IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WESTERN ENERGY ALLIANCE, Petitioner, v. S.M.R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, and the BUREAU OF LAND MANAGEMENT, Defendants.	No. 1:16-cv-00912-WJ-KBM

FEDERAL DEFENDANTS' MOTION AND MEMORANDUM TO DISMISS

PETITIONER'S COUNTS II AND III

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Federal Defendants S.M.R. Jewell and the Bureau of Land Management ("BLM"), by and through undersigned counsel of record, hereby move to dismiss Counts II and III of Petitioner, Western Energy Alliance's (hereinafter, "Petitioner" or "WEA") August 11, 2016 Complaint, Dkt. No. 1. Counts II and III relate to BLM's alleged violations of the Mineral Leasing Act ("MLA").[1] Counsel for Petitioner has indicated that Petitioner opposes this motion.

INTRODUCTION

The Court should dismiss Petitioner's Counts II and III for lack of jurisdiction for two reasons. First, Petitioner lacks standing. Petitioner failed to satisfy the requirements of associational standing because it declined to specify which members are injured, and because it has not shown that all of the interests it alleges are injured are germane to its organizational purpose. Petitioner also failed to show injury-in-fact because it has not specified which parcels it wishes to lease, and it cannot show taxpayer harm. Furthermore, any injuries it does have are based on such a weak chain of conjecture that any injuries are speculative and are not redressable by this Court.

[1] Federal Defendants are not moving to dismiss Petitioner's Freedom of Information Act claim, Count I. Federal Defendants read Counts II and III as two parts of one claim alleging that BLM has violated the MLA, split into Declaratory Judgment Act ("DJA") and Administrative Procedure Act ("APA") claims. *See* Compl. ¶¶ 111–25. These claims are duplicative, as five paragraphs of each count are identical. *Compare* Compl. ¶¶ 112, 119; 113, 120; 115, 121; 116, 122; 117, 124. Furthermore, neither the DJA nor the APA provide an independent basis for jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (DJA); *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (APA). Nevertheless, Federal Defendants do not consider these claims to be so "vague and ambiguous that [they] cannot reasonably prepare a response." *See* Fed. R. Civ. P. 12(e).

Second, even if Petitioner had standing, Petitioner brings an impermissible programmatic challenge by failing to challenge specific agency actions. Petitioner perceives a problem with the manner in which BLM is running lease sales nationwide, and requests a blanket order compelling the BLM to remedy that problem. *See* Compl. at 29. But in so doing, Petitioner fails to observe the requirements of the APA. It does not identify and challenge particular lease sales (or delayed lease sales) that harmed a particular WEA member. The APA does not permit Petitioner to challenge an entire agency program, nor does it permit this court to grant programmatic relief. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 893 (1990). Insofar as Petitioner or its members have objections to discrete lease sales, or any other agency actions or omissions within the meaning of 5 U.S.C. § 551, it is incumbent on them to challenge those agency actions directly. Because Petitioner has not done so here, Counts II and III must be dismissed.

BACKGROUND

The MLA, 30 U.S.C. §§ 181–287, provides the Secretary of the Interior with the authority to offer for lease certain federal minerals, including oil and gas. The MLA and its implementing regulations provide BLM with broad discretion to determine which areas are available for leasing, when to offer parcels in a lease sale, and the terms and conditions of the leases that it issues for specific parcels that are made available for leasing. *See WEA v. Salazar*, 709 F.3d 1040, 1043 (10th Cir. 2013) (citing *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *Justheim Petroleum Co. v. Dep't of the Interior*, 769 F.2d 688 (10th Cir. 1985); *McDonald v. Clark*, 771 F.2d 460 (10th Cir. 1985)).

The process of making public lands available for oil and gas leasing and allowing for development is a three-stage decision-making process. *See Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004). First, BLM must determine which lands should be open or closed to oil and gas leasing and prescribe necessary lease stipulations to protect various resources in the event of future leasing. This is done through the land-use planning process that is required by 43 U.S.C. § 1712 and 43 C.F.R. Part 1600. In the second stage, BLM decides which particular parcels of land will be offered for lease in a competitive lease sale. *See* 43 C.F.R. Subpart 3120. Third, BLM determines whether, and under what conditions, it will approve specific development proposals for existing leases. 30 U.S.C. § 226(g); 43 C.F.R. § 3162.3-1.

With respect to the second stage of the leasing process, which is the focus of Petitioner's allegations, the MLA provides that "[l]ease 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). And the MLA's implementing regulations specify that "[a]ll lands available for leasing shall be offered for competitive bidding . . . including, but not limited to . . . lands included in any expression of interest [("EOI")] or noncompetitive offer,"[2] among other lands. *See* 43 C.F.R. § 3120.1-1(e). But neither the MLA nor its implementing regulations prescribe how BLM should determine which public lands are "available" for mineral leasing. Instead, the Secretary retains "considerable discretion to determine which lands will be leased." *See WEA*, 709 F.3d at 1044 (citing 30 U.S.C. §§ 226(a), (b)(1)(A)).

