IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., PLAINTIFFS, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; et al., DEFENDANTS.	CIVIL ACTION NO. 2:21-cv-778-TAD-KK

MEMORANDUM IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE AND TO COMPEL COMPLIANCE WITH PRELIMINARY INJUNCTION

"Courts for centuries have possessed the inherent power to enforce their lawful decrees through the use of coercive sanctions in civil contempt proceedings." *Scott v. Hunt Oil Co.*, 398 F.2d 810, 811 (5th Cir. 1968); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("[T]he underlying concern that gave rise to the contempt power ... was disobedience to the orders of the Judiciary."). To establish a prima facie case of contempt, Plaintiff States must show by clear and convincing evidence "(1) That a court order is in effect; (2) That the order prescribes or requires certain conduct by the respondent; and (3) That respondent has performed an act or failed to perform an act in violation of the court's order." *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 119 (W.D. La. 1984). Plaintiff States "need not show that the violation was willful." *Id.*

The first and second elements cannot be contested here. Defendants have violated the Court's June 15 Order by their continued application of the Pause to refuse to hold new onshore lease sales or Lease Sale 257. Every day that passes without compliance irreparably harms Plaintiff States. Accordingly, this Court should order Defendants to show cause as to why they should not be held in contempt for violating the preliminary injunction. It also should order Defendants to comply with the law and this Court's injunction by holding Lease Sale 257.

I. Defendants Have Violated This Court's Preliminary Injunction.

More than seven weeks ago, after a hearing, this Court granted Plaintiff States' motion for a preliminary injunction. The Court's Order "enjoined and restrained" Defendants "from implementing the Pause of new oil and gas leases on public lands or in offshore waters as set forth in Section 208, Executive Order 14008, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021) and as set forth in all documents implementing the terms of said Executive Order by said defendants, as to all eligible lands." Doc. 140. The Court further ordered that Defendants "shall be enjoined and restrained from implementing said Pause with respect to Lease Sale 257, Lease Sale 258 and to all eligible onshore properties." *Id.* Finally, the Court ordered that "the scope of th[e] injunction shall be nationwide." *Id.*

BOEM has taken no action whatsoever to hold Lease Sale 257. Instead, it has focused on wind-related projects that are not mandated by the Five Year Plan, OCSLA, or this Court's Order. For instance, on June 17, the Bureau of Ocean Energy Management (BOEM) opened a public comment period and environment review for a wind project offshore New York and New Jersey. *See* Shapiro Decl. Ex. 9. On June 28, BOEM opened an environmental review regarding a wind project offshore Rhode Island and Massachusetts. *See* Shapiro Decl. Ex. 10. On July 2, BOEM opened a public comment period for an environmental impact statement regarding a wind project offshore Virginia Beach. *See* Shapiro Decl. Ex. 3. On July 29, BOEM opened a public comment period for industry input on wind power development offshore California. *See* Shapiro Decl. Ex. 4. On July 29, BOEM issued a notice of intent to prepare an environmental impact statement for a wind project offshore North Carolina. *See* Shapiro Decl. Ex. 11. BOEM has taken no action, however, to implement Lease Sale 257 or any other oil and gas lease sale under the Five Year Plan.

Defendants' noncompliance with the Court's order has recently been made plain by public testimony before Congress. On July 27, 2021,[1] Secretary of the Interior Deb Haaland testified before the Senate Committee on Energy and Natural Resources. At the hearing, the Secretary admitted that "the Pause is still in place." *See* DVD (Doc. 148-1) at 1:00:23. The Secretary also admitted that "the pause that you're referring to, that President Biden ordered in his executive order, is, I suppose it's in effect." *See id.* at 59:43.[2] Upon being asked "[w]hat action has the department taken to be in compliance with the judge's ruling" and whether "there has been any decisions to reinstate leases, lease sales" and "specifically ... lease sale 257," the Secretary refused to give an answer. *See id.* at 1:01-11.[3]

These actions—or inactions—clearly violate this Court's Order and holding. "A party's compliance with a court order cannot be avoided by 'a literal or hypertechnical reading of an order', for it is 'the spirit and purpose of the injunction, not merely its precise words, that must be obeyed.'" *NASCO, Inc.*, 583 F. Supp. at 120. The Court ordered that Defendants are "enjoined and restrained from implementing said Pause with respect to Lease Sale 257." Doc. 140. Yet the Pause is still very much in effect with respect to Lease Sale 257. And it is still in effect despite this Court's specific finding that there is "no explanation for the postponement of Lease Sale 257 other than reliance on Executive Order 14008," which "itself provides no rationale from departing from OCSLA." Doc.

[1] Plaintiff States have submitted this testimony with their Request for Judicial Notice, Doc. 148. The testimony can be found at https://www.youtube.com/watch?v=-Mz1XWLawFE.

