CASE NO. 17-2005
Oral Argument Requested

IN THE
United States Court of Appeals for the Tenth Circuit

WESTERN ENERGY ALLIANCE,
Petitioner-Appellee,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, and BUREAU OF LAND MANAGEMENT,
Respondents,

THE WILDERNESS SOCIETY, WYOMING OUTDOOR COUNCIL, SOUTHERN UTAH WILDERNESS ALLIANCE, SAN JUAN CITIZENS ALLIANCE, GREAT OLD BROADS FOR WILDERNESS, SIERRA CLUB, WILDEARTH GUARDIANS, CENTER FOR BIOLOGICAL DIVERSITY, AND EARTHWORKS,
Appellants–Applicants for Intervention.

On Appeal from the United States District Court
for the District of New Mexico
The Honorable William P. Johnson, United States District Judge

PETITIONER-APPELLEE'S RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner-Appellee Western Energy Alliance ("Alliance") states under Federal Rule of Appellate Procedure 26.1 that the Alliance has no parent company and that no publicly held corporation owns ten percent or more of the trade association's stock.

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STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any prior or related appeals within the meaning of Circuit Rule 28.2(c)(1).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred when it determined that the Appellants' motion to intervene is premised on "unfounded misrepresentation[s]" about the Alliance's Complaint and that, when the Alliance's actual claims are considered, the Alliance's lawsuit does not threaten – or even implicate – any of the alleged interests the Appellants assert, regardless of the ultimate outcome of this case.

2. Whether the district court erred when it found that the Bureau of Land Management ("BLM") could adequately represent Appellants' interest because the Alliance's lawsuit does not implicate any question of policy.

3. Whether the district court abused its discretion when it denied Appellants permissive intervention because Appellants intend to interject questions irrelevant to the legal questions this case presents.

STATEMENT OF THE CASE

Through this lawsuit, the Alliance seeks to compel the Secretary of the Interior to discharge a non-discretionary duty. The Mineral Leasing Act imposes a discrete, ministerial obligation with which the Secretary "shall" abide: oil and gas "[l]ease sales *shall* be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b) (emphasis added). The Secretary – acting through BLM – has failed to meet this obligation, routinely conducting lease sales less than quarterly for reasons of administrative whim and convenience unrelated to the availability of eligible parcels. The Alliance's Complaint challenges the Secretary's failure, specifically alleging: (i) that there have been occasions "where eligible lands are available" and BLM has still declined to conduct quarterly lease sales; and (ii) that the schedules BLM State Offices have issued for oil and gas lease sales in the future do not implement a quarterly lease sale schedule even though "eligible lands are available." The Alliance's Complaint presents a narrow central issue. 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.

SUMMARY OF THE ARGUMENT

The Alliance opposes Appellants' intervention not because the parties have a fundamentally different view on the law applicable to intervention, but because Appellants have misrepresented the factual bases of the Alliance's suit and the relief the Alliance seeks. *See* App. at 411:11-20. Appellants assert that the United States Court of Appeals for the Tenth Circuit "follows 'a somewhat liberal line in allowing intervention.'" Appellants' Br. at 19 (quoting *Wildearth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009)). But liberal or not, Appellants cannot distort the facts to convert a minimal standard into a nonexistent standard.

Like Appellants' moving papers below, Appellants' opening brief in this Court 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 arguments on which Appellants premise their application for intervention. After evaluating the claims that the Alliance raises – as opposed to the contorted mischaracterizations Appellants advance – the district court correctly concluded that Appellants "appear to be litigating an entirely different lawsuit from the one that is before the Court." App. at 350. The Alliance's actual case does not threaten (or even implicate) any of the alleged interests Appellants assert.

Appellants' distortion of the Alliance's suit also undermines Appellants' arguments that BLM cannot adequately defend Appellants' interest in this case. Appellants spend many pages focused on alleged policy differences between BLM and Appellants. But as the district court understood in denying intervention, all of Appellants' policy arguments are immaterial to the Alliance's actual case. Whether there is any disparity in the preferred land management policies between Appellants and BLM is irrelevant because the Alliance's lawsuit does not implicate those policies. The law in this Circuit is that when a case turns on facts, not on policy, an applicant's interests are fully represented.

Unable to establish intervention by right, Appellants request permissive intervention. Appellants notably do not provide any reason why permissive intervention should be allowed independent from the flawed reasons Appellants offer in support of their request for intervention by right. Given that Appellants are focused on issues that are not germane to this lawsuit, Appellants' participation will only delay and complicate the adjudication of this otherwise narrowly focused case. Because Appellants' participation will have no meaningful benefit to the court or the administration of justice, the district court properly denied Appellants permissive intervention.

ARGUMENT

On October 19, 2016, Appellants – nine special interest advocacy groups opposed to all oil and gas development – moved to intervene. Appellants' motion mischaracterized virtually every aspect of the Alliance's lawsuit, resulting in what is, in effect, a motion to intervene in a fictional lawsuit of Appellants' self-serving construction, rather than the suit the Alliance filed. Because Appellants' application to intervene is premised on a series of straw man arguments the Alliance has not raised, and because the Alliance's lawsuit does not threaten – or even implicate – any of the alleged interests Appellants assert, the district court properly denied the motion to intervene.

