IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WESTERN ENERGY ALLIANCE, Plaintiff, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, and BUREAU OF LAND MANAGEMENT, Defendants.	)	Civil Case No. 1:16-CV-00912-LF-KBM

RESPONSE IN OPPOSITION TO MOTION TO STAY

Plaintiff Western Energy Alliance (the "Alliance") submits respectfully this response in opposition to a motion to stay proceedings on Claims 2 and 3 of the Alliance's Complaint. Nine political advocacy groups (collectively, the "Advocacy Groups") who have been denied intervention in this action, request this Court to stay proceedings while the Advocacy Groups appeal the Court's denial of their motion to intervene. *See* Mot. to Stay Proceedings on Claims 2 and 3 Pending Appeal of Order Denying Mot. to Intervene, filed Jan. 20, 2017 (ECF No. 44) ("Mot. to Stay"). Like their motion to intervene, the Advocacy Groups' motion to stay repeats mischaracterizations of virtually every aspect of the Alliance's lawsuit, failing to account for material in the record that directly addresses, and contradicts, each of the allegations on which the Advocacy Groups premise their request for a stay. And because the Advocacy Groups have entirely misinterpreted the case pending before the Court, the Advocacy Groups' request for a stay fails to make mention of, let alone account for, the Alliance's continuing and ongoing

injury. Because the Advocacy Groups' repeated misrepresentations of the Alliance's claims suggests that the misrepresentations may be intentional, and because a stay will cause certain harm to the Alliance's members and the public, the Court should deny the motion to stay.

I. THE MOTION IS PREMISED ON FALSE ASSUMPTIONS.

On August 11, 2016, the Alliance filed its Complaint. *See* Compl., filed Aug. 11, 2016 (ECF No. 1). On October 19, 2016, the Advocacy Groups moved to intervene. *See* Conservation Groups Mot. to Intervene, filed Oct. 19, 2016 (ECF No. 11) ("Mot. to Intv."). As described in the Alliance's moving papers and acknowledged at the hearing on the motion to intervene, the Alliance opposed the Advocacy Groups' intervention not because the parties have any fundamentally different view on the law applicable to intervention, but because the Advocacy Groups have misrepresented the factual bases of the Alliance's suit and the relief the Alliance seeks. *See* Tr. of Proceedings at 24:11-20 (Dec. 15, 2016) ("Tr."). The Advocacy Groups assert that the United States Court of Appeals for the Tenth Circuit "follows 'a somewhat liberal line in allowing intervention.'" Mot. to Intv. at 5 (quoting *Coal. of Ariz./N.M. Cntys. for Stable Economic Growth v. Dep't of the Interior,* 100 F.3d 837, 841 (10th Cir. 1996)). But liberal or not, the Advocacy Groups cannot distort the facts to convert a minimal standard into a non-existent one.

The Advocacy Groups continue to misrepresent the Alliance's claims in the motion to stay. The Advocacy Groups argue that the Alliance seeks "a ruling that [the Bureau of Land Management ("BLM")] must offer oil and gas leases for sale every three months in each state where lands are 'eligible and available,' . . . advancing an extremely broad interpretation of that term." Mot. to Stay at 3. It is the Mineral Leasing Act, not the Alliance, that states "[l]ease sales

shall be held for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A). And the Alliance has never in this lawsuit offered *any* interpretation of which lands are eligible or available. To the contrary, the Alliance has repeatedly explained that the Alliance is not seeking in this lawsuit "to curtail the Secretary's discretion over oil and gas leasing, to limit the environmental review of parcels to be leased, or to otherwise modify the process by which eligible lands are classified as 'available' for leasing." Resp. in Opp'n to Mot. to Dismiss at 3, filed Nov. 30, 2016 (ECF No. 25) ("Resp. to MTD"); Resp. in Opp'n to Mot. to Intervene at 2, filed Nov. 2, 2016 (ECF No. 17) ("Resp. to Intv.") ("The Alliance seeks only to enforce the statutory obligation to conduct quarterly lease sales when lands are eligible; the Alliance does not seek in this lawsuit to amend the definition of 'eligible' or to modify the process by which lands become eligible to be offered at a lease sale."); Tr. at 32:20-33:2 (explaining that the Alliance is not challenging in this lawsuit BLM's process for determining when a parcel is eligible and available).

