Kyle Tisdel, NM Bar No. 152173
(*admitted pro hac vice*)
Western Environmental Law Center
208 Paseo del Pueblo Sur, Unit 602
Taos, NM 87571
(575) 613-8050
tisdel@westernlaw.org

Melissa Hornbein, MT Bar No. 9694
(*admitted pro hac vice*)
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org

Counsel for Center for Biological Diversity, Dakota Resource Council, and Western Organization of Resource Councils

Michael Freeman, CO Bar No. 30007
(*admitted pro hac vice*)
Thomas Delehanty, CO Bar No. 51887
(*admitted pro hac vice*)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 996-9615
mfreeman@earthjustice.org
tdelehanty@earthjustice.org

Counsel for Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of North Dakota, Plaintiff, vs. United States Department of Interior, *et. al*, Defendants. _____ Center for Biological Diversity, Dakota Resource Council, Sierra Club, and Western Organization of Resource Councils, Defendant-Intervenors.	Case No. 1:21-cv-00148-DMT-CRH (Lead Case) Case No. 1:23-cv-0004-DMT-CRH (Consolidated Case)

DEFENDANT-INTERVENORS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Louisiana v. Biden,
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Marathon Oil Co. v. Lujan,
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St. Louis Effort for AIDS v. Huff,
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Whitman v. Am. Trucking Ass'ns,
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Winter v. Nat. Res. Def. Council,
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30 U.S.C. § 226.....2, 12, 17, 18

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43 U.S.C. § 1714.....27, 28

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43 C.F.R. § 3120.1-1.....23, 24

43 C.F.R. § 3162.3–1 15

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H.R. Rep. 100-378, 100th Cong., 1st Sess. (Oct. 15, 1987) 19

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Thomas Sansonetti & William Murray, A Primer on the Federal Oil and Gas Leasing Reform Act of 1987 and Its Regulations, 25 Land & Water L. Rev. 375 n.112 (1990) 19

INTRODUCTION

Plaintiff North Dakota's motion for preliminary injunction should be denied because it asks this Court to enter an unprecedented and improper order requiring the Federal Defendants (collectively, BLM) to encumber public lands with new oil and gas leases. The purpose of a preliminary injunction is to maintain the status quo and prevent irreparable harm before the case can be decided on the merits. North Dakota, however, seeks to compel BLM to hold oil and gas lease sales, and apparently to issue new leases, every three months while this litigation is ongoing. Courts have repeatedly ruled that they cannot order BLM to do so.

North Dakota also has not made the showing required for a preliminary injunction. The State claims it faces irreparable harm because—while BLM held a June 2022 lease sale in North Dakota and has another planned for June 2023—the agency is not scheduling those sales every three months. But there is no need for preliminary injunctive relief: with a sale already scheduled for June of this year, any court-ordered leasing would have no impact until at least Autumn 2023. This Court can decide the merits on summary judgment before that time. Indeed, the central merits issues in this case might already have been resolved had North Dakota not delayed summary judgment briefing on its 2021 Complaint for most of last year.

In addition, North Dakota's underlying irreparable harm theories are meritless. BLM's leasing decisions do not infringe on North Dakota's "sovereign[ty]." ECF No. 69, Mem. Supp. Mot. Prelim. Inj. (ND Mem.), at 8. The federal minerals at issue belong to the United States—not North Dakota—and the U.S. Constitution empowers the federal government to decide how that property will be managed. North Dakota's claim that BLM is "blocking" development of private and state minerals, id., is factually and legally meritless. As for the State's claim of irreparable economic harm, North Dakota has offered no admissible evidence to support its claim that BLM's actions are costing it millions of dollars per month. Federal and state mineral

revenues paid to North Dakota actually have increased substantially over the past two years, undercutting the State's claim that it is suffering significant economic losses. Because leasing and drilling are ongoing, North Dakota cannot claim irreparable harm.

North Dakota also cannot show a likelihood of success on the merits. BLM has broad, well-established authority to determine when and where to lease public lands for oil and gas development based on the public interest—discretion it exercised here. The State's contrary arguments misread the plain language and legislative history of the Mineral Leasing Act (MLA), as well as Supreme Court precedent. North Dakota's MLA interpretation, in fact, would radically transform the federal oil and gas program, shifting control to oil and gas companies by forcing BLM to offer leases every three months whenever companies propose lands for leasing. Such a sea change would disregard the law, and North Dakota's motion for preliminary injunction should be denied.

BACKGROUND

BLM stewards public lands under the principle of "multiple use management." Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004). This mission requires balancing "the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" Id. (alteration in original) (quoting 43 U.S.C. § 1702(c)). As part of that balancing, oil and gas development is authorized under the Mineral Leasing Act, which provides that federal minerals "may be leased" by the Interior Department. 30 U.S.C. § 226(a). The MLA charges the Interior Department with managing the leasing and development of federally owned minerals in a manner that serves the public interest. See e.g., 30 U.S.C. § 187 (directing Department to adopt leasing requirements "necessary . . . for the protection of the interests of the United States . . . and for the safeguarding of the public welfare").

In January 2021, President Biden ordered a "comprehensive review" of federal leasing and permitting practices. Exec. Order No. 14008 § 208, 86 Fed. Reg. 7,619, 7,624–25 (Jan. 27, 2021). The President issued this directive "in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands," and ordered that new leasing be paused during the review "[t]o the extent consistent with applicable law." Id.

The direction to pause new leasing prompted several lawsuits, including North Dakota's initial complaint in this Court. See ECF No. 1 (2021 Complaint). Following entry of a preliminary injunction by the Western District of Louisiana in June 2021, Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. 2021), vacated and remanded sub nom., 45 F.4th 841 (5th Cir. 2022), BLM announced that it would hold new lease sales. BLM held a series of lease sales in June 2022. In North Dakota, BLM sold 15 leases at that sale.[1] BLM also has announced plans for additional sales in 2023, including a North Dakota sale scheduled for June 27, 2023, where it may offer 51 leases.[2] The agency is expected to release a draft NEPA analysis for that sale on March 7, 2023.[3]

This pace of leasing is comparable to sales the agency has held in the past. For example, in North Dakota, BLM offered leases in only five of the 16 calendar quarters from 2017 to 2020—an average of just over one sale per year. ECF No. 22-1 ¶ 11.

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[1] See BLM, Montana/Dakotas State Office Competitive Oil & Gas Lease Sale Results (June 30, 2022), https://eplanning.blm.gov/public_projects/2015346/200495288/20063438/250069620/MT%202022%2006%20Sale%20Results%20Detail.pdf.

