IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WESTERN ENERGY ALLIANCE, Plaintiff, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, and BUREAU OF LAND MANAGEMENT, Defendants.	)	Civil Case No. 1:16-CV-00912-LF-KBM

RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Plaintiff Western Energy Alliance (the "Alliance") submits respectfully this response in opposition to a motion that nine political advocacy groups filed to intervene in this action (collectively, the "Advocacy Groups"). *See* Conservation Groups Mot. to Intervene, filed Oct. 19, 2016 (ECF No. 11) ("Intvs.' Mot."). The Advocacy Groups mischaracterize virtually every aspect of the Alliance's lawsuit, resulting in what is, in effect, a motion to intervene in a fictional lawsuit of the Advocacy Groups' construction, rather than the suit the Alliance filed. Because the Advocacy Groups' motion is premised on a series of straw man arguments the Alliance has not raised, and because the Alliance's lawsuit does not threaten – or even implicate – any of the alleged interests the Advocacy Groups assert, the Court should deny the motion to intervene.

I. INTRODUCTION.

On August 11, 2016, the Alliance filed its Complaint initiating this case. *See* Compl., filed Aug. 11, 2016 (ECF No. 1). The Advocacy Groups suggest that the Alliance's lawsuit would "eliminat [e] important environmental protections" and "could fundamentally change the federal oil and gas leasing program." Intvs.' Mot. at 2. Neither premise is true. Contrary to the inference the Advocacy Groups would have this Court draw, the issue the Alliance's Complaint presents is narrow.

The Alliance contends that the Mineral Leasing Act imposes a discrete, ministerial obligation with which the Secretary "shall" abide: "Lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b). The Alliance's Complaint alleges that the Secretary has failed to meet this obligation. More specifically: the Alliance contends: (i) that there have been occasions "where eligible lands are available" and the Bureau of Land Management ("BLM") has still declined to conduct quarterly lease sales; and (ii) that the schedules BLM State Offices have issued for oil and gas lease sales in the future do not implement a quarterly lease schedule even though "eligible lands are available." The Alliance seeks only to enforce the statutory obligation to conduct quarterly lease sales when lands are eligible; the Alliance does not seek in this lawsuit to amend the definition of "eligible" or to modify the process by which lands become eligible to be offered at a lease sale.

The Advocacy Groups mistakenly assert that the Alliance "challenges" Instruction Memorandum ("IM") No. 2010-117. Yet the Alliance's Complaint observes that, "[a]mong other instructions, IM No. 2010-117 emphasizes that 'State offices will continue to hold lease sales

four times per year, as required by the Mineral Leasing Act, section 226(b)(1), and 43 CFR 3120.1-2(a), when eligible lands are determined by the state office to be available for leasing.'" Compl. ¶ 15, at 5 (quoting IM No. 2010-117 at 5). The Complaint also acknowledges that IM No. 2010-117 "instructs state offices to 'develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review process established in this IM.'" Compl. ¶ 16, at 6 (quoting IM No. 2010-117 at 5). Neither of these provisions are incompatible with the Alliance's request that the Secretary adhere to the statutory requirement to conduct quarterly oil and gas lease sales "when eligible lands are available." To the contrary, the portions of IM No. 2010-117 quoted in the Alliance's Complaint specifically reference 30 U.S.C. § 226(b) and 43 C.F.R. § 3120.1-2, the very authorities on which the legal obligation the Alliance seeks to enforce is based.

The Advocacy Groups contend that IM No. 2010-117 "increases the transparency and public input on BLM's leasing decisions." Intvs.' Mot. at 2. But rather than a point of contention between the Alliance and the Advocacy Groups, "increase[d] transparency and public input on BLM's leasing decisions" is a shared goal. Because BLM's failure to offer eligible lands at quarterly lease sales runs contrary to the plain language of 30 U.S.C. § 226(b), the Alliance submitted a Freedom of Information Act ("FOIA") request seeking information about how BLM determines which lands will be included in lease sales and when lease sales will be conducted. Because BLM failed to provide any response to the Alliance's FOIA request, the Alliance's Complaint includes a claim seeking enforcement of BLM's obligations under FOIA. To the

extent that FOIA claim relates in any way to IM No. 2010-117, it promotes (rather than undermines) "increased transparency" into BLM's leasing decisions.