Nor does the Alliance contend in this lawsuit that "the quarterly leasing mandate applies whenever a company expresses interest in leasing lands that are designated as available for leasing under a BLM resource management plan." Mot. to Stay at 3. The Alliance has expressly and repeatedly disavowed that position in this lawsuit. *See* Resp. to Intv. at 4 (stating that the Alliance's Complaint does not "assert the position that 'BLM *must* offer oil and gas leases for sale every three months wherever a company expresses interest in public lands.'" (quoting Mot. to Intv. at 2)); Tr. at 46:13-22. The Alliance has instead explained that the Alliance "presents no challenge in this lawsuit to curtail the Secretary's discretion over oil and gas leasing, to limit the

environmental review of parcels to be leased, or to otherwise impair BLM's ability to evaluate the impact of leasing on other resources."[1] Resp. to Intv. at 4.

The Advocacy Groups also state falsely that the Alliance is seeking to revise Instruction Memorandum No. 2010-117 or other non-binding guidance "because that policy imposes a rotating lease sale schedule that allegedly violates the Mineral Leasing Act." Mot. to Stay at 3. But the Alliance's Complaint indeed acknowledges that IM No. 2010-117 "instructs state offices to 'develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review process established in this IM.'" Compl. ¶ 16, at 6 (quoting IM No. 2010-117 at 5). And the Alliance has emphasized repeatedly its view that this provision is compatible with the Alliance's request that the Secretary adhere to the statutory requirement to conduct quarterly oil and gas lease sales "when eligible lands are available." *See* Resp. to Intv. at 3; Tr. at 26:6-14.

The Advocacy Groups' misleading statements about the Alliance's case do not become more accurate simply because the Advocacy Groups are willing to repeat those statements in the face of overwhelming evidence in the parties' moving papers and the case record. As Plaintiff, the Alliance is entitled to assert a case as broadly or narrowly as it chooses. The Court should

[1] The Alliance's Complaint does quote 43 C.F.R. § 3120.1-1, a provision titled: "Lands available for competitive leasing," Compl. ¶ 18, at 6, and observes that the categories enumerated in 43 C.F.R. § 3120.1-1 include, but are not limited to, "Lands included in any expression of interest." Compl. ¶ 18, at 6 (quoting 43 C.F.R. § 3120.1-1(e)). The Alliance has not, however, asked the Court to interpret these provisions in any manner inconsistent with BLM's interpretation. The Alliance has noted that the Court need not reconcile the cited regulations with BLM's non-binding guidance on designating parcels as eligible for leasing. *See* Resp. to MTD at 3. The Alliance's objection in this lawsuit is with the cancellation of lease *sales* whenever parcels are eligible, not with the process of how those parcels became eligible.

reject the Advocacy Groups' attempts to make this case something it is not and should allow the remaining parties to proceed to the merits of the case expeditiously.

II. A STAY IS NOT WARRANTED.

To obtain a stay pending appeal, the movant must establish four factors: (1) the likelihood that the movant will prevail on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable harm without the stay; (3) the stay will not result in substantial harm to the other parties to the appeal; and (4) the stay will be in the public interest. *In re Lang*, 414 F.3d 1191, 1201 (10th Cir. 2005). The four factors required for a stay "are the same, or are arguably more rigorous, than they are for a motion for preliminary injunction." *Diné Citizens Against Ruining our Env't v. Jewell*, No. CIV-15-0209-JB/SCY, 2015 WL 6393843, at *1 (D.N.M. Sept. 16, 2015). "[B]ecause the burden of meeting the [stay pending appeal] standard is a heavy one, more commonly stay requests will be found not to meet this standard and will be denied." Alan Wright & Arthur R. Miller, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed. 2004).

