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,

WEST SLOPE COLORADO OIL AND GAS ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE, COLORADO OIL AND GAS ASSOCIATION, and
WESTERN ENERGY ALLIANCE,

Intervenor-Respondents.

INTERVENOR-RESPONDENTS' RESPONSE IN SUPPORT OF FEDERAL RESPONDENTS' MOTION FOR VOLUNTARY REMAND

Intervenor-Respondents submit this response in support of the Federal Respondents' motion for voluntary remand without vacatur, and without a ruling on the merits, to allow the Bureau of Land Management (BLM) to conduct further analysis under the National Environmental Policy Act (NEPA) in regard to its approval of the 2015 Grand Junction Resource Management Plan (RMP).

The Court should grant the Federal Respondents' request for voluntary remand without vacating the Grand Junction RMP, and without imposing conditions on the BLM's request to prepare additional NEPA analysis.

I. Remand is appropriate and will conserve judicial resources.

The Court should grant BLM's request for voluntary remand so that the agency may determine, in the first instance, the extent of its obligations under NEPA.[1]

"Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *See Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980). Administrative reconsideration is "a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." *B.J. Alan Co. v. I.C.C.*, 897 F.2d 561, 563 n.1 (D.C. Cir. 1990) (internal quotations omitted).

BLM's request for voluntary remand is appropriate. BLM's request will not prejudice Petitioners and will result in additional environmental review by BLM. *See Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (holding that voluntary remand is appropriate where plaintiffs have not "demonstrated any examples of detrimental reliance" on the existing decision and further environmental review will help further the purposes of NEPA).

II. The Court should remand without vacatur.

This Court should remand the Grand Junction RMP without vacating it. In determining whether to vacate an agency decision during remand, federal courts generally look to "the seriousness of the [action's] deficiencies (and thus the extent of

[1] Intervenor-Respondents agree that the Federal Respondents do not need to "confess error or impropriety in order to obtain a voluntary remand." *Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017). The agency need only "profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Id.* Federal Respondents have done that here.

doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Com'n*, 988 F.2d 146, 150–51 (D.C. Cir 1993) (internal quotations omitted); *see also Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1286 (D. Colo. 2012) (applying *Allied-Signal* balancing test). In other words, remand without vacatur is appropriate "whether there is 'at least a serious possibility that the [agency] will be able to substantiate its decision on remand,' and whether vacatur will lead to impermissibly disruptive consequences in the interim." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91, 97 (D.D.C. 2017).

There is at least a serious possibility that BLM will be able to substantiate its planning decisions under the Grand Junction RMP on remand. As the District of Columbia observed in a similar challenge to BLM lease sales, to the extent "BLM's NEPA violation consists merely of a failure to fully discuss the environmental effects" of its action, there is nothing to suggest "that on remand the agency will necessarily fail to justify its decisions." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 (D.D.C. 2019). And the court noted that the plaintiffs had also challenged only one aspect of lease sales that otherwise complied with NEPA. *Id.* The court found that where the probability that BLM will be able to justify its prior decision is "sufficiently high," vacatur is simply "not appropriate." *Id.* (quoting *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (noting that this is the case even if the disruptive consequences might not be great)).

The same rationale applies here—with even greater force. BLM has not admitted any error. It has requested that the Court voluntarily remand the Grand

Junction RMP so that the agency may undertake further environmental analysis, which is one of the aims of Petitioners' complaint. Given the BLM's commitment to reassess its NEPA analysis, it is speculative to predict that the BLM's reassessment process will yield "the same shortcomings" that the court found with the Colorado River Valley RMP in *Wilderness Workshop I*. *See WildEarth Guardians v. Bernhardt*, No. CV 16-1724 (RC), 2019 WL 3253685, at *2 (D.D.C. July 19, 2019) (denying motion to amend order granting remand without vacatur and conditions and noting that the BLM lease sales subject to voluntary remand may not suffer from same procedural flaws as lease sales that were subject to the court's prior decision). Petitioners have also challenged only two limited aspects of BLM's NEPA analysis—BLM's climate change analysis of oil and gas leasing decisions and BLM's consideration of alternatives to limit oil and gas leasing and development within the planning area. *See Native Vill. of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Alaska 2010) (refusing to vacate decision to offshore oil and gas lease sale decision where agency failed to comply with NEPA in only three limited respects). Without a decision on the merits or a review of the record, there is simply nothing to suggest that on remand BLM "will necessarily fail to justify its decisions," making vacatur inappropriate. *WildEarth Guardians*, 368 F. Supp. 3d at 84.

The disruptive consequences of vacatur should also not be understated. Intervenor-Respondents each have a member that owns an oil and gas lease subject to the Grand Junction RMP. *See* Order Granting Mot. to Intervene, Dkt 27, at 6 (Apr. 20, 2020). Intervenor-Respondents also have members with an interest in obtaining future leases under the Grand Junction RMP. *Id.* Vacatur of the Grand Junction RMP, and of leases already issued under the RMP, would directly and significantly impair these

members' interests, which are "substantial, and legally protectable." *Id.* Vacatur could also potentially disrupt ongoing development and operations on the leases, including imperiling existing contracts, jobs, and much-needed economic activity in this rural area.

Given the serious possibility that BLM will justify its prior decisions on remand, and the disruptive consequences that would be caused by vacatur, the Court should grant the Federal Respondents' motion for voluntary remand without vacatur of the Grand Junction RMP or any subsequent decisions to date implementing the RMP.

