the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (citation omitted).

Second, as reflected in the federal environmental laws discussed above, preserving the environmental status quo and avoiding irreparable environmental harm serves the public interest. *Id.* (recognizing “the well-established public interest in preserving nature and avoiding irreparable environmental injury.”) (internal quotations omitted). The public interest is further served by ensuring “careful consideration of environmental impacts before major federal projects go forward.” *Id.* Halting lease issuance and seismic activity until a full review on the merits will serve these twin aims.

Allowing the Leasing Program to move forward without adequate environmental review under NEPA and compliance with other federal laws, including ANILCA and the Refuge Act, will forever alter the Coastal Plain, industrializing and polluting the delicate tundra ecosystem, altering water systems, and harming migratory birds and other wildlife, among other things. Seismic activity on the Coastal Plain will impair the delicate tundra ecosystem and leave long-lasting scars. AR90358–59, AR90384. In addition, the lease sale scheduled for January 6, 2021, will offer tracts across most of the Coastal Plain for leasing, including in areas significant for migratory bird, polar bear, and caribou habitat. *See* BLM, Coastal Plain Leasing Program, Available Lease Tracts for 2021 Lease Sale (amended Dec. 18, 2020).²

² https://www.blm.gov/sites/blm.gov/files/docs/2020-12/2021_BLM-AK-Coastal-Plain_Tracts-Offered-Map-12-18-2020.pdf.

As the Ninth Circuit has explained, BLM’s issuance of these leases “constitutes an irreversible and irretrievable commitment of resources” because surface occupancy leases do “not retain an absolute right to prohibit surface-disturbing activities” while the leases remain in effect. *See N. Alaska Env’tl. Ctr. v. U.S. Dep’t of the Interior*, 965 F.3d 705, 714 (9th Cir. 2020). Here, BLM will retain even fewer rights to prohibit surface-disturbing activities than under a typical surface occupancy lease. *See Amended Detailed Statement of Sale 5–6* (Dec. 18, 2020) (BLM cannot deny any right of way or development of production and support facilities up to 2,000 acres).³ Given this irreversible commitment of resources, the proper time to stop the harms that will flow from the leases is before leases issue. *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1239–41 (D. Idaho 2018) (granting injunction to halt lease sales because activities associated with leases and rights granted to lease holders “can unquestionably significantly affect the quality of the human/natural environment”); *see also W. Watersheds Project*, 391 F. Supp. 3d at 1022, 1026 (finding environmental harms from inadequate environmental review under NEPA and granting TRO).

Although the FEIS for the Leasing Program lacks essential analysis and is otherwise legally deficient under NEPA, the FEIS nevertheless acknowledges that the authorized Leasing Program will result in extensive harms to the environment and subsistence resources on the Coastal Plain. The FEIS notes that winter activities

³ https://www.blm.gov/sites/blm.gov/files/docs/2020-12/2021_BLM-AK-Coastal-Plain-Detailed-Statement-of-Sale-AMENDMENT-12-18-2020.pdf.

(including seismic exploration that is currently set to begin in late January), water drawdowns, gravel removal, and other activities will alter migratory bird habitat and nesting sites, water levels, and vegetation. AR90358–62. With respect to the delicate tundra habitat and migratory birds, the FEIS acknowledges that the selected alternative, Alternative B, would have the “most pronounced” impacts on unprotected streams and coastal areas and the species that use them. AR90342. In addition, the FEIS acknowledges that the Leasing Program will increase greenhouse gas emissions, AR90245–46, although it underestimates the amount and climate impacts of those emissions, AR60996–61006 (State Amici Draft EIS comments).

Compounding these acknowledged impacts are lease terms and required operating procedures that do not properly mitigate these harms. The required operating procedures and stipulations that purport to limit leaseholders and govern seismic activities are inadequate to protect wildlife habitat and, in any event, are subject to waiver, modifications, or exceptions by BLM officials. *See* AR206002, AR206013. Moreover, BLM incorrectly interprets the Tax Act to assert that it lacks authority to deny rights-of-way necessary for operation of the Leasing Program—even in areas closed to leasing or with a non-surface occupancy stipulation—and it must grant such access regardless of location or impact. AR206003. Given the weakness of the purported mitigation measures and BLM’s erroneous interpretation of its authority, issuance of the leases will likely result in irreparable environmental harms.

The environmental harms caused by the Leasing Program are precisely the type of harms a preliminary injunction should stop until a court can fully review the merits of a case. As the Ninth Circuit has explained, “The Supreme Court has instructed us that environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (quotations and alterations omitted).