[2] BLM, BLM Montana-Dakotas June 2023 Oil and Gas Lease Parcel Sale, BLM National NEPA Register (accessed Feb. 6, 2023), https://eplanning.blm.gov/eplanning-ui/project/2022645/510; BLM, June 27, 2023 Montana/Dakotas Oil and Gas Lease Sale Preliminary Parcel List (accessed Feb. 6, 2023), https://eplanning.blm.gov/public_projects/2022645/200541472/20072000/250078182/Appendix%20A%20MT%2006-27-2023%20Preliminary%20Parcel%20List.pdf.

[3] See BLM Montana-Dakotas June 2023 Oil and Gas Lease Parcel Sale, BLM National NEPA Register, n.2, supra.

After BLM announced that it would hold new lease sales, this Court in January 2022 denied a motion by North Dakota seeking mandamus relief that would order BLM to hold such sales. ECF No. 38. The Court held that "consideration of [North Dakota's] arguments should occur only after full briefing on the merits with the full administrative record." Id. at 5–6. The Court added that "[i]mmediate mandamus relief without a complete record is, to the Court's knowledge, unprecedented," id. at 9, and should be "dealt with in due course on proper summary judgment motions," id. at 6–7.

Despite this Court's admonition, North Dakota has not proceeded to summary judgment on its 2021 Complaint. BLM lodged the full administrative record, and the Court in April 2022 set a summary judgment briefing schedule that would have concluded more than six months ago had North Dakota followed it. See ECF No. 46 at 4–5 (scheduling summary judgment briefing to conclude on July 25, 2022). Instead, North Dakota brought the case to a halt for nearly seven months by seeking an extension of its summary judgment deadline, and then obtaining a stay of the case while it considered how to proceed. ECF Nos. 49, 50, 57. It has now been more than a year since this Court's January 2022 denial of North Dakota's mandamus petition, and the State has not yet moved for summary judgment.

Instead, North Dakota filed this new lawsuit in January 2023 bringing claims "virtually identical to the claims in [the 2021 Complaint] except for happening at different times in 2022," ECF No. 62 at 2, and now asks for immediate equitable relief similar to what the Court denied a year ago. On January 30, 2023, the Court consolidated the two cases and designated the 2021 Complaint as the lead case. ECF No. 67.

ARGUMENT

I. STANDARD FOR PRELIMINARY INJUNCTION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A Charles Alan Wright, et al., Federal Practice and Procedure § 2948 (2d ed. 1995)). A plaintiff seeking a preliminary injunction must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008); see also Dataphase Sys., Inc. v. C. L. Sys., Inc. , 640 F.2d 109, 113 (8th Cir. 1981). North Dakota bears the burden of establishing all four factors, and a failure to establish any one of them requires that its injunction request be denied. See Winter, 555 U.S. at 20; Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003).

II. NORTH DAKOTA'S PRELIMINARY INJUNCTION MOTION SHOULD BE DENIED BECAUSE IT SEEKS MORE RELIEF THAN THE STATE WOULD BE ENTITLED FOLLOWING A DECISION IN ITS FAVOR ON THE MERITS.

North Dakota's motion should be denied because it asks this Court to drastically alter the status quo and order BLM to encumber public lands with new leases while this litigation is ongoing. Such a preliminary injunction is improper because it would grant Petitioners relief beyond what they would be entitled from a victory on the merits.

The purpose of a preliminary injunction is "to preserve the relative positions of the parties until" a decision on the merits. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). For that reason, "mandatory preliminary injunctions" that compel agency action—which "will give the movant substantially the relief it would obtain after a trial on the merits"—are disfavored and must be "granted sparingly." Noem v. Haaland, 542 F. Supp. 3d 898, 911 (D.S.D.

2021); see also Rathmann Group v. Tanenbaum, 889 F.2d 787, 790 (8th Cir. 1989). And a preliminary injunction is not only disfavored, but wholly improper, where it seeks relief beyond what could be awarded in a final judgment. See DeBeers Consol. Mines v. United States, 325 U.S. 212, 220 (1945) (observing that courts may not grant a preliminary injunction that exceeds what "can be dealt with in [a] final injunction")) (emphasis added); Corman v. Schweitzer, No. 3:14-cv-00033, 2016 WL 8458371, *2 (D.N.D. Nov. 29, 2016) (similar).

Here, North Dakota seeks to compel BLM to hold lease sales and issue new leases. ND Mem. at 16 (arguing that MLA requires BLM "to lease at least some portion of available lands on a quarterly basis"); id at 27 (requesting an order compelling BLM "to hold the previously cancelled quarterly lease sales"). But North Dakota fails to offer any precedent where a court has ordered BLM to hold a lease sale or issue oil and gas leases, let alone as preliminary injunctive relief.[4] To the contrary, courts have held that, in light of BLM's broad discretion over mineral leasing, "federal courts do not have the power to order competitive leasing. By law, that discretion is vested absolutely in the federal government's executive branch and not in its judiciary." Wyoming ex rel. Sullivan v. Lujan, 969 F.2d 877, 882 (10th Cir. 1992); Marathon Oil Co. v. Babbitt, 966 F. Supp. 1024, 1026 (D. Colo. 1997) (finding courts "do not have the power" to order competitive leasing), aff'd, 166 F.3d 1221 (10th Cir. 1999); see also United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419–20 (1931) (declining to issue mandamus relief against

[4] In Louisiana v. Biden (cited by North Dakota), the court enjoined BLM from implementing a nationwide "pause" or "stop" of new leasing pursuant to President Biden's executive order, but did not affirmatively require holding any lease sales or issuing leases. Louisiana, 543 F. Supp. 3d at 419 (preliminary injunction); Louisiana v. Biden, --- F. Supp. 3d ----, No. 2:21-cv-00778, 2022 WL 3570933, at *20 (W.D. La. Aug. 18, 2022) (final injunction). To the contrary, the Court expressly noted that BLM "could cancel or suspend a lease sale due to problems with that specific lease [sale]," Louisiana, 2022 WL 3570933, at *16, or "because the land has become ineligible for a reason such as an environmental issue," Louisiana, 543 F. Supp. 3d at 409.

nationwide oil and gas moratorium in light of Department's discretion over whether to issue leases); see pp. 17–26, infra (describing BLM's discretion under the MLA). Ordering BLM to auction and issue new leases would be unprecedented and contrary to decades of caselaw.