A. THE COURT HAS ALREADY DECIDED THE MERITS.

Rule 24(a)(2) of the Federal Rules of Civil Procedure affords any party the right to intervene in an action when the party files a timely motion if: (i) the movant claims an interest relating to the property or transaction which is the subject of the action; (ii) the movant's interest may be impaired or impeded; and (iii) the existing parties do not adequately represent the movant's position. *See Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1231 (10th Cir. 2010).

The Alliance does not contest the timeliness of the Advocacy Groups' motion. And the Alliance does not challenge the Court's conclusion that the Advocacy Groups are interested in

the subject matter of this lawsuit. *See* Mem. Op. & Order Denying Mot. to Intervene at 9, filed Jan. 13, 2017 (ECF No. 38) ("Intv. Op."). But the Advocacy Groups cannot meet the remaining elements an intervenor must establish. The Court correctly determined that the result of this lawsuit will not impair or impede any legally protected interest the Advocacy Groups might possess and that the Advocacy Groups' participation in the lawsuit can serve no purpose other than to complicate and delay the resolution of this case.

1. The Court Correctly Rejected the Advocacy Groups' Misleading Representations.

The Advocacy Groups correctly state that the element of impairment presents only a minimal burden, *see* Mot. to Stay at 6 (citing *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010)), but the Advocacy Groups must still demonstrate "that impairment of [their] substantial legal interest is possible if intervention is denied." *WildEarth Guardians*, 604 F.3d at 1199. The Advocacy Groups have failed to make that showing. Because each example of impairment the Advocacy Groups allege is based on an inaccurate description of the Alliance's Complaint and litigation positions, the Court correctly determined that the Advocacy Groups face no impairment to their alleged interests

Disregarding the Court's holding on the motion to intervene, the plain language of the Alliance's Complaint, and the clarifications of the Alliance's positions in moving papers and at oral argument, the Advocacy Groups continue to assert incorrectly that the Alliance "challenges BLM's Leasing Reform Policy as inconsistent with the MLA" or that the Alliance "seeks an order revising or rescinding the Leasing Reform Policy because of its rotating lease sale directive." Mot. to Stay at 7. Yet the Alliance's Complaint observes that, "[a]mong other instructions, IM No. 2010-117 emphasizes that 'State offices will continue to hold lease sales four times per year, as required by

the Mineral Leasing Act, section 226(b)(1), and 43 CFR 3120.1-2(a), when eligible lands are determined by the state office to be available for leasing.'" Compl. ¶ 15, at 5 (quoting IM No. 2010-117 at 5). The Complaint also acknowledges that IM No. 2010-117 "instructs state offices to 'develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review process established in this IM.'" Compl. ¶ 16, at 6 (quoting IM No. 2010-117 at 5). Neither of these provisions are incompatible with the Alliance's request that the Secretary adhere to the statutory requirement to conduct quarterly oil and gas lease sales "when eligible lands are available." To the contrary, the portions of IM No. 2010-117 quoted in the Alliance's Complaint specifically reference 30 U.S.C. § 226(b) and 43 C.F.R. § 3120.1-2, the very authorities on which the legal obligation the Alliance seeks to enforce is based. The Court has already rejected the Advocacy Groups' unsupported assertion that the Alliance presents any challenge to leasing policy in this lawsuit. *See* Intv. Op. at 10. Given that the Advocacy Groups have done nothing more than repeat old arguments, the Court should do so again.

Likewise divorced from all record material and pertinent representations, the Advocacy Groups inexplicably continue to insist that the Alliance "challenges BLM's authority to postpone lease sales while the agency 'revise[s] or update[s] . . . resource management plans.'" Mot. to Stay at 7. The Advocacy Groups assert, without citation, that the Alliance "wants to require [BLM] to offer lands where BLM's current management plan does not account for important environmental concerns or new information." *Id.* at 8. The exact opposite is true. The Alliance has repeatedly recognized in this lawsuit that BLM may withhold individual parcels from leasing

when additional environmental review is required for any reason, including instances where additional review is warranted because the parcel is located in an area for which the controlling resource management plan is being revised. *See* Resp. to Intv. at 7 n. 3; Tr. at 39:2-18. And the Advocacy Groups' allegation contradicts directly the Court's holding that the Alliance is not "challenging BLM's withholding of certain land parcels from sale in order to conduct revisions to Resource Management Plans ('RMPs')." Intv. Op. at 11. Because the Advocacy Groups have done nothing more than repeat arguments that misstate the Alliance's position related to parcels withheld during the revision of an RMP, the Court's holding remains correct.

