UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 15-8109

WILDEARTH GUARDIANS, et al.,

Petitioners - Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondent - Appellee,

and

WYOMING MINING ASSOCIATION, et al.,

Intervenors - Appellees,

STATE OF WYOMING, et al.,

Respondents – Intervenors

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (Case No. 2:13-cv-00042-ABJ)
(JUDGE ALAN B. JOHNSON)

Oral Argument Continued

APPELLANTS' OPENING SUPPLEMENTAL MEMORANDUM BRIEF

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INTRODUCTION

Appellants Sierra Club and WildEarth Guardians ("Conservation Organizations") hereby submit the additional briefing this Court requested on the implications, if any, of the automatic stay provision of the U.S. Bankruptcy Code on this litigation and the environmental claims brought against the federal government. As explained in detail below, Congress limited the stay to eight enumerated categories of actions and proceedings, none of which are implicated here. These categories encompass scenarios necessary to ensure an orderly resolution of claims and judgments *against a debtor* who has filed for protection under the U.S. Bankruptcy Code. The stay functions, in part, by precluding a debtor's various creditors from bringing claims in disparate courts as they race to secure the largest possible share of a debtor's remaining estate. This case presents an entirely different scenario. Conservation Organizations challenge the environmental review conducted by the non-debtor U.S. Bureau of Land Management ("BLM"). There are no claims and no relief sought against the third-party intervenor that has filed for bankruptcy, and Conservation Organizations are not seeking to control, encumber, or limit the use of this debtor's property or assets. The stay provision of the Bankruptcy Code simply was not intended to cover this type of scenario, none of the statutory preconditions for the stay fit, and this Court should find that the bankruptcy stay does not apply. Conservation Organizations ask this Court to allow the appeal to proceed.

On September 12, 2016, Conservation Organizations filed with this Court a notice of their "Revised Request for Relief." The notice referenced the status of appellee BTU Western Resources ("BTU") as a debtor currently seeking relief, together with its parent

corporation Peabody Energy, under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court"). The notice gave effect to a stipulation entered into between BTU and Conservation Organizations and filed with the Bankruptcy Court (the "Stipulation") that called for, among other things, Conservation Organizations to withdraw their request for vacatur of all of the Wright Area Leases.[1] Importantly, the Stipulation indicates that BTU was prepared for this appeal to proceed so long as Conservation Organizations' request for vacatur was withdrawn, and stipulates that the automatic stay would not be implicated by the appeal proceeding after withdrawal of the request for vacatur.

On October 28, 2016, this Court directed the parties to submit supplemental briefing on two issues. First, the Court asked for briefing on whether its ruling on the merits of this appeal would violate the automatic stay provision of the Bankruptcy Code, even if applied only to the two leases that are not scheduled property in the Peabody Energy bankruptcy. Second, the Court asked for briefing on whether it should abate this appeal pending the resolution of the bankruptcy cases, and what authority would allow it to proceed. As explained below, the Bankruptcy Code's automatic stay does not apply to this appeal, especially because Conservation Organizations no longer seek vacatur of any of the leases. This Court can and should proceed with consideration of the appeal. There is no legal barrier to proceeding; neither BLM nor BTU would suffer any harm from

[1] At no time has BTU filed any notice of its bankruptcy with this Court.

having the propriety of BLM's environmental review resolved now. Putting this already four year old case on ice until BTU emerges from bankruptcy at some indeterminate point, possibly years into the future, would only add unnecessary and unjust delay to resolution of a straightforward issue of public importance.

The automatic stay provision in the Bankruptcy Code exists to give a bankrupt debtor a breathing spell from its creditors, and from any pending litigation brought against it. Here, however, Conservation Organizations are not creditors of BTU or Peabody, nor have they commenced litigation against the debtors. Indeed, the only relief sought in this appeal is against a non-debtor defendant, BLM. Conservation Organizations contend that BLM issued four coal leases, including two held by BTU, without fully analyzing or disclosing the climate impacts of doing so, as every party acknowledges BLM must do under the National Environmental Policy Act ("NEPA"). Conservation Organizations ask this Court to remand the matter to BLM to consider such impacts in accordance with its NEPA obligations. Conservation Organizations are not asking this Court to invalidate the leases or otherwise directly impact any property of the debtor at this time. Instead, Conservation Organizations merely seek a determination that BLM violated NEPA when issuing the leases, and an order remanding the matter back to BLM with instructions that the agency comply with NEPA's procedural safeguards. Once fully informed of the likely climate impacts of its decision to authorize the Wright Area Leases, BLM can determine whether issuance of these leases is in the public interest. Indeed, Conservation Organizations hope that BLM reconsiders the wisdom of approving

these massive expansions of coal mines on federal lands once the true climate impacts have been studied and disclosed.

