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,

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 (JUDGE ALAN B. JOHNSON)

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEE

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INTRODUCTION

This Court has asked the parties to address whether a ruling on the merits of this appeal would violate the automatic bankruptcy stay and whether this appeal ought to therefore be abated. The United States' view is that this Court may proceed to a ruling on the merits, so long as it abides by the stipulation signed by the Plaintiffs and the debtor in which the Plaintiffs stipulate that, during the pendency of the bankruptcy, they are not seeking vacatur of BLM's decision documents.

BACKGROUND

On September 29, 2006, BTU Western Resources, Inc. ("BTU Western"), a subsidiary of Peabody Energy Corporation, filed an application to lease coal adjacent to the existing North Antelope Rochelle Mine. The Bureau of Land Management examined the environmental impacts of offering leases for competitive sale at the request of BTU Western on two tracts of land, along with the impacts of issuing four other coal leases, in an environmental impact statement (or "EIS"). Following publication of the Final EIS and a 30-day comment period, BLM, over a period of eleven months, issued four separate records of decision in which it decided to offer for lease four of the six tracts analyzed in the final EIS. Three of those leases, including the two leases to BTU Western, have been offered for sale and sold.

The Plaintiffs filed this lawsuit contending that BLM's final EIS failed to comply with the National Environmental Policy Act, 42 U.S.C. § 4332, its

implementing regulations, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.[1] For relief, the Plaintiffs sought a declaration that BLM violated NEPA, injunctive relief, vacatur of the Final EIS and records of decision approving the lease sales as invalid, and vacatur of "any lease sales, issuances, or other actions conducted" conducted as a result of those actions. App. 49. BTU Western then intervened in this suit as a defendant. The district court ultimately granted judgment to the BLM, and the Plaintiffs appealed.

On April 13, 2016, while this appeal was pending, BTU Western filed for bankruptcy under chapter 11 of title 11 of the United States Bankruptcy Code. The Plaintiffs and BTU Western then entered into a stipulation, filed with the bankruptcy court, in which the Plaintiffs agreed to withdraw their requests for vacatur in this case in an effort to avoid violating the bankruptcy stay. A week before oral argument was scheduled in this case, the Plaintiffs filed the stipulation in this Court and expressly withdrew "their request that this Court vacate BLM's issuance of the Wright Area leases and associated Records of Decision if this Court rules in favor of the [Plaintiffs]." This Court cancelled oral argument and then ordered the parties to address whether the bankruptcy stay prevented a ruling on the merits of the appeal and required abatement.

[1] The Complaint also alleged violations of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, but the Plaintiffs have not pursued that claim on appeal.

ARGUMENT

As explained in our answering brief, BLM complied fully with NEPA and the APA when it approved and issued the leases in this case. If this Court disagrees, however, its remedial options are limited by the pending bankruptcy proceedings. Vacatur of BLM's records of decision approving the lease sales, or of BTU Western's leases, may be an "act" to "exercise control over property of the estate" and thus subject to the automatic stay. But a declaratory judgment and remand to the agency to reconsider its decision, while allowing the leases to remain in place, is not such an act. Because the Plaintiffs have agreed to withdraw their request for vacatur during the pendency of the bankruptcy proceedings, this Court may proceed to the merits and, if it concludes the agency acted arbitrarily or capriciously, issue declaratory relief and remand the matter without violating the bankruptcy stay. If this Court reverses the district court's judgment, it could hold that vacatur is unavailable while bankruptcy proceedings are ongoing, but remand to the district court for further proceedings on the appropriate remedy.

I. A ruling on the merits of this appeal will not violate the automatic bankruptcy stay if the Court abides by the stipulation between the Plaintiffs and BTU Western.