The Administrative Procedure Act (APA) further demonstrates why North Dakota cannot obtain such relief. North Dakota seeks relief under APA Section 706(1), ND Mem. at 6, which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), but "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton, 542 U.S. at 64. As the Supreme Court explained, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." Id. at 65.[5]

North Dakota's theory that BLM violated a Section 706(1) nondiscretionary duty under the MLA to hold lease sales every three months does not support its requested relief. Even if this claim were successful, the relief would be to direct that BLM proceed with the lease sale decision-making process, including environmental analysis and administrative appeals—not to require BLM to offer leases for sale. See Marathon Oil Co. v. Lujan, 937 F.2d 498, 501 (10th Cir. 1991) (affirming district court order to extent it required agency to act on application for oil

[5] To the extent North Dakota frames its case as challenging affirmative BLM decisions to cancel previously scheduled lease sales, see ND Mem. at 1, 11 (alleging that BLM "unlawfully cancelled" lease sales), its requested relief is also foreclosed under the APA. APA Section 706(2) authorizes a court to "hold unlawful and set aside" final agency actions found to be invalid. 5 U.S.C. § 706(2). The remedy under Section 706(2), however, is to "set aside" the action, id., and "remand to [the agency] for further consideration," Iowa League of Cities v. EPA, 711 F.3d 844, 855, 878 (8th Cir. 2013)—not for the court to order the agency to take a different action. Thus, even if North Dakota ultimately prevailed on the merits, the appropriate relief would be to set aside any decisions postponing the proposed sales and remand to BLM—to conduct NEPA analysis, for example—rather than an order directing that lease sales must take place.

shale mining patents within 30 days, but finding that the district court "exceeded its authority when it ordered the defendants to approve the application and to issue the patents"); W. Energy All. v. Salazar, No. 10-cv-0226, 2011 WL 3737520, at *6 (D. Wyo. June 29, 2011) (holding similar MLA provision required BLM only to decide whether to issue leases within a specified timeframe, not to issue them). Because an order requiring BLM to offer and issue leases would be improper at any stage of the case, North Dakota's motion for preliminary relief should be denied.

III. NORTH DAKOTA HAS NOT SHOWN IT WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION.

While BLM already is scheduling and holding oil and gas lease sales, North Dakota claims to be suffering irreparable harm because those sales are not occurring every three months. The State, however, fails to demonstrate any such harm.

A. North Dakota's Claim of Irreparable Harm Is Untimely and Speculative.

North Dakota's irreparable harm theory is both untimely and speculative. To obtain a preliminary injunction, North Dakota must demonstrate that the harm it faces "is certain and great and of such imminence that there is a clear and present need for equitable relief." Novus Franchising, Inc. v. Dawson, 725 F.3d 885, 895 (8th Cir. 2013) (internal quotation omitted). Speculation about the "possibility" of irreparable harm is insufficient. Padda v. Becerra, 37 F.4th 1376, 1384 (8th Cir. 2022) (internal quotation omitted). Moreover, a movant must demonstrate that it is "likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. updated 2022) (emphasis added). "If a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief." Id.

North Dakota has not shown that it faces imminent irreparable harm likely to occur

before this Court can rule on the merits of the case. First, BLM is already preparing to hold a lease sale in June of this year (i.e., during the second quarter of 2023). P. 3, supra. Thus, an injunction requiring new lease sales would have little or no impact until at least autumn of this year (the third quarter of 2023). That provides ample time for this Court to address the merits of the case on summary judgment.

Second, North Dakota's failure to prosecute its 2021 case undercuts any claim that it faces irreparable harm here. "A long delay by plaintiff after learning of the threatened harm . . . may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction." Adventist Health SystemSunBelt v. U.S. Dep't of Health and Human Servs., 17 F.4th 793, 805 (8th Cir. 2021) (quoting 11A Wright & Miller, Federal Practice and Procedure § 2948.1 & n.13 (3d ed. 2013)) (alteration omitted). North Dakota has known for nearly a year that BLM would not hold four lease sales in 2022. See ECF No. 40.1 at 3 (North Dakota stating on March 1, 2022, that BLM "cancelled the Q1 2022 lease sale, and it appears that they will continue to cancel quarterly lease sales in North Dakota for some undetermined time into the future"). And before that, BLM had not held quarterly sales for years, without any challenge from North Dakota. P. 3, supra.

Had North Dakota moved for summary judgment as called for in the briefing schedule set last spring, the central merits issues in this case could already have been resolved. Instead, North Dakota delayed for most of a year while it sought unsuccessfully to expand the administrative record to include additional lease sale dates, and then considered how it wanted to proceed. ECF Nos. 49, 50, 57. Even now, the State still has not moved for summary judgment on its 2021 complaint. See p. 4, supra. Having waited so long, the State cannot now claim that holding fewer than four lease sales each year creates an imminent threat of irreparable harm warranting

injunctive relief. See Adventist, 17 F.4th at 806 (one-year delay by plaintiffs "refuted their allegations of irreparable harm"); Wildhawk Investments, LLC v. Brava I.P., LLC, 27 F.4th 587, 597–98 (similar).

Third, North Dakota's irreparable harm claim amounts to pure speculation. Its argument rests on the assumption that, if the Court orders BLM to hold four lease sales per year, BLM will immediately offer far more acreage for lease. But the State acknowledges that nothing in the MLA dictates the size of any lease sale or requires BLM to offer the parcels sought by North Dakota. See ND Mem. at 16 (conceding that BLM has "discretion as to which parcels . . . [it] may lease").

There is no reason to assume BLM would immediately offer more acreage if the Court ordered it to start holding sales every three months. For example, BLM could simply choose to split its currently planned June 2023 sale into four smaller sales. Holding four smaller sales over the next year would be fully consistent with even North Dakota's interpretation of the MLA, but it would not result in issuance of additional leases. The State's unfounded speculation does not demonstrate that injunctive relief would remedy the irreparable harm it alleges. See Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 915 (8th Cir. 2015) (finding "speculative" allegation of harm did not support an injunction); Padda, 37 F.4th at 1384–85 (same).

B. BLM's Failure to Hold Lease Sales Every Three Months Does Not Infringe on North Dakota's Sovereignty.

North Dakota repeatedly mischaracterizes BLM's failure to schedule lease sales every three months as injuring the State's "sovereignty." See ND Mem. at 1–25 (referring 25 times to "sovereign" rights or injuries). This argument fails because the federal minerals at issue belong to the United States—not to North Dakota. The Property Clause of the U.S. Constitution gives Congress power to determine how federal property will be managed, and those determinations

preempt any conflicting state laws or policies. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580–81 (1987) (discussing supremacy of federal law over state authority regarding mineral exploration on federal lands). The Supreme Court has held that federal land management decisions authorized under the Property Clause do not represent "an impermissible intrusion upon state sovereignty." Kleppe v. New Mexico, 426 U.S. 529, 545 (1976); see also id. at 540 ("Although the Property Clause does not authorize an exercise of a general control over public policy in a State, it does permit an exercise of the complete power which Congress has over particular public property entrusted to it.") (internal quotation marks omitted). North Dakota has no sovereign right to override BLM's lawful property management decisions.

North Dakota also is wrong to claim that BLM is "block[ing]" state and private development that fall under the State's regulatory authority. ND Mem. at 8–13. While BLM decisions not to lease federal minerals may, in some situations, make development of nearby private minerals less economically attractive to oil and gas companies, nothing "blocks" North Dakota from authorizing that private development or prevents companies from developing private minerals while leaving federal minerals untapped.