[2] These admissions render incoherent the Secretary's repeated protestations that the Department is complying with the Court's Order. *Cf. NASCO, Inc.*, 583 F. Supp. at 120 ("[R]espondents' conduct flies in the face of their bold assertion of good faith to achieve substantial compliance with our Order."); *see also Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019) ("[A] party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable."); *Lelsz v. Kavanagh*, 673 F. Supp. 828, 839 (N.D. Tex. 1987) ("Good faith in attempting compliance is not sufficient to avoid contempt; there is no intent requirement.").

[3] The Department's recently published Semiannual Regulatory Agenda further demonstrates its non-compliance. The Agenda contains no reference to any progress or plans to start progress on the next OCSLA Five Year Plan. Not only are Lease Sales 257 and 258 under threat, the entire notion of oil and gas lease sales on the Gulf of Mexico are in doubt.

139 at 34-35. Moreover, the Court specifically held that "the Government Defendants were legally required to go through with the sale of Lease Sale 257" and have unreasonably and unlawfully delayed this agency action. Doc. 139 at 38-39.

Defendants have acted as if this Court's findings, conclusions of law, and compulsory order do not exist. They have taken no actions to reinstitute Lease Sale 257; they have not, for instance, revoked the Recission of the Record of Decision or published the Final Notice of Sale. Neither step would require vast work or resources—both documents already exist. Once these steps were taken, BOEM would need to hold the Lease Sale—an action it is more than capable of executing. It has not done so and thus has violated this Court's clear order, and remains in violation of OCSLA and the Administrative Procedure Act. *See NASCO, Inc.*, 583 F. Supp. at 120 (party must be "reasonably diligent and energetic in attempting to accomplish what was ordered"); *see also Calvillo Manriquez v. Devos*, 411 F. Supp. 3d 535, 539 (N.D. Cal. 2019) (finding contempt because "Defendants' attempt to comply with the preliminary injunction consisted of a single email to each service provider and partial confirmation of receipt of those emails" rather than "the normal actions one would expect from an entity facing a binding court order: multiple in-person meetings or telephone calls to explain the preliminary injunction and to confirm that the contractors were complying with the preliminary injunction").[4]

[4] This situation is distinguishable from the finding of no contempt in *Hornbeck*. *See Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787 (5th Cir. 2013). That contempt proceeding involved the implementation of a *new* moratorium rather than the continuation of the enjoined moratorium. *Id.* at 793-95. And the Court there never held that the moratorium violated OCSLA—a start contrast to this Court's conclusion in the Preliminary Injunction. *Compare id.* at 795 ("Hornbeck's complaint also asserted that a six-month moratorium on all drilling exceeded the authority delegated to Interior under the Outer Continental Shelf Act. The court never reached that issue. *Had the May Directive been enjoined on that basis, this would be a very different case*. Instead, the sole justification for the preliminary injunction that did issue as to the first Directive was a procedural failure to explain.") (emphasis added), *with* Doc. 139 at 5 ("[S]ince OCSLA does not grant specific authority to a President to 'Pause' offshore oil and gas leases, the power to 'Pause' lies solely with Congress. Therefore, Plaintiff States have made a showing that there is a substantial likelihood that President Biden exceeded his powers in Section 208 of Executive Order 14008."), *and id.* at 33 ("By pausing the leasing, the

II. Defendants Have No Valid Defenses to Their Failure to Comply.

Because Plaintiff States have established a prima facie case of contempt, "the burden falls upon [Defendants] to assert defenses or mitigating circumstances that might cause the court to withhold the exercise of its contempt power." *NASCO, Inc.*, 583 F. Supp. at 119. Defendants have no defense. As noted above, they have ample resources to conduct other activities such as wind project environmental impact statements and comment periods. No new record of decision, lease terms, or notice of sale would have to be prepared—those documents already exist. *See* Doc. 135-1 (Lease Sale 257 ROD); Doc. 135-8 (Lease Sale 257 Lease Stipulations); Doc. 139 at 29 ("[O]n January 20, 2021, (the day President Biden was sworn in), Walter Cruickshank sent an email to Loren Thompson [Doc. No.121, PR 17], in which he stated they had received instructions to withdraw any notices that were pending at the Federal Register, which included the Final Notice of Sale for Lease Sale 257."). All that remains is to hold the Sale itself. *Olivia Y. by & Through Johnson v. Barbour*, No. 3:04CV251TSL-FKB, 2011 WL 13353278, at *1 (S.D. Miss. May 17, 2011) ("'[A] party is in civil contempt if that party fails in meaningful respects to achieve substantial and diligent compliance with a clear and unambiguous decree.'"). Defendants thus fail to carry their burden to show "a present inability to comply with the order or substantial compliance with the order" and can point to no other "mitigating circumstances." *Id.*

Finally, Defendants have not filed a notice of appeal, or sought or received a stay. This Court's Order thus remains fully effective. *Cf. In re Timmons*, 607 F.2d 120, 125 (5th Cir. 1979) ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal."); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 439 (1976) ("'It is for the court of first instance to determine the question of

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agencies are in effect amending two Congressional statutes, OCSLA and MLA, which they do not have the authority to do. Neither OCSLA nor MLA gives the Agency Defendants authority to pause lease sales.").

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