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and Western Energy Alliance

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

MONTANA ENVIRONMENTAL INFORMATION CENTER, EARTHWORKS' OIL AND GAS ACCOUNTABILITY PROJECT, and WILDEARTH GUARDIANS, Plaintiffs, vs.	)	Case No. CV 11-15-GF-SEH DEFENDANT-INTERVENORS' OPPOSITION TO SETTLEMENT

UNITED STATES BUREAU OF LAND MANAGEMENT, an agency within the U.S. Department of Interior, KENNETH L. SALAZAR, in his 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, and THERESA M. HANLEY, in her official capacity as Deputy State Director of the Bureau of Land Management's Montana State Office, Federal Defendants. v. American Petroleum Institute, Montana Petroleum Association, Montana Chamber of Commerce, and Western Energy Alliance, Defendant-Intervenors.	)

Defendant-Intervenors American Petroleum Institute, Montana Petroleum Association, Montana Chamber of Commerce, and Western Energy Alliance (the "Defendant-Intervenors") oppose the Plaintiffs' and Federal Defendants' anticipated Settlement Agreement (the "Settlement"), which the Court ordered to be finalized and submitted by Friday, May 20, 2016 (Dkt. No. 105). Over the past three months, the Plaintiffs and Federal Defendants have refused to include the Defendant-Intervenors in their settlement negotiations. However, based on past

experience in the same case, Defendant-Intervenors believe that the terms of the anticipated Settlement are likely to substantially infringe on the rights of their members who hold oil and gas leases purchased during the challenged sale. As full parties to this lawsuit, Defendant-Intervenors have the right to object to the Settlement. Defendant-Intervenors hereby request that the Court deny any motion to dismiss and reject the Settlement, which the Defendant-Intervenors anticipate will likely suspend the Defendant-Intervenors' leases, impose substantial delays in implementing the leases while the Bureau of Land Management ("BLM") unnecessarily repeats its National Environmental Policy Act ("NEPA") review for a third time, and result in significant changes to the lease terms, if the stipulations requested by Plaintiffs are imposed. Defendant-Intervenors reserve the right to supplement this Opposition to Settlement when the Plaintiffs and Federal Defendants disclose the full terms of the proposed Settlement.

FACTUAL BACKGROUND

This lawsuit—which has continued in some iteration since 2008—involves federal oil and gas leases issued by BLM. In 2008, Plaintiffs challenged BLM's sale of 61 leases in Montana. The litigation ended with a Settlement Agreement, similar to the one anticipated here, which suspended the leases and sent BLM back to the drawing board to prepare additional NEPA review to address potential

climate change impacts of developing the leases. *Mont. Envtl. Info. Ctr. v. U.S. Bureau of Land Mgmt*., No. 08-cv-178 (D. Mont. March 12, 2010) (Dkt. No. 53-1).

In 2010, after completing additional Environmental Assessments as well as a Supplemental Information Report focusing specifically on greenhouse gas emissions and climate change impacts of oil and gas development in the region, BLM lifted the suspension on the 61 leases originally challenged in 2008 and sold additional leases in December 2010, many of which were purchased by Defendant-Intervenors' members. In February 2011, Plaintiffs again filed suit challenging, this time, both the lifting of the suspensions on the 61 leases at issue in the first lawsuit and the December 2010 lease sales. Plaintiff's Complaint, at Section V (Dkt. No. 1). Specifically, Plaintiffs claimed that BLM violated NEPA by failing to consider reasonable alternatives to prevent or abate greenhouse gas emissions and waste. Plaintiffs expected that successful litigation would lead to changes to the lease terms to reduce emissions and to "broader-scale reform that would amplify the benefits of this litigation." Plaintiff's Complaint, at ¶ 28.

As this Court recognized in granting Defendant-Intervenors' motion to intervene in this case (Dkt. No. 19), the Defendant-Intervenors' members have a substantial interest in the outcome of this litigation. Many of Defendant-Intervenors' members were the successful bidders in the 2008 and 2010 lease sales and have valid property rights under the leases to develop the oil and gas resources

subject to the terms and conditions under which they were offered at sale. The anticipated Settlement by Plaintiffs and the Federal Defendants is likely to undermine those terms and conditions and substantially delay development as BLM, yet again, reevaluates the climate change impacts of the leases and reconsiders imposing costly and unnecessary emissions controls and mitigation measures.