III. The Court should not place any conditions on BLM during the remand.

Federal Respondents request that the Court not impose any conditions on BLM while it conducts additional analysis on remand. *See* Mem. in Supp. of Federal Respondents' Mot. for Voluntary Remand, Dkt. 26-1, at 3–4 (Apr. 8, 2020) ("Mot. for Remand'). This request is appropriate. The Court should deny Petitioners' request to impose additional terms and conditions on BLM. *See* Pet'rs' Resp. to Mot. for Voluntary Remand, Dkt. 29, at 12 (Apr. 28, 2020) ("Pet'rs' Resp.").

The District of Columbia's decision in *WildEarth Guardians* is instructive. Following the court's determination that BLM failed to adequately analyze the climate change impacts associated with BLM lease sales in Wyoming lease sales, the court granted BLM's request to remand the decisions, without vacatur, of certain Colorado and Utah lease sales subject to the same litigation. *See* Minute Order, *WildEarth Guardians v. Bernhardt*, No. CV 16-1724 (RC), (D.D.C. May 29, 2019). The plaintiffs moved to "amend the minute order to specify that the Colorado and Utah leases should be enjoined until BLM demonstrates NEPA compliance." *WildEarth Guardians v. Bernhardt*, No. CV 16-1724 (RC), 2019 WL 3253685, at *1 (D.D.C. July 19, 2019).

The court denied the plaintiffs' motion. The court explained that to "satisfy what NEPA requires," BLM's environmental analysis on remand must be consistent with its prior decision in the case, "*before* making any further decisions concerning those leases." *Id.* at *2. In other words, BLM could not proceed with any further actions related to the existing leases, without demonstrating that those actions were supported by an adequate NEPA analysis. But the court noted that it "must assume that BLM will take its obligations seriously on remand." *Id.*

The district court's decision in *WildEarth Guardians* provides appropriate direction here. NEPA requires that BLM support any decisions under the Grand Junction RMP with an adequate environmental analysis. 42 U.S.C. § 4332(C)(i)–(iii). And as Federal Respondents note in their motion, NEPA applies at all stages of oil and gas leasing and development. *See* Mot. for Remand, Dkt. 26-1, at 7 (citing *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006)). If the BLM decides in the future to issue additional oil and gas leases under the 2015 Grand Junction RMP, or decides to authorize development of existing oil and gas leases, Petitioners may challenge those future BLM decisions. But again, those potential future decisions have not been made. Petitioners have not (and cannot) establish the requisite irreparable harm from hypothetical future actions to support issuance of an injunction at this point. *See WildEarth Guardians*, 2019 WL 3253685, at *3.

Petitioners argue that requiring them to challenge individual leasing decisions will prejudice Petitioners and waste judicial resources. Pet'rs' Resp., Dkt. 29, at 8–10. But this is not the case. This is how the system works. This Court reviews individual cases and controversies as they arise, rather than issuing advisory opinions on unripe matters

or possible future hypothetical issues. The Supreme Court rejected the contention raised by Petitioners in *Lujan v. National Wildlife Federation*, in which the Court observed that while "the case-by-case approach" is "understandably frustrating" to organizations that seek "across-the-board protection," federal courts will "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." 497 U.S. 871, 894 (1992).

The Court should also not prescribe the form or content of the agency's work on remand. Those determinations are best left to the agency rather than the Court or Petitioners. This is the purpose of voluntary remand—to provide the agency with the ability to reconsider its prior decision. *See Trujillo*, 621 F.2d at 1086.

Without a ruling on the merits, it is unclear whether the NEPA analysis for the Grand Junction RMP is inadequate. *See WildEarth Guardians*, 2019 WL 3253685, at *2. BLM should be provided the opportunity to determine, in the first instance, the extent of its obligations under NEPA and to comply with NEPA when and how it sees fit. *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986–87 (9th Cir. 1994) (noting the district court "was careful to leave the substance and manner of achieving . . . compliance" up to the agency). That includes the ability to conduct site-specific NEPA analyses, if it deems necessary, to approve development authorizations, or to conduct supplemental NEPA analyses to support individual lease sales. These are common practices in BLM field offices and are consistent with NEPA. *See* BLM, "Pecos District Carlsbad Field Office Oil and Gas Lease Sale, March 2019," at 24–25 (indirect emission

estimate to support lease sale)[2]; BLM, "Farmington Field Office Oil and Gas Lease Sale, June 2019," at 29–30 (same)[3]; *see also* Order, *Citizens for a Healthy Cmty. v. United States Bureau of Land Mgmt.*, No. 17-cv-02519-LTB-GPG, Dkt. 73, at 4 (D. Colo. Dec. 10, 2019) (remanding BLM approval of Master Development Plan (MDP), without vacatur, with instructions to complete additional NEPA analysis on the "limited" issue of the reasonably foreseeable indirect impacts of oil and gas development to be approved under the MDP).

CONCLUSION

Intervenor-Respondents respectfully request that the Court grant the Federal Respondents' motion for voluntary remand without vacatur and without imposing any conditions on BLM during remand.

[2] https://eplanning.blm.gov/epl-front-office/projects/nepa/115496/166371/202753/EA_CFO_March2019_LeaseSale_020819.pdf

[3] https://eplanning.blm.gov/epl-front-office/projects/nepa/119027/168306/204833/DOI-BLM-NM-2019-0032-EA-Unsigned-508.pdf

Respectfully submitted this 29th day of April 2020.

s/ Dale Ratliff
Ezekiel J. Williams
Carlos Romo
Dale Ratliff
Lewis, Bess, Williams & Weese P.C.
1801 California Street, Suite 3400
Denver, CO 80202
Phone: (303) 861-2828
Email: zwilliams@lewisbess.com
cromo@lewisbess.com
dratliff@lewisbess.com

Attorneys for Intervenor-Respondents
West Slope Colorado Oil and Gas Association
American Petroleum Institute
Colorado Oil and Gas Association
Western Energy Alliance