I. APPELLANTS CONTINUE TO MISREPRESENT THIS CASE.

This Court need look no further than the very opening of Appellants' brief for examples demonstrating that Appellants continue to premise their legal arguments on factual misrepresentations. The very first sentence in Appellants' "Issues Presented" contends falsely that the Alliance's "goal in this case is to increase oil and gas leasing and development on public lands by requiring BLM to hold more frequent sales of oil and gas leases." Appellants' Br. at 1.Yet the Alliance has repeatedly explained in its moving papers and at the hearing on Appellants' motion to intervene that the Alliance does not seek this result. *See* App. at 217 ("The Alliance does not seek in this lawsuit more frequent lease sales

necessarily or presume that, if the Alliance were to prevail, lease sales would occur more frequently."); *id.* at 414 ("[T]his is not a request for more frequent or more lease sales, necessarily.").

The next section of Appellants' brief also begins with a similarly misleading statement; the first sentence in Appellants' "Statement of the Case" contends that the "Alliance seeks to turn the federal Mineral Leasing Act into an industry-driven mandate requiring BLM to offer new oil and gas leases for sale every three months on public lands in each state." Appellants' Br. at 2. But 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, or argued that BLM is mandated to offer any particular parcel for sale. To the contrary, the Alliance has repeatedly explained that the Alliance does not seek 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." App. at 25; *id.* at 142 ("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."); *id.* at 419

(explaining that the Alliance is not challenging in this lawsuit BLM's process for determining when a parcel is eligible and available).

Appellants' brief is replete with similar misrepresentations. Among other errors, Appellants inaccurately assert that the Alliance: (i) challenges "leasing reforms" that Appellants worked to implement, *see* Appellants' Br. at 8, 20; (ii) seeks an order that BLM "must hold more oil and gas lease sales," *id.* at 22; (iii) requests BLM eliminate "rotational" lease sales schedules, *id.* at 13, 31; (iv) intends to curtail or abbreviate the environmental review of any eligible oil and gas parcel, *see id.* at 16, 23; (v) attempts to diminish the public's ability to participate in the environmental review process, *see id.*; and (vi) contests BLM's right to defer the sale of oil and gas parcels while a resource management plan is being revised, *see id.* at 25, 31 n.17. All of these statements are false.

II. APPELLANTS HAVE NO RIGHT TO INTERVENE.

Rule 24(a)(2) of the Federal Rules of Civil Procedure affords any party the right to intervene in an action upon 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 Appellants' application for intervention. But Appellants

cannot meet the other elements a putative intervenor must establish. The result of this lawsuit will not impair or impede any legally protected interest Appellants assert, and, because resolution of the lawsuit does not implicate any questions of policy over which Appellants and BLM may differ, Appellants' interests in the case are already adequately represented.

A. APPELLANTS' APPLICATION IS BASED ON FALSE ASSUMPTIONS.

Appellants identify two interests that Appellants allege relate to the subject of this lawsuit: (i) an interest in preserving oil and gas leasing reforms that Appellants contend they worked to have implemented, *see* Appellants' Br. at 15; and (ii) an "interest in protecting public lands from the impacts of oil and gas drilling." *Id.* The Alliance acknowledges that, under certain circumstances, a conservation interest similar to the interests Appellants assert may constitute a legally protectable interest. *See Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001). But the Alliance's lawsuit does not implicate either of the interests Appellants assert.

1. The Alliance Does Not Request "More Lease Sales."

Relying on their inaccurate characterization of the case, Appellants assert incorrectly that, if the Alliance prevails, the result will be an "increase in leasing and development." Appellants' Br. at 21. As discussed above, the Complaint does not "request relief that will require BLM to hold more lease sales." *Id.* The

Alliance's Complaint asks only that lease sales be conducted at least quarterly when eligible lands are available, i.e., consistent with the requirements of the Mineral Leasing Act. The Alliance acknowledges that, "if no eligible lands are available in a given State, then BLM is not required to conduct a quarterly lease sale." App. at 217. Equally important, the Alliance presents no challenge in this lawsuit to the criteria the Secretary employs to determine how and when a parcel becomes eligible for leasing. *See* App. at 222 ("[T]he 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.").

The Alliance does not ask in this lawsuit that any lands presently unavailable for oil and gas leasing be made eligible for nomination. The Alliance does not ask in this lawsuit that any eligible parcel that is nominated be offered for oil and gas leasing before being subject to environmental review. The Alliance does not ask in this lawsuit that BLM's discretion to withhold nominated parcels from oil and gas leasing be curtailed or eliminated. Regardless of the outcome, the Alliance's lawsuit will not change: (i) how parcels are designated as available for leasing; (ii) the process by which available parcels are nominated; or (iii) the process by which nominated parcels are reviewed before leasing. The Alliance's lawsuit will not make a single parcel that is not presently eligible for oil and gas leasing subject to lease or require a single eligible parcel be offered for lease before environmental

review is conducted on that parcel and BLM determines the parcel is appropriate for leasing.

While the Alliance no doubt seeks to enforce the obligation that lease sales be conducted at statutorily directed times, the Alliance has acknowledged frequently and consistently that BLM remains in full control over the scale and scope of those sales.[1] *See* App. at 222. Appellants' contention that the Alliance's suit will result in increased oil and gas drilling is a false narrative and should be rejected.