This Court's first question is whether a ruling on the merits would violate the bankruptcy stay, even if the ruling were limited to the two challenged leases that are not possessed by BTU Western and are therefore not scheduled property in the bankruptcy proceeding. In our view, if this Court were to conclude that BLM acted

arbitrarily or capriciously with respect to the final EIS or records of decision, it could issue a declaratory judgment to that effect without violating the automatic bankruptcy stay. The further equitable relief of vacatur, however, may violate the automatic stay as to the two leases that are property of the bankruptcy estate, and should not in any event be granted as to any of the leases, including the two leases that are not scheduled property in the bankruptcy proceedings, because vacatur is not granted as of right, but requires a balancing of the equities. In any event, a ruling on the merits would not violate the automatic bankruptcy stay if the remedy is limited to declaratory relief, and the Plaintiffs have withdrawn their request for vacatur as to all of the lease decisions.

The automatic bankruptcy stay applies to prevent "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." 11 U.S.C. § 362(a)(3).[2] BTU Western's coal-mining leases may be property of the estate, which is defined to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Courts have interpreted the scope of the interests in property broadly to include property of all descriptions, tangible and intangible, as well as causes of action. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05. That broad definition may include the leases here. *Cf. Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 253-55

[2] We agree with the Plaintiffs that the other bankruptcy stay provisions in 11 U.S.C. § 362(a) are not applicable here. Pl. Supp. Br. 7-9.

(3d Cir. 2001) (noting that "a licensee's interest in a government-issued license is generally likely to fall within the ambit of the Bankruptcy Code's property definition, given the fact that licenses, unlike grants, typically inure to the direct benefit of the recipient."); *In re Cent. Ark. Broad. Co.*, 68 F.3d 213, 215 (8th Cir. 1995) (affirming the bankruptcy court's conclusion that a Federal Communications Commission license was property of the estate).

The Plaintiffs, in their complaint, seek to vacate the final EIS and the records of decisions to offer the lease sales, as well as "any lease sales, issuances, or other actions" taken under the approvals contained in those documents. App. 49. Vacating the lease sales or issuances themselves would directly terminate BTU Western's leases, requiring the issuance of new leases after further environmental review, and depriving BTU Western of the benefit of its leases in the interim. Vacating the leases may therefore be an act to "exercise control" over property of the estate. Vacating only the final EIS or records of decision to offer the lease sales would require BLM to, at the very least, suspend the leases pending further environmental review,[3] which may also be an act to "exercise control" over that property interest, as it would deprive BTU Western of at least some portion of its interest in the lease during BLM's review.

[3] Section 39 of the Mineral Leasing Act, as amended, provides for a suspension of operations and production on a federal coal lease "in the interest of conservation" and a suspension serves to toll the diligent development requirement of Section 7 (a) and (b). 30 U.S.C. § 209 (2000); 30 U.S.C. § 207(a) and (b) (2000).

Vacatur may therefore not be an available remedy while the bankruptcy stay is in effect.[4]

Indeed, the Plaintiffs have stipulated that they are not seeking vacatur of any of those challenged documents or approvals during the pendency of the bankruptcy proceedings, and they have expressly withdrawn their request to this Court for vacatur. Because vacatur is an equitable remedy, this Court may abide by the stipulation and, if it concludes the BLMS violated NEPA, reverse and remand to the district court without vacating BLM's decisions. As the Eleventh Circuit recently explained, "[u]ndeniably, vacatur is 'equitable relief'" and thus the "remedy of remand without vacatur is within a reviewing court's equity powers under the APA." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1289-90 (11th Cir. 2015) (citations omitted); *see also id.* at 1290 (noting that the D.C., Federal, First, Fifth, and Ninth Circuits have agreed and citing cases); *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) (recognizing availability of partial vacatur as a remedy in APA cases).

[4] One might contend that vacating only the two leases that are not scheduled property in the bankruptcy proceedings—while leaving final EIS, records of decision, and leases for the two scheduled properties in place—would not violate the bankruptcy stay. Pl. Supp. Br. 11-12. But vacatur is an equitable remedy, and that relief would likely be inequitable in this circumstance. In any event, as explained in the text, should this Court reverse, a remand to the district court to determine the scope of any further remedy is the most appropriate disposition in this appeal.