Conservation Organizations filed this challenge to BLM's environmental review in 2012. More than four years later, Conservation Organizations seek resolution of a single issue, initially raised in comments to the agency in 2009: whether BLM failed to adequately analyze and disclose the climate impacts of leasing more than two billion tons of federally-owned coal through the Wright Area Leases. If this Court abates this appeal until some uncertain future date when BTU emerges from bankruptcy, it would have the effect of allowing BLM to use BTU's bankruptcy as a safe haven shielding *BLM's* environmental wrongdoing from timely judicial scrutiny in a way that Congress never intended when it enacted the Bankruptcy Code.

BACKGROUND

On May 2, 2012, Conservation Organizations brought suit challenging BLM's decision to issue four federal coal leases in the Powder River Basin of Wyoming – the North Hilight, South Hilight, North Porcupine and South Porcupine Leases – collectively referred to as the Wright Area Leases.

Conservation Organizations allege that BLM's environmental review of the Wright Area Leases violated NEPA, 42 U.S.C. §§ 4321-4347, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The relief sought in Conservation Organizations' complaint included vacatur of BLM's Environmental Impact Statement and subsequent Records of Decision, as well as any subsequent lease sales, issuances, or other actions.

On May 30, 2013, BTU, along with several non-Debtor parties, intervened in this action challenging BLM's lease authorizations. On August 17, 2015, without specifically addressing the merits of the single issue raised on appeal before this Court, the district court issued an order affirming BLM's decisions, and entered judgment to that effect. This appeal followed.

BTU, along with its parent company Peabody Energy and additional subsidiaries, filed for chapter 11 bankruptcy protection on April 13, 2016. BTU has continued conducting business during its bankruptcy, and indeed has continued to mine coal at its North Antelope Rochelle mine, expanded by the North and South Porcupine Leases at issue here.

On August 31, 2016, Conservation Organizations and BTU lodged a Stipulation and Consent Motion with the Bankruptcy Court which, among other things, agreed that Conservation Organizations would withdraw their request for vacatur of all four of the Wright Area Leases. On September 12, 2016, Conservation Organizations notified this Court of BTU's bankruptcy and their revised request for relief, attaching the Stipulation. In the Stipulation, BTU agreed with Conservation Organizations that "a request for reversal of the Judgment and remand to the District Court or the BLM" would not violate the automatic stay.[2]

[2] Paragraph J of the Stipulation states, in full:

> The Debtors and the Environmental Groups have met and conferred regarding the Action and the Appeal, the Oral Argument, and the request for affirmative relief – namely, vacatur of the Wright Area Leases – sought

ARGUMENT

I. A Ruling on the Merits of this Appeal Would Not Violate the Automatic Stay Because the Automatic Stay Does Not Apply.

The Court's first question to the parties is whether a ruling on the merits would violate the automatic stay. It would not, because the automatic stay does not apply to this appeal. Under the plain language of the Bankruptcy Code, the automatic stay applies only to eight specific categories of actions and proceedings. This matter does not fall into any of those categories. Thus, the stay does not apply.[3]

The automatic stay is codified in section 362 of the Bankruptcy Code, 11 U.S.C. § 362, which states in pertinent part as follows:

> . . . [A] petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of--
> (1) the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

> by the Environmental Groups in the Reply Brief. The Debtors take the position that a request for affirmative relief directed to the 10th Circuit, as opposed to a request for reversal of the Judgment and remand to the District Court or the BLM for further proceedings, constitutes a violation of the automatic stay imposed in the Debtors' cases pursuant to section 362(a) of the Bankruptcy Code.

[3] This court has jurisdiction to determine whether the automatic stay applies to the proceeding. *See, e.g.*, *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 347 (2d Cir. 1985) ("Whether the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of . . . the court within which the litigation is pending.").

> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine . . . .

11 U.S.C. § 362(a).

It is facially apparent that five of the eight provisions of section 362 do not apply here. This case is not an action to enforce, against the debtor or against property of the estate, a judgment obtained before the commencement of the bankruptcy case. *Cf.* § 362(a)(2). This case is also not an action to create, perfect, or enforce a lien. *Cf.* §§ 362(a)(4)-(5). In addition, this case does not concern the setoff of a debt and is not a proceeding before the United States Tax Court. *Cf.* §§ 362(a)(7)-(8).

Nor do paragraphs (a)(1), (a)(6), or (a)(3) apply here, as we explain below. Paragraphs (a)(1) and (a)(6) do not apply because this case is not, and could not be, brought "against" BTU. Paragraph (a)(3) does not apply because this case does not seek possession or control over the leases or any other property of BTU.

A. The Automatic Stay Does Not Apply Via Paragraphs 362(a)(1) or (6) Because this is Not an Action Commenced Against BTU.

Section 362(a)(1) does not apply to this case because the case is not one that was or could have been commenced against BTU before the start of the bankruptcy case. As noted above, this case was commenced only against BLM, and not against BTU. Nor could it have been. This appeal is brought under NEPA and the APA, which impose obligations only on federal agencies and officials. No relief here has ever been sought against BTU, nor would any such relief be available under NEPA or the APA.

Citizen suits pursuant to the APA and NEPA are brought against the federal agency taking the action at issue, and focus on that agency and its obligations under applicable environmental and administrative law, and not any private beneficiary such as a lease holder. *See S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966, 969 n.2 (10th Cir. 2008) (holding that private lessees were not indispensable parties in environmental group's NEPA action against BLM). This Court has agreed that an environmental group's NEPA lawsuit against a federal agency does "not purport to adjudicate the rights of current lessees; it merely [seeks] to enforce the public right to administrative compliance with the environmental protection standards of NEPA." *Id*. (quoting with approval *Conner v. Burford,* 848 F.2d 1441, 1458–62 (9th Cir.1988)). In these cases, "the challenge is to a federal government decision based on the federal decision-maker's alleged non-compliance with NEPA's environmental review and other requirements." *Dine Citizens Against Ruining Our Env't v. Klein*, 676 F. Supp. 2d 1198, 1216-17 (D. Colo. 2009). Since a permit- or lease-holder "plays no role in [the agency's] permitting

decisions or related NEPA review except that of commentator," its inclusion as a party is not necessary for the court to resolve the claims. *Id.* Accordingly, this is not an "action or proceeding against the debtor" and the automatic stay does not apply via section 362(a)(1).

In addition, the automatic stay does not apply via sections 362(a)(1) and (6) because the underlying action at issue in this appeal is not an effort by Conservation Organizations to collect, assess, or recover a "claim" against BTU. The Bankruptcy Code defines "claim," in pertinent part, as a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). Conservation Organizations do not seek any rights or remedy against BTU. The only relief sought here is against BLM, and there has been no assertion by any party that BTU owed Conservation Organizations payment or performance of any kind. For purposes of the Bankruptcy Code, causes of action that do "not give rise to a right to payment are not 'claims' . . . unless such obligations could be translated into a claim for damages if breached." 2 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 101.05[5], at 101-47 to 101-48 (16th ed. 2010); *see also, In re Mark IV Indus., Inc*., 438 B.R. 460, 465 (Bankr. S.D.N.Y. 2010) ("[W]here a [claimant] does not have the option to accept money in lieu of the equitable remedy, the equitable obligation is not a 'claim' and is not dischargeable in bankruptcy."). While, on remand, BLM might conceivably require that BTU take further steps to protect the environment, the potential and speculative cost to the company of such steps, if any, does not render the causes of action here "claims" under the Bankruptcy Code. *See United States v. Apex Oil Co.*, 579 F.3d 734, 737 (7th

Cir. 2009) (the cost to a debtor of an environmental equitable remedy does not render that remedy a "claim"). Thus, Conservation Organizations are not asserting any "claims" against BTU, and the automatic stay does not apply via section 362(a)(1) or (6).[4]

This Court has also requested guidance on the question of whether a ruling on the merits concerning the issuance of non-debtor leases (namely, North Hilight and South Hilight) "would of necessity also affect the validity of the North and South Porcupine leases . . . and thereby violate the automatic stay." Conservation Organizations submit this question must be answered in the negative for two reasons.