2. <u>Appellants' Alleged Conservation Interest is not Implicated</u>.

The Alliance has repeatedly emphasized that it is not challenging the environmental review process for any parcel eligible to be included in an oil and gas lease sale. *See* App. at 144 n.4 (addressing Appellants' arguments related to environmental protection and explaining that "the Alliance does not request in this lawsuit that any lease be issued before any required environmental review is

[1] The quarterly sale requirement was added in 1987 when Congress amended the Mineral Leasing Act by enacting the Federal Onshore Oil and Gas Leasing Reform Act ("Reform Act"). *See* Pub. L. No. 100-203 § 5102(a), 101 Stat. 1330 (Dec. 22, 1987). In December 1989, the Office of the Solicitor "advised the [BLM] Director that the quarterly sale requirement is mandatory but that the Secretary may determine the size of the sale consistent with the purposes of the Reform Act." Thomas L. Sansonetti & William R. Murray, *A Primer on the Federal Oil & Gas Leasing Reform Act of 1987 and its Regulations*, 25 LAND & WATER L. REV. 375, 386 n.97 (1990). The Solicitor's position in 1989 is precisely the one the Alliance takes for the purposes of this lawsuit – though BLM controls the process of making lands available for leasing, "where eligible lands are available," the obligation to offer those lands for lease is mandatory.

conducted"); *id.* at 206 (recognizing that 43 C.F.R. § 3120.1-3 authorizes BLM to suspend the offering of a specific parcel while considering a protest or appeal against the parcel's inclusion in a lease sale and clarifying that "[p]arcels deferred under this provision are not the subject of the Alliance's lawsuit"); *id.* at 413-14 (affirming "BLM's discretion to choose which parcels will be leased" and rejecting Appellants' representation that the Alliance is "somehow [] trying to shortchange or curtail environmental review"). Appellants fail entirely to address the Alliance's actual claims and instead raise straw man arguments "to create the impression that [Appellants'] interests would be impaired if they are not allowed to participate in this case." *Id.* at 354. The district court understood that Appellants' assertions of environmental harm are premised on mischaracterizations and therefore properly rejected those assertions. *See id.*

Appellants continue to disregard the true nature of the Alliance's claims. The Alliance does not, for example, contend "that the rotating lease sale schedule conflicts with the [Mineral Leasing] Act because it results in fewer than four sales per year in some states." Appellants' Br. at 23. The Alliance has never argued that conducting four lease sales in every State is a statutory imperative. *See* App. at 416-17 (conceding that if BLM "has not completed the environmental review on every single parcel that has been submitted in the state, they are likely within their rights to withhold a lease sale, defer or cancel the lease sale"). What the Alliance

has argued is that, if eligible parcels exist in a State, quarterly lease sales must be conducted. Contrary to the inference Appellants would have this Court draw, the Alliance has offered repeatedly its view that a rotating sales schedule is compatible with the Alliance's request that BLM adhere to the statutory requirement to conduct at least quarterly oil and gas lease sales "when eligible lands are available." *Id.* at 143 (rejecting the contention that rotational lease sales "are incompatible with the Alliance's request"); *id.* at 413 ("[T]here's nothing in the complaint that suggests somehow that the [policy prescribing rotational lease sales] is contrary to the [Mineral Leasing Act].").

Appellants next complain that if BLM is precluded from taking all the time it needs to conduct environmental analysis and consider public input, "it will limit the agency's ability to 'conduct comprehensive parcel reviews.'" Appellants' Br. at 23 (quoting App. at 136). But nothing about the Alliance's Complaint would abbreviate the time afforded BLM to conduct those reviews. Both the Alliance and the district court recognized that "current regulations authorize BLM to 'suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.'" App. at 206 (quoting 43 C.F.R. § 3120.1-3); *id.* at 324 n.3; *id.* at 414. The Alliance asks only that, if additional time is needed for an individual parcel, BLM engage the regulatory mechanisms that allow BLM to conduct additional review on that parcel and not simply cancel

an entire lease sale when other lands remain eligible within a State. *See* App. at 144 n.4; *id.* at 354 (acknowledging the Alliance's confirmation at the hearing on Appellants' motion to intervene that the Alliance "does not request in this lawsuit that any lease be issued before required environmental analysis is conducted" and observing that the Alliance "envisions and expects that BLM will engage the regulatory mechanisms that are in place in order to allow it to conduct additional review on any specific land parcel"). Appellants' assertions that this case will result in a limitation on BLM's ability to extend the time to complete environmental review on any nominated parcel are unfounded.

