

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

WILDEARTH GUARDIANS et al.,

*Plaintiffs,*

v.

DAVID BERNHARDT in his official  
capacity as Secretary of the Interior, et al.,

*Federal Defendants,*

and

AMERICAN PETROLEUM INSTITUTE,  
STATE OF WYOMING, and WESTERN  
ENERGY ALLIANCE,

*Defendant-Intervenors.*

Case No. 1:20-cv-056-RC  
The Honorable Rudolph Contreras

**FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND WITHOUT  
VACATUR AND MEMORANDUM IN SUPPORT**

## MOTION

The United States Bureau of Land Management (“BLM”), an agency of the United States Department of the Interior (“Interior”), and the federal officials named herein as defendants (collectively, “Federal Defendants”), hereby move the Court for a partial voluntary remand without vacatur of the environmental assessments (“EAs”), Findings of No Significant Impact (“FONSI”), and determinations of National Environmental Policy Act (“NEPA”) adequacy (Determinations of NEPA Adequacy) (“DNAs”) for twenty-four of the twenty-seven oil and gas leasing decisions challenged in this case, so that BLM may conduct further NEPA analysis. Specifically, Federal Defendants request that the Court remand the EAs, FONSI, and DNAs for all challenged Colorado, Utah, and Wyoming oil and gas leasing decisions, as well as the September 1, 2016 New Mexico leasing decision and the December 8, 2016 and June 13, 2017 Montana leasing decisions.

Undersigned counsel has conferred via email with counsel for the other parties and advises (i) that the Intervenor-Defendants do not oppose (or take no position on) the motion; and (ii) that while Plaintiffs do not oppose partial remand, they oppose the motion to the extent that it seeks remand without vacatur.<sup>1</sup> For reasons discussed herein, Federal Defendants decline to request vacatur because there is a substantial probability that they will be able substantiate the challenged decisions on remand, while vacatur would require the Court to expend scarce judicial resources evaluating the merits of decisions the agency wishes to revisit.

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<sup>1</sup> Plaintiffs requested that the following representation of their position be included in this brief: “Plaintiffs do not oppose partial remand. Plaintiffs oppose the motion to the extent that it seeks remand *without vacatur*. Plaintiffs intend to file a brief detailing their opposition.”

## MEMORANDUM

### 1. Background

This case involves a challenge to twenty-seven decisions under the Mineral Leasing Act of 1920, which authorized the sale of oil and gas leases on more than 2,000 parcels of public land in the states of Colorado, Montana, Utah, Wyoming and New Mexico.<sup>2</sup> Those decisions were issued from September 2016 to March 2019, when the Court issued its decision in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). Ten months later, Plaintiffs brought this action alleging that these twenty-seven decisions violated NEPA, based primarily on the Court’s *Zinke* decision. *See* Compl. ¶¶ 9–10, 33, 55, 102–103, 105, 115, 141, 149, ECF No. 1.<sup>3</sup>

In that decision, the Court concluded that the challenged NEPA analyses were insufficient because they did not (1) quantify and forecast direct, drilling-related emissions of greenhouse gases (“GHGs”); (2) adequately consider the indirect GHG emissions from downstream use of oil and gas; and (3) compare those GHG emissions to regional and national GHG emissions forecasts. *Zinke*, 368 F. Supp. 3d at 83. The Court remanded the EAs and FONSIIs and directed that BLM supplement those documents to address the noted deficiencies in the environmental analyses. *Id.* at 84. The Court did not vacate the decisions, nor did it vacate the associated leases, but it enjoined BLM from approving applications for permits to drill (“APDs”) for those leases until the agency

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<sup>2</sup> While the Complaint challenges only twenty-three lease sales, Plaintiffs have confirmed that they are challenging twenty-seven leasing decisions, as some of the sales consisted of multiple decisions.