Nor does the Alliance's Complaint assert the position that "BLM *must* offer oil and gas leases for sale every three months wherever a company expresses interest in public lands." Intvs.' Mot. at 2. The Alliance argues only that BLM must conduct oil and gas leases sales at least quarterly whenever "*eligible* lands are available." The Alliance presents no challenge in this lawsuit to curtail the Secretary's discretion over oil and gas leasing, to limit the environmental review of parcels to be leased, or to otherwise impair BLM's ability to evaluate the impact of leasing on other resources.[1] Again, the Alliance asserts in this lawsuit only that, under existing BLM regulations, there have been times (and there are scheduled to be times in the future) when "eligible lands are available" but BLM still declined to offer those lands for lease according to the statutorily required schedule.

II. THE ADVOCACY GROUPS DO NOT HAVE A RIGHT TO INTERVENE.

Rule 24(a)(2) of the Federal Rules of Civil Procedure affords any party the right to intervene in an action when the party files a timely motion if: (i) the movant claims an interest relating to the property or transaction which is the subject of the action; (ii) the movant's interest

[1] Each of the Advocacy Groups' contentions that the Alliance's suit undermines environmental protections fall short. The Advocacy Groups observe, for example, that "BLM must complete its environmental analysis of reasonably foreseeable development before issuing the leases." Intvs.' Mot. at 5. But the Alliance does not request in this lawsuit that any lease be issued before any required environmental analysis is conducted. The Advocacy Groups emphasize that IM No. 2010-117 provides for the extension of timeframes "as necessary, to ensure there is adequate time for the field offices to conduct comprehensive parcel reviews." Intvs.' Mot. at 8 (quoting IM No. 2010-117 § III(A)). The Alliance asks only that, if additional time is needed for an individual parcel, BLM engage the regulatory mechanisms that allow BLM to conduct additional review on that parcel and not simply cancel an entire lease sale when other lands remain eligible. The Advocacy Groups describe Master Leasing Plans as "an important new planning tool" that allow "BLM to better plan in areas where oil and gas companies have expressed interest in development that may conflict with other resources." Intvs.' Mot. at 8. Nothing in the Alliance's lawsuit precludes BLM from preparing Master Leasing Plans as a planning tool. Master Leasing Plans are entirely irrelevant to this lawsuit.

may be impaired or impeded; and (iii) the existing parties do not adequately represent the movant's position. *See Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1231 (10th Cir. 2010). The Alliance does not contest the timeliness of the Advocacy Groups' motion. But the Advocacy Groups cannot meet the other elements a putative intervener must establish. This lawsuit does not implicate any interest the Advocacy Groups assert, the result of this lawsuit will not impair or impede any legally protected interest the Advocacy Groups might possess, and to the extent the Advocacy Groups disagree with the Alliance's interpretation of the law, the federal defendants have expressed their intent to oppose the Alliance's lawsuit and are capable of adequately representing the Advocacy Groups' point of view.

A. THE ALLIANCE'S SUIT DOES NOT IMPLICATE ANY INTEREST THE ADVOCACY GROUPS ASSERT.

For a movant to qualify for intervention by right, the movant's alleged interest must be "direct, substantial, and legally protectable." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (quoting *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996)). The interest test is "highly fact-specific" and represents "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Utah Ass'n of Cntys.*, 255 F.3d at 1251-52 (quoting *Ariz./N.M. Cntys.*, 255 F.3d at 841).

The Advocacy Groups identify two interests that the Advocacy Groups allege relate to the subject of this lawsuit: (i) an interest in preserving oil and gas leasing reforms that the Advocacy Groups contend they worked to have implemented, *see* Intvs.' Mot. at 14; and (ii) "an interest in protecting public lands from the impacts of oil and gas drilling." *Id.* at 15. The Advocacy Groups' argument is misplaced. The Alliance acknowledges that, under certain

circumstances, a conservation interest similar to the interests the Advocacy Groups assert may constitute a legally protectable interest in litigation. *See Utah Ass'n of Cntys.*, 255 F.3d at 1252. But the Alliance's lawsuit does not implicate either of the interests the Advocacy Groups' assert.