Relying on a reference in the Alliance's Complaint to the cancellation of a January 2015 lease sale focused on parcels in northwest New Mexico, Appellants state 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 as part of the pre-leasing review process." Appellants' Br. at 24. 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* App. at 146-47 & n.3; *id.* at 206; *id.* at 416. And with specific reference to the January 2015 lease sale, the Alliance has noted expressly that the Alliance does not object to the withdrawal of the five individual parcels that

required additional environmental review and tribal consultation; the Alliance objects to the cancellation of an *entire* lease sale without any statement regarding why eligible parcels located in other parts of New Mexico – or in Kansas, Oklahoma, or Texas (which are also under the jurisdiction of the BLM New Mexico State Office) – were not being offered at that time. *Id.* at 415. The Alliance *does* argue that BLM cannot cancel a statutorily mandated lease sale simply because it wishes to "prioritize" other tasks, but the Alliance *does not* contend in this lawsuit that BLM is ever compelled to offer a parcel before all necessary environmental review has been completed. The record on this point is well-developed and clear; the district court observed, in fact, that "the Court lost count of the number of times [the Alliance] confirmed that it does not seek to interfere with BLM's discretion to determine which parcels are 'eligible' for lease sale and when parcels become 'eligible.'" *Id.* at 355.

Appellants' assertion that the Alliance challenges the postponement of lease sales while BLM revises or updates resource management plans is equally baseless. As with Appellants' misleading statements related to "workload priorities," the record is replete with evidence that the Alliance is not challenging in this lawsuit withdrawal of individual parcels located within an area for which BLM is updating a resource management plan. To the contrary, the Alliance has explained that the Court need not reach that question to resolve this case. *See id.* at

426 (acknowledging that the question of whether BLM may withhold a parcel because of revisions to a resource management plan is "immaterial to this court" and stating to the district court that "[y]ou don't need to decide that question"); Suppl. App. at 3-4 n.1. What the Alliance challenges here is complete cancellation of a lease sale for an entire State on the basis that a few individual parcels will not be offered because a resource management plan covering those parcels is being revised and where BLM has made no assertion that there are no other eligible parcels at any location within the State.[2] Appellants' assertions regarding the impact of this case on Appellants' conservation interests are premised on false assumptions and should be rejected.

[2] Appellants' position is again premised on a reference in the Alliance's Complaint to the New Mexico State Office's cancellation of a lease sale in northwest New Mexico – an area where the State Office is currently updating the applicable resource management plan. This Court has recently clarified that "[t]he agency's decision to improve its plan for managing federal lands . . . does not immediately invalidate the old plan or prevent the agency from referring to it." *Diné Citizens Against Ruining our Env't v. Jewell*, 839 F.3d 1276, 1285 (10th Cir. 2016). But the legality of BLM's withdrawal of parcels subject to the resource management plan revision is not before this Court. The record is clear that the Alliance's "concern is not with the five parcels that were subject to the [resource management plan] under revision, but to the dozens, if not hundreds, of other parcels that were pending . . . under the jurisdiction of the New Mexico State Office at the time those five parcels were withheld." App. at 426. Appellants imply that the Alliance would have BLM "select individual parcels to offer under an outdated [resource management plan]," Appellants' Br. at 28, but that assertion reflects a misunderstanding of this case. The Alliance does not demand that any parcels subject to planning revisions be offered in any individual sale.

3. Appellants Misunderstand the "Central Issue."

The district court recognized that, "[w]ith a proper and accurate understanding of [the Alliance's] actual claims (as opposed to [Appellants'] gloss on those claims), [Appellants] cannot meet their 'impairment of interest' burden, minimal though it is." App. at 357. Appellants nevertheless contend that the district court's "ruling sidesteps the central issue in the case: the meaning of when eligible lands are available." Appellants' Br. at 26. Appellants state, without citation to the record, that the Alliance's "interpretation is much more restrictive than BLM's reading of that provision." *Id.*

Appellants' reference to the "central issue" evinces a fundamental misunderstanding of this case. The Alliance's interpretation "of when eligible lands are available" is not the "central issue" in this case; in fact, whether the Alliance's "interpretation is much more restrictive than BLM's" is not an issue at all. The Alliance has explained that, for the purposes of this lawsuit, it defers to BLM's interpretation of "eligible" and "available." *See* App. at 25 (explaining that the Alliance does not seek to "modify the process by which eligible lands are classified as 'available' for leasing"); *id.* at 142 ("[T]he 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."); *id.* at 419 (explaining that the Alliance is not challenging in this lawsuit BLM's process for determining when a

parcel is eligible and available). Whether the Alliance would classify more lands as eligible and available for lease sales than BLM is irrelevant; what the Alliance challenges here is cancellation of lease sales *even after* BLM has identified parcels as eligible and available.

The district court understood the Alliance's Complaint, observing that the Alliance had offered "examples where BLM withdrew parcels of land for lease sale for reasons other than 'eligibility.'" *Id.* at 356. It is this simpler issue – whether cancellations occurred for reasons other than "eligibility" – that is the "central issue" in this case. The more complicated issues of whether parcels were properly classified as eligible or whether the Alliance or Appellants agree with BLM's classification policy are immaterial to this lawsuit.

Appellants' failure to understand the fundamental issue this case presents dooms their arguments related to impairment. The district court recognized correctly that, because the Appellants' "interests are environmental in nature," Appellants' efforts "to allow BLM to withdraw land parcels for reasons having nothing to do with environmental concerns . . . cannot be a basis for intervention as of right." *Id.* But no matter how this case is resolved, Appellants' environmental interests will be protected. Because Appellants have not identified any environmental or conservation interest that will be harmed, the district court was correct to reject Appellants' application for intervention.

