No. 15-8109

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS, et al.,

Petitioners- Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondent – Appellee

v.

WYOMING MINING ASSOCIATION, et al.,

Intervenors – Appellees

On Appeal from the United States District Court for the
District of Wyoming (No. 2:13-cv-00042-ABJ) (Johnson, J.)

SUPPLEMENTAL MEMORANDUM BRIEF OF INTERVENORS-APPELLEES BTU WESTERN RESOURCES, INC., NATIONAL MINING ASSOCIATION, AND WYOMING MINING ASSOCIATION

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INTRODUCTION

The automatic stay of section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), does not preclude this Court from entering a ruling on the merits in this appeal. Upon the filing of a bankruptcy case, section 362(a)(3) automatically enjoins "any act to obtain possession of property of the [bankruptcy] estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Because a leasehold interest is property of the estate, any attempt by any party to vacate a debtor's lease during a bankruptcy case would constitute a violation of section 362(a)(3). For this reason, Appellants' initial request for vacatur of debtor BTU's leases would, if maintained, have been a violation of the automatic stay.[1]

In the Stipulation between Appellants and BTU entered in the Bankruptcy Court, however, Appellants agreed to withdraw their request for vacatur of the Wright Area Leases, including those held by BTU. Appellants' modified request for relief now seeks only a determination by this Court that BLM violated NEPA in examining the Wright Area Leases and a remand to the District Court for proceedings consistent any such determination. Because this modified request for

[1] Defined terms in this section have the meaning attributed to them later in the brief.

relief, if granted, would not necessarily lead to the vacatur of BTU's leases, it does not amount to a violation of the automatic stay under section 362(a)(3).

This Court is therefore not required to abate this appeal, and it can fully resolve the issues in this appeal while BTU's bankruptcy case is pending. The only question on appeal is whether the District Court properly determined that BLM complied with NEPA when it approved and entered into a sale of the Wright Area Leases. Resolution of this question does not require vacatur of the leases, and, in fact, vacatur would not be an appropriate remedy at this stage of the proceedings. Because it determined that BLM did not violate NEPA, the District Court has not yet heard evidence or determined any facts regarding whether vacatur is an appropriate remedy for any defect in BLM's review. Thus, to the extent this Court finds it necessary to reverse the District Court, it should remand the case to the District Court for further proceedings on remedies. Such a course would fully resolve this appeal without running afoul of the automatic stay.

The automatic stay thus does not prohibit this Court from ruling on whether BLM's actions with respect to any of the Wright Area Leases were arbitrary and capricious, and does not require this Court to abate the appeal pending resolution of BTU's bankruptcy case.

BACKGROUND

On May 2, 2012, Appellants Sierra Club and WildEarth Guardians (the "Appellants") commenced this action by filing a petition for review (the "Petition") against the United States Bureau of Land Management ("BLM") in the United States District Court for the District of Columbia (the "Action"). The Action was subsequently transferred to the United States District Court for the District of Wyoming (the "District Court").

Through the Action, Appellants sought judicial review of BLM's environmental review, issuance, and subsequent sale of four federal coal leases in the Powder River Basin of Wyoming: the North Hilight, South Hilight, North Porcupine and South Porcupine leases (collectively, the "Wright Area Leases"). In the Petition, Appellants alleged that BLM violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, when issuing the Wright Area Leases because it failed to consider various impacts of the Wright Area Leases, including impacts on the amount of carbon dioxide in the atmosphere. For this alleged violation, the Appellants sought (i) a declaration that BLM violated NEPA in issuing the Wright Area Leases, (ii) vacatur of BLM's Environmental Impact Statement and subsequent Records of Decision, as well as any subsequent lease sales, issuance, or other actions, and (iii) an injunction against further BLM approvals or actions with respect to the Wright Area Lease parcels, and any coal

mining activities conducted thereon, until such time as BLM complied with applicable federal law.

Shortly after commencement of the Action, Intervenor-Respondent BTU Western Resources, Inc. ("BTU") obtained the right to mine under two of the Wright Area Leases—the North Porcupine and South Porcupine tracts (collectively, the "BTU Leases")—at lease sales conducted by BLM. Because Appellants' claims could have prevented BTU from continuing operations on the leased land and imposed additional costs in any new NEPA process, BTU sought to intervene in the Action on May 28, 2013. On May 30, 2013, the District Court granted BTU's motion.