North Dakota cannot identify any regulation or policy where the federal government actually purports to preclude state approval of non-federal mineral development. The regulations and federal policies cited by North Dakota describe mechanisms to address situations where state-approved wellbores may improperly "drain" nearby federal minerals or trespass on federal lands, but they do not forbid state officials from approving wells that produce from state and private minerals. See ECF No. 69-1, Decl. of Lynn Helms Supp. Plf.'s Mot. Prelim. Inj. (Helms Decl.) ¶¶ 13–16 (citing regulations and guidance documents that describe remedies available to federal government, such as payment into escrow accounts for federal minerals, and enforcement

to collect federal royalties).

Moreover, the examples North Dakota provides of allegedly "[s]tranded" areas actually depict large blocks of contiguous state and private minerals that would be entirely feasible to develop without trespassing on adjacent federal property. See Helms Decl. at 140 (depicting unit with a full section (square mile) of private minerals and nearly half a square mile of state minerals); see also id. at 23–24, 51, 119 (same).[6] While companies may prefer the economics of developing several square miles of federal and non-federal minerals together, they do not need to do so. Companies can proceed with private development while avoiding the unleased federal lands. Ratledge Decl. ¶ 15, attached as Ex. 1. In fact, that may already have occurred in at least one of the areas highlighted by North Dakota: online state records show that numerous wells have been drilled throughout an area where North Dakota claims private development has been "blocked" by unleased federal minerals. Id.

North Dakota also errs in claiming that private minerals "cannot be developed" under communitization agreements (CAs) where there are unleased federal minerals in the communitized area. ND Mem. at 4.[7] First, CAs are voluntary: nothing requires a company developing private or state minerals to enter into such an agreement, or to include unleased federal minerals in the communitized area. See 30 U.S.C. § 226(m); ND Mem. at 9 (conceding that such agreements require "consent of the leaseholders"). Any alleged impacts on oil and gas companies' voluntary CAs do not infringe on North Dakota's sovereignty.

[6] Mr. Helms' declaration does not provide pagination for its attachments. Cited page numbers for the declaration refer to PDF pagination (i.e., out of 140 total PDF pages).

[7] Under a communitization agreement, state, private and federal minerals are managed together, and the area is "developed and operated as an entirety." Helms Decl. at 39, 81 (CA ¶ 5).

Moreover, where a communitized area pools both federal and private minerals, companies can proceed with development so long as they do not drill into unleased federal minerals. CAs, in fact, expressly provide for such development: BLM establishes an "unleased lands account," and the company pays any royalties due for that portion of the communitized area into that escrow account. See Helms Decl. at 137 (Sept. 27, 2022 BLM testimony); see also id. at 39, 81 (CA ¶ 5 describing how unleased lands are addressed). While leasing additional federal lands may make private development under some CAs easier or more lucrative, BLM's choice not to do so does not infringe on North Dakota's sovereignty. See BLM Manual 3160-9.11.B.2 ("Communitization is not to be construed as . . . [a] method for promoting future development . . . on the premise that additional drilling or development may result from the approval of communitization.").[8] BLM's leasing decisions do not infringe on North Dakota's sovereignty.

C. North Dakota's Irreparable Economic Harm Theory Fails.

The evidence also does not support North Dakota's claim to suffer irreparable economic harm from a loss of royalties, bonus payments and other revenues generated by the additional lease sales it wants.

As an initial matter, any economic impacts North Dakota might experience while this case is pending are not irreparable. Holding fewer than four lease sales each year does not mean bonus payments and other revenues are lost to North Dakota—only that they may be delayed by a few months. "[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." Sampson v. Murray, 415 U.S. 61, 90 (1974); see also Wildhawk, 27 F.4th at 597 ("Economic loss, on its own, is not an irreparable injury so long as the losses can

[8] Available at: https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3160-9.pdf.

be recovered").

Moreover, if the Court rules in North Dakota's favor on summary judgment and requires BLM to commence selling oil and gas leases every three months, the State will obtain the same relief as from a preliminary injunction, and any delayed revenues will accrue to North Dakota at that point. See Grosso Enters., LLC v. Express Scripts, Inc., 809 F.3d 1033 (8th Cir. 2016) (finding no irreparable harm from denial of pharmacy drug benefit because later ruling that drug was covered under plan would provide adequate remedy); Roberts v. Van Buren Pub. Schs., 731 F.2d 523, 526 (8th Cir. 1984) (holding terminated teachers had not shown irreparable harm because if they prevailed on merits "they would be entitled to reinstatement and backpay relief").[9] Any economic impacts to North Dakota from BLM's current lease sale schedule are not irreparable.

Moreover, North Dakota provides virtually no support for its claim of economic harm. The only evidence offered is an affidavit from Lynn Helms, a state official who claims delays in leasing are costing the State $9 million per month in lost revenue. ND Mem. at 11–12 (citing Helms Decl. ¶ 37). Mr. Helms' opinion does not support injunctive relief because he offers almost no support for his forecast: instead, he makes vague statements about a "spreadsheet," with no clear explanation for how he derived those estimates, and without providing the spreadsheet or any other supporting data. See Helms Decl. ¶¶ 37–42; Ratledge Decl. ¶¶ 3–6. These cursory claims fall far short of establishing irreparable harm. See Padda, 37 F.4th at 1384–85 ("conclusory declaration" alleging economic impacts without supporting evidence or

[9] North Dakota's claim to suffer irreparable harm by being "deprived" of a right to participate in a notice and comment process, ND Mem. at 13–14, fails for similar reasons. If the Court ultimately ruled in North Dakota's favor on its Federal Land Policy and Management Act (FLPMA) claim (which is meritless, see pp. 26–28, infra), the State could participate in notice and comment at that point.

explanation was too "vague and speculative" to establish irreparable harm).[10]

In fact, the evidence undercuts Mr. Helms' claims in several ways. First, he cites three areas where he claims federal leasing delays are impeding oil and gas development. Helms Decl. ¶ 43 & Attachs. C–E. Federal records, however, indicate that BLM already sold leases in two of those areas at its June 2022 auction. Ratledge Decl. ¶ 10. Thus, the only specific evidence Mr. Helms does provide turns out to be outdated and inaccurate.

Second, North Dakota mineral revenues have increased significantly from 2020 to 2022. Federal mineral revenues paid to North Dakota climbed to $163 million in 2022, a 43% increase from 2019. Ratledge Decl. ¶ 13 & Figure 4. The same was true for state oil and gas revenues: oil and gas taxes, fees and royalties tripled from 2020 to 2022. Id. (increase from $168 million to $634 million). These figures indicate that North Dakota does not face substantial or imminent economic harm from BLM's current pace of lease sales.