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[2] An EOI is an informal request that certain lands be included in an oil and gas competitive lease sale. *See id.* § 3120.1-1(e).

In exercise of that discretion, BLM has provided guidance on how to evaluate whether lands should be made available for leasing and mineral development and whether they should be included in a given lease sale. On May 17, 2010, the Director of BLM issued Instruction Memorandum ("IM") 2010-117, which provides BLM employees with internal guidance intended to "establish[] a process for ensuring orderly, effective, timely, and environmentally responsible leasing of oil and gas resources on Federal lands." *See* U.S. Dep't of the Interior, Bureau of Land Management, IM 2010-177, Dkt. No. 11-3 at 1, 4 (Ex. 3 to Conservation Grps Mot. for Intervention). IM 2010-117 provides general guidance to field offices on the distribution of "lease parcel review responsibilities." *See id.* at 4 (citing 30 U.S.C. § 226(b)(1)(A); 43 C.F.R. § 2120.1-2(a)). Although this IM expired by its terms on September 30, 2011, *see* Dkt. No. 11-3 at 2, part of the guidance was incorporated into BLM Handbook H-1624-1: Planning for Fluid Mineral Resources (updated January 28, 2013), Ex. 1; BLM Manual 3120 (updated February 18, 2013), Ex. 2; and BLM Handbook 3120-1 (updated February 18, 2013) on Competitive Oil and Gas Leasing, Ex. 3.

According to its guidance, to determine which parcels are available for leasing, the applicable BLM state office completes an initial review of eligible parcels, and then sends a preliminary parcel sale list to the field office for review and confirmation. Manual 3120, § .42A, Ex. 2 at 2. The BLM field office assembles an interdisciplinary parcel review team, which reviews the preliminary list to ensure conformance with land use plans and compliance with the National Environmental Policy Act ("NEPA") and other requirements. *Id.* § .43A, Ex. 2 at 3. The field manager (or in some cases, the district manager) forwards the finalized NEPA document and a recommendation for each parcel to the applicable state director. *Id.* § .43B, Ex. 2 at 3. The

recommendation may include offering a parcel with appropriate stipulations, offering a parcel with modified boundaries, or deferring a parcel from leasing, pending further evaluation of specified issues. Handbook 3120-1, at 9-10, Ex. 3 at 2–3.

The BLM state office offering the parcel for sale posts the final sale notice with a list of the offered parcels at least 45 days prior to the sale date, and typically as many as 90 days prior. *See* 43 C.F.R. § 3120.4-2, Manual 3120, § .52, Ex. 2 at 5. Any party may protest a parcel offered for sale within thirty days of posting of the final sale notice, Manual 3120, § .53, Ex. 2 at 5, and BLM "may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale." 43 C.F.R. § 3120.1-3.

STANDARD OF REVIEW

Rule 12(b) of the Federal Rules of Civil Procedure allows courts to dismiss a complaint for "lack of subject-matter jurisdiction." *See* Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b) is appropriate in cases, such as this, that seek judicial review of agency action or inaction pursuant to *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), but that fail to state a claim within the Court's jurisdiction. *See Kane Cty v. Salazar*, 562 F.3d 1077, 1086 (10th Cir. 2009) ("[N]othing in *Olenhouse* . . . precludes an APA-based complaint from being summarily dismissed pursuant to Federal Rule of Civil Procedure 12(b).").

Pursuant to Rule 12(b)(1), a complaint must be dismissed for lack of subject matter jurisdiction if the Petitioner does not have standing, *see Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 102 (1998), or "the cause is not one described by any jurisdictional statute." *See Baker v. Carr*, 369 U.S. 186, 198 (1962). Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads

sufficient facts to establish it." *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994) (citations omitted). "Mere conclusory allegations of jurisdiction are not enough; the party pleading jurisdiction 'must allege in his pleading the facts essential to show jurisdiction.'" *Id.* (quoting *Penteco Corp. Ltd. P'ship-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. In the first form, the movant asserts that the allegations in the complaint on their face fail to establish the court's subject matter jurisdiction. "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted). In the second form, the movant may present evidence challenging the factual allegations in the complaint "upon which subject matter jurisdiction depends." *Id.* at 1003 (citation omitted). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations . . . [but] reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion." *Id.* (citations omitted). With one small exception noted below in Argument section I.C., this motion brings a facial challenge to the Court's jurisdiction over Counts II and III.

ARGUMENT

As set forth below, Petitioner's Counts II and III must be dismissed for lack of jurisdiction under 12(b)(1) because Petitioner does not have standing to bring these claims, and Petitioner fails to challenge final agency action.