4. Appellants Misrepresent the Relief Requested.

Beyond Appellants' misleading statements regarding the Alliance's claims, Appellants' contention that their interests will be harmed should the Alliance prevail in this lawsuit also rely on misrepresentations of the relief the Alliance requests. Appellants urge this Court to "focus on the complaint," Appellants' Br. at 32, and assert that the Alliance "challenges" Instruction Memorandum ("IM") No. 2010-117.[3] The Alliance agrees that this Court should focus on the Complaint. The plain language of the Alliance's Complaint demonstrates that Appellants are mistaken.

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.'" App. at 8 (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.'" *Id.* at 16 (quoting IM No. 2010-117 at 5). Neither

[3] Appellants refer to IM No. 2010-117 as the "Leasing Reform Policy."

of these provisions is incompatible with the Alliance's request that BLM 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 that mandate the legal obligation the Alliance seeks to enforce.

Notwithstanding the express language of the Alliance's Complaint, Appellants continue to assert that the Alliance: (i) "seeks to set aside the rotating sale schedule that is the linchpin of [IM No. 2010-117]"; (ii) intends to eliminate "time for public participation and environmental analysis" provided for under the provisions of IM No. 2010-117; and (iii) "would invalidate a provision [of IM No. 2010-117] that authorizes BLM to defer leasing [when a resource management plan is under revision]." App. at 30-31 & n.17. As discussed exhaustively above, Appellants' assertions are false.

Appellants criticize the district court for considering the United States District Court for the District of Columbia's decision in *Environmental Integrity Project v. McCarthy*, __ F.R.D. __, No. 16-842 (JDB), 2016 WL 6833931 (D.D.C. Nov. 18, 2016) ("*EIP*"), a case in which another federal district court denied intervention to applicants presenting arguments virtually identical to those Appellants present in this case.

As a preliminary matter, the district court was careful to acknowledge the limited manner in which the decision in *EIP* impacted the district court's holding in this case. The district court recognized that the decision in *EIP* was "not binding precedent," and that, unlike the Tenth Circuit, the United States Court of Appeals for the District of Columbia Circuit requires an applicant to establish Article III standing before allowing the applicant to participate in a suit.[4] App. at 352 (citing *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1167 (10th Cir. 2007), for the proposition that an intervenor in the Tenth Circuit need not establish Article III standing to participate in a case). The district court explained, however, that the decision in *EIP* was "informative because of the [*EIP*] court's treatment of the applicants' hyperbolic description of plaintiffs' claims." App. 353. Given the "inescapable" similarity between the facts in *EIP* and the facts in this case, it was perfectly reasonable for the district court to consider the decision in *EIP* to be "helpful" and to incorporate the *EIP* decision in a limited manner.

[4] The Supreme Court has granted a petition for certiorari on the question of whether intervention by right requires Article III standing. *See Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60 (2d Cir. 2016), *cert. granted*, 137 S. Ct. 810 (2017) (Mem.) (No. 16-605); Pet. for a Writ of Cert., *Town of Chester v. Laroe Estates, Inc.*, No. 16-605, 2016 WL 6549195, at *i (Nov. 3, 2016). Oral argument in *Laroe Estates* is presently set for April 17, 2017. Because the district court did not require Appellants to establish Article III standing and because the district court held that Appellants failed to establish impairment even under the lower standard presently applicable in the Tenth Circuit, the outcome of *Laroe Estates* will not affect this case.

Plaintiffs in *EIP*, a coalition of special interest groups,[5] brought an action under the citizen suit provision of the Resource Conservation and Recovery Act, contending that the Environmental Protection Agency ("EPA") failed to discharge non-discretionary duties under two statutory provisions that required EPA to "review[], and where necessary, revise[]" certain regulations related to oil and gas waste disposal "not less frequently than every three years." *See EIP*, 2016 WL 6833931, at *2 (citing 42 U.S.C. §§ 6912(b) & 6942(b)). The plaintiffs asked the court "to order [EPA] to 'review, and where necessary revise'" the regulations "by a date certain." *EIP*, 2016 WL 6833931, at *2. "Fearing that such an order would result in burdensome new regulations," the State of North Dakota and three oil and gas industry trade associations (collectively, the "applicants") moved to intervene. *Id.* at *1.

Like the applicants in *EIP*, Appellants here attempt to "muddy the waters," exaggerating the relief the Alliance seeks in this case. *Id.* at *4. In *EIP*, the applicants pointed to the request in the plaintiffs' Prayer for Relief that the court issue an order "requiring [EPA] to 'issue necessary revisions'" as evidence that the plaintiffs' action sought more than compliance with ministerial obligations, arguing that the plaintiffs sought to "put the substance of EPA's regulation squarely before the Court, to limit EPA's discretion, and to obtain a court order

[5] Two of the plaintiffs that contested intervention in *EIP* – San Juan Citizens Alliance and Earthworks – are among the groups that seek intervention in this case.

broader than those in prior cases." *Id.* Appellants here likewise suggest that the request in the Alliance's Prayer for Relief that the court "[d]irect BLM to revise or rescind all agency guidance and instructional memoranda, including IM No. 2010-117, that direct implementation of BLM's lease sale program in a manner contrary to law," App. at 42, somehow represents an effort to modify existing law and limit BLM's discretion.[6] *See* Appellants' Br. at 30.