On August 17, 2015, the District Court entered an opinion and order affirming BLM's decisions and denying Appellants' Petition. The District Court also entered a judgment in favor of BLM and the other respondents to the Action (including BTU). In its opinion, the District Court held that BLM had sufficiently analyzed the anticipated impacts of the Wright Area Leases on local air quality and aesthetics and on global climate change. Moreover, because it held that BLM did not violate NEPA, the District Court did not consider whether vacatur of the leases would have been an appropriate remedy if BLM *had* erred in its decision. The Appellants filed a timely appeal to this Court.

While this case was pending on appeal before this Court (the "Appeal"), BTU filed for protection under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, *et seq.*, (Case No. 16-42554) in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court") along with its parent corporation, Peabody Energy Corporation ("PEC") and 152[2] of PEC's other subsidiaries. Upon filing its chapter 11 petition with the Bankruptcy Court, the automatic stay under 11 U.S.C. § 362(a) became effective.

In their briefs to this Court, Appellants sought not only a determination regarding BLM's compliance with NEPA and a remand to the District Court for further proceedings, but they also requested that this Court go beyond the scope of the District Court's order and, on its own initiative, vacate the Wright Area Leases. As a result of this additional request for relief, Appellants and BTU (collectively, the "Stipulation Parties") met and conferred regarding the Appeal. BTU took the position that the automatic stay was not implicated by Appellants' request for this Court to review the District Court's order affirming BLM's decision because, even if the District Court's decision were reversed, such a decision would not itself limit BTU's ability to continue mining operations under the Wright Area Leases. However, BTU asserted that Appellants' additional request that this Court go

[2] The chapter 11 case against one of PEC's subsidiaries, Lively Grove Energy Partners, LLC (Case No. 16-42584) was dismissed on May 19, 2016.

beyond the scope of the District Court's order and itself vacate the BTU Leases was an attempt by Appellants "to exercise control over property of the estate" in violation of the automatic stay under section 362(a)(3) of the Bankruptcy Code. 11 U.S.C. § 362(a)(3). Appellants disagreed.

On August 31, 2016, the Stipulation Parties entered into a stipulation and consent order (the "Stipulation") whereby Appellants agreed to withdraw their request that this Court vacate any of the Wright Area Leases. Stipulation ¶ 1. In return for this withdrawal, BTU agreed that it would not seek to continue, cancel or stay the pending oral argument before this Court without the written consent of Appellants. Id. at ¶ 3. The Stipulation was approved by the Bankruptcy Court on September 1, 2016 and submitted to this Court on September 12, 2016.

On October 28, 2016, this Court requested supplemental briefing on two issues pertaining to the scope of the automatic stay as it relates to the Appeal. In particular, the Court requested that the parties address (1) whether a ruling by this Court on the merits of this Appeal, as to any of the Wright Area Leases, would violate the automatic stay; and (2) whether the Court should abate this Appeal pending resolution of BTU's bankruptcy case. Appellants filed their supplemental brief on November 18, 2016, in which they answered both questions in the negative.

ARGUMENT

I. THE AUTOMATIC STAY DOES NOT PRECLUDE A RULING BY THIS COURT ON THE MERITS OF THE APPEAL

"Section 362(a)(3) [of the Bankruptcy Code] provides that the filing of a bankruptcy petition operates as a stay of '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.'"[3] In re C.W. Mining Co., 749 F.3d 895, 899 (10th Cir. 2014) (quoting 11 U.S.C. § 362(a)(3)). "[P]roperty of the estate," includes, "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), and "courts are in agreement that unexpired leasehold interests . . . constitute property of the bankruptcy estate," In re 48th St. Steakhouse, Inc., 835 F.2d 427, 430 (2d Cir. 1987). Thus, as a leading bankruptcy treatise has observed, "[c]learly, an attempted ouster, after the commencement of the case, of a debtor who is a lessee would be stayed under section 362(a)(3)," 362 Collier on Bankruptcy ¶ 362.03 (16th ed. 2016); see also 48th St. Steakhouse, 835 F.2d at 431 (holding that an attempt to terminate a senior lease was barred by section 362(a)(3) because of its effect on a debtor's sub-lease).

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[3] For the reasons articulated in Appellants' supplemental brief, see ECF No. 10414472, at 6-11, BTU agrees with Appellants that subsections (1), (2), and (4) – (8) of section 362(a) of the Bankruptcy Code are not implicated by the Action or Appellants' request for a determination that BLM's environmental review of the Wright Area Leases was arbitrary and capricious.