I. Petitioner Lacks Standing to Bring Counts II and III

Whether a party has standing under Article III of the U.S. Constitution is a "threshold jurisdictional question" that a court must decide before it may consider the merits. *Steel Co.*, 523

U.S. at 102. A party's standing to sue "constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Id.* at 103–04.

In order to demonstrate standing under Article III, a party must establish, at an "irreducible constitutional minimum" three requirements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in the original, citations omitted). Petitioner must satisfy the injury, causation, and redressability requirements with respect to each claim. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Furthermore, because Petitioner seeks prospective relief, *see* Compl. 29 ¶¶ 3–4, it must be "suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1257 (D.N.M. 2011) (quoting *Tandy v. City of Wichita*, 380 F.3d 1227, 1283 (10th Cir. 2004)).

Here, Petitioner argues that BLM's "illegal administration of its leasing program has injured and will continue to injure individual Alliance members" in five ways, i.e., by: (1) "prevent[ing] member companies from drilling wells" on federal, Indian, state, and fee lands; (2) "restrict[ing] member companies' operational flexibility thereby reducing member companies' ability to plan projects so that waste is reduced and development is executed in the most environmentally sensitive manner;" (3) forcing missed deadlines in agreements with third parties

and BLM; (4) denying "member companies[']s . . . ability to realize revenue;" and (5) denying "federal and state taxpayers the ability to receive royalty payments from the development of federal minerals." Compl. ¶¶ 76–77.

Each of these alleged injuries is insufficient to establish standing. First, Petitioner has failed to establish associational standing because it has not identified which of its members are harmed, and environmental and taxpayer harms are not germane to its organizational purpose. Second, Petitioner has failed to satisfy the injury-in-fact requirement, because it has not identified which parcels its members wish to lease and because it cannot assert taxpayer standing. Third, Petitioner's alleged injuries are not traceable to BLM's actions because they rely on a long and attenuated chain of causation, built from assumptions that are too speculative to support Article III standing. And fourth, Petitioner's injuries are not redressable by this Court because the relief requested by Petitioner will not redress its members' alleged injuries.

A. Petitioner has Failed to Establish Associational Standing

Petitioner has not made allegations sufficient to establish associational standing. To sue on behalf of its members, an association must demonstrate that "(a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Petitioner's allegations do not satisfy the first, and, as to certain alleged injuries, the second, prongs, and therefore fail to demonstrate associational standing.

1. Petitioner has not Identified which Members are Harmed

Petitioner fails to identify which member firms are harmed by BLM's alleged failure to hold quarterly lease sales. *See, e.g.*, Complaint ¶ 21 ("Alliance members are among the companies that submitted [EOIs] . . . ."). As a result, Petitioners have failed to meet the minimum requirements of associational standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("the Court . . . require[s] plaintiffs claiming organizational standing to identify members who have suffered the requisite harm . . . ."); *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured") (citing *Summers*, 555 U.S. at 498). Without alleging which members are harmed, Petitioner cannot demonstrate that individual members would have standing to sue. *See Osage Producers Ass'n v. Jewell*, No. 15-CV-469-GKG-FHM, --- F. Supp. 3d ---, 2016 WL 3093938, at *3 (N.D. Okla. June 1, 2016) (dismissing case when organization did not specify "at least one member adversely affected by each challenged agency action.").

To the extent Petitioner claims it cannot specify certain information, such as which members are harmed, because BLM has not yet released documents pursuant to a FOIA request, this argument does not have merit. The burden is on the plaintiff to frame a "complaint with enough factual matter (taken as true) to suggest" that he or she is entitled to relief. *Robbins*, 519 F.3d at 1247 (quoting *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 556 (2007)); *see also Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1148 n.4 (2013) ("[I]t is [plaintiffs'] burden to prove their standing by pointing to specific facts[.]" (citing *Lujan*, 504 U.S. at 561)). In *Clapper*, the Supreme Court found that plaintiffs who had "no actual knowledge" of the Government's

surveillance practices did not have standing because it was "speculative whether the Government will imminently target [their] communications[.]" *See Clapper*, 133 S. Ct. at 1148. This was so even though the Government could not disclose the information that plaintiffs needed without risks to national security. *See id.* at 1148 n.4. Likewise here, if Petitioner does not have the information needed to know whether its members have actually been injured, or are in imminent danger of injury, its claims of injury are merely conjectural.

Petitioner's members know the parcels for which they have submitted EOIs. They know whether they have bid on any of those parcels at auction, and whether they have leased those parcels. Yet Petitioner fails to allege that BLM has unreasonably delayed action on any particular EOI. Petitioner's attempt to reverse the normal pleading burden only shows the conjectural nature of its alleged injuries. Furthermore, as explained in more detail below, Petitioner's MLA claims can be dismissed on alternate grounds without the aid of additional information.