First, the stay will not be implicated because Conservation Organizations – despite having no obligation to do so – expressly withdrew their request for vacatur of the non-debtor leases in the Stipulation. All that Conservation Organizations ask is for a determination that BLM violated NEPA when issuing the leases, and an appropriate remand to BLM. BTU has acknowledged, in the Stipulation, that such relief is not violative of the automatic stay as it pertains to its leases. If this is the case, it must therefore follow that such relief as to non-debtor property is similarly (if not even more clearly) non-violative.

Second, even if Conservation Organizations had not withdrawn their request for vacatur of the non-debtor leases, any ruling of the Court concerning BLM's actions with respect thereto would not violate the automatic stay, which typically does not apply to

[4] To the extent that Conservation Organizations may eventually seek costs and fees for this action, those costs and fees are only recoverable from the United States, not BTU. *See* 28 U.S.C. § 2412.

non-bankrupt co-defendants. *See, e.g., Okla. Federated Gold & Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 141 (10th Cir. 1994) ("the rule followed by this circuit and the general rule in other circuits is that the stay provision does not extend to solvent codefendants of the debtor"). Indeed, there are only very limited exceptions to the general rule that the automatic stay does not apply to a non-debtor. The only prominent exception to this general rule is the "immediate adverse economic consequences" standard, in which courts have expanded the stay to non-debtors when the claim against the non-debtor entity will have an "immediate adverse economic consequence [on] the debtor's estate." *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003). Here, no such risk exists. Even if this Court were to deviate from the Conservation Organizations' express request and order the vacatur of the non-debtor leases, that action, in and of itself, would not result in the vacatur of the BTU leases; rather, at most, those leases would be subject to further review by BLM. But in any event, this possibility is merely hypothetical, given Conservation Organizations' express request that this Court act consistently as to both debtor and non-debtor leases alike.

Nor does the "unusual circumstances" exception apply here, as this exception is usually employed only "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986); *In re Panther Mountain Land Dev., LLC*, 686 F.3d 916, 921 (8th Cir. 2012) ("[t]he unusual circumstances in which the bankruptcy court can stay cases against non-debtors are

rare.") (internal citations omitted). Here, not only does BTU have no identity with the actual defendant in this case (BLM), it also has no known identity with the non-debtors holding the North and South Hilight Leases. As such, the "unusual circumstances" standard is inapplicable.

B. The Automatic Stay Does Not Apply Via Paragraph 362(a)(3) Because the Requested Relief Would Not Allow Conservation Organizations to Obtain Possession of or Exercise Control Over the Leases.

The automatic stay does not apply via section 362(a)(3) because this case is not an action to "obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).[5] There can be no assertion that Conservation Organizations are seeking to "obtain possession of" or "exercise control over" BTU's leases. Rather, as noted above, Conservation Organizations are seeking an order requiring that BLM fulfill its obligation under the law to adequately analyze and disclose the climate impacts of its decision to lease more than two billion tons of taxpayer-owned coal.

Conservation Organizations seek only a decision from this Court reversing the district court's determination that BLM acted properly in issuing the Wright Area Leases, and an order remanding the issue back to the district court or BLM for further consideration. BTU itself has agreed that the relief Conservation Organizations currently

[5] Section 362(a)(3) of the Bankruptcy Code was expanded in 1984 to add the phrase "or to exercise control over property of the estate." *In re Albion Disposal, Inc.*, 217 B.R. 394, 404–05 (W.D.N.Y. 1997). Congress did not, however, explain why it added the "control provision." *Id.*; *see also In re Spaulding Composites Co.*, 207 B.R. 899, 907 n.9 (B.A.P. 9th Cir. 1997). Nor is "control" elsewhere defined in the Bankruptcy Code. *Id.*

seek does not implicate the stay. In the Stipulation, BTU took the position that "a request for reversal of the Judgment and remand to the District Court or BLM for further proceedings," in contrast to "a request for affirmative relief directed to the 10th Circuit," would not constitute a violation of the automatic stay. A decision in Conservation Organizations' favor here would not invalidate BTU's property interests or otherwise "exercise control" over its leases under the meaning of 11 U.S.C. § 362(a)(3). Indeed, a decision by the Court in Conservation Organizations' favor would not prohibit any activities in which the company is presently engaged under those leases.