In contrast to vacatur, a declaratory judgment and remand to the agency would be available to this Court or the district court. That relief would leave in place the final EIS, records of decision, and leases while BLM worked to correct any errors identified by the Court. There is no act to exercise control over BTU Western's property inherent in that course of action, as the relief is directed at BLM and would affect only BLM's review of the lease sales. And there is no principle in NEPA or the APA that would preclude leaving those decisions in place while simultaneously reevaluating them under NEPA. In fact, district courts have recently concluded that an agency violated NEPA in mining cases, yet with withheld vacatur and issued only declaratory relief. *WildEarth Guardians v. OSM*, 104 F. Supp. 3d 1208 (D. Colo. 2015); *WildEarth Guardians v. OSM*, Nos. CVI4-13, CVl4-103, 2016 WL 259285 (D. Mont. Jan. 21, 2016). Here, the ultimate claim under NEPA, a procedural statute, is that BLM must prepare a better EIS, not that it must not issue the leases. As the Supreme Court has explained, a successful NEPA claim does not require the imposition of equitable relief, which "does not follow from success on the merits as a matter of course," and thus a court finding a NEPA violation "has many remedial tools at its disposal, including declaratory relief . . . ." *Winter v. NRDC*, 555 U.S. 7, 32-33 (2008).

A ruling on the merits of this appeal reversing and remanding to the district court, while withholding vacatur, would not violate the automatic bankruptcy stay. Because the equitable relief of vacatur is not required after a finding that an agency has acted arbitrarily or capriciously, this Court may abide by the stipulation and refuse

to order vacatur even if the Plaintiffs prevail on appeal. If it does so, the automatic bankruptcy stay would not apply.

II. This Court should not abate this appeal pending resolution of the bankruptcy case.

Neither affirmance nor reversal of the district court's judgment without vacatur would violate the automatic bankruptcy stay. Therefore the bankruptcy case does not require abating this appeal. Even if this Court were to reverse, on remand the district court could issue a declaratory judgment and remand the matter to BLM for further consideration, while leaving the records of decisions and leases in place. That relief would not involve any act to exercise control over the property of the estate, because the leases would remain in effect and unaltered during the pendency of BLM's review. While it is possible that BLM could reconsider its decision to issue the leases after further review under NEPA, the Supreme Court has noted that where ongoing, non-final administrative proceedings are occurring, the *possibility* that the proceedings will be resolved in a such a way as to implicate exercise of control over the property is insufficient to conclude that the stay applies under section 362(a)(3). *Bd. Of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 40-41 (1991).[5]

[5] In such a case, the Government's action may also be entitled to the exemption for enforcement of a "governmental unit's or organization's police or regulatory power." 11 U.S.C. § 362(b)(4).

Finally, the Plaintiffs and BTU Western, the debtor, agree that the case may proceed once the request for vacatur has been withdrawn. Because the Plaintiffs have stipulated that they are not seeking vacatur at this time, this appeal should proceed.

CONCLUSION

This Court should decide the merits of this appeal and, if it were to reverse, may remand the case to the district court to with instructions to fashion relief that balances the equities and takes into account the parties' stipulation that vacatur is not being sought as well as the legal effect of the bankruptcy automatic stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) and this Court's order dated 10/28/2016 because it has been prepared in 14-point Garamond, a proportionally spaced font, and does not exceed 15 pages.

s/ Michael T. Gray
MICHAEL T. GRAY

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

• There is no information in this Brief subject to the privacy redaction requirements of 10th Cir. R. 25.5; and

• By order dated 10/28/2016, no hard copies of this brief are being submitted to the Court; and

• This brief was scanned with System Center Endpoint Protection, version 1.233.1838.0, updated December 9, 2016, and according to the program the Brief is free of viruses.

DATE: April 4, 2016

s/ Michael T. Gray_____
MICHAEL T. GRAY

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Michael T. Gray
MICHAEL T. GRAY