2. Environmental and Taxpayer Harms are not Germane to WEA's Purpose

Even if Petitioner had identified which member companies are harmed, and demonstrated that these member companies have standing to sue in their own right, the environment and the public fisc are not germane to Petitioner's interests. The requirement that "an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–56 (1996). Petitioner alleges that it is injured by being unable to plan and thus develop "in the most environmentally sensitive manner;" and that leasing delays "deny federal and state taxpayers the

ability to receive royalty payments . . . .” *see* Compl. ¶ 77 (ii), (v). However, neither interest is germane to WEA’s purpose as a trade association representing independent oil and natural gas producers. *See* Compl. ¶ 1.

The courts have consistently held that trade associations may not base standing on non-economic harm. *See Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1104 (9th Cir. 2005), *as amended* (Aug. 17, 2005) (cattle association could not base standing on environmental harms because it was organized to protect “trade and marketing” interests); *Pac. Nw. Generating Co-op. v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994) (power-generation companies could not base standing on alleged injuries to salmon); *Wyo. Timber Indus. Ass’n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245, 1252–53 (D. Wyo. 2000) (protection of aesthetic and recreational interests were not germane to the purposes of timber industry trade association) (appeal dismissed as moot). Similarly here, Petitioner’s purpose is to protect the economic interests of its members, not to protect the environment or the public fisc. Neither of these interests are germane to Petitioner’s organizational purpose, and it cannot base its standing on allegations of injuries to these interests.

B. Petitioner Has Failed to Demonstrate Injury in Fact

Even if Petitioner had specified which members were harmed by BLM’s alleged failure to conduct quarterly lease sales, Petitioner’s allegations would not satisfy the injury in fact requirement for two reasons. First, Petitioner has not identified any parcels for which its members submitted EOIs and which have not been offered for sale. Second, Petitioner cannot assert the interests of state and federal taxpayers.

1. Petitioner has Not Specified which Parcels its Members Sought to Lease

As a preliminary matter, Petitioner has failed to specify which parcels have not yet been offered for sale, despite being identified in EOIs submitted by its members. Other courts, including the Supreme Court, have found similarly vague allegations to be insufficient to confer standing. In *Summers*, the Supreme Court found that plaintiffs did not have standing when they failed "to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of [plaintiffs']." *See* 555 U.S. at 495. Similarly, in *Swanson Group Manufacturing v. Jewell*, allegations that shortfalls in Forest Service timber sales *may* mean that the plaintiff could not continue to operate its facility were "the kind of uncertain and unspecific prediction of future harm that is inadequate to establish Article III standing." *See* 790 F.3d 235, 242 (D.C. Cir. 2015). In both of these cases, the courts found that these vague allegations of injury were insufficient to confer standing.

This Court should come to the same conclusion here. "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' . . . ." *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (citations omitted); *see also Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1070 (D. Colo. 2012) (plaintiff did not have standing when he did not offer facts demonstrating that he owned properties allegedly affected by antitrust violations); *Amigos Bravos v. U.S. BLM*, 816 F. Supp. 2d 1118, 1133–34 (D.N.M. 2011) (finding that environmental plaintiffs lacked standing when they failed to identify which lands subject to lease sales that they use).

In one instance, when discussing lease sales by the Eastern States Office, Petitioner fails to even specify the states in which the parcels for which its members have submitted EOIs are

located. *See* Compl. ¶ 68 ("EOIs for parcels in at least some of these states have been pending . . . ."). Since Petitioner alleges that BLM must conduct lease sales quarterly for each state, *see* Compl. ¶ 19, its failure to allege the particular states where the parcels its members wish to lease are located is fatal to its claims relating to the Eastern States Office. *See Clapper*, 133 S. Ct. at 1148 n.4 (2013) ("it is [Petitioner's] burden to prove [its] standing by pointing to specific facts." (citing *Lujan*, 504 U.S. at 561)).

2. Petitioner Does Not Have Taxpayer Standing

Even if Petitioner were more specific in its allegations, Petitioner cannot base its standing on the assertion that BLM is denying "federal and state taxpayers the ability to receive royalty payments from the development of federal minerals." *See* Compl. ¶¶ 76–77. Federal taxpayer standing fails for two reasons. First, a complaint alleging taxpayer standing may only be directed at taxing and spending actions authorized by Article I, Section 8 of the Constitution, not actions by a federal agency acting under authority that Congress delegated to it under the Property Clause, Article IV, Section 3. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479–80 (1982) (citing *Flast v. Cohen*, 392 U.S. 83, 102 (1968)); *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988). "'[N]eedful rules 'respecting' the public lands" are an exercise of Property Clause authority. *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Thus, any actions that BLM takes under the authority Congress delegated to it through the MLA are an exercise of Property Clause authority, not the taxing and spending authority, and cannot be the subject of a suit based on taxpayer standing.

