

ROBERT W. FERGUSON
Attorney General of Washington
AURORA JANKE, *Pro Hac Vice pending*
CINDY CHANG, Wash. Bar No. 51020
Assistant Attorneys General
Washington Attorney General's Office
Environmental Protection Division
800 5th Ave Ste. 2000 TB-14
Seattle, Washington 98104-3188
(206) 233-3391
Aurora.Janke@atg.wa.gov
Cindy.Chang@atg.wa.gov

Attorneys for State of Washington

[additional counsel listed on signature page]

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

GWICH'IN STEERING
COMMITTEE, et al.,

Plaintiffs,

v.

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

Defendants.

No. 3:20-cv-00204-SLG

**STATES' MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

The States of Washington, California, Connecticut, Delaware, Illinois, Michigan,
Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont,
and the Commonwealth of Massachusetts ("State Amici") respectfully move this Court

STATES' MOTION FOR LEAVE
TO FILE AMICUS BRIEF

*Gwich'in Steering Committee v.
Bernhardt*, No. 3:20-cv-00204-
SLG

for leave to file the attached States' Amicus Brief in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction in the above-captioned matter. Pursuant to Local Civil Rule 7.1(b)(2), a proposed order is lodged with this filing.

Plaintiffs do not oppose this motion.

Federal Defendants, Defendant-Intervenors Alaska Oil & Gas Association and American Petroleum Institute, and Movant and proposed Defendant-Intervenor State of Alaska take no position on this motion. Counsel for State Amici contacted counsel for Defendant-Intervenors Kaktovik Inupiat Corporation, Native Village of Kaktovik, and North Slope Borough in writing on December 15, 2020, seeking their position on this motion, but they did not respond as of the time of this filing.

Similar but distinct preliminary injunction motions have been filed in related cases: *National Audubon Society v. Bernhardt*, 3:20-cv-00205-SLG and *Native Village of Venetie Tribal Government v. Bernhardt*, 3:20-cv-00223-SLG. To aid the efficiency of the Court's review, State Amici seek leave to file identical briefs in each case, with the exception of case-specific references, such as docket citations.

APPLICABLE POINTS AND AUTHORITIES

A. State Amici Have Complied with Applicable Procedure.

Federal Rule of Appellate Procedure 29(a)(2) permits states to file an amicus brief without consent of the parties or leave of court. However, because the Federal Rules of Civil Procedure and Local Civil Rules do not contemplate amicus filings, State Amici seek the Court's leave to file the attached amicus brief.

STATES' MOTION FOR LEAVE
TO FILE AMICUS BRIEF

2

*Gwich'in Steering Committee
v. Bernhardt*, No. 3:20-cv-
00204-SLG

State Amici rely on the applicable Federal Rules of Appellate Procedure to govern the timing and length of the brief. Plaintiffs filed their Motion for Preliminary Injunction on December 15, 2020, and this filing occurs no later than seven days later and two days before Defendants’ and Defendant-Intervenors’ responses are due. *See* Fed. R. App. P. 29(a)(6) (amicus brief must be filed no later than seven days after the principal brief of the party being supported). Likewise, at 2,814 words, the amicus brief is no more than half the maximum length authorized for the parties’ principal brief under Local Civil Rule 7.4(a)(2). *See* Fed. R. App. P. 29(a)(5) (amicus brief may be no more than one-half the maximum length allowed for a party’s principal brief).

Under analogous circumstances, this Court has granted leave for an amicus to file a brief during preliminary injunction proceedings. SLG Text Order, *Alaska v. Fed. Subsistence Bd.*, 3:20-cv-00195-SLG, ECF No. 23 (Aug. 31, 2020); *see also* TMB Text Order, *Friends of Alaska Nat’l Wildlife Refuges v. Zinke*, 3:18-cv-00029-SLG, ECF No. 69 (Aug. 28, 2018) (granting motion for State of Alaska to file amicus brief during summary judgment proceedings).

B. State Amici Have an Interest in This Case.

State Amici have an interest in the outcome of this litigation because, with the exception of New Mexico,¹ they are plaintiffs in a pending related case, *Washington v.*

¹ Although New Mexico is not party to the pending litigation, it shares State Plaintiffs’ interests in the Leasing Program’s impacts on migratory birds and climate change. For example, the Bosque del Apache National Wildlife Refuge is internationally renowned

Bernhardt, No. 3:20-cv-00224-SLG, which asserts some claims similar to those in this case that challenge the Environmental Impact Statement and Record of Decision authorizing an oil and gas leasing program on the Coastal Plain (“Leasing Program”) of the Arctic National Wildlife Refuge (“Arctic Refuge”). Most State Amici also participated in the administrative review process for the leasing program by submitting comments on the draft Environmental Impact Statement (filed Mar. 13, 2019), AR60972–61114, the Marsh Creek East Seismic Exploration Program Proposed Action and Plan of Operations² (filed Nov. 6, 2020), and BLM’s Call for Nominations and Comments³ for the January 6 lease sale (filed Dec. 17, 2020). State Amici have a fundamental interest in preventing Defendants’ implementation of the Leasing Program because Defendants have not complied with federal environmental laws in authorizing the program.

