IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 19-cv-2869

CENTER FOR BIOLOGICAL DIVERSITY,
THE WILDERNESS SOCIETY, and
WILDERNESS WORKSHOP,

Petitioners,

v.

UNITED STATES BUREAU OF LAND
MANAGEMENT, *et al.*,

Federal Respondents.

FEDERAL RESPONDENTS' MOTION FOR VOLUNTARY REMAND

Federal Respondents move this Court for an order granting a voluntary remand—without vacatur, and without a ruling on the merits—of the decision to approve the Grand Junction Field Office Resource Management Plan. As more fully explained in the accompanying memorandum of law, BLM proposes, during remand, to prepare further environmental analysis for the Grand Junction Resource Management Plan under the National Environmental Policy Act.

Respectfully submitted this 8th day of April, 2020.

PRERAK SHAH
Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Caitlin Cipicchio

Caitlin Cipicchio
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
4 Constitution Square
150 M St. NE
Washington, DC 2002
(202) 305-0503
Email: caitlin.cipicchio@usdoj.gov

Attorneys for Federal Respondents

CERTIFICATE OF SERVICE

I hereby certify that on April 8th, 2020, a copy of the foregoing motion was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ *Caitlin Cipicchio*
CAITLIN CIPICCHIO

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MEMORANDUM IN SUPPORT OF FEDERAL RESPONDENTS' MOTION FOR VOLUNTARY REMAND

This case involves a challenge to the decision to approve the Grand Junction Field Office Resource Management Plan ("RMP"). Federal Respondents now move for a voluntary remand of that decision without vacatur, and without a ruling on the merits, so that the Bureau of Land Management ("BLM") may conduct further environmental analysis.

BACKGROUND

On August 24, 2015, the BLM Colorado State Director signed the Record of Decision ("ROD") approving the Grand Junction RMP, which was supported by an Environmental Impact Statement ("EIS"). The Grand Junction RMP guides the management of more than 1 million surface acres and 1.2 million acres of subsurface mineral estate in western Colorado administered by the Grand Junction Field Office. Petitioners claim that BLM, in the Grand

Junction RMP EIS, failed to consider certain alternatives, and failed to quantify or analyze indirect and cumulative emissions relating to oil and gas production that may occur while the RMP is in effect. Petition for Review of Agency Action, Dkt. 1, ¶ 11.

A separate RMP—the one governing BLM's Colorado River Valley management area—was challenged in a separate civil action. *See Wilderness Workshop v. BLM*, No. 16-cv-01822 (D. Colo.). The court ruled on the merits in that case on October 17, 2018, finding that the Colorado River Valley RMP and EIS were partially deficient because BLM failed to take a hard look at the reasonably foreseeable indirect impacts of oil and gas emissions, and failed to consider reasonable alternatives with respect to lands open to oil and gas leasing. *Wilderness Workshop v. United States BLM*, 342 F.Supp.3d 1145 (D. Colo. 2018). The parties agreed to a partial remand without vacatur of the Colorado River Valley EIS and ROD so that BLM could address the portions of the RMP, EIS, and ROD affected by the deficiencies identified in Judge Babcock's decision. Settlement Agreement, *Wilderness Workshop v. BLM*, No. 16-cv-01822 (D. Colo. Sept. 16, 2019) (ECF No. 58-1).

Based on its review of the Court's decision in Wilderness Workshop I, and resource similarities between the Grand Junction and Colorado River Valley planning areas, BLM intends to prepare supplemental analysis for the Grand Junction RMP as well.

The undersigned counsel for Respondents has conferred with Petitioners regarding this motion. Petitioners state they "do not oppose the motion for voluntary remand in principle, though because they have not had an opportunity to review the motion prior to filing, [Petitioners] reserve the right to file a response and, if necessary, request the Court to impose additional terms and conditions in its Order."

ARGUMENT

I. A Remand of the Grand Junction RMP/EIS Is Appropriate

Courts have long recognized the propriety of voluntarily remanding a challenged agency action without judicial consideration of the merits. As the Tenth Circuit has explained, agencies have the "inherent authority" to reconsider their own decisions, "since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)).