ARGUMENT

The anticipated Settlement in this case has been negotiated without the participation of the Defendant-Intervenors and without their consent. Beginning on February 11, 2016, and on no fewer than nine occasions over the last three months, the undersigned has attempted to obtain drafts of the Settlement or, in the alternative, a summary of the provisions and scope of the Settlement from counsel for the Federal Defendants and counsel for Plaintiffs. Neither the government nor the Plaintiffs have been willing to share either the draft Settlement or information about the scope of the Settlement with Intervenors. For this reason, the Defendant-Intervenors are in the dark about the proposed resolution, although based on prior experience, they anticipate that the Settlement's provisions will substantially infringe on their lease rights. Had the Defendant-Intervenors been given a seat at the table, a more reasonable result may have been reached. In this case, however, Defendant-Intervenors were left out of the negotiations and are therefore

compelled to oppose the anticipated Settlement which is, in process and substance, unfair, inadequate, and unreasonable.

A. As parties to this lawsuit, Defendant-Intervenors' objections to the Settlement must be heard.

When some parties to a case attempt to settle litigation without participation or approval of another party, the opposing party has a right to "have [their] objections heard at the hearings on whether to approve" the settlement. *S. Cal. Edison Co. v. Lynch,* 307 F.3d 794, 807 (9th Cir. 2002) (citing *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501 (1986)). As this Court recognized in its Order granting intervention (Dkt. No. 19), the Defendant-Intervenors have rights at stake in this litigation and the right to participate as full parties under Fed. R. Civ. Pro. 24. When a court grants intervention, the intervenor becomes a party within the meaning of the Federal Rules of Civil Procedure and is entitled to fully litigate on the merits. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997); *Syngenta Seeds, Inc. v. Cnty. of Kauai*, No. Civ. 14-00012 BMK, 2014 WL 1631830, at *9 (D. Haw. Apr. 23, 2014). Accordingly, Defendant-Intervenors have the right to object to any Settlement that disposes of the case.

B. The anticipated Settlement is not fair, reasonable, and adequate as it will likely have a severe impact on the rights and interests of the Defendant-Intervenors and is not in the public interest.

This Court should reject the anticipated Settlement as it is not likely to survive judicial review and scrutiny. When reviewing a settlement, a court must be satisfied that it is procedurally and substantively "fair, adequate and reasonable."[1] *E.g., U.S. v. State of Or.*, 913 F.2d 576, 580 (9th Cir. 1990); *Sierra Club v. McCarthy*, No. 13-CV-03953-SI, 2015 WL 889142, at *5 (N.D. Cal. Mar. 2, 2015). This Court must "independently evaluate its terms" without giving it "rubber stamp approval" and it must determine whether the "negotiation process was fair and full of adversarial vigor." *Sierra Club*, 2015 WL 889142, at *5 (citing *U.S. v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 747 (9th Cir. 1995)). Ensuring the Settlement is fair, reasonable, and adequate is especially critical here as it substantially affects Defendant-Intervenors' interests and the public interest. An agreement that "affects the public interest or third parties imposes a heightened responsibility on the court to protect those interests." *U.S. v. State of Or.*, 913 F.2d at 581. This requirement is meant to "protect those who did not participate in negotiating the compromise, not those who negotiated it." *Id.*

[1] This standard applies to both consent decrees and settlement agreements. *See Conservation Nw. v. Sherman*, 715 F.3d 1181, 1186 (9th Cir. 2013) (citing *U.S. v. State of Or.*, 913 F.2d 576, 580 (9th Cir. 1990)) ("A consent decree is essentially a settlement agreement subject to continued judicial policing."). "That consent decrees involve an additional layer of 'judicial action' does not mean that we must ignore the many ways in which they resemble settlements." *Id.*

Defendant-Intervenors have a substantial stake in the outcome of this lawsuit and have been denied the opportunity to protect their interest by participating in settlement negotiations. Thus, the Settlement cannot be considered procedurally fair, adequate, or reasonable. Further, the terms of the anticipated Settlement are not likely to be substantively fair, reasonable, or adequate, as they are likely to: (1) once again suspend leases in which the Defendant-Intervenors have valid existing property rights; (2) substantially delay the eventual ability to develop oil and gas under the challenged leases; (3) result in new or changed stipulations on the leases that call for costly and unnecessary emission controls; and (4) be contrary to the public interest.

First, Defendant-Intervenors and their members have real property interests in the oil and gas leases acquired during the lease sales at issue. The Defendant-Intervenors anticipate that the Settlement will call for the suspension of these leases so that BLM can conduct additional and unnecessary NEPA analysis. A suspension would unfairly and unreasonably preclude lease owners from realizing a return on their investment. These leases are not mere prospects or expectancies. Rather, they give rise to interests in real property that include a right of access and production of minerals. *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975); *Bretz v. Ayers*, 756 P.2d 1115, 1118 (Mont. 1988); 43 C.F.R. § 3101.1-2. The Settlement is likely to have a substantial negative impact on Defendant-

Intervenors' ability to fully capitalize on their investments and will fail to adequately protect these interests.