As asserted in the Complaint in the related case, the impacts of the Leasing Program will reach the State Amici and their residents. Specifically, oil and gas development on the fragile landscape of the Coastal Plain of the Arctic Refuge also threatens to harm millions of at least 156 species of migratory birds that breed, molt, and rest in the Coastal Plain, many thousands of which then annually fly to the lower 48 states, including all of the State Amici. Given the documented and staggering net

for migratory bird viewing, and the state is the sixth fastest-warming state in the nation, with an increase in annual average temperature of 2.7 degrees Fahrenheit since 1970.

² <https://eplanning.blm.gov/eplanning-ui/project/2003258/510>.

³ Call for Nominations and Comments for the Coastal Plain Alaska Oil and Gas Lease Sale, 85 Fed. Reg. 73292 (Nov. 17, 2020).

STATES’ MOTION FOR LEAVE
TO FILE AMICUS BRIEF

4

*Gwich’in Steering Committee
v. Bernhardt*, No. 3:20-cv-
00204-SLG

population loss of nearly three billion birds in North America since 1970, the impact of development on an area ecologically vital to so many birds could be potentially devastating. *See* Kenneth V. Rosenberg, et al., *Decline of the North American avifauna*, 366 *Science* 120, 120–24 (Oct. 4, 2019). 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 State Amici states where bird and wildlife watchers collectively spent over \$20 billion in 2011.⁴

Oil and gas development in the Arctic Refuge, as contemplated by the noticed lease sale and seismic exploration activity, will also emit greenhouse gas emissions that cause climate change that 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. State Amici have invested significant resources in decreasing reliance on fossil fuels while also responding to the devastating and increasingly severe climate impacts. 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

⁴ 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>.

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.

Finally, the Arctic Refuge is a national treasure and was protected from oil and gas development for nearly 40 years. The outcome of Plaintiff's Motion for Preliminary Injunction is a matter of national importance and public interest. State Amici inherently represent the public interest, and as Federal Rule of Appellate Procedure Rule 29(a)(2) recognizes, State Amici are uniquely situated to assist courts deciding matters of general public interest.

CONCLUSION

For the reasons set forth above, State Amici respectfully, request the Court to grant this motion for leave to file the attached States' Amicus Brief in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

DATED this 21st day of December, 2020.

ROBERT W. FERGUSON
Attorney General of Washington

s/ Aurora Janke

AURORA JANKE, *Pro Hac Vice pending*
CINDY CHANG (Wash. Bar No. 51020)
Assistant Attorneys General
Washington Attorney General's Office
Environmental Protection Division

Attorneys for State of Washington

STATES' MOTION FOR LEAVE
TO FILE AMICUS BRIEF

6

Gwich'in Steering Committee
v. Bernhardt, No. 3:20-cv-
00204-SLG

MAURA HEALEY
Attorney General of Massachusetts

s/ Matthew Ireland
MATTHEW IRELAND
(Mass. Bar No. 554868)
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division

*Attorneys for
Commonwealth of Massachusetts*

For the STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California

s/ Joshua R. Purtle
JOSHUA R. PURTLE
(Cal. Bar 298215)
Elizabeth B. Rumsey
(Cal. Bar 257908)
Deputy Attorneys General
David A. Zonana
(Cal. Bar 196029)
Supervising Deputy Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
(510) 879-0098
joshua.purtle@doj.ca.gov

For the STATE OF CONNECTICUT

WILLIAM TONG
Attorney General

s/ Daniel M. Salton
DANIEL M. SALTON
(Conn. Bar 437042)
Office of the Attorney General of
Connecticut
156 Capitol Avenue
Hartford, CT 06106
(860) 808-5280
daniel.salton@ct.gov