Second, "[a]bsent special circumstances . . . standing cannot be based on a plaintiff's mere status as a [federal] taxpayer." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134

(2011). The Supreme Court found that this general lack of taxpayer standing applies to challenges to decisions not to collect revenue as well as to challenges to taxes, since "[t]o conclude there is a particular injury in fact would require speculation that [] lawmakers react to revenue shortfalls by increasing respondents' tax liability." *See id.* 563 U.S. at 137. Furthermore, it would be "conjectural" to find that "any tax increase would be traceable to" the decision not to collect revenue, "as distinct from other governmental expenditures or other tax benefits." *Id.* at 137–38. Here, Petitioner has only alleged a "generalized grievance," and thus, cannot show federal taxpayer standing. *See id.* at 140 (quoting *Flast*, 392 U.S. at 106).

Petitioner's state taxpayer standing claims also fail. As a preliminary matter, Petitioner fails to allege that its members are taxpayers, identify the states in which its members pay taxes, or explain whether its members have submitted EOIs for parcels in the same states. In other words, Petitioner has failed to show that its members are taxpayers in a state that is allegedly losing royalty revenues as a result of BLM's administration of its leasing program.

Furthermore, because Petitioner is alleging a loss of federal royalty revenue to a state, not an illegal appropriation or expenditure,[3] Petitioner is essentially bringing its claim on behalf of unnamed states, not those state's taxpayers. Not only does this once again show a failure to plead its claims with particularity, but "absent statutory authorization, citizens and taxpayers may not

[3] To show state taxpayer standing to challenge an appropriation or expenditure, the "state taxpayer must allege that appropriated funds were spent for an allegedly unlawful purpose and that the illegal appropriations and expenditures are tied to a direct and palpable injury threatened or suffered . . . ." *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1401 (10th Cir. 1992) (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952)).

bring a derivative suit on behalf of the state." *Gallagher v. Cont'l Ins. Co.*, 502 F.2d 827, 832 (10th Cir. 1974) (citations omitted); *see also Mountain States Legal Found. v. Costle*, 630 F.2d 754, 768–69 (10th Cir. 1980) (plaintiff could not bring action on behalf of State of Colorado). Without specifying which state has lost royalty revenues and showing that the suit is authorized by that state, Petitioner cannot bring claims related to those revenues.

Even if Petitioner could bring a claim of loss of revenue on behalf of certain states, Petitioner would have to present "concrete evidence [that] revenues have decreased or will decrease . . . ." *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012). Otherwise, Petitioner would merely present a "generalized grievance" as its basis for "unwarranted litigation against the federal government." *See id.* Petitioner has failed to plead facts that would "state a claim to relief that is plausible on its face," and thus its taxpayer standing claims must be dismissed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

C. Petitioner Member Companies' Injuries are not Traceable to BLM's Conduct

Petitioner's allegations of injury make a number of speculative leaps to connect BLM state offices' scheduling of lease sales with its members' alleged injuries, which include such harms as being unable to drill on federal, Indian,[4] state, and fee lands; reductions in operational

[4] Additionally, any inability of Petitioner's member companies to develop minerals on Indian lands, *see* Compl. ¶ 77(i), is not traceable to BLM's scheduling of lease sales. "[L]ands within an Indian reservation are not subject to the leasing provisions of 30 U.S.C.A. § 226." *Gonsales v. Seaton*, 183 F. Supp. 708, 710 (D.D.C 1960); *see also* 43 CFR 3100.0-3(a)(2)(ii) (clarifying that "Indian reservations" are excepted from leasing under the MLA); *Haley v. Seaton*, 281 F.2d 620, 623 (D.C. Cir. 1960) (holding that "Indian lands are not leasable under the [MLA].") (citing Executive Order Indian Reservations- Leasing Act, 34 Op.Atty.Gen. 171 (1924)).

flexibility; missed deadlines; losses in revenue; and losses of royalties to taxpayers. Compl. ¶ 77. Petitioner's burden of demonstrating causation is not satisfied when "[s]peculative inferences are necessary to connect [its] injury to the challenged actions." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 (10th Cir. 2005) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45–46 (1976)). The speculative inferences that Petitioner implicitly makes in its complaint are as follows: first, that if BLM were to offer more frequent lease sales, more parcels would be offered for sale, including all of the (unspecified) parcels for which Petitioner's members have submitted EOIs; second, if a lease sale were held, the member companies would obtain their desired parcels; and third—specifically relating to its allegations of loss of revenue—if the member companies obtained their desired leases, those leases would be productive. Together, these links are too weak to maintain the chain of causation.