Part of the reason North Dakota does not face imminent economic harm is that even after a new lease is issued, several steps must occur before oil and gas production commences and significant revenues start flowing to the State. For example, once a company obtains a lease, it must propose a drilling plan and get an approved drilling permit from BLM. See 43 C.F.R. § 3162.3–1(c) ("No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the [application for permit to drill].").

[10] Mr. Helms' affidavit also is inadmissible under the Federal Rules of Evidence. Rule 702 requires that expert opinion testimony be "based on sufficient facts or data" and be "the product of reliable principles and methods," and that "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702; see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993). North Dakota has not met these requirements. Mr. Helms fails to disclose the data he relies on, or clearly explain the "principles and methods" he used and how he applied those principles and methods to generate his $9 million per month estimate. This does not meet the standards for admissibility under Rule 702 and Daubert.

Federal oil and gas leases have an initial ten-year term, and many companies do not seek approvals to drill until several years into the lease term. Even where an operator seeks to drill immediately after acquiring a lease, BLM takes an average of 182 days (six months) to approve a drilling permit. Ratledge Decl. ¶ 14. And it then takes an average of two years in North Dakota from when drilling commences to the completion of a well. Id. Thus, once a company applies for a drilling permit, it takes two to three years to develop an average oil lease in North Dakota.

As a result, even if the court entered a preliminary injunction requiring BLM to issue new federal leases, no significant new production would be likely on those leases for several years. A decision on the merits is likely in this case well before the economic impacts alleged by North Dakota would be felt, if they were to occur at all.

IV. NORTH DAKOTA CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

North Dakota also cannot meet the requirement that it is likely to succeed on the merits of its claims that BLM is violating the MLA and FLPMA. As an initial matter, the State's request for relief is premature: North Dakota acknowledges it does not yet know what BLM's justification was for holding fewer than four lease sales last year. Rather than wait for an administrative record, the State seeks immediate relief based on speculation about what BLM's rationale might have been. See ND Mem. at 18 (addressing "two potential justifications" for lease sale schedule). The Court's conclusion when denying mandamus relief last year applies with equal force today: "consideration of [North Dakota's] arguments should occur only after full briefing on the merits with the full administrative record," and those claims should be "dealt with in due course on proper summary judgment motions." ECF No. 38 at 5–7.

North Dakota attempts to sidestep this flaw by asserting interpretations of the MLA and FLPMA that it claims do not require a full fact record. Those theories, however, are meritless.

A. BLM Has Not Violated the Mineral Leasing Act.

North Dakota claims that BLM violated the MLA by not holding lease sales every three months in North Dakota when companies have proposed lands for leasing there. This argument fails because the available record does not indicate that BLM has completed a NEPA analysis, or decided to lease any particular lands, beyond the lease sales it already has held. On those facts, quarterly leasing is not required.

1. The Text of the MLA Leaves BLM with Discretion Not to Lease.

Section 226(a) of the MLA states that federal lands "may be leased" for oil and gas by BLM. 30 U.S.C. § 226(a) (emphasis added). Courts have repeatedly held that this language leaves BLM with broad discretion to not offer any leases. See Udall v. Tallman, 380 U.S. 1, 4 (1965) (MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract"); Haley v. Seaton, 281 F.2d 620, 625 (D.C. Cir. 1960) (legislative intent of "may be leased" language was "to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease"). In fact, the Supreme Court has upheld a national oil and gas moratorium under the MLA—allowing the Interior Department to halt all oil and gas leasing on public lands nationwide. McLennan, 283 U.S. at 419, aff'g Wilbur v. United States ex rel. Barton, 46 F.2d 217, 218 (D.C. Cir. 1930) (affirming Hoover administration moratorium to conserve federally owned oil). In McLennan, the Supreme Court accepted the Interior Department's argument that the MLA "empower[s]" the agency to issue leases but does not compel leasing. Id. at 419–20.

North Dakota, however, asserts that BLM violated a provision of the MLA (enacted in 1987) stating that "lease sales shall be held for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A); ND Mem. at 14–15. North Dakota takes this language out of context. Section 226(b)(1)(A) states: "All lands to be leased . . . shall be leased as provided in this paragraph . . . by competitive bidding . . . . Lease sales shall be held for each

State where eligible lands are available at least quarterly . . .” 30 U.S.C. § 226(b)(1)(A) (emphasis added). This language indicates that the procedural requirements for leasing—including holding quarterly lease sales—apply only once BLM determines that lands are “to be leased.” See Salazar, 2011 WL 3737520 at *4–5 (interpreting Section 226(b)(1)(A) as preserving discretion not to lease).

Courts have read Subsections 226(a) and 226(b)(1)(A) together, giving effect to both. Section 226(a)’s “may be leased” language gives BLM the discretion, but not a mandate, to lease federal lands for oil and gas development. Section 226(b) describes the procedures BLM must follow where lands are “to be leased.” Thus, the procedures in Section 226(b) “merely mean that the Secretary must issue a lease” according to the Section 226(b)(1)(A) procedures “if he is going to lease at all.” Salazar, 2011 WL 3737520 at *4–5 (quoting Justheim Petroleum Co. v. U.S. Dep’t of Interior, 769 F.2d 668, 671 (10th Cir. 1985)); see also Sw. Petroleum Corp. v. Udall, 361 F.2d 650, 654 (10th Cir. 1966) (similar). In short, the provision in Section 226(b)(1)(A) providing for quarterly lease sales does not preclude BLM from determining that no lands are “to be leased” at all.

2. The Legislative History of the 1987 Amendments Confirms that Congress Did Not Intend to Mandate Leasing.

The legislative history of the 1987 amendments confirms that North Dakota is misreading the MLA. Congress added the quarterly lease sale language in 1987 as a housekeeping provision in connection with amendments requiring that oil and gas leases be offered primarily through competitive auctions. Prior to 1987, leasing was accomplished primarily on an over-the-counter basis, without competitive bidding. Salazar, 2011 WL 3737520, at *4. The quarterly leasing provision ensured competitive auctions would occur on a regular basis when BLM wanted to offer leases for sale, but left the agency with broad discretion to determine when not to lease.

Congress did not intend to alter the agency's long-established discretion not to lease. As one commentator noted, "nowhere in the legislative history of the [1987 amendments] did Congress suggest that it modified the Secretary's discretion in any way." Thomas Sansonetti & William Murray, A Primer on the Federal Oil and Gas Leasing Reform Act of 1987 and its Regulations, 25 Land & Water L. Rev. 375, 388 n.112 (1990). Nor is there any evidence that Congress intended to overturn or limit the Supreme Court's McLennan decision recognizing the agency's authority to adopt a nationwide moratorium, or any other established precedent. See id. (citing McLennan in explaining that amendments did not affect pre-1987 discretion).