The automatic stay cannot be stretched so far as to apply to actions brought against a non-debtor that would not disturb the present legal interests of the debtor. Section 362(a)(3) "does not stay acts simply because they may have an indirect effect of limiting the manner in which the debtor had intended to use his property." *In re Albion Disposal, Inc.*, 217 B.R. at 406. The automatic stay is instead targeted at actions affecting the rights of debtors and creditors.

> [The stay] enables debtors to resolve their debts in a more orderly fashion . . . and at the same time safeguards their creditors by preventing 'different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all in which opposing interests maneuver to capture the lion's share of the debtor's assets.'

In re Soares, 107 F.3d 969, 975 (1st Cir. 1997) (internal citations omitted). As the D.C. Circuit has observed,

> The object of the automatic stay provision is essentially to solve a collective action problem-to make sure that creditors do not destroy the bankrupt estate in their scramble for relief. . . . Fulfillment of that purpose cannot require that every party who acts in resistance to the debtor's view of its rights violates § 362(a) if found in error by the bankruptcy court.

United States v. Inslaw, Inc., 932 F.2d 1467, 1473 (D.C. Cir. 1991) (citation omitted).

This action against a government agency will not benefit one of BTU's creditors over another or otherwise disrupt the orderly proceeding of BTU's bankruptcy restructuring.

II. Because the Automatic Stay Does Not Apply to this Appeal, the Appeal Should Proceed.

The second question posed to the parties was whether the appeal should be abated pending resolution of the bankruptcy. It should not. As noted above, the U.S. Bankruptcy Code's automatic stay provision applies only to eight specific categories of actions, none of which are implicated here. Because the automatic stay does not apply to this appeal, and because both Conservation Organizations and BTU have stipulated that they are prepared to proceed consistent with the Stipulation, there is no legal barrier to the Court proceeding.

Moreover, there is also no equitable reason why the Court should stay the appeal. Neither BLM nor BTU are prejudiced by proceeding with the appeal. In the seven months since BTU filed for bankruptcy, no party has suggested to this Court that its ruling on the propriety of BLM's environmental review would implicate the Bankruptcy Code's automatic stay provision. Despite ample opportunity to do so, no party has thus far requested this Court put its consideration of the merits on hold until some indeterminate point in the future when BTU eventually emerges from bankruptcy.

Further delay here would be unjust and unnecessary. Throughout every level of this action, beginning with comments submitted to BLM in 2009, Conservation

Organizations have maintained that BLM failed to own up to the climate impacts of its decision to authorize what are among the largest federal coal leases in the history of the agency's federal coal leasing program. That analysis is necessary to inform both the public and decisionmakers of the likely climate impacts of BLM's decisions and thus fulfill the twin aims of the nation's "basic national charter for protection of the environment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989); 40 C.F.R. § 1500.1(a). Even with a favorable ruling from this Court, BLM is likely still years from completing the legally required analysis mandated by NEPA and sought by Conservation Organizations. It has been more than four and a half years since Conservation Organizations originally filed their petition for review of agency action with the district court, and equity favors allowing the appeal to proceed as expeditiously as possible at this time. *See* Fed. R. Civ. P. 1 (calling for federal rules to be administered to secure the "speedy" determination of every proceeding).

CONCLUSION

Accordingly, this Court should hold that the automatic stay does not apply and should allow the appeal to proceed.

Respectfully submitted on this 18th day of November, 2016.

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CERTIFICATE OF SERVICE

I, Nathaniel Shoaff, hereby certify that on November 18, 2016, true and correct copies of APPELLANTS' OPENING SUPPLEMENTAL MEMORANDUM BRIEF were served on the following counsel of record through the Court's ECF system:

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CERTIFICATE OF DIGITAL SUBMISSION

I, Nathaniel Shoaff, hereby certify that with respect to the foregoing:

1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;
2) hard copies are not required to be filed;
3) the ECF submissions have been scanned for viruses with the most recent version of commercial virus scanning program (Symantic Endpoint Protection, version 12.1.7004.6500, updated November 18, 2016) and, according to the program, is free of viruses.

s/ Nathaniel Shoaff