Like the plaintiffs in *EIP*, the Alliance has repeatedly and effusively denied that it is seeking the expansive relief upon which Appellants premise their motion for intervention. The Alliance has made clear in its moving papers and at hearing on Appellants' motion that the Alliance does not in this lawsuit: (i) seek to set aside any leasing reform, including IM No. 2010-117, *see* App. at 148; (ii) challenge BLM's discretion to choose which nominated parcels will be offered for lease, *see id.* at 144, 148; (iii) present any request for more frequent lease sales, *see id.* at 217; (iv) attempt to limit Appellants' right to protest lease sales or otherwise

[6] Both the Alliance and the district court acknowledged that the request to revise guidance documents is "cosmetic," App. 347, 435, and superfluous to the intervention analysis because BLM's instruction memoranda do not have the force and effect of law and are not controlling when the provisions of a memorandum are inconsistent with the terms of relevant statutes or regulations. *See Atl. Richfield Co.*, 121 IBLA 373, 380 (1991). Requesting that the court require BLM to revise non-binding guidance documents to make those documents consistent with controlling law cannot constitute a substantive attack on valid and enforceable leasing policies. BLM is precluded from implementing the terms of guidance memoranda that are inconsistent with federal statutes, regardless whether the district court grants a request to revise that guidance.

participate in the leasing process, *see id.* at 146; (v) request that any lease be issued before any required environmental analysis be conducted, *see id.* at 144 n.1; or (vi) demand that BLM rush leasing approvals in a manner that might compromise environmental review, *see id.* at 148. Recognizing that the plaintiffs, not the applicants, were the "masters of their complaint," the district court in *EIP* rejected the applicants' mischaracterization of the plaintiffs' action and "accept[ed] plaintiffs' representations about the scope of their complaint." *EIP*, 2016 WL 6833931, at *5. The district court did the same here and this Court should affirm.

B. APPELLANTS' POLICY INTERESTS ARE IRRELEVANT.

Appellants spend many pages repeating their argument that BLM will not adequately represent Appellants' interests in this case because of potential policy differences. As the district court understood, these arguments are immaterial to the case the Alliance has filed. Whether there is any disparity in the preferred land management policies between Appellants and BLM is irrelevant because the Alliance's lawsuit does not implicate any aspect of those policies. And while Appellants contend that BLM often applies the agency's multiple-use management mandate in a manner that "compromises [Appellants'] environmental protection interests in favor of oil and gas development and other land uses," Appellants' Br. at 36, the district court recognized correctly that BLM's multiple use mandate is

not under review in this lawsuit, because this "lawsuit does not seek any change" in BLM's exercise of discretionary authority. App. at 359.

1. Appellants Apply an Incorrect Legal Standard.

Without exception, each of the authorities that Appellants cite in support of their contention that BLM cannot adequately represent Appellants' interests involve government officials exercising discretionary authority, balancing competing policy objectives, or weighing the interests of multiple parties. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538-39 (1972) (observing that the controlling statute required the Secretary of Labor to balance the rights of individual union members against their union with the obligation to ensure that no individual's rights undermined the public interest in democratic union elections); *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, (D.C. Cir. 2015) (holding that agency and applicant had "different interests" where applicant challenged the scope of agency's discretionary power); *N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 540 F. App'x 877, 881 (10th Cir. 2013) (acknowledging that the Forest Service's development of a travel management plan involved "balancing various interests"); *Wildearth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200-01 (10th Cir. 2010) (stating that "[w]here a government agency may be placed in the position of defending both public and private interest, the burden of showing inadequacy of representation is satisfied," but declining to

decide whether the National Park Service could adequately represent applicants and remanding to district court to consider that issue); *Wildearth Guardians,* 573 F.3d at 997 (acknowledging that in developing a plan to vent methane gas from an underground coal mine, "the government has multiple objectives and could well decide to embrace some of the [the plaintiff's] environmental goals"); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246 (10th Cir. 2001) (seeking to intervene in case challenging the discretionary creation of a national monument); *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (observing that the decision whether to list the Mexican Spotted Owl as an endangered species involved balancing the public interest against the individual applicant's "particular interest in the protection of the Owl in the habitat where he has photographed and studied the Owl"). Appellants' reliance on these authorities is misplaced. This Court has explained that these cases are not controlling where, as here, the applicant for intervention has not pointed to anything like "conflicting statutory authorities," *San Juan Cty.*, 503 F.3d at 1205 (quoting *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984)), and the "government is a party pursuing a single objective." *San Juan Cty.*, 503 F.3d at 1204.

In *Kane County, Utah v. United States*, 597 F.3d 1129, 1134 (10th Cir. 2010), the Southern Utah Wilderness Alliance ("SUWA") attempted to intervene

in a quiet title action between Kane County, Utah and the United States over roads that traversed federal public lands. Like Appellants here, SUWA argued in *Kane County* that it should be permitted to intervene because it had a history of adversarial relations with BLM and because SUWA had disagreed with the United States' land management decisions in the past. *See id.* at 1134-35. In rejecting SUWA's attempt to intervene, the Tenth Circuit noted that, irrespective of these policy differences about land management generally, the question at issue was limited to the title dispute over the roads – a question whose resolution depended entirely on how the roads at issue had been used historically. *See id.* at 1135. Because SUWA would not present "any special expertise, experience or knowledge with respect to the historic use of the roads that would not be available to the United States," SUWA did not have a right to intervene. *Id.*

The decision in *Kane County* controls this case. This lawsuit does not implicate any policy questions or land management decision-making subject to agency discretion. This is not a case where "the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." Appellants' Br. at 35 (quoting *Wildearth Guardians*, 573 F.3d at 996). 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. The government has "only a single litigation objective," *San Juan Cty.*, 503 F.3d at 1206 – to demonstrate that at the time BLM cancelled or deferred lease sales, no eligible parcels were available for leasing. 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.