STATES' MOTION FOR LEAVE
TO FILE AMICUS BRIEF

For the STATE OF DELAWARE

KATHLEN JENNINGS
Attorney General of Delaware

s/ Christian Douglas Wright
CHRISTIAN DOUGLAS WRIGHT
(Del. Bar No. 3554)
Director of Impact Litigation
Ralph K. Durstein III
(Del. Bar No. 0912)
Deputy Attorney General
Jameson A.L. Tweedie
(Del. Bar No. 4927)
Special Assistant Deputy Attorney
General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8600
christian.wright@delaware.gov
ralph.durstein@delaware.gov
jameson.tweedie@delaware.gov

7

*Gwich 'in Steering Committee
v. Bernhardt*, No. 3:20-cv-
00204-SLG

For the STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

/s/ Jason E. James
JASON E. JAMES
(Ill. Bar No. 6300100)
Assistant Attorney General
Matthew J. Dunn
Chief, Environmental
Enforcement/Asbestos Litig. Div.
Office of the Illinois Attorney General
69 West Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660
jjames@atg.state.il.us

For the PEOPLE OF THE STATE OF
MICHIGAN

DANA NESSEL
Attorney General of Michigan

/s/ Elizabeth Morrisseau
ELIZABETH MORRISSEAU
(Mich. Bar No. P81889)
Assistant Attorney General
Environment, Natural Resources, and
Agriculture Division
6th Floor G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
MorrisseauE@michigan.gov

STATES' MOTION TO FILE
AMICUS BRIEF

For the STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

/s/ Leigh K. Currie
LEIGH K. CURRIE (Minn. Bar No.
0353218)
Special Assistant Attorney General
Minnesota Attorney General's Office
445 Minnesota Street Suite 900
Saint Paul, MN 55101
(651) 757-1291
leigh.currie@ag.state.mn.us

For the STATE OF NEW JERSEY

GURBIR GREWAL
Attorney General of New Jersey

/s/ Dianna Shinn
DIANNA SHINN
(N.J. Bar No. 242372017)
Deputy Attorney General
Environmental Enforcement &
Environmental Justice Section
New Jersey Division of Law
25 Market Street, P.O. Box 093
Trenton, NJ 08625-0093
(609) 376-2789
Dianna.Shinn@law.njoag.gov
For the STATE OF NEW MEXICO

HECTOR H. BALDERAS
Attorney General of New Mexico

/s/ Bill Grantham
BILL GRANTHAM
Assistant Attorney General
Consumer & Environmental Protection
Div.
New Mexico Office of the Attorney
General
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Tel: (505) 717-3520
wgrantham@nmag.gov

8 *Gwich 'in Steering Committee*
v. Bernhardt, No. 3:20-cv-
00204-SLG

For the STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York

/s/ Mihir A. Desai
MIHIR A. DESAI
(N.Y. Bar No. 4468823)
Assistant Attorney General
Office of the New York State Attorney
General
Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, NY 10005
(212) 416-8478
mihir.desai@ag.ny.gov

For the STATE OF OREGON

ELLEN ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan
PAUL GARRAHAN
(Or. Bar No. 980556)
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

For the STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
(R.I. Bar No. 5570)
Special Assistant Attorney General
Rhode Island Office of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
gschultz@riag.ri.gov

For the STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
(Vt. Bar No. 4718)
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3171
nick.persampieri@vermont.gov

STATES' MOTION TO FILE
AMICUS BRIEF

9

Gwich 'in Steering Committee
v. Bernhardt, No. 3:20-cv-
00204-SLG

ROBERT W. FERGUSON
Attorney General of Washington
AURORA JANKE, *Pro Hac Vice pending*
CINDY CHANG, Wash. Bar No. 51020
Assistant Attorneys General
Washington Attorney General's Office
Environmental Protection Division
800 5th Ave Ste. 2000 TB-14
Seattle, Washington 98104-3188
(206) 233-3391
Aurora.Janke@atg.wa.gov
Cindy.Chang@atg.wa.gov

Attorneys for State of Washington

[additional counsel listed on signature page]

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

GWICH'IN STEERING
COMMITTEE, et al.,

Plaintiffs,

v.

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

Defendants.

No. 3:20-cv-00204-SLG

**STATES' AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND 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

STATES' AMICUS BRIEF

*Gwich'in Steering Committee v.
Bernhardt*, No. 3:20-cv-00204-
SLG

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 Temporary Restraining Order and 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

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).

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

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.

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 (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

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/>.

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 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. 21 (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

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.

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 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 Temporary Restraining Order and Preliminary Injunction.

DATED this 21st day of December, 2020.

