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

WILDEARTH GUARDIANS, et al.,

Plaintiffs,

v.

DEBRA HAALAND, in her official capacity as
Secretary of the Interior, et al.,

Defendants, and

STATE OF WYOMING, et al.

Intervenor-Defendants.

Case No. 1:21-cv-00175-RC

**INTERVENOR-DEFENDANT
STATE OF WYOMING'S
OPPOSITION TO FEDERAL
DEFENDANTS' MOTION FOR
VOLUNTARY REMAND WITHOUT
VACATUR**

INTRODUCTION

Federal Defendants ask this Court for a voluntary remand to perform further NEPA analysis on all twenty-eight of the lease sales challenged in this action. This request comes weeks after Intervenor-Defendant American Petroleum Institute (API) moved this Court to dismiss the Citizen Groups' claims for relief with respect to a majority of the challenged lease sales. Federal Defendants' request for remand is premature, and presumes the answer to a question that only this Court should resolve – namely, whether the Citizen Groups have presented legally sufficient claims under Federal Rule of Civil Procedure 12(b)(6). API's motion to dismiss is now fully briefed and ready for decision. This Court's dismissal of Citizen Groups' claims would immediately settle the parties' rights regarding several of the challenged lease sales and would significantly limit the scope of any future remand. Granting a voluntary remand before addressing the motion to dismiss would unduly prejudice Wyoming and other intervenors, who have substantial reliance interests in the validity of the challenged lease sales. Therefore, this Court should exercise its discretion and deny Federal Defendants' request for voluntary remand.

BACKGROUND

The Citizen Groups challenge twenty-eight of the Bureau of Land Management's oil and gas lease sales under the Mineral Leasing Act and the National Environmental Policy Act, specifically alleging that the Bureau failed to properly quantify and analyze the direct, indirect, and cumulative impacts of greenhouse gas emissions. (ECF_13 at 3-4). On July 30, 2021, the Federal Defendants moved for a voluntary remand of all twenty-eight challenged lease sales. (ECF_43 at 1). The Bureau completed its NEPA analysis for all but one of these lease sales before this Court's decision in *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020). (*Id.* at 2). Federal Defendants view the challenged lease sales as "similar in some respects" to those

considered in *Bernhardt* and, therefore, ask this Court to remand the lease sales for further NEPA analysis. (*Id.* at 5). According to Federal Defendants, this measure will “avoid judicial resolution of issues that may well be resolved upon remand and further study.” (*Id.* at 6).

Several weeks before Federal Defendants filed their motion for voluntary remand, Intervenor-Defendant API moved this Court to dismiss the Citizen Groups’ claims regarding a majority of the lease sales or, in the alternative, grant API partial summary judgment. (ECF_28 at 1-2). Among other grounds for dismissal, API argues that the Citizen Groups failed to challenge twenty-three of the twenty-eight lease sales within ninety days, as required by the Mineral Leasing Act, 30 U.S.C § 226-2. (ECF_28-1 at 12). API contends that the Citizen Groups’ failure to comply with an applicable statute of limitations warrants dismissal under Federal Rule of Civil Procedure 12(b)(6). (*Id.* at 12). If successful, API’s motion would result in the dismissal of the Citizen Groups’ challenges to all three of the Wyoming lease sales at issue in this case. (*Id.* at 17).

As Wyoming demonstrated in support of its intervention, the State has a substantial economic interest in maintaining the outcome of the challenged lease sales and has acted in reliance upon their validity. (ECF_15-1 at 3-4). The challenged Wyoming lease sales occurred in September 2019, December 2019, and March 2020. (ECF_13 at 54-55). Wyoming’s share of bids for the parcels leased in these sales was approximately \$10,665,891. (ECF_15-1 at 3). Wyoming distributes its share of bid revenue on a quarterly basis to schools, local governments, State infrastructure accounts, and State reserve accounts. (*Id.* at 3). Based on the timing of the challenged sales, Wyoming has already received its share of bid revenue and distributed these funds to schools, local governments, and State accounts. (*See id.* at 3) (explaining Wyoming’s distribution of fiscal year 2020 revenue from federal mineral sales, bonuses, rentals, and royalties). Wyoming

also stands to collect ad valorem taxes, severance taxes, and a share of federal mineral royalties from oil and gas produced on the leased parcels. (*Id.* at 3-4).

ARGUMENT

Courts commonly grant motions for voluntary remand to allow agencies “to cure their own mistakes... .” *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). To support voluntary remand, the agency must “intend[] to take further action with respect to the original agency decision on review.” *Limnia, Inc. v. Dep’t of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017). An agency can base its remand request upon “intervening events outside of the agency’s control, for example, a new legal decision or the passage of new legislation.” *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)).

Courts have “broad discretion to grant or deny an agency’s remand motion.” *Id.* However, in exercising this discretion, courts must consider “whether remand would unduly prejudice the non-moving party” and “whether the agency’s request appears to be frivolous or made in bad faith.” *Id.* These inquiries are separate from one another, and a showing of undue prejudice does not require proof of bad faith. See *American Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95, 97-98 (D.D.C. 2019); *Conservation Law Found. v. Ross*, 2019 WL 1359284, slip op. at 2 (D.D.C. 2019). Instead, the non-moving party’s showing of undue prejudice may be based on any “apparent or clearly articulated countervailing reasons” that justify proceeding with litigation. *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015) (quoting *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004); see also *American Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 47 (D.D.C. 2013) (requiring more than

“ill-defined prejudice” to overcome the “certain benefits to be gained by avoiding further litigation.”).

Voluntary remand may benefit some parties to an action, while prejudicing others to such an extent that remand is improper. Recognizing this, the D.C. Circuit blocked the Environmental Protection Agency’s attempt to revisit its statutory authority at the invitation of industry petitioners, when doing so “would prejudice the vindication of [environmental petitioners’] claim.” *Util. Solid Waste Activities Grp.*, 901 F.3d at 436. In a similar case, this Court rejected the EPA’s attempt to voluntarily remand a prior decision protecting waters of the Puget Sound from sewage discharge. *American Waterways Operators*, 427 F. Supp. 3d 95. Despite support from industry petitioners, this Court decided that the remand would “unduly prejudice the Environmental Intervenors’ interests.” *Id.* at 99. The intervenors had acted in reliance on the agency’s determination by implementing strict restrictions on sewage discharge and had realized clear environmental benefits from the agency action, including the improved health of commercial shellfish beds. *Id.* Because remand “would leave all this in limbo” and potentially disturb the intervenors’ “important reliance interests,” this Court refused to let EPA “reconsider an otherwise final decision.” *Id.* at 99-100.

Here, Wyoming and other intervenors would suffer undue prejudice from the Federal Defendants’ proposed remand. Federal Defendants’ remand motion is prejudicial to intervenors not because of its rationale – that this Court has issued intervening decisions regarding the issues in dispute – but rather because of its timing. Federal Defendants moved for voluntary remand on July 30th, just one week before API’s motion to dismiss was fully briefed. (ECF_43; ECF_45). Federal Defendants either ignore or aim to circumvent the possibility that this Court agrees with API and finds certain claims brought by the Citizen Groups to be time-barred under 30 U.S.C.

§ 226-2. A decision by this Court to dismiss the Citizen Groups' claims would settle the parties' rights regarding the underlying lease sales, including the three Wyoming lease sales at issue. (ECF_28-1 at 17). With no surviving challenge to these leases sales, there would be no basis to include them in a remand to the Bureau.