Appellants have previously argued that *San Juan County* and *Kane County* are inapplicable because those cases involved disputes under the Quiet Title Act. *See* App. at 197. But this Court has never held that the Quiet Title Act has any sort of talismanic significance requiring unique intervention analysis or confined the holding of those cases to quiet title actions exclusively. What this Court has done is

distinguish cases like quiet title actions – where the government has a single litigation objective – from cases in which the federal defendants are required "to balance a spectrum of views in furthering the public interest . . . which might cause them to deviate from the private concerns of the would-be intervenors." *N.M. Off-Highway Vehicle All.*, 540 F. App'x at 882 n.7. *See also WildEarth Guardians*, 573 F.3d at 997 (observing that, in *San Juan County*, this Court was "not informed of any potential federal policy that could be advanced by the government's relinquishing its claim of title to the road," and distinguishing that scenario from one where "the government has multiple objectives and could well decide to embrace some of [the plaintiff's] goals"). Appellants appear to concede that there are two standards – one for cases like *Kane County* and a second for cases that involve "the government balancing multiple objectives." App. at 197. Appellants simply apply the wrong standard to this case because of their fundamental misunderstanding of the Alliance's claims. In the end, it is the extent to which discretionary policy is implicated, not the statute that provides the cause of action, that determines whether *San Juan County* and *Kane County* control.

2. <u>Appellants' Arguments are Detached from the Record</u>.

Like Appellants' arguments on impairment, Appellants' mischaracterization of the Alliance's Complaint undermines Appellants' contention that Appellants' interest will not be represented adequately. Appellants fear that "BLM could agree

to offer more of the delayed lease parcels about which [the Alliance] objects." Appellants' Br. at 38. But the Alliance does not object to the delay of any individual parcel and actually cites to regulatory provisions by which BLM could achieve that result. *See* App. at 146-47 & n.3; *id.* at 206; *id.* at 416. Appellants fear that BLM may not defend the rotating lease sale schedule. Appellants' Br. at 38-39. But the Alliance's Complaint does not contend that the rotational lease sale requirement is incompatible with the Mineral Leasing Act. *See* App. at 143; *id.* at 413. Appellants fear that BLM may not "'make all of [Appellants'] arguments' when briefing this case." Appellants' Br. at 39. But again, there are no policy arguments to make. Using BLM's own standards (not the Alliance's standards or Appellants' standards), eligible parcels were or were not available at times that BLM failed to conduct lease sales; nothing that Appellants might argue will change the dispositive facts in this case.

Equally detached from the record is Appellants' position that "if the district court rules in [the Alliance's] favor it will need to fashion a remedy, such as requiring changes to the Leasing Reform Policy and BLM's lease sale schedules, taking into consideration the hardships to different parties." *Id.* at 40. Unlike Appellants, the district court focused on the Alliance's Complaint, noting that the Alliance seeks only "a declaration that BLM's practice of canceling or deferring lease sales less frequently than quarterly, for reasons other than lack of eligible

parcels, is illegal under the Mineral Leasing Act." App. at 348. *See also id.* at 42 (requesting that the district court: (i) "[d]eclare the manner in which BLM is presently scheduling and administering oil and gas lease sales unlawful as a violation of the Mineral Leasing Act"; and (ii) "[r]equire BLM to immediately abandon all currently existing lease sale schedules that do not comply with the Mineral Leasing Act and to adopt promptly revised lease sale schedules that comply with the terms of the Mineral Leasing Act"). The remedy that the district court would therefore impose is a declaration that BLM is not in compliance with applicable law. The Alliance has not asked the court to devise specific lease sale schedules or to write new policy guidance for BLM. Should BLM choose to update any specific schedule or policy after this case in a manner that Appellants believe is contrary to law, that choice might incentivize Appellants to bring a new suit challenging that new action; but that speculative possibility does not translate into an interest in this case challenging different agency action.