Just the opposite: the legislative history demonstrates "Congress did not intend to affect the [Interior Department]'s discretion in determining which lands would be suitable for leasing." Salazar, 2011 WL 3737520, at *5 n.10. Congress sought to reform the MLA because the existing non-competitive leasing process had been rife with abuse. See 133 Cong. Rec. S 8322-04, 1987 WL 940033 (Jul. 13, 1987) (statement of Senate sponsor Sen. Melcher); H.R. Rep. 100-378, 100th Cong., 1st Sess., at 7–8 (Oct. 15, 1987), attached as Ex. 2 (Delehanty Decl. Attach. 3 at 003–04). In moving to a competitive leasing system, the sponsors of the 1987 amendments made clear that Congress did not intend to limit the agency's existing discretion not to lease.

For instance, in a committee hearing, Senator Melcher stated that his bill "does not change the Secretary's discretion in refusing to lease, because there are overriding reasons why he should not lease." Sen. Hr'g 100-464, 100th Cong., 1st Sess., at 108 (June 30, 1987) (Delehanty Decl. Attach. 2 at 012) (emphasis added); see also H.R. Hr'g 100-11, 100th Cong., 1st Sess., at 67 (July 28, 1987) (Delehanty Decl. Attach. 1 at 004) (comments by sponsor Rep. Rahall reflecting his understanding that Department would retain discretion "to reject lease offers [for] land management purposes"); H.R. Rep. 100-378, at 11 (Delehanty Decl. Attach. 3 at 007)

(quarterly leasing to occur "where appropriate," and competitive leasing process was "[s]ubject to the Secretary's discretionary authority" over leasing).

Interior Department testimony also reflected the Department's understanding that the amendments did "not change the Secretary's discretion to not lease lands." H.R. Hr'g 100-11, at 67 (Delehanty Decl. Attach. 1 at 004); Sen. Hr'g 100-464, at 159 (Delehanty Decl. Attach. 2 at 015) (explaining that under amendments agency "has discretion to not lease" as provided in the MLA and FLPMA, and "[t]he discretion is limited only by the need to not be capricious").[11]

Thus, the 1987 amendments reformed the MLA to prevent abuses of the leasing process while maintaining the Department's existing discretion not to lease. The Court should reject North Dakota's theory that Congress—without ever mentioning it—sought to overturn controlling Supreme Court precedent and impose a new non-discretionary mandate to offer leases for sale every three months. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes").

3. BLM's Longstanding Interpretation of "Eligible" and "Available" Allows It Not to Hold Quarterly Lease Sales.

The Interior Department's consistent interpretation of the 1987 amendments points to the same conclusion. For more than 30 years, BLM has interpreted the terms "eligible" and "available" in the quarterly leasing provision to preserve the agency's discretion not to lease.

[11] North Dakota largely ignores the legislative history of the 1987 amendments, aside from making a passing reference to an unsuccessful 1987 bill that would have made explicit the Department's existing authority to postpone lease sales. ND Mem. at 15. Based on that bill, North Dakota asks the Court to disregard the substantial legislative history showing that Congress did not intend to restrict BLM's existing discretion not to lease. Id. This argument ignores the presumption that "Congress acts with knowledge of existing law, and absent a clear manifestation of contrary intent, a revised statute is presumed to be harmonious with existing law and its judicial construction." United States ex rel. Strubbe v. Crawford Cnty. Mem'l Hosp., 915 F.3d 1158, 1167 (8th Cir. 2019) (cleaned up).

Since shortly after the 1987 amendments added the terms to the MLA, BLM has interpreted "eligible" and "available" in a consistent manner:

- Lands are "eligible" for leasing when they are not barred from leasing by statute or regulation.[12] Lands precluded from leasing, and thus not "eligible," include national parks and wilderness areas, for example. See 43 C.F.R. § 3100.0-3.
- Lands become "available" when they are both (a) "open to leasing in the applicable resource management plan [RMP]," and (b) "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA)."[13] As BLM explained to a court in 2017, lands become available when they are "selected for lease at BLM's discretion after compliance with all relevant statutory requirements." Br. of United States as Amicus Curiae, W. Energy All. v. Zinke, No. 17-2005, 2017 WL 1383853, at *2 (10th Cir. April 12, 2017).

Thus, lands are not eligible and available, and quarterly lease sales not required, unless: (a) the lands are not precluded by statute or regulation from leasing; (b) they are designated as open for leasing in the RMP; and (c) the agency has determined it wants to offer the lands after completing NEPA review and other statutory requirements to support that decision.

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[12] BLM Manual MS-3120.11 (2013), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3120.pdf; BLM Handbook H-3101-1, § I.A.1, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h3101-1.pdf; BLM Instruction Memorandum 2018-034 n.6 (2018), https://www.blm.gov/policy/im-2018-034; BLM Instruction Memorandum 2010-117 n.8 (2010), https://www.blm.gov/policy/im-2010-117; ECF No. 69-2, Memorandum from Office of the Solicitor to BLM Director re: 'Eligible' and 'Available' Land Under the Federal Onshore Oil and Gas Leasing Reform Act of 1987, at 8 (Dec. 15, 1989).

[13] See n.12, supra. RMPs are land use plans that BLM offices adopt to guide management of public lands and minerals under their purview. See 43 U.S.C. § 1712. Among other things, RMPs describe whether certain lands are open for oil and gas leasing. Designating an area as open for leasing allows BLM to lease those lands, but does not mandate leasing: the agency retains its discretion over whether and when to do so. See n.16, infra.

Here, additional lands North Dakota wants leased are not eligible and available for leasing. There is no evidence before the Court indicating that BLM has completed its NEPA compliance for any additional lease sales, or that the agency has made a final determination to lease any additional lands. The Court owes deference to the agency's reasonable and long-standing interpretation of these statutory terms. See Barnhart v. Walton, 535 U.S. 212, 222 (2002). BLM's interpretation conforms with the plain language and purpose of the 1987 amendments and long-standing caselaw, and it represents a proven standard that has been followed for decades.

