IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Marcia S. Krieger

Civil Action No. 18-CV-2468-MSK

ROCKY MOUNTAIN WILD,
NATIONAL PARKS CONSERVATION ASSOCIATION,
CENTER FOR BIOLOGICAL DIVERSITY, and
WILDEARTH GUARDIANS,

Plaintiffs,

***v*.**

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, and
BUREAU OF LAND MANAGEMENT,

Defendants,

***v*.**

AMERICAN PETROLEUM INSTITUTE, and
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Intervenor-Defendants.

OPINION AND ORDER ON MOTION TO TRANSFER

THIS MATTER comes before the Court upon the Defendants' Motion to Sever and Transfer Claims to the District of Utah (**# 15**), the Plaintiffs' Response (**# 29**), and the Defendants' Reply (**# 35**). For the reasons that follow, the motion is granted, in part, and denied, in part.

I. BACKGROUND

The Bureau of Land Management generally creates Resource Management Plans (RMP) to provide for the use of resources on public lands. In formulating an RMP, the BLM relies upon Environmental Impact Statements (EIS) and Environmental Analyses (EA) prepared in

accordance with the National Environmental Policy Act (NEPA). EAs consider the impact of oil-and-gas leasing on the specific lands under consideration.

The Plaintiffs appeal from three administrative decisions made by the BLM, two in Utah and one in Colorado. Two decisions were made by the BLM's Field Office in Vernal, Utah, with regard to oil and gas leases on property located in Utah. The first decision was in December 2017 following a period of public review of and comment on an EA. In it, the BLM issued a decision permitting the lease of 59 parcels (61,910.92 acres) in Uintah and Duchesne Counties. The second decision, issued in June 2018, addressed eight parcels covered by the December 2017 decision that had not been successfully leased. As to those eight parcels, the BLM issued a Determination of NEPA Adequacy (DNA), finding that leasing them would have the same impact as articulated in the EA supporting the December 2017 decision. The third decision was made in June 2018 by the BLM's Colorado State Office. It permitted oil and gas leasing on of 62 parcels of land (55,809.67 acres) located in Colorado. The decision included a DNA, finding that the pertinent EISs and EAs in existence adequately addressed the impact of leasing.

According to the Plaintiff, the three decisions are related because they each affect geographically similar lands located in the Uintah Basin Airshed that spans the Colorado-Utah border. The Defendants move to sever the review of the decisions into separate actions, and to transfer review of the first two decisions to the United States District Court in Utah. (# **15**).

II. DISCUSSION

The Defendants raise two distinct legal questions: first, should the appeals from the Utah and Colorado decisions be severed; and second, if severance is appropriate, should the first two appeals be transferred to the District of Utah.

A. Severance / Consolidation

It is helpful at the outset to note that although this is styled as a civil action, it is actually three appeals from three separate administrative decisions. Appeals from administrative decisions are brought by civil action in accordance with 5 U.S.C. § 702, but as appeals they are determined on the underlying record. *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1991). Ultimately, the court must determine whether each decision, based on its own record, comports with the Administrative Procedure Act. *See Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1580 (10th Cir. 1994).

Rather than separately addressing each administrative decision and the grounds for its reversal, the Complaint asserts claims based on common legal theories. For example, Claim 1 alleges a failure of both the Colorado and Utah offices to consider the environmental impacts of oil and gas leasing in reaching separate decisions. As to Colorado, the BLM allegedly relied on a DNA in deciding to forego any additional NEPA analysis, thus basing the decision on previous EAs. The EAs allegedly did not take into account "significant new information showing that oil and gas development will contribute to exceedances of the ozone [National Ambient Air Quality Standards (NAAQS)] under every reasonably foreseeable development scenario". (**# 1 ¶ 182**.) As to Utah, the BLM allegedly relied on a *flawed* EA that concluded leasing would not have a significant environmental impact. The EA allegedly failed to take a hard look at public health implications, impact of emissions on Dinosaur National Monument, and the degree to which leasing would violate federal law given that every model led to exceedances of the ozone NAAQS.[1]

[1] The second Utah decision is derivative of the first.

The posture is the same for Claim 2, which alleges a failure to analyze and evaluate reasonable alternatives, violating NEPA. In Colorado, the BLM never considered a no-leasing alternative. In Utah, the BLM *refused* to consider alternatives to leasing within Dinosaur National Monument's viewshed.

Claim 3 — which alleges a failure to prevent unnecessary degradation, provide for compliance with NAAQS, and ensure conformity with RMPs — stands distinct from either of the other decisions. It concerns the decision of the Vernal Field Office in adding air pollution in a nonattainment area.