The Advocacy Groups next assert, again falsely, that the Alliance "challenges BLM's authority to postpone lease sales based on 'workload priorities,' where the 'workload' involves performing additional environmental review and tribal consultation." Mot. to Stay at 8. But not only does the Alliance not object to BLM's postponement of individual parcels for these very reasons, the Alliance actually cites – in multiple places – regulatory provisions by which BLM could effect that postponement. *See* Resp. to Intv. at 6-7 n.3; Resp. to MTD at 4; Tr. at 29:1-7. Unlike the Advocacy Groups, the Court has already recognized that the Alliance "is not seeking to . . . force BLM to rush into leasing land parcels without adequate environmental review or remove the environmental review process from the discretion and control of the BLM." Intv. Op. at 17. Simply repeating arguments that the Court has already considered and rejected does not distinguish the Advocacy Groups' position from the Court's earlier holding.

The Advocacy Groups' repeat their earlier attempts to fabricate claims the Alliance has not raised, offering a myopic interpretation of this case that disregards all contrary evidence. While the Advocacy Groups imply that the Alliance offers a "view of the law" pursuant to which any parcel

nominated through an expression of interest immediately makes that parcel available for leasing, the Alliance has repeatedly explained to the Court that it is not advancing that view in this case. *See* Tr. at 31:3-7 (emphasizing that the Alliance is "not saying that any expression of interest automatically makes a parcel that's been nominated available for leasing"); *id.* at 46:19-22 ("[T]he Alliance does not take the position in this case that a submitted expression of interest equates to the parcel being eligible and available under the Mineral Leasing Act."). And the Court has already objected the Advocacy Groups' meritless contention, observing that "[t]he Complaint . . . does not state anywhere that Plaintiff seeks a ruling that oil and gas leases must be sold whenever a company expresses interest." Intv. Op. at 6. The Court should do so again.

2. <u>The Advocacy Groups' Policy Interests are Inapposite</u>.

The Advocacy Groups spend many pages repeating their argument that the BLM will not adequately represent the Advocacy Groups' interests in this case because of potential policy differences. As the Court understood in rejecting the motion to intervene, all of these arguments are immaterial to the case that the Alliance has filed. Whether there is any disparity between the preferred land management policies of the Advocacy Groups and BLM is irrelevant because the Alliance's lawsuit does not implicate any aspect of those policies. And while the Advocacy Groups contend that "BLM's multiple-use management mandate, and its application of that mandate in making leasing decisions[] differ substantially from the Conservation Groups' interest in protecting public lands," Mot. to Stay at 10, the Court has already recognized that BLM's multiple use mandate is not under review in this lawsuit. *See* Intv. Op. at 19.

The only question before the Court is whether BLM has failed to conduct quarterly oil and gas lease sales even though "eligible lands are available," a question that, because the Alliance has not challenged the process by which eligible lands become available, is purely a question of fact and

not policy. If the administrative record reveals that – applying BLM's own metrics – there have been occasions on which eligible parcels were available and BLM failed to conduct a quarterly lease sale, then the Alliance will prevail. If the administrative record demonstrates that each time BLM canceled a lease sale or each time BLM offered no parcels from a particular state those decisions were made because of a state-wide lack of eligible parcels that had been designated as available under BLM's current standards, then the Alliance's action will fall short. Either way, this case turns on whether BLM had or had not designated any eligible parcels as available, not on the procedure BLM employed or the analysis BLM conducted to reach that conclusion.

This case involves only a factual review of the administrative record to determine whether BLM has failed to meet a ministerial obligation to conduct lease sales when eligible lands are available. Given these narrow parameters, the Advocacy Groups' focus on policy differences is misplaced. Because the Advocacy Groups do not – and cannot – present any colorable argument that the Advocacy Groups possess any relevant factual material that BLM does not possess, the Advocacy Groups cannot establish that BLM will not adequately represent the Advocacy Groups' interest, and the Court should confirm its holding.

B. ALLOWING THE CASE TO PROCEED CANNOT HARM THE ADVOCACY GROUPS.

The Advocacy Groups' contention that a stay is necessary to prevent the Advocacy Groups from suffering irreparable harm fails for the same reasons as the Advocacy Groups' merits arguments. The Advocacy Groups' harm arguments are premised on the same false assumptions regarding this case.

No matter how this case is resolved, the outcome will not affect any legally protectable interest the Advocacy Groups might possess. The Alliance has emphasized repeatedly that it does not

in this lawsuit request that the Court: (i) strike down BLM's current leasing policies, Tr. at 26:4-23; (ii) modify the standard for how lands become eligible for oil and gas leasing, *id.* at 32:15-19; (iii) require BLM to rush leasing approvals in a manner that might compromise any environmental review process associated with oil and gas leasing, *id.* at 27:9-16; or (iv) curtail BLM's discretion to withhold individual parcels from oil and gas leasing, *id.* at 27:9-10.

The sole harm that the Advocacy Groups imply is a speculative contention that, if the decision on intervention were to be reversed, the proceedings in the district court would have to be re-litigated, potentially harming all the parties and the Court. *See* Mot. to Stay at 12. There is no support for this position. This is not a case where the Advocacy Groups' participation will change the outcome – either eligible parcels were available on occasions when BLM failed to conduct lease sales or they were not. If no parcels were available, this case will be resolved in accordance with the Advocacy Groups' preference. And even if parcels were available, the Advocacy Groups' conservation preference does not entitle the Advocacy Groups to preclude the enforcement of applicable statutory and regulatory law. The Advocacy Groups' ability to ensure federal environmental laws are applied and enforced will exist to the same degree regardless of how this case is resolved. Having failed to establish that the Alliance's lawsuit implicates any legally protected interest in their merits arguments, the Advocacy Groups' assertions of irreparable harm likewise fail.

C. THE ALLIANCE'S MEMBERS ARE SUBJECT TO CONTINUING AND ONGOING HARM.

While the Advocacy Groups are immune from harm regardless of the outcome of this lawsuit, each day that the resolution of this case is delayed extends the Alliance's members' continuing and ongoing injury. The Alliance's lawsuit does not seek redress for a discrete and

finite violation that occurred in the past, but rather requests injunctive relief to halt ongoing conduct that fails to comply with the Mineral Leasing Act. Because a stay of proceedings would exacerbate that injury, the Court should not only deny the Advocacy Groups' motion, but order the remaining parties to proceed to the merits expeditiously.

As documented in the Alliance's Complaint, the present schedule for upcoming lease sales in several states demonstrates that BLM remains noncompliant with its statutory obligations. *See* Compl. ¶ 36, at 10. On January 25, 2017, the New Mexico State Office, for example, conducted its most recent lease sale, involving parcels exclusively within the jurisdiction of the Farmington Field Office. The New Mexico State Office is not scheduled to conduct another lease sale until June 8, 2017 – a sale that will involve parcels exclusively from the Oklahoma Field Office. *See* Bureau of Land Mgmt., FY2017 Oil and Gas Lease Sale Schedule (updated Jan. 19, 2017).[2] On September 4, 2017, the New Mexico State Office is scheduled to conduct a lease sale involving parcels from Field Offices within the Pecos District. *See id.* Even assuming those lease sales occur according to schedule, a minimum of almost nine months will pass – between January 25, 2017 and September 4, 2017 – without any parcels located in New Mexico being offered for lease. A period of more than one year will pass – between April 20, 2016 and June 8, 2017 – without any parcel in Oklahoma, Texas, or Kansas being offered for lease.