Courts "commonly grant" agency motions for voluntary remand. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *accord Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Salazar* (*Coalition of Counties*), No. 07-cv-00876 JEC/WPL, 2009 WL 8691098, at *3 (D. N.M. May 4, 2009). This deference to agency preference encourages agencies "to cure their own mistakes rather than wasting the courts' and the parties' resources" by continuing to litigate matters to ultimate conclusion. *Ethyl Corp.*, 989 F.2d at 524 (footnote omitted). Voluntary remand is appropriate so long as an agency's concern with the challenged decision is "substantial and legitimate" rather than "frivolous or in bad faith." *Vanda Pharm., Inc. v. Food & Drug Admin.*, No. CV 19-301 (JDB), 2019 WL 1198703, at *1 (D.D.C. Mar. 14, 2019) (quoting *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23-24 (D.D.C. 2008) (comparing *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta* (*Pellissippi Parkway*), 375 F.3d 412, 417 (6th Cir. 2004), and *Lutheran Church–Mo. Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998))).

Voluntary remand is warranted "(i) when new evidence becomes available after an agency's original decision was rendered, or (ii) where intervening events outside of the agency's control may affect the validity of an agency's actions." *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (internal citations and quotation marks omitted). Here,

an intervening event—this Court's decision in *Wilderness Workshop*—has led Federal Respondents to determine that a remand is appropriate for the Grand Junction RMP/EIS.[1]

At the time the Grand Junction RMP/EIS was approved, no court had yet ruled that BLM was required to quantify the downstream GHG emissions pertaining to oil and gas development at the RMP stage. The court's decision in *Wilderness Workshop* was the first to do so. 342 F. Supp. 3d at 1156. That decision also found that BLM violated NEPA by not closely studying an alternative closing low and medium potential lands to oil and gas leasing. *Id.* at 1166-67. Because of that intervening decision, BLM is already planning to complete a Supplemental EIS for the Colorado River Valley RMP in order to further review the issues discussed by the court, *see* Federal Respondents' First Status Report, *Wilderness Workshop*, 1:16-cv-1822 NO. (D. Colo. Jan. 31, 2020) (ECF No. 67), and proposes to undertake additional NEPA analysis for the Grand Junction RMP as part of that process.[2] BLM therefore seeks a remand for that purpose. To continue litigating the merits of the Grand Junction RMP while BLM is preparing supplemental NEPA analysis would be a waste of the parties' and this Court's resources.

The Court should exercise its inherent authority to manage its docket and its equitable power to grant remand, without making determinations on the merits or ruling on the asserted

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[1] An agency need not confess error when seeking remand, *see SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Ethyl Corp*., 989 F.2d at 524; *Pellissippi Parkway*, 375 F.3d at 417, and Federal Respondents do not do so here because it is not clear that the analysis BLM is proposing to undertake is required by NEPA at the RMP stage. Notwithstanding this uncertainty, the proposed supplemental analysis is an appropriate response to the guidance provided by this Court for the Colorado River Valley RMP and EIS in *Wilderness Workshop v. United States BLM*, 342 F.Supp.3d 1145 (D. Colo. 2018), and will further the purposes of NEPA by informing both the agency and the public of potential environmental impacts relating to estimated levels of oil and gas development activity that may ultimately occur in the resource planning area.

[2] The two planning areas are adjacent, and share similar resource issues.

defenses. This would serve the public interest because, as the Sixth Circuit explained, an agency's "reconsideration of the potential environmental impacts of a project furthers the purpose of NEPA." *Pellissippi Parkway,* 375 F.3d at 418. Such a course would advance the "twin aims" of NEPA, that is, facilitating informed agency decisionmaking and promoting public involvement. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 703 (10th Cir. 2009) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council,* 462 U.S. 87, 97 (1983)).

II. The Court Should Maintain the Status Quo Pending Remand

A. The Court Should Remand Without Vacatur

Courts have discretionary authority to remand agency decisions without vacatur and without a determination on the merits. *Coalition of Counties*, 2009 WL 8691098, at *3 (explaining that "the equitable analysis that applies to determine vacatur is the same whether or not the Court reaches the merits of the underlying rule prior to remand"). This principle is reflected in the Administrative Procedure Act, which provides that nothing in the Act affects "the power or duty of the court to dismiss any action *or deny* relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702 (emphasis added). On numerous occasions, courts have allowed the continued implementation of an activity authorized by agency action even while the agency reconsiders its action on remand. *See, e.g.*, *WildEarth Guardians v. OSMRE* (*Guardians I*), 104 F. Supp. 3d 1208, 1231- 32 (D. Colo. 2015), *order vacated, appeal dismissed*, 652 F. App'x 717 (10th Cir. 2016) (J. Jackson) (declining to vacate Colowyo and Trapper mining plan approvals during period of corrective NEPA analysis); *WildEarth Guardians v. OSMRE*, Nos. CV14-13-BLG-SPW, CV14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016) (declining to vacate Spring Creek mining plan approvals during period of corrective NEPA analysis)*; Cook Inletkeeper v. EPA*, 400 F. A'ppx. 239, 241 (9th Cir. 2010) (allowing continued

operation of natural gas and oil extraction facilities under challenged wastewater discharge permit during voluntary remand of the challenged permit). This Court should do the same, especially given that Petitioners do not seek vacatur of the existing Grand Junction RMP/EIS.

B. BLM Should Not Be Enjoined While the Remand Is Pending

Petitioners do not oppose BLM conducting additional NEPA review for the Grand Junction RMP, but indicate they may seek imposition of additional conditions on BLM during remand. However, any condition constituting an injunction would be improper in this instance.

First, the law already prevents the government from issuing leases that are not supported by adequate NEPA review; an injunction that would essentially direct BLM to comply with NEPA and its own regulations is therefore unwarranted. *See, e.g., City of New York v. United States Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019) (noting that "obey the law" injunctions are disfavored) (citing *Int'l Longshoremen's Ass'n, Local 1291 v. Phil. Mar. Trade Ass'n,* 389 U.S. 64, 76 (1967); *see also City of New York v. Mickalis Pawn Shop,* LLC, 645 F.3d 114, 144 (2nd Cir. 2011) (rejecting an injunction requiring the defendants "to act 'in full conformity with applicable laws pertaining to firearms,' and to 'adopt [ ] appropriate prophylactic measures to prevent violation' of those laws, without specifying which laws are 'applicable' or identifying the ways in which the defendants must alter their behavior to comply with those laws." (alteration in original)).

Second, because BLM's oil and gas program includes various decision points and opportunities for NEPA analysis, an order at this time enjoining the government from issuing new leases would be premature. Oil and gas development on federal lands is a multi-stage process. First, BLM develops an area-wide resource management plan, specifying what areas will be open to potential leasing and development and identifying certain resource-protection

stipulations that may be placed on future leases. 43 U.S.C. § 1712(a). RMP-level designations do not constitute decisions "to undertake or approve any specific action." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 504 (D.C. Cir. 2010). Rather, leasing decisions for specific lands occur later in time, in a separate administrative process requiring additional NEPA review. *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004). Then, following a successful lease sale, a lessee seeking to develop its leasehold must submit to BLM an Application for Permit to Drill ("APD"). Further NEPA review and BLM approval are required before the lessee may "commenc[e] any 'drilling operations' or 'surface disturbance preliminary thereto.'" *Pennaco Energy*, 377 F.3d at 1151-52 (quoting 43 C.F.R. § 3162.3-1(c)); *see also N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006) ("NEPA applies at all stages of the [oil and gas development] process").

Against that backdrop, should the government make a new leasing decision that Petitioners consider unlawful, Petitioners may challenge that decision and its supporting NEPA analysis at that time. To the extent a court finds BLM's corresponding NEPA analysis is inadequate, it could then issue an appropriate injunction. Any further tying of BLM's hands at this time goes beyond the scope of NEPA.

Third, Petitioners have not made any showing of entitlement to injunctive relief. And, there has been no briefing—nor a ruling on the merits—with respect to the adequacy of the EIS for the Grand Junction RMP.[3] Therefore, this Court should not enjoin BLM from issuing leases under the Grand Junction RMP/EIS at this time. *See, e.g., WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), 2019 WL 3253685, at *3 (D.D.C. July 19, 2019) (refusing to amend

[3] The parties also have not briefed Federal Respondents' defenses, including jurisdictional issues such as Petitioners' standing to assert all or some of their claims.

judgment and enter injunction against BLM because the Court "decline[d] to speculate about BLM's analysis on remand . . . particularly without rigorous application of the controlling legal standard for injunctive relief.").

CONCLUSION

For the reasons stated above, Federal Respondents ask the Court to remand the decision approving the Grand Junction RMP, without vacatur, and without making a determination on the merits of this case. This will avoid judicial resolution of issues that may well be resolved upon remand.

Respectfully submitted this 8th day of April, 2020

PRERAK SHAH
Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Caitlin Cipicchio
Caitlin Cipicchio
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
4 Constitution Square
150 M St. NE
Washington, DC 2002
(202) 305-0503
Email: caitlin.cipicchio@usdoj.gov

Attorneys for Federal Respondents

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/s/ *Caitlin Cipicchio*
CAITLIN CIPICCHIO