ROBERT W. FERGUSON
Attorney General of Washington

s/ Aurora Janke
AURORA JANKE, *Pro Hac Vice pending*
CINDY CHANG (Wash. Bar No. 51020)
Assistant Attorneys General
Washington Attorney General's Office
Environmental Protection Division

Attorneys for State of Washington

MAURA HEALEY
Attorney General of Massachusetts

s/ Matthew Ireland
MATTHEW IRELAND
(Mass. Bar No. 554868)
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division

*Attorneys for
Commonwealth of Massachusetts*

For the STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California

s/ Joshua R. Purtle

JOSHUA R. PURTLE
(Cal. Bar 298215)
Elizabeth B. Rumsey
(Cal. Bar 257908)
Deputy Attorneys General
David A. Zonana
(Cal. Bar 196029)
Supervising Deputy Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
(510) 879-0098
joshua.purtle@doj.ca.gov

For the STATE OF CONNECTICUT

WILLIAM TONG
Attorney General

s/ Daniel M. Salton

DANIEL M. SALTON
(Conn. Bar 437042)
Office of the Attorney General of
Connecticut
156 Capitol Avenue
Hartford, CT 06106
(860) 808-5280
daniel.salton@ct.gov

STATES' AMICUS BRIEF

For the STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of Delaware

s/ Christian Douglas Wright

CHRISTIAN DOUGLAS WRIGHT
(Del. Bar No. 3554)
Director of Impact Litigation
Ralph K. Durstein III
(Del. Bar No. 0912)
Deputy Attorney General
Jameson A.L. Tweedie
(Del. Bar No. 4927)
Special Assistant Deputy Attorney
General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8600
christian.wright@delaware.gov
ralph.durstein@delaware.gov
jameson.tweedie@delaware.gov

For the STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

s/ Jason E. James

JASON E. JAMES
(Ill. Bar No. 6300100)
Assistant Attorney General
Matthew J. Dunn
Chief, Environmental
Enforcement/Asbestos Litig. Div.
Office of the Illinois Attorney General
69 West Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660
jjames@atg.state.il.us

*Gwich 'in Steering Committee v.
Bernhardt*, No. 3:20-cv-00204-
SLG

For the PEOPLE OF THE STATE OF MICHIGAN

DANA NESSEL
Attorney General of Michigan

/s/ Elizabeth Morrisseau
ELIZABETH MORRISSEAU
(Mich. Bar No. P81889)
Assistant Attorney General
Environment, Natural Resources, and
Agriculture Division
6th Floor G. Mennen Williams Building
525 W. Ottawa Street/P.O. Box30755
Lansing, MI 48909
(517) 335-7664
MorrisseauE@michigan.gov

For the STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

/s/ Leigh K. Currie
LEIGH K. CURRIE (Minn. Bar No.
0353218)
Special Assistant Attorney General
Minnesota Attorney General's Office
445 Minnesota Street Suite 900
Saint Paul, MN 55101
(651) 757-1291
leigh.currie@ag.state.mn.us

For the STATE OF NEW JERSEY

GURBIR GREWAL
Attorney General of New Jersey

/s/ Dianna Shinn
DIANNA SHINN
(N.J. Bar No. 242372017)
Deputy Attorney General
Environmental Enforcement &
Environmental Justice Section
New Jersey Division of Law
25 Market Street, P.O. Box 093
Trenton, NJ 08625-0093
(609) 376-2789
Dianna.Shinn@law.njoag.gov

For the STATE OF NEW MEXICO

HECTOR H. BALDERAS
Attorney General of New Mexico

/s/ Bill Grantham
BILL GRANTHAM
Assistant Attorney General
Consumer & Environmental Protection
Div.
New Mexico Office of the Attorney
General
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Tel: (505) 717-3520
wgrantham@nmag.gov

For the STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York

/s/ Mihir A. Desai
MIHIR A. DESAI
(N.Y. Bar No. 4468823)
Assistant Attorney General
Office of the New York State Attorney
General
Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, NY 10005
(212) 416-8478
mihir.desai@ag.ny.gov

For the STATE OF OREGON

ELLEN ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan
PAUL GARRAHAN
(Or. Bar No. 980556)
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

For the STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
(R.I. Bar No. 5570)
Special Assistant Attorney General
Rhode Island Office of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
gschultz@riag.ri.gov

For the STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
(Vt. Bar No. 4718)
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3171
nick.persampieri@vermont.gov

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.4

I certify that this motion contains 2,814 words, excluding items exempted by
Local Civil Rule 7.4(a)(4).

Respectfully submitted this 21st day of December, 2020.

s/ Aurora Janke

Aurora Janke
Attorney for Amici States

STATES' AMICUS BRIEF

*Gwich'in Steering Committee v.
Bernhardt*, No. 3:20-cv-00204-
SLG