

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 31 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MONTANA ENVIRONMENTAL
INFORMATION CENTER;
EARTHWORKS' OIL AND GAS
ACCOUNTABILITY PROJECT;
WILDEARTH GUARDIANS,

Plaintiffs - Appellants,

v.

UNITED STATES BUREAU OF LAND
MANAGEMENT, an agency in the U.S.
Department of Interior; SALLY JEWELL,
in her official capacity as Secretary of the
Interior; JAMIE CONNELL, in her official
capacity as State Director of the Bureau of
Land Management's Montana State
Office; THERESA M. HANLEY, in her
official capacity as Deputy State Director
of the Bureau of Land Management's
Montana State Office,

Defendants - Appellees,

AMERICAN PETROLEUM INSTITUTE;
MONTANA PETROLEUM
ASSOCIATION; MONTANA
CHAMBER OF COMMERCE;

No. 13-35688

D.C. No. 4:11-cv-00015-SEH

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

WESTERN ENERGY ALLIANCE,

Intervenor-Defendants -
Appellees.

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted June 2, 2015
Seattle, Washington

Before: O'SCANNLAIN, TASHIMA, and McKEOWN, Circuit Judges.

Appellants appeal from the district court's grant of summary judgment against them in their procedural challenge to the U.S. Bureau of Land Management's decision to sell oil and gas leases in Montana. At issue is whether the district court correctly concluded that Appellants have not shown a concrete and redressable injury sufficient to establish standing. As the facts are known to the parties, we repeat them only as necessary to explain our decision.

To establish standing, Appellants must show that they: (1) are under actual or imminent threat of suffering a concrete and particularized injury, (2) which is fairly traceable to the challenged action, and (3) which is likely to be prevented or redressed by a favorable judicial decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). In their procedural challenge, once Appellants have shown actual

injury, “the causation and redressability requirements are relaxed.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (internal quotation marks omitted).

I

The recreational and aesthetic interests asserted by Appellants’ members¹ may establish actual injury to the extent such interests would be concretely harmed by the challenged governmental action. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–83 (2000). In analyzing these claims of injury, the district court erred by failing to consider surface harms caused by development of the challenged leases and instead focusing only on the climate-change effects of such development. Although Appellants’ claims of procedural error relate to the government’s alleged failure to consider climate-change effects, Appellants’ injuries which *resulted from* that error need not. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 78–79 (1978) (rejecting need to establish “subject-matter nexus between the right asserted and the injury alleged”); *Bd. of Nat. Res. v. Brown*, 992 F.2d 937, 945 (9th Cir. 1993) (same). For standing,

¹ Appellants may have standing to bring suit on behalf of their members, whose interests are germane to Appellants’ organizational purposes, provided that such members would otherwise have standing to sue in their own right. *Friends of the Earth*, 528 U.S. at 181.

it matters only whether the challenged governmental action would cause the plaintiff a concrete and redressable injury. *See Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1176–78 (9th Cir. 2000). Once such injury is established, the plaintiff may seek to invalidate the action that caused it “by identifying all grounds on which the agency may have failed to comply with its statutory mandate.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006) (internal quotation marks omitted); *see also Desert Citizens*, 231 F.3d at 1177 (“If, by exchange, public lands are lost to those who use and enjoy the land, they are certainly entitled under the APA to file suit to assure that no exchange takes place unless the governing federal statutes and regulations are followed . . .”).

II

Therefore, Appellants may have standing to challenge the government’s sale of oil and gas leases on the basis of any concrete injury that is caused by such sale and which would likely be remedied by the sale’s invalidation. This analysis requires consideration of *which* of the numerous leases, if developed, would harm the specific areas of land enjoyed by Appellants’ members. *See W. Watersheds Project*, 632 F.3d at 485 (requiring geographical nexus between plaintiffs’ interests and area allegedly suffering environmental impact). Given the complexity of the factual record before us, we decline to undertake such analysis on appeal. Instead,

we remand to allow the district court to determine, in the first instance, which leases the Appellants have standing to challenge. When doing so, the district court should include consideration of any actual injury stemming from surface harms fairly traceable to the challenged action.²

VACATED and REMANDED. Each party shall bear its own costs on appeal.

² Federal Appellees' Suggestion of Partial Mootness, filed with this court on June 6, 2014, is DENIED without prejudice to renewal in the district court.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

Form fields for case name, v., and 9th Cir. No.

The Clerk is requested to tax the following costs against:

Table with columns: Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1; REQUESTED (Each Column Must Be Completed); ALLOWED (To Be Completed by the Clerk). Rows include Excerpt of Record, Opening Brief, Answering Brief, Reply Brief, Other**, and TOTAL.

* Costs per page: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees cannot be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk