

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-02869-REB

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

Petitioners,

vs.

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

Federal Respondents.

**PETITIONERS' RESPONSE TO
FEDERAL RESPONDENTS' MOTION FOR VOLUNTARY REMAND**

Petitioners Center for Biological Diversity, The Wilderness Society, and Wilderness Workshop (together "Citizen Groups") hereby respond to Federal Respondents U.S. Bureau of Land Management's, *et al.*, (together "BLM") motion for voluntary remand. Dkt. 26. As stated in BLM's motion, Citizen Groups "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." *Id.* at 2. Having now reviewed BLM's motion, Citizen Groups oppose the vague and open-ended terms of the voluntary remand as proposed, and therefore request the Court to impose reasonable terms and conditions in any subsequent Order.

BACKGROUND

Citizen Groups filed this action October 8, 2019, challenging BLM's Grand Junction Field Office Resource Management Plan ("RMP") and Environmental Impact Statement ("EIS"), which was approved by Record of Decision ("ROD") on August 24, 2015, for violations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* In particular, Citizen Groups' alleged that BLM: (1) failed to take a hard look at *indirect* and *cumulative* combustion emissions; and (2) failed to consider all reasonable alternatives to oil and gas leasing and development. Dkt. 1 at 19, 21.

As BLM's motion identifies, the present action shares similarities with a prior case, *Wilderness Workshop v. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145 (D. Colo. 2018), which involved a challenge to an RMP in the adjacent Colorado River Valley Field Office. In *Wilderness Workshop*, this Court held that BLM violated NEPA by failing to take a hard look at indirect emissions of oil and gas, as well as failing to consider reasonable alternatives to lands made available to oil and gas leasing. *Id.* at 1156, 1167. The Court then ordered the parties to confer and attempt to reach agreement as to remedies.

Notably, and as described in BLM's motion, such negotiations were successful and ultimately resulted in a Settlement Agreement. *See* Dkt. 26-1 at 2 (citing *Wilderness Workshop*, No. 1:16-cv-01822 (D. Colo. Sept. 16, 2019) (Dkt. 58-1)).¹ Relevant terms of the Agreement include:

1. The Parties agree to a partial remand without vacatur of the EIS and ROD, so that Respondents may address those portions of the RMP, EIS and ROD that are affected by the deficiencies identified by the Court in its order of October 16, 2018.

¹ Terms of the Settlement Agreement included a provision preventing any Party from using the Agreement as evidence in other litigation. Because BLM's motion cited this Agreement and identified some, but not all relevant terms, Citizen Groups reference here is intended to provide the Court with the remaining relevant terms.

2. During remand, Respondents agree to prepare a Supplemental EIS, which will address the deficiencies identified by the Court.
3. Respondents agree to comply with all relevant requirements of NEPA, including requirements for public notice and comment.
4. Following issuance of the final Supplemental EIS, Respondents agree to issue a new decision document that will amend or supersede the existing ROD to the extent determined necessary or appropriate by Respondents.
5. Pending issuance of the new decision document, Respondents agree to not hold any oil or gas lease sales within the CRVFO RMP decision area.
6. Pending issuance of the new decision document, Respondents agree to file with the Court quarterly written reports regarding the status of proceedings on remand.

See id. Whereas BLM has acknowledged the holding of *Wilderness Workshop* as guiding these proceedings and, accordingly, “intends to prepare a supplemental analysis for the Grand Junction RMP as well[,]” Dkt. No. 26-1 at 2, Citizen Groups propose that the terms of the Settlement Agreement in *Wilderness Workshop* be used to guide the scope of the agency’s voluntary remand in this case. *See also id.* at 4 (stating “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”).

ARGUMENT

I. Petitioners Agree that a Partial Remand Without Vacatur is Appropriate

Citizen Groups agree that a partial remand of the Grand Junction RMP/EIS without vacatur is appropriate, and do not oppose BLM’s motion for voluntary remand on this condition. *See also Wilderness Workshop* Settlement Agreement. As provided in BLM’s motion, Dkt. 26-1 at 6, Citizen Groups did not seek vacatur in their request for relief in this case—although we did request the Court to vacate actions taken in reliance on the Grand Junction RMP/EIS, which include, for example, oil and gas lease sales. Dkt. 1 at 22.

Notably, unlike implementation stage decisions under NEPA—where vacatur of the decision would result in no actions being taken—here at the management stage, vacatur of the 2015 Grand Junction RMP/EIS would result in reversion to management under the prior 1987 Grand Junction RMP. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C.Cir.1987) (holding “the effect of invalidating an agency rule is to ‘reinstat[e] the rules previously in force.’”). Despite the shortcomings of the challenged RMP—as identified in Citizen Groups’ complaint—we certainly agree that BLM’s management of resource values under the current RMP have improved over the prior plan, and we do not seek a return to the 1987 management plan.

However, because vacatur is not sought as a remedy, it makes conditioning BLM’s voluntary remand with reasonable terms and conditions that much more important, as detailed below.

II. The Court Should Require BLM to Prepare a Supplemental EIS and Define the Scope of BLM’s Remand Analysis

BLM’s motion for voluntary remands includes only vague and open-ended terms, which fail to sufficiently describe the issues or type of analysis BLM is committing to perform on remand. *See* Dkt. 26-1 at 2 (stating “BLM intends to prepare supplemental analysis”); and *id.* at 4 (stating BLM “proposes to undertake additional NEPA analysis for the Grand Junction RMP” as part of the *Wilderness Workshop* remand process). While BLM notes that it is preparing a Supplemental EIS for the *Wilderness Workshop* remand—as prescribed by the Settlement Agreement—the agency offers no such commitment for the Grand Junction RMP in its motion.

As the Tenth Circuit described in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009), when preparing an EIS, NEPA regulations require:

At all stages throughout the process, the public must be informed and its comments considered. [40 C.F.R.] § 1503.1(a)(4) (public comment must be requested after publication of a draft EIS); § 1503.1(b) (public comment may be requested after publication of a final EIS but before a decision is made); § 1506.10 (requiring notice of draft and final EISs to be published in the federal register and setting time periods for public comment); § 1505.2 (requiring publication of a record of decision after the decision is made).

The public's right to participate is not mandated for the other types of supplemental NEPA analysis that BLM may choose to undertake in its remand of the Grand Junction RMP/EIS, including requirements for notice and comment. Accordingly, Citizen Groups ask the Court to condition BLM's voluntary remand on its preparation of a Supplemental EIS.

Moreover, while BLM's motion proposes to include consideration of the Grand Junction RMP/EIS as part of the remand process already occurring for *Wilderness Workshop*, Dkt. 26-1 at 4, the agency makes no firm commitment as to the issues or scope of the analysis it intends to prepare. Although Citizen Groups do not seek an admission from BLM on the merits of this case, because the agency has committed to prepare a voluntary remand, that analysis should, at a minimum, address the causes of action identified by Citizen Groups' complaint. Dkt 1 at 19-21. *See Limnia v. U.S. Dep't of Energy*, 857 F.3d 379, 383 (D.C. Cir. 2017) (describing the risk of confusion and need for additional litigation where a district court failed to clarify the scope of consideration and requirements upon the agency during remand).

A. Indirect and Cumulative Emissions

BLM is required to provide a hard look analysis of impacts before there are "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C)(v); *see also* 40 C.F.R. §§ 1501.2, 1502.5(a). "Indirect effects" are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include

growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b). “Cumulative effects” are “the impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

As alleged in Citizen Groups’ complaint, BLM failed to address the foreseeable indirect impacts from the downstream combustion of the oil and gas resources leased and developed in the planning area. Dkt. 1 at 19-21. As held by this Court in *Wilderness Workshop*, “BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP.” 342 F. Supp. 3d at 1156.

Additionally, the Grand Junction RMP/EIS fails to take a hard look at the cumulative effects to the climate caused by foreseeable oil and gas production under the RMP in combination with the BLM’s nationwide federal public lands oil and gas program, including by failing to evaluate the magnitude or severity of the increased emissions and the emissions caused in total by BLM’s nationwide federal public lands oil and gas program using existing tools such as the social cost of methane or carbon budgeting. *Id.* In a recent leasing stage decision, *WildEarth Guardians v. Zinke*, the court held that “BLM’s failure to quantify GHG emissions rendered the EAs’ cumulative impact analyses inadequate,” and further explained that NEPA requires the agency to “quantify the emissions from each leasing decision—past, present, or

reasonably foreseeable—and compare those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the leasing decision at issue.” 368 F. Supp. 3d 41, 76, 77 (D.D.C. 2019).

Accordingly, and because BLM has committed to prepare a voluntary remand of the Grand Junction RMP/EIS, that analysis should commit to taking a hard look at the indirect and cumulative emissions that arise from its management decision.

B. Alternatives

An EIS must consider “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). NEPA further requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” *Id.* § 4332(2)(E). Federal Defendants must “[r]igorously explore and objectively evaluate all reasonable alternatives” to their proposed action. 40 C.F.R. § 1502.14(a). This alternatives analysis is the “heart” of the EIS. *Id.* § 1502.14.

In the Grand Junction RMP/EIS, BLM failed to consider any alternatives that would meaningfully limit oil and gas leasing and development within the planning area and safeguard other multiple use values. As this Court held in *Wilderness Workshop*, “BLM did not closely study an alternative that closes low and medium potential lands [to oil and gas leasing]” and that “BLM's failure to consider reasonable alternatives violates NEPA.” 342 F. Supp. 3d at 1167.

Accordingly, BLM’s remand analysis should include consideration of reasonable alternatives that would limit or eliminate oil and gas leasing within the Grand Junction planning area.

III. Petitioners Agree that the Court Should Maintain the Status Quo Pending Remand

BLM has emphasized that “[t]o 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.” 26-1 at 4. Citizen Groups agree.

Yet at the same time, in advocating that there be no limitation on the agency’s ability to continue holding oil and gas lease sales during the pendency of the Grand Junction RMP/EIS remand, BLM argues that:

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.

Dkt. 26-1 at 7. In other words, rather than hitting pause until the remanded analysis is completed—which rightfully includes a hard look at climate impacts and underlying consideration of alternatives that may limit or eliminate areas open to oil and gas leasing—BLM is suggesting that Citizen Groups instead file untold additional cases before this Court—the opposite of preserving judicial resources.

To be clear, such a suggestion is not merely hypothetical. There is another pending case before this Court, *Wilderness Workshop v. Bureau of Land Mgmt.*, No. 1:18-cv-00987-MSK (D. Colo.), which involves a challenge to two BLM oil and gas leasing auctions, held in December 2016 and December 2017, and containing parcels in both the Grand Junction and Colorado River Valley planning areas. Of note, BLM’s approval of those lease sales was done through determinations of NEPA adequacy (“DNA”), which involved no additional NEPA analysis whatsoever, and instead relied on RMP analyses for the Grand Junction and Colorado River

Valley field offices—the first of which is challenged here, and the second of which this Court has already found to be unlawful in *Wilderness Workshop*, 342 F. Supp. 3d 1145.

BLM’s only assurance to this Court is that “the law already prevents the government from issuing leases that are not supported by adequate NEPA review[,]” and later, that “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.” Dkt. 26-1 at 6. But unlike the cases BLM cited involving nondiscretionary legal obligations, here, the agency’s leasing decisions are discretionary based on the agency’s own determination of what constitutes “adequate” NEPA review. Indeed, it has been BLM’s practice to issue oil and gas leases pursuant to challenged RMPs without additional consideration under NEPA. *See, e.g., Wilderness Workshop v. Bureau of Land Mgmt.*, No. 1:18-cv-00987-MSK (D. Colo.). In this case, the agency’s voluntary remand without any clear sideboards or any admission of NEPA deficiencies offers little assurance that this pattern will not continue—especially at a time when BLM is actively pursuing an agenda of energy dominance and working to expedite oil and gas leasing on public lands.² It then rests on the public to rebut those decisions, thus compelling further litigation.

Such uncertainty and the need for additional litigation can be easily avoided. As the Parties established in the *Wilderness Workshop* Settlement Agreement, “[p]ending issuance of the new decision document, Respondents agree to not hold any oil or gas lease sales within the CRVFO RMP decision area.” No. 1:16-cv-01822 (D. Colo. Sept. 16, 2019) (Dkt. 58-1). This

² *See* Final Report: Review of the Department of the Interior Actions That Potentially Burden Domestic Energy, 82 Fed. Reg. 50532, 50533 (Nov. 1, 2017); BLM Instruction Memorandum No. 2018-034, Updated Oil and Gas Leasing Reform, available at: <https://www.blm.gov/policy/im-2018-034>.

term recognized that it would be foolish to proceed with additional oil and gas leasing during the pendency of the agency's remand, particularly where that remand involved the underlying decision of which lands, if any, should be made available to oil and gas leasing. The same condition should govern this case.