4. North Dakota Misreads the Relevant Regulations.

North Dakota attempts to overcome all of this by inventing its own definition of "available" that would require BLM to offer leases for sale whenever lands are sought by oil and gas companies. ND Mem. at 14–15. No court has ever adopted such an interpretation of the MLA, and it is meritless. In fact, recent decisions from the District of Wyoming and Western District of Louisiana declined to adopt North Dakota's view of the law. W. Energy All. v. Biden, No. 21-cv-00013, 2022 WL 18587039, at *9 (D. Wyo. Sept. 2, 2022) (WEA v. Biden) (following BLM's interpretation of "eligible" and "available"); Louisiana, 2022 WL 3570933, at *5 (finding "[l]and is 'available' to be leased if statutory requirements are met and if it is in the public interest to approve the lease").[14]

[14] North Dakota's reliance on Western Energy Alliance v. Zinke, 877 F.3d 1157 (10th Cir. 2017), and Western Energy Alliance v. Jewell, No. 1:16-cv-00912-WJ-KBM, 2017 WL 3600740 (D.N.M. Jan. 13, 2017), is misplaced. See ND Mem. at 14–15. Both orders came in the same 2017 lawsuit, and neither ruled on the meaning of the MLA's quarterly lease sale provision. The Tenth Circuit ruling reversed a denial of intervention by conservation groups. In doing so, the court merely acknowledged the MLA's quarterly lease sale provision and cited BLM's manual and regulations as background. See Zinke, 877 F.3d at 1162 (quoting BLM's definition that lands become "[a]vailable" when "all statutory requirements and reviews have been met"). The district court ruling found WEA's legal claims reviewable in the course of denying a motion to

North Dakota contends that lands are "available" whenever: (a) they are "subject to leasing under the Mineral Leasing Act," and (b) a company nominates them for leasing by submitting an "expression of interest." ND Mem. at 14–15. This construction erases BLM's requirement that NEPA and other statutory reviews be completed before land becomes available, and instead makes industry nominations the trigger for availability. See pp. 20–22, supra.[15] Thus, according to North Dakota, when BLM has the legal authority under to lease under the MLA, it must hold a lease sale whenever any company proposes lands for leasing in that state. That reading would upend the MLA by allowing oil and gas companies to impose a mandatory obligation on BLM to offer leases for sale. See ND Mem. at 17 ("neither BLM (nor the [relevant surface management agency, such as the Forest Service]) determines whether lands are 'available'"). That is not how the MLA works.

North Dakota bases its interpretation on a BLM regulation, 43 C.F.R. § 3120.1-1, but neglects to quote the regulation's full text. ND Mem. at 15. The regulation states:

> All lands available for leasing shall be offered for competitive bidding under this subpart, including but not limited to:
> (a) Lands in oil and gas leases that have terminated, expired, been cancelled or relinquished.
> ***
> (d) Lands which are otherwise unavailable for leasing but which are subject to drainage (protective leasing).
> (e) **Lands included in any expression of interest** or noncompetitive offer….
> (f) Lands selected by the authorized officer.

dismiss. Jewell, 2017 WL 3600740, at *6–7, 13. Neither ruling decided the merits issue presented here.

[15] North Dakota makes a passing claim that BLM has "completed the NEPA compliance process" for additional leases, ND Mem. at 18, 20 (citing Helms Decl. ¶ 34), but this assertion appears to be based on Mr. Helms' incorrect assertion that NEPA compliance is complete as soon as BLM posts a draft NEPA document for public comment. See Helms Decl. ¶¶ 28–29.

43 C.F.R. § 3120.1-1 (emphasis added). Section 3120.1-1 simply lists examples of lands that may potentially be "available" for leasing and thus subject to the requirement that any leasing be done competitively. It does not make every parcel in the listed categories automatically "available" for leasing, the construction North Dakota urges. See WEA v. Biden, 2022 WL 18587039 at *9 (rejecting same argument North Dakota makes here).

This is confirmed by the regulation's silence on RMPs. North Dakota acknowledges that lands cannot be offered for leasing unless they are designated as open for leasing under the RMP. See ND Mem. at 17 (stating that BLM must determine "whether leasing would be in compliance with" the RMP). But Section 3120. 1-1 does not limit each category to those lands designated as "open" under the RMP. See 43 C.F.R. § 3120. 1-1. As a result, if the listed categories were automatically "available," they would encompass lands closed to leasing under the RMP. Indeed, BLM itself has never interpreted the regulation as making the listed categories automatically "available." See pp. 20–22, supra; see also BLM Manual 3120.11 (explaining that, "if eligible and available for lease," lands in similar listed categories "may be offered for competitive bidding") (emphasis added).

An interpretation making each listed category automatically "available" also would lead to an absurd result by requiring that BLM "shall" offer for lease "all lands" in each category. For example, BLM would be required to lease a parcel whenever an oil and gas company files an "expression of interest" for it, and automatically to re-offer a parcel whenever an existing lease expires or is relinquished. 43 C.F.R. § 3120.1-1. BLM did not abdicate leasing decisions to industry or require continual offering of expired leases regardless of the public interest or any countervailing management considerations. Even North Dakota does not contend that BLM must offer every lease parcel nominated by a company. ND Mem. at 16 (conceding BLM can choose

"which parcels" to lease); see also Clinton v. City of New York, 524 U.S. 417, 429 (1998) (rejecting interpretation that "would produce an absurd and unjust result Congress could not have intended") (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982)).

North Dakota also cherry-picks a sentence from the preamble to Section 3120.1-1, stating "[t]he term 'available' means any lands subject to leasing under the Mineral Leasing Act." ND Mem. at 14 (quoting 53 Fed. Reg. 22,814, 22,828 (June 17, 1988)). That passing statement cannot bear the weight North Dakota places on it. As with the regulation itself, the State's reading of the preamble would make lands "available" even where they are closed to leasing under the RMP. That cannot be what BLM intended and would be inconsistent even with North Dakota's interpretation. See WEA v. Biden, 2022 WL 18587039, at *9 (rejecting same argument).

Further, reading "available" as everything "subject to leasing" violates basic canons of construction by making the term "eligible" surplusage. See Jewett v. Comm'r of Internal Revenue, 455 U.S. 305, 315–16 (1982) (declining to adopt interpretation rendering part of law superfluous); St. Louis Effort for AIDS v. Huff, 782 F.3d 1016, 1025 (8th Cir. 2015) (same). As noted above, "eligible" refers to lands that are not barred from leasing by statute or regulation. P. 21, supra. Under North Dakota's reading, the preamble would make "available" and "eligible" synonymous. BLM's longstanding interpretation of the MLA gives meaning to both "eligible" and "available," but the State fails to do so, rendering its interpretation impermissible. Jewett, 455 U.S. at 315–16; Huff, 782 F.3d at 1025.

Moreover, the full text of the preamble makes clear North Dakota reads too much into its quoted sentence. The preamble states "prior to offering" lands, BLM determines "whether leasing will be in the public interest." 53 Fed. Reg. at 22,828. The preamble also notes that

"many if not most lands will not be 'offered' by the Bureau but are nonetheless available for filing or expressions of interest." Id. (emphasis added).