First, Petitioner's alleged harms are not traceable to BLM's lease sale frequency. Regardless of frequency of sales, BLM must determine whether parcels are "available" before offering them for any sale. *See* 30 U.S.C. § 226(b). As discussed above in the background section, this is a complex process involving analyses under FLPMA and NEPA. *See, e.g.*, BLM Handbook H-1624-1, Ex. 1 at 3. The Secretary, and by extension the BLM, also has considerable discretion in this regard. *See WEA*, 709 F.3d at 1044 ("The MLA . . . continues to vest the Secretary with considerable discretion to determine which lands will be leased") (citing 30 U.S.C. §§ 226(a), 226(b)(1)(A)). Simply because a Petitioner member company has submitted an EOI for a particular parcel does not mean that the Secretary will determine that it is "available." *See Minerals Management*, BLM, 53 Fed. Reg. 22814, 22828 (June 17, 1988) ("many if not most lands will not be 'offered' by the Bureau but are nonetheless available for filing an EOI.").

Moreover, more frequent sales would not increase the number of parcels that are determined to be "available." If anything, more frequent sales may simply result in fewer parcels being offered per lease sale. Any injury that Petitioner's members experience from being unable to lease certain parcels is not traceable to the frequency of sales.

Second, Petitioner's alleged injuries are not traceable to the frequency of competitive lease sales because even if BLM offers for sale a parcel for which a Petitioner member company has submitted an EOI, there is no guarantee that the Petitioner member company would obtain a lease as a result of the sale. Parcels are offered for lease at auction. *See* 43 CFR § 3120.5-1. For Petitioner to be injured by a decreased frequency of sales, its member companies would have to be assured that they would be the winning bidder.[5] The Tenth Circuit, when addressing this issue under the redressability prong, has found this chain of causation to be too attenuated. *See Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451 (10th Cir. 1994). The court in *Mount Evans* found that one of the plaintiff companies in that case did not have standing to force the Forest Service to rebuild a facility and allow the company the opportunity to compete for a sale because there was "no guarantee" that the petitioner "would be awarded the concession contract." *See id.* at 1451. Similarly here, Petitioner's allegations require the Court to speculate that a Petitioner member company would obtain a lease as a result of the sale of a parcel for which that member company has submitted an EOI. Such speculation cannot provide the basis for standing.

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[5] Even if a member company were to be the winning bidder, the BLM may decide not to issue a lease for that parcel and, therefore, reject the lease offer and refund the bidder's money. A lease offer may be rejected and the bid payment refunded, up until BLM executes and issues a lease. *See WEA*, 709 F. 3d at 1043–44; *Roy G. Barton*, 188 IBLA 331 (Sept. 26, 2016).

Third, even if one of Petitioner's member companies obtains a lease and completes the permitting process, there is no guarantee that a lease will be profitable and generate revenue. Not all leases are productive, and many may produce paying quantities of oil and gas for only a short time. *See* Marc Humphries, Cong. Research Serv., R42432, *U.S. Crude Oil and Gas Production in Federal and Nonfederal Areas* 10 (2016), https://fas.org/sgp/crs/misc/R42432.pdf (last visited Nov. 8, 2016), Ex. 4 at 3. Leases may not be productive for various reasons that are not attributable to BLM, including equipment availability, oil and gas prices, capital costs, labor shortages, lack of commercial discovery, and holding of leases without drilling. *See id.* at 10–11, Ex. 4 at 3–4. Accordingly, even when a lease is obtained, it is speculative to assume that revenue will follow. *See Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992).

Recent commodity price decreases provide an alternative explanation for Petitioner's loss of revenue.[6] Between July of 2014 and July of 2015, the spot price of West Texas Intermediate Crude fell by more than half, from $103.59 per barrel to $50.90 per barrel. *See* U.S. Energy Info. Admin., *Cushing, OK WTI Spot Price FOB*, http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=M (last visited Nov. 8, 2016), Ex. 5. The price bottomed out at $30.32 per barrel in February of 2016 and, as of September 2016, was at $45.18 per barrel. *See id.* These market conditions have also led to a dramatic decrease in the number of Applications for Permits to Drill that BLM receives for existing leases. *See* BLM, *Onshore Oil*

[6] Federal Defendants concede that this argument relating to price decreases is a factual attack, but note that this public information may be considered when considering a motion to dismiss for lack of jurisdiction under 12(b)(1). *See Holt*, 46 F.3d at 1003 ("A court has wide discretion to allow . . . other documents . . . to resolve disputed jurisdictional facts under Rule 12(b)(1)) (citations omitted).

and Gas Operations, 81 Fed. Reg. 49,913, 49,914 (July 29, 2016). This drastic fall in crude oil prices is further evidence that any loss of revenue is not fairly traceable to BLM's actions. *See Swanson Grp. Mfg.*, 790 F.3d at 243–44 (plaintiffs failed to show economic injury was traceable from BLM's failure to hold annual timber sales "rather than to an independent source, such as the recession.") (citing *Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1296–97 (D.C.Cir.2015)); *c.f. Wyoming*, 674 F. 3d at 1233 ("conclusory statements and speculative economic data" were "insufficient" to show that reductions in snowmobile entries into Yellowstone would result in decreased tax revenues for local governments).