As described above, the Alliance does not seek in this lawsuit to change any existing law, regulation, or practice governing the administration of oil and gas leasing. To the contrary, the Alliance seeks to have *existing law* enforced.[2] The Alliance does not ask this Court to restrict the Advocacy Groups rights "to submit comments and provide other input on numerous potential lease sales" or to prohibit BLM from using Master Leasing Plans as a planning tool. Intvs.' Mot. at 15. Like the Advocacy Groups, the Alliance seeks "a more transparent and inclusive public process" for oil and gas leasing and has taken affirmative action – in the form of comprehensive FOIA requests and the filing of this lawsuit – to secure that result.

Contextual examples in the Advocacy Groups' own briefing proves the Alliance's point. The Advocacy Groups note that, in response to appeals the Advocacy Groups submitted, BLM deferred offering leases in the San Juan Basin scheduled to be auctioned in January 2015. The Advocacy Groups characterize this deferral as "one of the actions [the Alliance] objects to in its Complaint." Intvs.' Mot. at 16. The Advocacy Groups misread the Alliance's Complaint. The Alliance does not challenge deferral of *individual parcels* when the appropriate regulatory

[2] The Advocacy Groups suggest that the request in the Alliance's Prayer for Relief that the Court "[d]irect BLM to revise or rescind all agency guidance and instructional memoranda, including IM No. 2010-117, that direct implementation of BLM's lease sale program in a manner contrary to law," somehow represents a challenge to existing law. But BLM's Instruction Memoranda do not have the force and effect of law and are not controlling when the provisions of a memorandum are inconsistent with the terms of relevant statutes or regulations. *See Atlantic Richfield Co.*, 121 IBLA 373, 380 (1991). Requesting that the Court require BLM to revise non-binding guidance documents to make those documents consistent with controlling law cannot constitute an attack on valid and enforceable leasing policies.

mechanisms to effect that deferral are engaged.[3] What the Alliance challenges here is the cancellation of an entire *lease sale* when other "eligible lands are available."

The Alliance agrees with the Advocacy Groups that the oil and gas leasing program benefits from "a transparent and thorough review process" and assumes that at least some of the lease sales described in the Alliance's Complaint involve parcels where the Advocacy Groups "submitted administrative protests or comments identifying issues that required additional review by BLM." Intvs.' Mot. at 17. Those parcels are not the subject of the Alliance's lawsuit. The Alliance's Complaint alleges instead that lease sales have been cancelled for reasons including, but not necessarily limited to: (i) "workload priorities," Compl., ¶ 24; (ii) a lack of expressions of interests for lands in a particular field office (despite eligible lands being available in other places within the State), *see id.* ¶¶ 29, 34; (iii) BLM's decision to change the location where the lease sale will be conducted, *see id.* ¶ 31, at 9; (iv) BLM's failure to include parcels from all States under a State Office's jurisdiction in which eligible lands are available, *see id.* ¶¶ 35-36, 38-42; (v) BLM's decision to revise or update existing resource management plans,[4] *see id.* ¶ 44; (vi) snowstorms, *see id.* ¶ 52; and (vii) public interest in attending the lease sale, *see id.* ¶ 57. It is these cancellations of entire lease sales based on administrative whim, convenience, or preference (not the deferral of individual parcels), that the Alliance challenges in this case.

That BLM has *other* obligations it must meet – including obligations related to environmental and resource review – does not excuse the agency from its obligation to comply

[3] The Alliance recognizes, for example, that current regulations authorize BLM to "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.

[4] The United States Court of Appeals for the Tenth Circuit has recently clarified that "[t]he agency's decision to improve its plan for managing federal lands . . . does not immediately invalidate the old plan or prevent the agency from referring to it." *Diné Citizens Against Ruining our Env't v. Jewell*, __ F.3d __, 2016 WL 6301136, at *5 (10th Cir. Oct. 27, 2016).

with 30 U.S.C. § 226(b). The Advocacy Groups may have a policy preference for less frequent oil and gas lease sales, but the Advocacy Groups have no legally protectable interest in having the oil and gas leasing program managed in a manner that is inconsistent with controlling statutory law. Because the alleged interests the Advocacy Groups advance are not at issue in this case, the Advocacy Groups have no right to intervene and this Court should deny their motion.