Each administrative decision from which the Plaintiffs appeal is akin to a distinct controversy. See 5 U.S.C. §§ 702, 704, 706 (contemplating review of singular "agency action", which is defined in 5 U.S.C. § 551(12) as a singular "order"). Thus, unless the records for all of the administrative decisions are identical — or at least substantially the same — the appeal from each decision is an independent controversy.[2] As is apparent above, each decision is based upon slightly different facts, agency actions, and records. The question is not whether the Complaint's claims (or challenges to each administrative decision) should be severed, but instead whether the appeal from three separate decisions can be consolidated in a single action.

Consolidation is governed by Rule 42, which permits the Court to consolidate actions that "involve a common question of law or fact". The decision as to whether to consolidate cases is confined to the sound discretion of the trial court in considering the need for expedition and economy in providing justice to the parties. *Breaux v. Am. Family Mut. Ins. Co*., 220 F.R.D. 366, 367 (D. Colo. 2004).

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[2] Because the fundamental problem here is that there are three administrative decisions from which the parties appeal, and the parties to each are the same, the parties' arguments with regard to Federal Rules of Civil Procedure 20 and 21 governing the joinder of and severance for misjoinder of *parties* is not particularly helpful.

Between the Utah and Colorado decisions, there is no evidence of a common record, or common questions of law or fact. All that they share is a common outcome. The Colorado and Utah decisions were made in different BLM offices on the basis of different EAs and different public comments. The Plaintiffs do not allege some sort of overarching BLM policy that compelled a consonant outcome or required decisionmakers to disregard environmental data.[3]

As to the two Utah decisions, there appears to some overlap in administrative record with the second decision incorporating information considered and findings reached in the first decision. Thus, as to these two decisions, the Court finds common facts.

Accordingly, there is no justification for consolidation of all of the appeals in a single action, but consolidation of the Utah appeals is warranted. The action will therefore be bifurcated into two actions — one from the Colorado decision and one from the Utah decisions. Though the legal issues are largely discrete within each appeal, to the extent that the parties think any distinct legal issue would benefit from consolidated briefing, they may so request and articulate the basis for doing so.

B. Transfer

The parties have approached the issue of transfer as one of change of venue pursuant to 28 U.S.C. § 1404. In that context, a court would consider numerous factors: (1) the plaintiffs' choice of forum; (2) the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; (3) the cost of making the

[3] The Plaintiffs discuss in great depth the geographical boundaries of the Uintah Basin Airshed and other scientific features shared by the land affected by the three decisions, but it does not appear that such information is contained in any of the administrative records. Rather, the Plaintiffs attach declarations supporting the scientific similarities. Should it be important to supplement one or more records with such information is an issue for another day. The Complaint cannot simply assume that extra-record information is pertinent to justify consolidation of appeals.

necessary proof; (4) questions as to the enforceability of a judgment if one is obtained; (5) relative advantages and obstacles to a fair trial; (6) difficulties that may arise from congested dockets; (7) the possibility of the existence of questions arising in the area of conflict of laws; (8) the advantage of having a local court determine questions of local law; and (9) all other considerations of a practical nature that make a trial easy, expeditious and economical. *Chrysler Credit Corp. v. Country Chrysler Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991). The Plaintiffs have the presumptive right to select a forum. The Defendants bear the burden of establishing that inconvenience of proceeding in Colorado outweighs the presumption that the Plaintiffs' choice of forum is appropriate. *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992).

As noted earlier, although brought as a civil action, these actions are administrative appeals for which most of the *Chrysler Credit* factors are irrelevant because they bear upon fact-finding at trial. In appeals, where the facts are contained in a record, the location of the federal court is not very important — hence the Federal Rules of Appellate Procedure are silent on transfer and the Administrative Procedure Act directs appeal of the decisions only to "a court of the United States". 5 U.S.C. § 702.

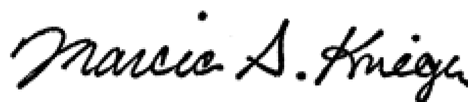
The Defendants argue that the Utah decisions impact local land and the local economy and thus Utah has a great local interest in reviewing the administrative decisions. Assuming that to be the case, there is no suggestion that local law will come into play nor that any local evidence will be added to the record. Instead, the legal issues are federal and the record has already been made. This reason is insufficient to overcome the presumption that this Court is an appropriate forum for reviewing the Utah decisions.

III. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Sever and Transfer (# **15**) is **GRANTED IN PART** and **DENIED IN PART**. Within 7 days of this order, the Plaintiffs shall file an Amended Complaint in this action, seeking judicial review of the administrative decision rendered by the BLM Colorado State Office. The Plaintiffs shall also file a second Complaint, initiating a new case seeking judicial review of the administrative decisions rendered by the BLM Vernal Field Office. The Clerk of Court shall assign the new case to the undersigned as a related case. The Motion is **DENIED** in all other respects.

Dated this 29th day of May, 2019.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge