No. 17-2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WESTERN ENERGY ALLIANCE,

Plaintiff-Appellee,

-v.-

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

Defendants,

THE WILDERNESS SOCIETY, EARTHWORKS, GREAT OLD BROADS FOR WILDERNESS, SAN JUAN CITIZENS ALLIANCE, WYOMING OUTDOOR COUNCIL, SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, and WILDEARTH GUARDIANS,

Applicants-in-Intervention-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, Case No. 1:16-cv-912 (Hon. William P. Johnson)

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Fed. R. App. P. 29(a), the United States submits this *amicus curiae* brief in support of affirmance of the district court's denial of the motion to intervene filed by The Wilderness Society et al. (collectively, "Conservation Groups"). While not parties to this appeal, the Secretary of the Interior and the U.S. Bureau of Land Management (collectively, "BLM") are named defendants in the underlying action and thus have an interest in whether and to what extent the Conservation Groups are parties to this suit. BLM did not oppose their motion to intervene before the district court. But, as explained herein, BLM's non-opposition was tendered at a time when the claims pleaded and relief sought by Plaintiff Western Energy Alliance ("WEA") were arguably far broader than WEA has since conceded. Because the district court "will hold [WEA] to [its] representations" about the narrow scope of its complaint for the remainder of this suit, Appx. 348, the United States submits that the court's ruling that the Conservation Groups could not intervene as of right was correct. The court also did not clearly abuse its discretion by denying permissive intervention.

STATEMENT OF THE ISSUES

1. Did the district court err by denying the Conservation Groups intervention as of right after WEA conceded it was not seeking any limit on BLM's discretion to decide when eligible mineral lands are available to lease for oil and gas production?

2. Did the district court clearly abuse its discretion by denying the motion of the Conservation Groups for permissive intervention?

STATEMENT OF THE CASE

A. Legal background

The Mineral Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437 ("MLA"), vests BLM with the authority to lease mineral lands to private parties for production of oil and gas. BLM state offices offer parcels for lease through periodic lease sales. The MLA requires that quarterly "[l]ease sales shall be held for each State where eligible lands are available" to be leased. 30 U.S.C. § 226(b)(1)(A); *see* 43 C.F.R. § 3120.1-2(a). "Eligible" lands include all lands in the public domain or acquired by the federal government, with the exception of lands that are withdrawn from leasing by statute or regulation. *See* 43 C.F.R. § 3100.0-3; BLM Manual 3120.11 (2013 Rel. 3-337) ("BLM Manual"), *available at* https://go.usa.gov/xX5RV. "Available" lands are parcels selected for lease at BLM's discretion after compliance with all relevant statutory requirements. BLM Manual 3120.11; BLM Handbook 3100-1, Glossary p.14 (1985 Rel. 3-122) (defining "parcel"), *available at* https://go.usa.gov/xX5QY.

Pursuant to the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-475, 90 Stat. 2743, BLM prepares Resource Management Plans ("RMPs") that designate areas as "open", *i.e.*, potentially available for lease, under specified terms and conditions. *See* 43 U.S.C. § 1712(a); 43 C.F.R. § 1610. Designation of lands as

open in an RMP is necessary but not sufficient for BLM to lease the lands under the MLA. Before leasing a parcel, BLM also must comply with various other legal requirements, most notably the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 ("NEPA"), a statute that "facilitate[s] informed decisionmaking" by requiring federal agencies to consider the environmental effects of their actions. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009).

Neither the MLA nor BLM's regulations cabin the agency's "considerable discretion to determine which lands will be leased" for oil and gas development, assuming that other legal requirements are met. *WEA v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013). In exercising that discretion, BLM has issued guidance on how to evaluate whether a parcel should be made "available" at a lease sale. In 2010, BLM issued Instruction Memorandum ("IM") 2010-117, which "establishes a process for ensuring orderly, effective, timely, and environmentally responsible leasing of oil and gas resources on Federal lands." Appx. 134. Although IM 2010-117 expired by its own terms in 2011, *ibid.*, part of its contents is incorporated into the BLM Manual and Handbook, which are permanent agency guidance documents.

The BLM Manual recommits the agency to following the MLA requirement for quarterly lease sales "when eligible lands are determined by the state office to be available for leasing." Appx. 185. The Manual further states that, "to balance the workload" among the various BLM field offices within a given State, the Director

of the State office may rotate "parcel review responsibilities" among different field offices "as needed." *Ibid.* No matter which field office *reviews* a parcel for "[RMP] conformance and compliance with NEPA and other legal and policy requirements," *id.* at 186, each State office remains responsible for *determining* whether any given parcel should be made available for lease.

B. Procedural background

On August 11, 2016, WEA sued BLM and pleaded violations of the quarterly lease-sale statute. WEA alleged that "BLM's State Offices routinely fail to conduct the required four lease sales, despite parcels being available for leasing." Appx. 40. The gravamen of WEA's claim seemed to be that, "[o]nce an expression of interest is submitted" to BLM by a company interested in leasing a parcel designated in an RMP, "these lands become 'available for leasing.'" *Id.* at 20. The complaint referred to parcels in several States, stated that companies had filed expressions of interest in leasing these parcels, then argued that BLM violated the MLA by not offering them for timely sale. *Id.* at 19–31. WEA pleaded three claims: Count 1, which alleges a Freedom of Information Act ("FOIA") violation not relevant on appeal, *id.* at 37–39; and Counts 2 and 3, which allege violations of the MLA's quarterly-lease-sale duty, *id.* at 39–41. In its complaint, WEA asked the court to, *inter alia*, "[d]irect BLM to revise or rescind all agency guidance * * *, including [IM] 2010-117, that

direct[s] implementation of BLM's lease sale program in a manner contrary to law." *Id.* at 42.

On October 19, 2016, the Conservation Groups moved to intervene to protect two interests: (1) their interest in upholding IM 2010-117, which was threatened by WEA's prayer for relief; and (2) their interest in preserving "BLM's well-established discretion over oil and gas leasing," which was threatened by WEA's apparent stance "that BLM *must* offer oil and gas leases for sale * * * wherever a company expresses interest in leasing public lands." Appx. 45. They requested intervention as of right under Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissive intervention under Fed. R. Civ. P. 24(b)(1).[1] While the motion to intervene was pending, BLM moved to dismiss WEA's complaint for lack of subject-matter jurisdiction.

On January 13, 2017, the district court denied the motion to intervene and the motion to dismiss in separate opinions. Both opinions are premised on exceedingly narrow constructions of the complaint, to which the court pledged to hold WEA in future proceedings. Appx. 348. First, WEA "did not take the position that [IM 2010-117] was inconsistent with [the MLA's quarterly lease-sale requirement]," and WEA disclaimed the request in its complaint to vacate that guidance. *Id.* at 347; *see also ibid.* ("Plaintiff's counsel explained * * * that this request for relief was 'cosmetic'

[1] The Conservation Groups did not seek to participate in proceedings related to Count 1 so long as BLM provided them with copies of any documents produced in connection with WEA's FOIA request. Appx. 342 n.3.

in nature and was not part of any stated claim."); *id.* at 359 (WEA explaining that it "is not seeking * * * to require action by BLM in a way that is not already set forth in [IM 2010-117]."). Second, WEA "expressly and repeatedly disavowed" any claim that "'BLM *must* offer oil and gas leases for sale every three months wherever a company expresses interest in public lands.'" *Id.* at 365; *see also id.* at 323 n.1 (reciting WEA's view that "BLM still has complete discretion to decide *which* parcels are offered for lease sale to oil companies").

Given these substantial concessions, the district court agreed with WEA that "this lawsuit does not threaten, or even implicate, any of the alleged interests of the [Conservation Groups]." Appx. 344. The Conservation Groups had nothing to fear as to IM 2010-117 because "this case is not an attempt to set aside or modify" that document. *Id.* at 347. The same was true with respect to the Conservation Groups' interest in preserving BLM's statutory and regulatory discretion: "[T]his case does not challenge BLM's discretion to determine when and how land parcels become 'eligible'[2] or BLM's right to withhold parcels, or BLM's discretion to determine

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[2] The district court and the other parties have at times conflated the MLA terms "eligible" and "available." *See, e.g.*, WEA Br. 9. These terms are clearly defined in the BLM Manual. *See supra* page 2. "Eligible" lands comprise all lands "subject to leasing, *i.e*, lands not excluded from leasing by a statutory or regulatory prohibition." Manual 3120.11. "Available" lands are those "open to leasing in the applicable [RMP], * * * when all statutory requirements and reviews have been met." *Ibid.* WEA's complaint might be read to propose a far broader definition of "available" lands, Appx. 20 (citing 43 C.F.R. § 3120.1-1), but WEA later waived

when further environmental analysis is necessary for any parcel of land." *Ibid.* The district court's "clarification of the issues in this case" was "critical" to its denial of intervention. Appx. 351. The court explained that, once WEA foreswore most of the relief arguably sought in its complaint, it was clear that this suit could not "impair or impede" the Conservation Groups' "ability to protect [their] interest[s]." Fed. R. Civ. P. 24(a)(2); *see* Appx. 356. The court further held, given the limited scope of this suit, that an existing party (BLM) would adequately represent the Conservation Groups' interests. Appx. 357–60. Finally, the court denied permissive intervention because the Conservation Groups' participation would "cause undue delay and potentially obfuscate the relevant issues in this lawsuit." *Id.* at 361.

On March 1, 2017, following the Conservation Groups' appeal to this Court, the district court granted their motion to stay proceedings pending the outcome of this appeal. The court held that the Conservation Groups might be likely to succeed in their appeal if they were characterizing WEA's position correctly; that a stay was warranted to allow them to participate as parties if intervention were deemed proper;

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any challenge to the agency's definitions of *eligible* and *available*. Appx. 366 n.1; WEA Br. 16 ("[WEA] defers to BLM's interpretation of 'eligible' and 'available.'"). The disposition of this appeal does not turn on the proper definition of either term; what matters is that WEA does not challenge BLM's discretion to decide whether a given parcel is available for lease. Still, the United States respectfully submits that this Court, if it issues an opinion in *(cont'd)* this case, should recognize the BLM-defined meanings of *eligible* and *available* to avoid any confusion in future proceedings.

and that the balance of harms and the public interest favored a stay. Appx. 379–86. The district court also stayed all proceedings on WEA's FOIA claim. *Id.* at 386.

ARGUMENT

I. The district court correctly denied intervention as of right.

Intervention as of right is unwarranted because whatever remains of this suit will not "impair or impede" the Conservation Groups' ability to protect their stated interests. Fed. R. Civ. P. 24(a)(2). Their interests concern the process by which BLM determines which eligible parcels are "available" for lease, but WEA has repeatedly and expressly disavowed any intent to amend or accelerate that process. *See* Appx. 333 ("WEA * * * is not asking the Court to compel BLM to lease parcels that have not been designated as available."); *id.* at 357 ("[WEA] is not seeking * * * to force BLM to rush into leasing land parcels without adequate environmental review or remove the environmental review process from [its] discretion and control."); WEA Br. 7 (disavowing request that "BLM eliminate 'rotational' lease sales schedules").

Thus, contrary to the Conservation Groups' view (Br. 26), the "central issue in the case" is not "the meaning of 'when eligible lands are available.'" Before the district court, WEA, BLM, and the Conservation Groups all agreed that lands can be offered for lease if and only if BLM chooses to offer the parcels for lease—in its discretion—after all applicable reviews are complete. *See, e.g.*, Appx. 347. The sole

issue on the merits[3] is whether WEA has shown that BLM has an unlawful "practice of canceling or deferring lease sales * * *, for reasons other than lack of [available] parcels," in violation of the MLA's quarterly lease-sale requirement. *Id.* at 348.

Even if the district court agrees with WEA on that issue, its remedy would be limited to an order that simply directs BLM to conduct "[l]ease sales * * * for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A). The Conservation Groups have no valid interest in BLM's alleged noncompliance with that MLA provision. Their interest is in what happens beforehand, when BLM chooses which eligible lands are available for leasing. If the history of this lawsuit makes one thing clear, it is that this choice is and will remain within the agency's "considerable discretion," *WEA*, 709 F.3d at 1044, subject to the environmental-review requirements with which the Conservation Groups are concerned. Even if BLM is not adequately representing their interests (which it is, *see* Appx. 357–60), the Conservation Groups may not intervene as of right because this suit will not harm those interests.

[3] The United States maintains that WEA lacks standing and that its challenge to BLM's general "practice" is not cognizable under the Supreme Court's decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), but those questions are not before this Court, nor are they pertinent to the issues on appeal.

For similar reasons, the Conservation Groups have not shown that an adverse judgment will cause them injury, as would be required for a plaintiff-intervenor to intervene as of right under Fed. R. Civ. P. 24(a)(2). This Court held in *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc), that standing is not a prerequisite for intervention, *id.* at 1172, but the Supreme Court may rule to the contrary in *Town of Chester v. Laroe Estates*, No. 16-605 (argument set for Apr. 17, 2017). If it does, lack of standing will provide an additional basis for denying intervention as of right.

II. The court did not clearly abuse its discretion by denying permissive intervention.

"Reversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent." *South Dakota v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003). Examples of such reversals *are* nonexistent in this circuit. *See Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015). The Conservation Groups offer no evidence that the district court's denial of permissive intervention in this case was "arbitrary, capricious, whimsical, or manifestly unreasonable." *Ibid.* (citation omitted). Rather, as they did below, the Conservation Groups merely repackage their arguments for intervention as of right in support of permissive intervention. Br. 44–48. If those arguments are not persuasive grounds for intervention as of right, they necessarily provide no basis for reversing the discretionary denial of permissive intervention.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying the Conservation Groups' motion to intervene.

Respectfully submitted,

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April 12, 2017
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations imposed by Fed. R. App. P. 29(d), because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), it contains 2,579 words. This brief complies with the typeface and type style requirements because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

On April 12, 2017, I served a copy of the foregoing brief on the United States Court of Appeals for the Tenth Circuit using the Appellate CM/ECF System. All parties to these consolidated cases are represented by registered users who will be served by the CM/ECF System.

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I hereby certify that with respect to the foregoing:

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