B. THE RESOLUTION OF THIS CASE WILL NOT IMPAIR ANY INTEREST THE ADVOCACY GROUPS MIGHT POSSESS.

"[T]he question of impairment is not separate from the question of existence of an interest." *Utah Ass'n of Cntys.*, 255 F.3d at 1253. The Advocacy Groups correctly state that the element of impairment presents only a minimal burden on a movant, *see* Intvs.' Mot. at 17 (citing *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010)), but the Advocacy Groups must still demonstrate "that impairment of [their] substantial legal interest is possible if intervention is denied." *WildEarth Guardians*, 604 F.3d at 1199. The Advocacy Groups cannot make this showing.

No matter how this case is resolved, the outcome will not affect any legally protectable interest the Advocacy Groups might possess. The Advocacy Groups argue that a ruling in the Alliance's favor would compromise the Advocacy Groups' conservation interests, but as described above, that is a mischaracterization of the Alliance's lawsuit. The Alliance does not in this lawsuit request that the Court: (i) "strike down BLM's Leasing Reform Policy," Intvs.' Mot. at 17; (ii) modify the standard for how lands become eligible for oil and gas leasing, *see id.* at 18; (iii) require BLM to rush leasing approvals in a manner that might compromise any environmental review process associated with oil and gas leasing, *see id.* at 19; or (iv) curtail BLM's discretion to withhold individual parcels from oil and gas leasing, *id.*

While the Advocacy Groups may have an emotional interest in the sense that the Advocacy Groups purport to care deeply about the outcome of this case, the Advocacy Groups have no legal interest in having BLM cancel lease sales when eligible lands *are* available. To the extent the Advocacy Groups have a conservation interest in federal public lands generally, applicable law must define the extent to which that interest can be enforced. The Advocacy Groups' conservation interest does not entitle the Advocacy Groups to preclude the enforcement of applicable statutory and regulatory law. Again, while the Advocacy Groups may have a preference regarding how this litigation might be resolved, this litigation can have no impact on the Advocacy Groups' general conservation interest, and Advocacy Groups' ability to ensure federal environmental laws are applied and enforced will exist to the same degree regardless of how this case is resolved.

C. THE FEDERAL DEFENDANTS WILL ADEQUATELY REPRESENT THE ADVOCACY GROUPS' POSITION.

The Advocacy Groups contend that BLM will not adequately represent the Advocacy Groups' interest in this lawsuit because "BLM manages public lands under a 'multiple use' mandate that requires balancing a wide variety of interest, including 'recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.'" Intvs.' Mot. at 21 (quoting 43 U.S.C. § 1702 (c)). The Advocacy Groups represent that they have a "narrower interest: protecting public lands and other natural resources from harm, and ensuring a robust process and thorough environmental review for oil and gas leasing." Intvs.' Mot. at 21. This perceived difference in perspective, whether accurate or not, is entirely irrelevant to this lawsuit.

"Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its interest is adequately represented by existing parties." *Kane Cnty., Utah v. United States*, 597 F.3d 1129, 1134 (10th Cir. 2010) (internal quotation omitted). In *Kane County*, the Southern Utah Wilderness Alliance ("SUWA") attempted to intervene in a quiet title action between

Kane County, Utah and the United States over roads that traversed federal public lands. Like the Advocacy Groups in this case, SUWA argued in *Kane County* that it should be permitted to intervene because it had a history of adversarial relations with BLM and because SUWA had disagreed with the United States' land management decisions in the past. *See id.* at 1134-35. In rejecting SUWA's attempt to intervene, the Tenth Circuit noted that, irrespective of these policy differences about land management generally, the question at issue was limited to the title dispute over the roads– a question whose resolution depended entirely on how the roads at issue had been used historically. *See id.* at 1135. Because SUWA would not present "any special expertise, experience or knowledge with respect to the historic use of the roads that would not be available to the United States," it did not have a right to intervene. *Id.*