Second, the anticipated Settlement is unlikely to be fair, reasonable, or adequate because it is likely to result in substantial and unnecessary delay in the exercise of lease rights. Many of the leases at issue in this case were initially sold and challenged in 2008, and the others in 2010 after additional NEPA review pursuant to the first settlement agreement. Another five years later, Defendant-Intervenors still have not been permitted to exercise their rights to develop the leases. If BLM is required again to conduct additional unneeded NEPA analysis, that review could take years, and a decade may have passed between the time when BLM issued the first leases and the suspension on them is lifted once again. Extending the already lengthy NEPA review process in this case is unnecessarily repetitive and burdensome. BLM has conducted a thorough review of the potential impacts that these leases will have on climate change and the possible associated greenhouse gas emissions not once, but twice. Defendant-Intervenors' Brief in Support of Their Cross-Motion for Summary Judgment, at 17-28 (Dkt. No. 42). Delaying Defendant-Intervenors' right to exercise their real property interests while BLM conducts this review a third time is not fair, reasonable, or adequate.

Third, if this Court grants a motion to dismiss and approves the anticipated Settlement, there is a possibility that, on remand, BLM will agree to impose

additional requirements on the lessees through lease stipulations, changing the terms under which the Defendant-Intervenors originally purchased the leases. The Defendant-Intervenors expect that any additional stipulations will require greenhouse gas emission controls or other mitigation aimed at reducing environmental impacts that would be both costly and unnecessary. Further, there is no way to know what these stipulations will be or to how to anticipate or plan for them. These uncertainties impose additional burdens on Defendant-Intervenors. Remanding for the purpose of considering additional lease stipulations is unnecessarily costly and burdensome, especially given that the same mitigation and emission controls could be considered at the application for permit to drill stage.

Finally, the Court should deny any motion to dismiss and reject the anticipated Settlement because it will likely have a significant impact on the public interest. Courts take on an expanded role in reviewing settlement agreements that implicate public interests. *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986) (citing *Adams v. Bell*, 711 F.2d 161, 170 n. 40 (D.C. Cir. 1983)); *see also Colorado v. City and County of Denver*, No. 10-CV-1303, 2010 WL 4318835, at *4 (D. Colo. Oct. 22, 2010); *U.S. v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994); *Friends of the Earth v. Archer Daniels Midland Co.*, 780 F. Supp. 95, 99 (N.D.N.Y. 1992). Here, Plaintiffs admit that a successful outcome in this case

may "spark broader-scale reform that would amplify the benefits of this litigation." Plaintiff's Complaint, at ¶ 28. If this Court were to approve the Settlement, an undesired precedent will be set that lessees cannot rely on the terms of their leases, or on BLM's resolve to defend those lease terms when parties opposed to oil and gas development decide to challenge them. Here, BLM followed the proper procedures and prepared twice-over detailed NEPA review considering all the relevant issues and impacts. Now the agency is proposing to acquiesce to even more delay in the implementation of its leasing decisions to the injury and detriment of its lease holders and high bidders.

Additionally, the anticipated Settlement is not in the public interest because it likely restricts BLM's agency discretion and expertise. Congress charges federal agencies with certain statutory obligations and expects that these duties will be carried out according to agency expertise and judgment. An agreement that "restrict[s] their discretion, especially over long periods of time, could undermine the ability of agencies to exercise the judgment and expertise as envisioned by Congress." *Ctr. for Biological Diversity v. Bureau of Land Mgt.*, No. C 00-00927 WHA, 2001 WL 777088, at *4 (N.D. Cal. Mar. 20, 2001); (citing *Citizens for a Better Env. v. Gorsuch*, 718 F.2d 1117, 1127 (D.C. Cir. 1983)). If the Settlement restricts BLM's ability to issue oil and gas leases or requires that certain mitigation

measures be placed on lease operations, it will unnecessarily and unreasonably interferes with the agency's discretion and expertise, and should be denied.

CONCLUSION

In this case, the anticipated Settlement is not fair, adequate, or reasonable, as required by law. It is fundamentally unfair for the Court to approve a Settlement disposing of the claims when Defendant-Intervenors were shut out of the negotiations and when the terms are anticipated to substantially infringe on the Defendant-Intervenors' rights and on the public interest. For the foregoing reasons, Defendant-Intervenors request that the Court deny any motion to dismiss this case, reject the anticipated Settlement, and proceed to consider the merits of Plaintiffs' NEPA claims.

Dated this 18th day of May, 2016.

/s/ William W. Mercer
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