In addition, courts have repeatedly held that "[s]ection 362(a)(3) . . . applies to actions against third parties as well as actions against the debtor." ACandS, Inc. v. Travelers Cas. and Sur. Co., 435 F.3d 252, 259 (3d Cir. 2006) (Alito, J.)). Thus, actions initially directed at a third party can nonetheless violate section 362(a)(3) if they would affect property of the debtor's estate. See, e.g., 48th Street Steakhouse, 835 F.2d at 431 (landlord's attempt to terminate a third party non-debtor's lease violated section 362(a)(3) because of adverse impact on property of the bankruptcy estate, namely, a sub-lease held by the debtor); ACandS, 435 F.3d at 259 (arbitration proceeding involving debtor's insurer and a third party was subject to the automatic stay under section 362(a)(3) because the proceeding "negatively impact[ed] the bankruptcy estate" by "diminish[ing] the property of the estate"); Harsh Inv. Corp. v. Bialac (In re Bialac), 712 F.2d 426, 432 (9th Cir. 1983) (foreclosure action against third party owner stayed because debtor held a right-of-redemption interest in the property, which was deemed property of the estate).

In short, courts have made clear that "'[a]n action taken against a nondebtor which would inevitably have an adverse impact upon the property of the estate must be barred by the [§ 362(a)(3)] automatic stay provision.'" In re Nat'l Century Fin. Enters., Inc., 423 F.3d 567, 578 (6th Cir. 2005) (quoting Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 392 (2d Cir. 1997)).

In this case, the BTU Leases are clearly property of BTU's bankruptcy estate. See 48th St. Steakhouse, 835 F.2d at 431. Because of this, the automatic stay of section 362(a)(3) enjoined any actions affecting BTU's ability to operate under the BTU Leases upon the commencement of BTU's chapter 11 case, whether those actions were aimed at BTU directly or a third party such as BLM. See id. Thus, because Appellants' initial request for vacatur of the leases would, if successful, have required BTU to cease mining operations at the North Porcupine and South Porcupine sites, Appellants' initial request would, if maintained, have amounted to a violation of the automatic stay.

Nonetheless, because Appellants withdrew their request for vacatur of the Wright Area Leases in the Stipulation, see Stipulation ¶ 1, that concern is no longer an issue. The Appellants' modified request for relief, which seeks only a determination by this Court that BLM violated NEPA in examining the Wright Area Leases, and a remand to the District Court for proceedings consistent with any such opinion, will not result in the immediate termination of the BTU Leases or require BTU to cease mining operations under them. Only an order *vacating* the BTU Leases would have such an effect and, as explained above, Appellants are no longer seeking such relief from this Court. See id. Thus, because the relief presently sought from this Court by Appellants will not "inevitably have an adverse impact upon the property of the estate," Nat'l Century Fin. Enters., 423

F.3d at 578 (internal quotation marks omitted), the automatic stay of section 362(a)(3) is not implicated.

Indeed, for this same reason, the fact that only two of the four Wright Area Leases are property of BTU's estate does not pose any additional obstacles to this Court's ability to rule on the two non-BTU leases. A ruling that BLM's actions were arbitrary and capricious in connection with *any* of the leases (including the BTU Leases) would not run afoul of section 362(a)(3) because such a ruling would not require BTU to cease mining operations under any of the leases (including the BTU Leases). See id. Moreover, even if a decision by this Court to vacate the non-BTU Leases could have affected BTU's ability to continue mining operations under the BTU Leases, that concern was also obviated by the Stipulation, in which Appellants withdrew their request for vacatur of *any* of the Wright Area Leases, not merely the two leases that are property of BTU's bankruptcy estate. See Stipulation ¶ 1. Consequently, the automatic stay does not preclude this Court from ruling on the merits of this appeal.