The decision in *Kane County* is controlling here. While the Advocacy Groups may object to the United States' past (and future) oil and gas leasing decisions generally, those policy decisions are not on trial in this lawsuit. The only question before the Court is whether BLM has failed to conduct quarterly oil and gas lease sales even though "eligible lands are available," a question that is ultimately grounded in a factual analysis as revealed in the administrative record. This lawsuit does not implicate any policy questions or land management decision-making subject to agency discretion. As in *Kane County*, the federal government has "displayed no reluctance" to defend the position that the Advocacy Groups wish to advance and the Advocacy Groups identify no argument on the merits that the Advocacy Groups believe the federal defendants will fail to make. *See id.*

In the end, this lawsuit does not implicate the Advocacy Groups' purported specialized interest. This case involves only a factual review of the administrative record to determine whether BLM has failed to meet a ministerial obligation to conduct lease sales when eligible lands are available. Because the federal defendants have the expertise, the resources, and the expressed

willingness to address this discrete question, the federal defendants are capable of adequately representing the Advocacy Groups' interests, and the Advocacy Groups' motion to intervene as a matter of right should therefore be denied.

III. THE ADVOCACY GROUPS SHOULD NOT BE PERMITTED TO INTERVENE UNDER RULE 24(b).

The Advocacy Groups contend that, even if they do not have a right to intervene in this action, the Court should still permit intervention under Rule 24(b). *See* Intvs.' Mot. at 22. Under Rule 24(b)(1)(B), the Court may grant permissive intervention when a movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Whether to grant permissive intervention lies within the discretion of the district court, *Kane Cnty.*, 597 F.3d at 1135, "but in exercising its discretion, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3).

The Advocacy Groups do not provide any reason why they should be granted permissive intervention independent from the grounds the Advocacy Groups offer in support of their request for intervention by right. The Advocacy Groups state only that they "intend to address the same question of law that is at the heart of this litigation: the legality of BLM's Leasing Reform Policy, and the agency's discretion over lease sales." Intvs.' Mot. at 22. As described in detail throughout this memorandum, neither of those questions have any relevance to this lawsuit.

The Advocacy Groups suggest that, because of the early stage of this case, the Advocacy Groups' participation in the case will not unduly delay or prejudice the rights of the existing parties. *Id.* But the Advocacy Groups have not articulated any reason why their participation – focused on issues not germane in this lawsuit – will be helpful to the Court in this action. Without such a

showing, the Advocacy Groups' participation can do nothing but slow and complicate the adjudication of this otherwise narrowly focused case.

Lacking any legally protectable interest in precluding the enforcement of 43 U.S.C. § 226(b), the Advocacy Groups' interest in this lawsuit is no different from any other member of the public that cares about the outcome of the litigation. But allowing the Advocacy Groups to intervene based on nothing more than a preferred result would invite any member of the public who holds strong views about the outcome to seek intervention. Adopting such an approach would undermine the efficient and just resolution of this case. Because the Advocacy Groups' participation will have no meaningful benefit to the Court or the administration of justice, the Court should deny the Advocacy Groups' motion and decline to grant the Advocacy Groups permissive intervention.

IV. CONCLUSION.

The Alliance's lawsuit does not threaten – or even implicate – any of the alleged interests the Advocacy Groups assert. Nor have the Advocacy Groups identified any legally protected interest that the outcome of this case could impair. The Advocacy Groups' participation would neither assist the Court to resolve the legal question upon which this case is premised, nor result in the advancement of any distinct or independent legal position. Because the Advocacy Groups cannot enter the case by right and because the Advocacy Groups' participation will provide no meaningful benefit to the Court or the administration of justice, the Court should deny the motion to intervene.

Submitted respectfully this 2nd day of November, 2016

By: */s/ Mark S. Barron*

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CERTIFICATION REGARDING NON-MEMBER ATTORNEYS

I hereby certify that I am a member of the New Mexico District Federal Bar in good standing and that non-member attorney Alexander K. Obrecht is in good standing with the Supreme Court of Colorado.

/s/ Mark S. Barron
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2016, a true and correct copy of the foregoing Response in Opposition to Motion to Intervene was served by filing a copy of that document with the Court's CM/ECF system, which will send notice of electric filing to all counsel of record.

/s/ Susan Quinn
Susan Quinn