The Interior Department Solicitor's Office, in fact, addressed this issue more than 30 years ago. In a 1989 memo, the Solicitor explained that the preamble "clearly shows the Department interpreted the [1987 amendments'] competitive leasing provisions as retaining Secretarial discretionary power to lease lands." ECF No. 69-2 at 8. The Solicitor's office stated that "[a] sale . . . must . . . be held each quarter" where eligible lands are available. Id. But the memo concluded, based on the preamble and the history of the 1987 amendments, that "eligible and available" lands are those: (a) "statutorily open to leasing under the MLA, [(b)] that have met other statutory requirements, and [(c)] for which leasing is in the public interest" as determined by BLM after "appropriate review processes." Id. The Solicitor's office also noted that "BLM may never include a parcel in a sale for which it has not completed its statutory requirements under laws such as" NEPA and the Endangered Species Act. Id. at 9.

BLM's reading of the preamble has applied for over thirty years. The Court should reject North Dakota's attempt to re-write the law and turn federal oil and gas leasing into a process driven by the industry.

B. BLM Is Not Violating FLPMA.

North Dakota also claims that BLM is violating FLPMA because the agency did not comply with the process for "withdraw[ing]" lands from leasing when it held fewer than four sales per year. ND Mem. 22–24. This theory fails because BLM's lease sale schedule did not "withdraw" lands within the meaning of FLPMA.[16]

[16] North Dakota also seems to argue that holding fewer than four lease sales per year violated the governing RMPs, which designate certain lands in North Dakota as open for leasing. ND Mem. at 22–24. This argument fails because North Dakota cites nothing in any RMP that requires BLM to hold four lease sales each year. Moreover, designating lands as open for leasing in the RMP

A "withdrawal" is a formal Interior Department decision that "temporarily suspends the operation of some or all of the public land laws" for a specified time period to protect resources or other uses of the land. S. Utah Wilderness All. v. U.S. Bureau of Land Mgmt., 425 F.3d 735, 784 (10th Cir. 2005); Bob Marshall All. v. Hodel, 852 F.2d 1223, 1229–30 (9th Cir. 1988) (similar); 43 U.S.C. §§ 1702(j) (defining withdrawal as decision to "withhold[] an area of Federal land from settlement, sale, location or entry under some or all of the general land laws"). FLPMA provides a detailed procedural framework for adopting a withdrawal, including submission of a report to Congress, publishing notice in the Federal Register, a public hearing, and other requirements. 43 U.S.C. § 1714.

Scheduling fewer than four lease sales per year in North Dakota does not meet this definition. Rather than removing lands from operation of the MLA, scheduling lease sales involves an exercise of the Department's authority under that statute. See Bob Marshall All., 852 F.2d at 1230 (holding deferral of leasing in an area not a withdrawal because, rather than "removing [the area] from the operation of the mineral leasing law," it "constitute[s] a legitimate exercise of the discretion granted to the Interior Secretary"); Se. Conf. v. Vilsack, 684 F. Supp. 2d 135, 144–45 (D.D.C. 2010) (similar, where Forest Service limited logging in old-growth forests).

Moreover, unlike a withdrawal, BLM's periodic lease sales do not segregate the area for set time period: even if a sale is not held every three months, BLM can and does offer lands for

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does not mandate that BLM lease them; it allows leasing those lands, but the agency retains its discretion over whether and when to do so. See, e. g., New Mexico ex rel. Richardson v. U.S. Bureau of Land Mgmt., 459 F. Supp. 2d 1102, 1124 (D.N.M. 2006) ("BLM remains free [after adoption of RMP] to . . . refuse to offer for lease any lands that, upon such further review, do not appear suitable for leasing."), aff'd in relevant part, 565 F.3d 683, 689 n.1 (10th Cir. 2009) (noting BLM "may" lease lands designated as "open to development" in the RMP); Roy G. Barton, 188 IBLA 331, 337 (2016).

lease just a few months later. Cf. 43 U.S.C. § 1714(c)(1) (authorizing large withdrawals for up to 20 years). Requiring BLM to institute a formal withdrawal whenever scheduling sales more than three months apart would lead to absurd results. If the Department were required to follow withdrawal procedures (such as submission of a detailed report to Congress, 43 U.S.C. § 1714(c)) every three months, the agency would have to initiate those steps knowing they could likely become moot before they were completed. FLPMA does not require such a pointless and wasteful exercise.

V. THE BALANCE OF EQUITIES AND PUBLIC INTEREST DO NOT FAVOR AN INJUNCTION.

Neither the balance of equities nor the public interest supports the unprecedented relief North Dakota seeks. In considering whether to grant the "extraordinary remedy" of a preliminary injunction, "courts 'must balance the competing claims of injury and must consider the effect on each party of" an injunction, "pay[ing] particular regard for the public consequences." Winter, 555 U.S. at 24. These factors point strongly against North Dakota's request.

North Dakota seeks to commit property belonging to the American public to oil and gas development before this case can be decided on the merits. The harm from encumbering public property with new leases far outweighs the State's concern that BLM is holding lease sales less frequently than North Dakota wants. Courts have held that the "unique nature" of property interests makes preserving them particularly important when assessing preliminary injunctive relief. RoDa Drilling v. Siegal, 552 F.3d 1203, 1210 (10th Cir. 2009); see also Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 256 n.14 (3d Cir. 2011) (collecting cases). This consideration merits even more weight here, because BLM manages federal property for the benefit of the public. See 43 U.S.C. § 1701(a); 30 U.S.C. § 187. If BLM is ordered to sell oil and gas leases, and the Court later rules against North Dakota on the merits, it would be difficult for

the federal government to claw back those leases at that point. See Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (recognizing difficulty in undoing the "chain of bureaucratic commitment" resulting from issuance of oil and gas leases). On the other hand, if no injunction issues, North Dakota will still reap the benefits from lease sales if it later prevails on the merits. Pp. 13–14, supra. The balance of harms and public interest thus favor denial of injunctive relief.

CONCLUSION

For the reasons stated above, North Dakota's motion for preliminary injunction should be DENIED.

Respectfully submitted this 9th day of February, 2023,

/s/ Michael S. Freeman
Michael Freeman (*admitted pro hac vice*)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 996-9615
mfreeman@earthjustice.org

/s/ Thomas Delehanty
Thomas Delehanty (*admitted pro hac vice*)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 996-9628
tdelehanty@earthjustice.org

Counsel for Sierra Club

/s/ Kyle Tisdel
Kyle Tisdel (*admitted pro hac vice*)
Western Environmental Law Center
208 Paseo del Pueblo Sur, Unit 602
Taos, NM 87571
(575) 613-8050
tisdel@westernlaw.org

/s/ Melissa Hornbein
Melissa Hornbein (*admitted pro hac vice*)
Western Environmental Law Center

103 Reader's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org

Counsel for Center for Biological Diversity, Dakota Resource Council, and Western Organization of Resource Councils

CERTIFICATE OF SERVICE

I certify that on this 9th day of February, 2023, I electronically filed the foregoing **DEFENDANT- INTERVENORS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the U.S. District Court for the District of North Dakota and served all parties using the CM/ECF system.

/s/ Michael S. Freeman