For very similar reasons, Appellants' reference to the possibility that the new presidential administration may choose to promote policies more favorable to the oil and gas industry generally is likewise irrelevant to the case. Were the current administration to make changes to the non-binding agency guidance that Appellants hope to preserve, that will not be as a result of this lawsuit. Once again, the Alliance does not ask for that result in this case. And as the district court

observed, if BLM were to withdraw its opposition to the Alliance's lawsuit or modify existing leasing schedules, those changes would not create an interest for Appellants in this lawsuit, it would "make this a different case altogether, and would probably moot the need for this litigation in the first place." *Id.* at 359-60. At that point, Appellants might feel compelled to bring a new and separate legal action to challenge those new and distinct actions with which Appellants disagree, but it would not give Appellants the right to intervene in this case that challenges only ministerial failures divorced from the exercise of discretionary policy.[7]

This case involves only a factual review of the administrative record to determine whether BLM has failed to meet a discrete, ministerial obligation to conduct lease sales when eligible lands are available. Given these narrow parameters, Appellants' focus on policy differences is misplaced. Because Appellants do not – and cannot – present any colorable argument that Appellants

[7] Appellants read too much into the district court's acknowledgment – in the context of the district court's order to stay the case pending this appeal – that the new administration "may take a position 'that would presumably be more favorable to companies dealing in the energy business.'" Appellants' Br. at 42 (quoting App. at 385-86). The district court noted that a "stay would allow a bit of time for any changes in administrative policy which might occur to settle in and take effect while the Appellants' appeal is pending." App. at 386. But the district court did not conclude that a shift in policy was likely to endow Appellants with a right to intervene. The district court's ruling was instead premised on the very reasonable understanding that, given the administrative changes about which Appellants speculate, providing time for the implementation of those changes might moot the need for this litigation. The district court's stay merely promotes judicial economy; it does not legitimize the substantive arguments in Appellants' motion to intervene.

possess any relevant factual material that BLM does not possess, Appellants cannot establish that BLM will not adequately represent Appellants' interest, and this Court should affirm.

C. THE DISTRICT COURT WAS CORRECT TO DENY PERMISSIVE INTERVENTION.

Appellants contend that the district court abused its discretion when it denied Appellants permissive intervention. *See* Appellants' Br. at 44. Under Rule 24(b)(1)(B), the court may grant permissive intervention when a movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Appellants do not provide any reason why they should be granted permissive intervention independent from the grounds Appellants offer in support of their request for intervention by right. Appellants contend only that Appellants' alleged conservation interests "raise the same questions of law and fact that lie at the heart of this litigation: the legality under the [Mineral Leasing] Act of BLM's postponement of lease sales, and the rotating lease sale schedule required by the Leasing Reform Policy."[8] Appellants' Br. at 45. As described in detail throughout

[8] Appellants' understanding of the questions "at the heart of this litigation" has changed since the district court proceedings. In Appellants' motion to intervene,

this brief, neither of those questions have any relevance to the resolution of this lawsuit.

Unlike Appellants, the district court recognized that the issue this case presents "turns out to be fairly discrete." App. at 348. Appellants complain that "neither the district court nor [the Alliance] pointed to any way [Appellants] will actually cause undue delay or unfair prejudice to the other parties." Appellants' Br. at 47. Appellants are incorrect. The Alliance observed that Appellants have not articulated any reason why their participation – focused on issues not germane to this lawsuit – will be helpful, and emphasized that, without such a showing, Appellants' participation can do nothing but delay and complicate the adjudication of this otherwise narrowly focused case. *See* App. at 151-52. And the district court anticipated correctly that Appellants would "obfuscate the relevant issues in this lawsuit," *id.* at 361, because Appellants conceded that Appellants would in fact do so.

Lacking any legally protectable interest in precluding the enforcement of the Mineral Leasing Act, Appellants' interest in this lawsuit is no different from any other member of the public who cares about the outcome of the litigation. But allowing Appellants to intervene based on nothing more than a preferred result

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Appellants stated that they "intend to address the same question of law that is at the heart of this litigation: the legality of BLM's Leasing Reform Policy, and the agency's discretion over lease sales." App. at 65.

would invite any member of the public who holds strong views about the outcome to seek intervention. Adopting such an approach would undermine the efficient and just resolution of this case. Because Appellants' participation will have no meaningful benefit to the court or the administration of justice, the district court did not abuse its discretion when it denied Appellants' request for permissive intervention. This Court should affirm.

III. CONCLUSION.

Appellants' application for intervention fails not because the parties have a fundamentally different view of the applicable law, but because Appellants' apply that law to a fabricated lawsuit that does not exist. Appellants' misleading statements about the Alliance's case, however, do not become more accurate simply because Appellants are willing to repeat those statements in the face of overwhelming evidence in the parties' moving papers and the record. Because Appellants' repeated misrepresentations of the Alliance's claims suggests that the misrepresentations may be intentional and because those claims, when understood properly, do not threaten any interest Appellants advance or implicate any aspect of BLM's discretionary decision making, this Court should affirm the district court's denial of Appellants' application for intervention.

Submitted respectfully this 5th day of April, 2017

By: */s/ Mark S. Barron*

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STATEMENT REGARDING ORAL ARGUMENT

The Alliance believes oral argument will be beneficial to the Court's understanding and resolution of this case because of the complexity, importance, and widespread applicability of the legal issues involved.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of 30 pages or 14,000 words, because this brief contains 8,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman, 14 point.

Date: April 5, 2017.

/s/ Mark S. Barron
Mark S. Barron

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, TREND MICRO™ Office Scan™, Version 10.6.5372 Service Pack 3, last updated April 5, 2017, and according to the program are free of viruses.

Date: April 5, 2017.

/s/ Mark S. Barron
Mark S. Barron

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **PETITIONER-APPELLEE'S RESPONSE BRIEF** was served on April 5, 2017, using the CM/ECF system, to counsel for all parties of record.

/s/ Susan Quinn
Susan Quinn