II. THE AUTOMATIC STAY DOES NOT REQUIRE THIS COURT TO ABATE THE APPEAL PENDING RESOLUTION OF BTU'S BANKRUPTCY CASE

Because the relief sought by Appellants, as modified in the Stipulation, would not affect BTU's continued operations under the BTU Leases, section 362(a)(3) does not require this Court to abate the Appeal pending the resolution of

BTU's bankruptcy case. Nor does the automatic stay, or Appellants' withdrawal of their request for vacatur, prevent this Court from fully resolving the issues presented on appeal. The question in this Appeal is whether the District Court properly determined that BLM complied with NEPA when it approved and entered into a sale of the Wright Area Leases. Resolution of this question does not require this Court to vacate the Wright Area Leases on its own initiative; rather, it requires only that this Court evaluate the District Court's decision and, if it determines that the District Court's decision was erroneous, remand for further proceedings consistent with its opinion. As a result, this Court can fully resolve the Appeal without vacating the leases and running afoul of the automatic stay.

Indeed, vacatur by this Court is not only unnecessary to fully resolve the Appeal, but would also be an inappropriate remedy at this stage of the proceedings. Even if this Court were to determine that the District Court's opinion was erroneous, and that BLM violated NEPA in issuing the Wright Area Leases, it would not necessarily follow that vacatur of the leases is the proper remedy. See Native Village of Point Hope v. Jewell, 740 F.3d 489, 505 (9th Cir. 2014) (reversing and remanding lease sale case to district court for "proceedings" without vacatur); San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1035 (9th Cir. 2006) (remanding, without vacating, licensing action for compliance with NEPA). Rather, "[w]hether agency action should be vacated depends on how

serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) (quoting Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Because it found that BLM's determination complied with NEPA, the District Court did not consider the question of the appropriate remedy for Appellants' claims. Nor did it require Appellants to make the necessary showing of an entitlement to vacatur and the injunctive relief they sought. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157-58 (2010) ("It is not enough for a court considering a request for injunctive relief [in a NEPA case] to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test."). Thus, even if this Court determines that BLM's decision was arbitrary and capricious, the District Court should be required, in the first instance, to hear any facts and render any decisions necessary to determine whether vacatur is the appropriate remedy. See Lyons v. Jefferson Bank & Tr., 994 F.2d 716, 720 (10th Cir. 1993) ("'[I]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.'") (quoting Singleton v. Wulff, 428 U.S. 106, 120 (1976)); Joseph A. by Wolfe v. N.M. Dep't of Human Servs., 69 F.3d 1081, 1089 (10th Cir. 1995) ("It is the role of the district courts to engage in

clear and specific factfinding, and we are neither equipped nor inclined to assume that role."). Vacatur of BLM's decision by this Court without District Court factfinding on whether such relief is necessary and justified would thus not be an appropriate remedy at this stage of the proceedings, particularly given that Appellants are no longer seeking such relief from this Court. See Stipulation ¶ 1.

Finally, because "[s]ection 362(a)(3) stays all actions, whether judicial or private, that seek to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," vacatur of the Wright Area Leases could violate the automatic stay even though such relief has not been expressly requested by Appellants. 362 Collier on Bankruptcy ¶ 362.03 (16th ed. 2016); see also In re Nat'l Cattle Cong., Inc., 179 B.R. 588, 595 (Bankr. N.D. Iowa 1995) ("Section 362(a)(3) applies to any act by any entity to obtain possession of property or exercise control over property of the estate."); In re Santangelo, 325 B.R. 874, 880-81 (Bankr. M.D. Fla. 2005) (finding that a district court did not violate section 363(a)(3) and the debtor's confirmed plan when its order gave the debtor an option to remain in, or opt out of, a class settlement because this was not an "exercise[of] control over the debtor's claims").

For these reasons, this Court can and should decide this Appeal without vacating the Wright Area Leases, leaving for the District Court the question of the

appropriate remedy in the event this Court finds it necessary to reverse the District Court's decision on the merits.

CONCLUSION

Accordingly, the automatic stay of the Bankruptcy Code does not prohibit this Court from ruling on whether BLM's actions regarding any of the Wright Area Leases were arbitrary and capricious, and does not require this Court to abate the Appeal pending resolution of BTU's bankruptcy case.

Dated: December 9, 2016

Respectfully Submitted,

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CERTIFICATES OF SERVICE, DIGITAL SUBMISSIONS, AND PRIVACY REDACTIONS

I hereby certify that on this 9th day of December, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the appellate CM/ECF system. The parties in this case will be served electronically by that system.

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5; that the ECF submission is an exact copy of the hard copies filed with the Clerk; and that the digital submissions have been scanned for viruses with the Microsoft Forefront Endpoint Protection 2010 program, version 1.217.362.0, and, according to the program, is free of viruses.

/s/ Kirsten L. Nathanson
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