D. Petitioner's Injuries are not Redressable

Petitioner also lacks standing because its alleged injuries are not redressable by this Court. "To establish Article III standing" it must be "likely, as opposed to merely speculative, that the injury will be redressed by the relief requested." *See Tandy*, 380 F.3d at 1283 (quoting *Friends of the Earth v. Laidlaw Envtl. Servs.,Inc.*, 528 U.S. 167, 180–81 (2004)). For the same reasons that Petitioner's injuries are not traceable to BLM's actions or lack thereof, its injuries are also not redressable by this Court. "In this case, like many, 'redressability and traceability overlap as two sides of a causation coin.'" *Nova Health Sys.*, 416 F.3d at 1159 (quoting *Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1123 (10th Cir.1998)). The crux of Petitioner's request for relief is that the Court order BLM to "abandon all currently existing lease sale schedules . . . and . . . adopt promptly revised lease sale schedules." Compl. 29, ¶ 3. However, the Court cannot order that particular parcels be offered for sale. And even if it could, holding more frequent lease sales does not guarantee that more total parcels would be offered for

sale, or that Petitioner's members would be able to develop the parcels for which they have submitted EOIs. Therefore, its injuries are not redressable by this Court.

First, the Court cannot order that BLM offer for sale the parcels for which Petitioner member companies have submitted EOIs. *See Marathon Oil Co. v. Babbitt*, 966 F. Supp. 1024, 1025–26 (D. Colo. 1997) (dismissing for lack of standing a claim by an oil company seeking to compel DOI to offer tracts for oil and gas leasing), *aff'd*, 166 F.3d 1221 (10th Cir. 1999) (unpublished)). Because "the federal courts do not have the power to order competitive leasing . . . [a] favorable ruling in this case will not guarantee the [Petitioners] one nickel of [oil and gas] leasing royalties." *See Sullivan*, 969 F.2d at 881.

Second, even if the Court had the power to order lease sales, such an order would not redress Petitioner member companies' injuries because holding an auction does not guarantee them the leases they seek. In *Mt Evans*, the court found that even if the plaintiff had the opportunity to compete for the concession contract, there was "no guarantee that [petitioner] would be awarded the concession contract, and there is no way this court or any other court could order the Forest Service to award [petitioner] that contract," and therefore the petitioner's injuries were not redressable. *See* 14 F.3d at 1451; *see also Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1247–79 (10th Cir. 2004) ("loss of the opportunity to bid" did not confer standing); *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 874 (10th Cir. 1992) (injury from "loss of the possibility of leasing" was "not redressable by a favorable decision.") (citing *Glover River Org. v. U.S. Dep't of Interior*, 675 F.2d 251, 253–54 (10th Cir. 1982)). Similarly here, even if BLM offered the parcels for which Petitioner member companies have submitted EOIs, there is

no guarantee that the companies would submit the winning bids at auction, and thus Petitioner's injuries are not redressable by this Court.

Petitioner's complaint is an attempt to get around the Secretary's discretion in determining which lands are available by targeting the frequency of sales. But Petitioner's alleged injuries are not traceable to the frequency of sales, nor are they redressable by this Court. In sum, Petitioner's claims of standing "founder[] on too many contingencies for [the court] to conclude that it meets the constitutional requirement of redressability." *See Sullivan*, 969 F.2d at 881. And as discussed above, Petitioner's alleged injuries, to the extent that Petitioner has associational standing, are conjectural and speculative. For all of these reasons, the Court should dismiss Petitioner's claims for lack of standing.

II. Petitioner Brings an Impermissible Programmatic Challenge

Where, as here, no applicable statute supplies a private right of action for a petitioner's claim challenging the actions of a federal agency, those claims may only be brought pursuant to the judicial review provisions of the APA. *See* 5 U.S.C. §§ 701–06; *Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998). The APA's waiver of sovereign immunity is limited. *See High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006) (citing *Califano*, 430 U.S. at 105–07). The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute[.]" 5 U.S.C. § 702. "Agency action" is defined in the APA to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" *Id.*, § 551(13). Thus, claims brought pursuant to the APA must challenge "circumscribed, discrete agency actions." *Norton v. Southern Utah Wilderness All.* (*SUWA*), 542

U.S. at 62; *see also Lujan*, 497 U.S. at 891 ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."). Further, the agency action complained of must be "final." 5 U.S.C. § 704. Final agency actions are those that "mark[] the consummation of the agency's decision-making process" and "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations and citations omitted).

The burden is on the party seeking review under the APA "to set forth specific facts . . . showing that he has satisfied its terms." *Lujan*, 497 U.S. at 884. Petitioner here brings an improper programmatic challenge to the "[t]he manner in which BLM is presently scheduling and administering oil and gas lease sales." Compl. ¶¶ 117, 124. In doing so, Petitioner fails to challenge a discrete final agency action and instead brings a broad programmatic challenge that is barred by the Supreme Court's opinions in *Lujan* and *SUWA*.