Other state offices are similarly out of compliance. The last lease sale the Montana/Dakotas State Office conducted was on December 8, 2016. *See* Bureau of Land Mgmt.,

[2] Available at: https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/new-mexico.

Montana/Dakotas Oil & Gas Lease Sales.[3] That sale involved parcels located exclusively in Montana. The Montana/Dakotas State Office is not scheduled to conduct another lease sale until June 13, 2017 and is not scheduled to conduct another lease sale involving parcels located in North Dakota until September 12, 2017. Even assuming those lease sales occur according to schedule, a minimum of six months will pass – between December 8, 2016 and June 13, 2017 – without any parcels located in in Montana or the Dakotas being offered for lease. A period of more than fourteen months will pass – between July 11, 2016 and September 12, 2017 – without any parcel in North Dakota being offered for lease.

Before the Court is undisputed evidence of the certain harm that that the Alliance's members will continue to incur if the resolution of this lawsuit is delayed to be balanced against the absence of any possibility that the issuance of a stay will harm the Advocacy Groups or pose any meaningful risk to the environment. Because weighing these equities counsels against a stay, the Court should deny the Advocacy Groups' motion. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (finding the balance of harms tipped in industry's favor when industry had incurred economic costs and movants had failed to show a sufficient likelihood of environmental harm).

D. A STAY WILL HARM THE PUBLIC INTEREST.

The Advocacy Groups' motion ignores the public interest in proficient and cost-effective administration of the statutes and regulations that govern the development of natural resources on public lands. BLM has a statutory obligation to conduct quarterly lease sales in "each State

[3] Available at: https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/montana-dakotas (last visited Feb. 2, 2017).

where eligible lands are available" 30 U.S.C. § 226(b). Both BLM's past conduct and its present slate of scheduled lease sales demonstrate that the agency is failing to meet its obligation to the public.

Particularly for the western public lands states, the stakes of federal oil and gas development are high. A state receives fifty percent of all monies from lease sales, bonus payments, and royalties (including interest charges) derived from oil and gas production on federal lands within a state's borders. *See* 30 U.S.C. § 191(a). The states therefore have an incentive to promote responsible energy development within each state's boundaries. States "apply these revenues to a variety of local needs ranging from school funding to infrastructure improvements and water conservation projects," resulting in "new schools, senior citizen facilities, and hospitals." Leveraging Am.'s Res. as a Revenue Generator & Job Creator Before the Senate Comm. on Energy & Natural Res., S. Hrg. 113-394, at 8 (2014) (statement of Gregory J. Gould, Dir., Office of Natural Res. Revenue).[4] Money received from federal minerals revenue "pays salaries for teachers, funds local road improvements, and provides grants for important local projects." *Id.* Because continuing to allow BLM to cancel or postpone mandatory lease sales to satisfy the political whims of Advocacy Groups that have not identified any interest that this lawsuit might implicate is not in the best interest of the public, the Court should deny the Advocacy Groups' motion.

III. CONCLUSION.

The Advocacy Groups' request for a stay is based exclusively on a retread of arguments that the Court has already considered and rejected. On one hand, the Alliance's lawsuit does not

[4] Available at http://www.gpo.gov/fdsys/pkg/CHRG-113shrg89711/pdf/CHRG-113shrg89711.pdf.

threaten – or even implicate – any of the alleged interests the Advocacy Groups assert, regardless of the ultimate outcome of this case. On the other hand, delaying the resolution of this case will continue to exacerbate the ongoing and continuing injuries BLM's failure to adhere to the agency's statutory obligations imposes on the Alliance's members and the public. The Court should confirm its ruling on the merits of the Advocacy Groups' motion to intervene and deny the motion the stay.

Submitted respectfully this 3rd day of February, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2017, a true and correct copy of the foregoing Response in Opposition to Motion to Stay was served by filing a copy of that document with the Court's CM/ECF system, which will send notice of electric filing to all counsel of record.

/s/ Susan Quinn
Susan Quinn