Not unlike the environmental intervenors in *American Waterways Operators*, Wyoming has a clear reliance interest in maintaining the validity of the Bureau's lease sales. Wyoming received approximately \$10,665,891 as its share of bids from the lease sales and has distributed these funds to schools, local governments, State infrastructure accounts, and State reserve accounts. (ECF_15-1 at 3). Wyoming also stands to collect ad valorem taxes, severance taxes, and additional royalties from production on the leased parcels. (*Id.* at 3-4). Granting Federal Defendants' requested remand, without first deciding API's motion to dismiss, would deprive Wyoming and other intervenors of the opportunity to protect their important interests in this action.

In *American Forest Resource Council*, this Court evaluated prejudice by weighing the benefit that a non-moving party would gain from proceeding on the merits against the costs imposed by prolonging the litigation. 946 F. Supp. 2d at 47. This Court questioned the benefit of further litigation, noting that it would grant a "substantial part of the relief requested" whether it approved the agency's request for voluntary remand or made a decision on the merits and ordered remand at that point. *Id.* at 46. By contrast, prolonging the litigation would "necessitate the expenditure of considerable time and resources" and delay the agency's work in reconsidering its action. *Id.* at 43, 46. Thus, where an outcome on the merits would likely match the outcome of a voluntary remand, the party opposing remand had not shown prejudice. *Id.* at 46; *see also Clark v. Perdue*, 2019 WL 2476614, slip op. at 3 (D.D.C. 2019) ("[T]he typical redress for an agency's procedural deficiency would be to remand to that agency to have it decide the substance of the

dispute in a procedurally proper manner. Here, the agency has agreed to do just that... . [Plaintiff] is getting all the relief she seeks and would not, on this score, be prejudiced by a remand.”).

The circumstances here are different altogether from *American Forest Resource Council* and *Clark*. First, intervenors are not seeking relief that could otherwise be gained through remand. Intervenors ask this Court, before considering remand, to rule on API’s motion to dismiss. One possible outcome from this course of action – dismissal – would prevent a remand, at least as to some of the challenged lease sales. Next, resolving the motion to dismiss would require no further resources from the parties because the motion is fully briefed. In sum, the potential benefits to intervenors from resolving the motion to dismiss are significant, and the costs of resolving the motion are low. Under *American Forest Resource Council* and *Clark*, this supports a finding that Wyoming and other intervenors will suffer undue prejudice from a remand of this action.

If this Court grants the voluntary remand, the parties may seek further review of the Bureau’s decisions. *See* Order Granting Fed. Defs.’ Mot. for Voluntary Remand Without Vacatur, *WildEarth Guardians v. Haaland*, Case No. 20-cv-56, ECF No. 46 at 2 (Oct. 23, 2020) (acknowledging that “Plaintiffs will be able to challenge any subsequent decision post remand if they continue to consider the leasing decisions unlawful.”). Courts often view this right to future judicial review as a factor that reduces prejudice. *See, e.g. TransWest Express LLC v. Vilsack*, 2021 WL 1056513, slip op. at 5 (D. Colo. 2021) (“[I]n the event the NRCS upon reconsideration issues a revised final agency decision, all parties retain their right to challenge the reconsidered decision.”). Here, however, the parties’ right to subsequent judicial review would uniquely prejudice Wyoming and other intervenors. In deciding API’s motion to dismiss, this Court could find that several of the Citizen Groups’ challenges are time-barred under 30 U.S.C. § 226-2, foreclosing further adjudication of the claims in question. By instead granting Federal Defendants’

motion for voluntary remand, this Court would provide the Citizen Groups a fresh opportunity to challenge any new decisions on the lease sales. In other words, the remand might resurrect otherwise time-barred claims and thus “prejudice the vindication” of intervenors’ defenses to this action. *Util. Solid Waste Activities Grp.*, 901 F.3d at 436.

CONCLUSION

For the foregoing reasons, Wyoming requests that this Court deny Federal Defendants’ motion for voluntary remand.

Dated this 13th day of August, 2021.

/s/ Matt VanWormer
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CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 2021, I electronically filed the foregoing with the Clerk of the U.S. District Court for the District of Columbia and served all parties using the CM/ECF system.

/s/ Matt VanWormer
Matt VanWormer