In *Lujan*, environmental groups challenged what they termed BLM's "land withdrawal review program," which is how they described BLM's practice of reclassifying public lands that had previously been "withdrawn" from mineral leasing and mining activities. *See* 497 U.S. at 875, 879. The Supreme Court found that the challenged "land withdrawal review program" was not an "'agency action' within the meaning of § 702, much less a 'final agency action' within the meaning of § 704." *Id.* at 890. The Court explained that "[t]he term 'land withdrawal review program' . . . does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." *Id.* The Court also made clear that even if any one land status determination was a final agency action, an entire program "cannot be laid before the courts for wholesale correction under the APA[.]" *Id.* at 893.

The Supreme Court reaffirmed the APA's bar on programmatic challenges in *SUWA*. The environmental groups in *SUWA* alleged that BLM failed to carry out a statutory mandate. *See* 542 U.S. at 59 (quoting 43 U.S.C. § 1782(c)). The Supreme Court held that it could not compel BLM to act under § 706(1) of the APA because "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*." *Id.* at 64 (citing 5 U.S.C. § 706(1)). The Court made clear that "[t]he limitation to discrete agency action precludes" that type of "broad programmatic attack." *See id.*

Petitioner's Complaint inappropriately seeks "wholesale correction" of an entire program. Petitioner's Complaint requests, *inter alia*, that the Court:

> 2. Declare the manner in which BLM is presently scheduling and administering oil and gas lease sales unlawful as a violation of the express terms of the [MLA];
>
> 3. Require BLM to immediately abandon all currently existing lease sale schedules that do not comply with the [MLA] and to adopt promptly revised lease sale schedules that comply with the [MLA];
>
> 4. Direct BLM to revise or rescind all agency guidance and instructional memoranda, including I.M. No. 2010-117, that direct implementation of BLM's lease sale program in a manner contrary to law;

Compl. 29, ¶¶ 2–4. Petitioner's request that the Court declare BLM's policies invalid without challenging discrete actions taken pursuant to those policies is not justiciable. *See Lujan*, 497 U.S. at 891; *Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000); *Nat'l Wildlife Fed'n v. Caldera*, No. Civ. A 00-1031(JR), 2002 WL 628649, at *4 (D.D.C. Mar. 26, 2002) (unpublished) ("[T]he prayer for declaratory relief is merely another way of approaching the programmatic relief that this court does not have the jurisdiction to grant.").

Petitioner's impermissible programmatic challenge is not saved by the fact that its Complaint references some specific lease sale cancellations. *See, e.g.*, Compl. ¶ 29. In *Peterson*, the Fifth Circuit rejected a programmatic challenge brought by environmental groups where the groups "cited twelve allegedly ripe and allegedly improper timber sales" in support of their claim, but made clear "that these sales were examples of the larger even-aged management techniques they were challenging rather than the extent of their challenge." 228 F.3d at 563–64; *see also Caldera*, 2002 WL 628649, at *4–5 (dismissing case where plaintiffs identified twenty-three permits as "examples of what plaintiffs see as rampant unlawfulness in the permitting program . . . ."). Similarly here, Petitioner's examples are insufficient to overcome its failure to challenge a particular sale cancellation involving a specific parcel subject to a member company's EOI, or to claim that BLM has unreasonably delayed action on a particular pending EOI. *See Donelson v. United States*, No. 14-CV-316-JHP-FHM, 2016 WL 1301169, at *10 (N.D. Okla. Mar. 31, 2016) (unpublished) ("Petitioners could not challenge an entire leasing program by identifying specific allegedly-improper final agency actions within that program and using those examples as evidence to support a sweeping argument . . . .").[7]

Petitioner seeks the precise type of sweeping programmatic review barred by *Lujan* and *Peterson*. Petitioner's claims must be dismissed because it attempts to challenge BLM's policies on a "wholesale" basis rather than challenging a discrete final agency action.

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[7] It bears noting that, even if the Court ultimately were to determine that Petitioner has pleaded a claim as to one or more discrete agency actions, it would still have to satisfy itself that Petitioner has met the requirements of standing for each of those discrete actions—and we have already explained why Petitioner falls short of that burden. In addition, the Court would have to dismiss all other aspects of the complaint that assert a programmatic challenge or seek programmatic relief.

CONCLUSION

Petitioner lacks standing to bring Counts II and III. It has failed to establish associational standing both because of the lack of specificity of its claims and because certain interests it alleges are harmed are not germane to its organizational purpose. Even if it had shown associational standing, it has failed to allege sufficiently specific facts to show a concrete injury. Furthermore, any injuries it has are not traceable to BLM's actions, and not redressable by this Court. Petitioner also brings a non-justiciable programmatic challenge. For these reasons, the Court does not have jurisdiction over Petitioner's Counts II and III and should dismiss those claims.

Respectfully submitted this 9th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2016, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

/s/ Rachel K. Roberts
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