Here, the Court should use its broad authority “to do equity and to mould each decree to the necessities of the particular case.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 174 (2010); *see also Colo. Environmental Coalition v. Office of Legacy Management*, 819 F. Supp. 2d 1193, 1224 (D. Colo. 2011) (ordering that no new leases could be issued and no ground-disturbing activity could occur until the agency fully complied with NEPA); *Ford Motor Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 364, 373 (1939) (“The jurisdiction to review the orders [of an agency] is vested in a court with equity powers ... [and] it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial actions.”). During the pendency of BLM's voluntary remand of the Grand Junction RMP/EIS, the Court should maintain the status quo—and preserve judicial resources—by requiring the agency not hold any oil and gas lease sales until a new decision document is released.

IV. Remanded Analysis for the Grand Junction RMP Should be Distinct, and Include a Separate Record of Decision

As stated in BLM's motion, the agency “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 ... and proposes to undertake additional NEPA analysis for the Grand Junction RMP as part of that process.” Dkt. 26-1 at 4. While BLM maintains some discretion in the remand processes and the efficient preparation of supplemental analyses, the Court should require that the Grand Junction RMP/EIS remand have a separate ROD from the Colorado River Valley RMP/EIS remand.

Although the Grand Junction and Colorado River Valley planning areas are adjacent and, correspondingly, share similarities in many resource conditions, a total conflation of analysis and a single ROD would create confusion and unneeded complexity down the line. In particular, both remands involve underlying consideration of oil and gas leasing alternatives, analyzing which lands, if any, should be open to oil and gas leasing.³ Such consideration is delimited to within planning area boundaries, would necessarily implicate a host of other resource values and management decisions specific to those areas, and would supplement analysis and decisions previously made for those RMPs. The sufficiency of such remand analysis could then involve varying degrees of public comment and engagement and, perhaps, give rise to additional litigation. Moreover, while BLM has not yet committed to the remand processes it undertakes for the two RMP/EIS decisions, the merging of such analysis may also violate the terms of the *Wilderness Workshop* Settlement Agreement.

To avoid such confusion and procedural complexity, Citizen Groups request that the Court require a separate Supplemental EIS and ROD be prepared for the Grand Junction RMP/EIS.

V. The Court Should Retain Jurisdiction

If the above-mentioned terms and conditions are included in a Court Order granting BLM's motion for voluntary remand—essentially, the same requirements of the *Wilderness Workshop* Settlement Agreement—Citizen Groups would agree to a stipulated dismissal of this action. *See Wilderness Workshop*, No. 1:16-cv-01822 (D. Colo. Sept. 16, 2019) (Dkt. 58).

³ *See supra* II(B) (requesting that the scope of the Grand Junction RMP/EIS remand expressly include the consideration of oil and gas alternatives, which this Court also found to be unlawful in *Wilderness Workshop*, 342 F. Supp. 3d at 1167, and accordingly must be considered in that Supplemental EIS).

However, if the voluntary remand is granted pursuant to the vague and open-ended terms included in BLM's motion, then Citizen Groups alternatively request the Court to retain jurisdiction over this matter throughout the Grand Junction RMP/EIS remand process. "District courts have the authority to stay court proceedings and retain jurisdiction over cases even when an agency's request for a voluntary remand is granted." *XP Vehicles v. U.S. Dep't of Energy*, 156 F. Supp. 3d 185, 193 (D.D.C. 2016) (rev'd on other grounds, *Limnia*, 857 F.3d 379). "While this is not always done, courts have exercised their discretion to do so when, for example, the court wishes to ensure that a voluntary remand will not, in fact, prejudice the non-movant." *Id.* Here, the vague nature of BLM's motion threatens such prejudice to Citizen Groups, and thus supports the Court retaining jurisdiction.

CONCLUSION

For the reasons identified above, Citizen Groups do not oppose BLM's motion for voluntary remand of the Grand Junction RMP/EIS, but request that the Court Order, if any, include necessary terms and conditions, including: (1) that remanded analysis be prepared in a Supplemental EIS; (2) that the scope of remanded analysis include a hard look at indirect and cumulative emissions, as well as consideration of reasonable alternatives limiting or eliminating lands available to oil and gas leasing; (3) pending issuance of the new decision document, BLM agree to not hold any oil or gas lease sales within the Grand Junction RMP decision area; and (4) that the remand analysis for the Grand Junction RMP be approved by a separate ROD. Should the Court grant BLM's motion without such conditions, Citizen Groups alternatively request that the Court retain jurisdiction as necessary to ensure the agency's compliance with NEPA.

Respectfully submitted this 28th day of APRIL, 2020.

/s/ Kyle Tisdel

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on April 28, 2020, I electronically filed the foregoing *Petitioners' Reponse to Federal Respondents' Motion for Voluntary Remand* with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kyle Tisdell
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