Injunctive relief will not preclude BLM from holding a lease sale by December 22, 2021, as required by the Tax Act. Tax Act § 20001(c)(1). That timeline gives BLM a year from the date of this filing to cure legal deficiencies and comply with the Tax Act. BLM’s own actions indicate that a lease sale may occur after January 6, 2021. Despite public representations that it would hold a lease sale by the end of 2019,⁴ BLM did not issue its Record of Decision until August 2020, waiting nearly a year after issuance of its FEIS. And even after issuing the Record of Decision, BLM took no steps to hold a lease sale until issuing its Call for Nominations three months later. Call for Nominations and Comments for the Coastal Plain Alaska Oil and Gas Lease Sale, 85 Fed. Reg. 73292 (Nov. 17, 2020). Now, despite its haphazard approach, BLM is rushing to hold a lease sale on January 6, issuing a notice of lease sale ten days before the close of its Call for

⁴ See Yereth Rosen, *Trump administration will hold Arctic refuge oil lease sales this year, official says*, Arctic Today (May 31, 2019), <https://www.arctictoday.com/trump-administration-will-hold-arctic-refuge-oil-lease-sales-this-year-official-says/>.

Nominations. Notice of 2021 Coastal Plain Alaska Oil and Gas Lease Sale and Notice of Availability of the Detailed Statement of Sale, 85 Fed. Reg. 78865 (published Dec. 7, 2020). BLM’s rushed lease sale contradicts the regulatory process BLM purports to follow, 43 C.F.R. §§ 3131.1–31.4, and BLM’s own representations to this court, *see* ECF No. 20 (indicating that the notice of lease sale would be “[s]ubsequent” to the 30-day nominations and comment period). Halting BLM’s rushed process will allow this Court to review the full merits of the cases pending before it and still provide BLM time to comply with the Tax Act.

BLM’s hurried process also violates the public interest in transparency and public participation. Despite BLM’s pronouncements to the contrary, BLM’s rushed timeline makes it nearly impossible for BLM to meaningfully consider the nominations and comments it solicited on November 17, including those submitted by Amici States and others urging BLM to withdraw notice of the lease sale until it complies with applicable laws to better protect the Arctic Refuge.⁵ Injunctive relief will force BLM to proceed at a pace that fully allows for public participation and careful agency deliberation consistent with the public interest.

2. The Balance of Hardships Also Tips Sharply in Favor of an Injunction.

For many of the same reasons, the balance of hardships tips strongly in favor of an injunction. *See Se. Alaska Conservation Council v. U.S. Forest Serv.*, 413 F. Supp.3d

⁵ One day after the comment period closed, BLM issued an amendment to its Detailed Statement of Sale withdrawing ten tracts from the lease sale but not addressing Amici States’ comments regarding the unlawfulness of the Leasing Program. *See supra* n.3.

973, 984 (D. Alaska 2019) (“If environmental injury is sufficiently likely ... the balance of harms will usually favor the issuance of an injunction to protect the environment.”) (citations and alterations omitted); *W. Watersheds Project*, 391 F. Supp. 3d at 1025 (“Courts also have repeatedly held that when the government does not properly follow the law or regulations, balancing the equities favors the plaintiff.”).

Maintaining the status quo until this Court conducts a full review on the merits will not cause significant harm to Defendants or Defendant-Intervenors. As discussed above, injunctive relief will not preclude Defendants from complying with the Tax Act mandate to hold a lease sale before December 22, 2021. Notably, as discussed above, Defendants’ rush to hold a sale and issue leases comes after waiting nearly a year to finalize the EIS without making any meaningful changes to the draft and then an additional three months after issuing the Record of Decision to issue a Call for Nominations. Halting BLM’s attempt to move quickly after its own delays does not rise to a level of hardship that outweighs the hardship identified by Plaintiffs. *See Se. Alaska Conservation Council*, 413 F. Supp.3d at 985 (delay in timber sale while preliminary injunction in place did not outweigh irreparable environmental harm to plaintiffs).

II. CONCLUSION

For the reasons stated, the Court should grant Plaintiffs’ Motion for Preliminary Injunction.

DATED this 21st day of December, 2020.

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CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.4

I certify that this motion contains 2,802 words, excluding items exempted by
Local Civil Rule 7.4(a)(4).

Respectfully submitted this 21st day of December, 2020.

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