<sup>3</sup> Plaintiffs’ Complaint identifies, among the challenged lease sale decisions in Table A, the BLM Colorado March 8, 2018 lease sale, described as including parcels managed by the Colorado River Valley and Grand Junction Field Offices. ECF No. 1 at 52. However, the decision for the March 8, 2018 lease sale included only parcels managed by the Tres Rios Field Office.

supplemented the EAs and FONSIIs. *Id.* at 85. After issuing that decision, which addressed only a portion of the challenged leases, the Court remanded the NEPA documentation for the remaining leasing decisions, without enjoining BLM from approving APDs. Mem. Op., at 5–6, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 121 (July 19, 2019).

Since the Court’s *Zinke* decision, Interior has completed a reassessment of the adequacy of the NEPA analyses supporting the leasing decisions challenged in this case, in light of the decision. Based on that assessment, BLM now concludes that voluntary remand for further analysis under NEPA is appropriate for all but three of the challenged lease sale decisions. For the reasons set out herein, Federal Defendants ask that the EAs, FONSIIs, and DNAs for all challenged Colorado, Utah, and Wyoming oil and gas leasing decisions, as well as the September 1, 2016 New Mexico leasing decision and the December 8, 2016 and June 13, 2017 Montana leasing decisions, be remanded to the agency for further NEPA analysis without vacatur.

## **2. Discussion**

Courts “commonly grant motions to remand an administrative record to allow an agency to consider new evidence that became available after the agency’s original decision.” *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 523–24 & n.3 (D.C. Cir. 1993)). This approach serves dual purposes: permitting agencies to exercise their “inherent power to reconsider their own decisions,” *id.* (quoting *Prieto v. United States*, 655 F.Supp. 1187, 1191 (D.D.C.1987)); and conserving judicial resources by “allow[ing] agencies to cure their own mistakes,” *id.* (quoting *Ethyl*, 989 F.2d at 524). Because remands further these purposes, even without a confession of error, courts in this Circuit “generally grant an

agency’s motion to remand so long as ‘the agency intends to take further action with respect to the original agency decision on review.’” *Util. Solid Waste Activities Grp. v. Env’tl. Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Limnia, Inc. v. Department of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017)).

Remand is especially “appropriate if the agency’s motion is made in response to ‘intervening events outside of the agency’s control, for example, a new legal decision or the passage of new legislation.’” *Id.* at 436 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)). Such remands “comport[] with the general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review.” *Nat’l Fuel Gas Supply Corp. v. F.E.R.C.*, 899 F.2d 1244, 1249–50 (D.C. Cir. 1990). Thus, “where an intervening event may affect the validity of the agency action at issue, a remand is generally required.” *Sierra Club*, 560 F. Supp. 2d at 23 (“noting that it can be ‘an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action’” (quoting *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004))).

In the instant case, Federal Defendants have determined that a remand is appropriate so they may further analyze the impacts of twenty-four of the twenty-seven challenged leasing decisions. This determination is informed by the Court’s *Zinke* decision, viz., the “intervening event” that draws into question “the validity of [BLM’s] actions.” *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C.

2010).<sup>4</sup> In the *Zinke* ruling, the Court found that BLM failed to take a hard look at the GHG emissions-related climate change impacts of oil and gas leasing, based on the NEPA analyses supporting the leasing decisions. *Zinke*, 368 F. Supp. 3d at 83. The analyses supporting twenty-four of the twenty-seven currently challenged leasing decisions are similar in some respects to those that the Court considered in *Zinke*. Remand to allow the agency to address these matters would serve the public interest because an agency’s “reconsideration of the potential environmental impacts of a project furthers the purpose of NEPA.” *Pellissippi Parkway*, 375 F.3d at 418. Additional analysis and public input in this instance would advance the “twin aims” of NEPA, that is, facilitating informed agency decisionmaking and promoting public involvement in that process. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983).

Further, remand without vacatur is appropriate because there is “at least a serious possibility that the [agency] will be able to substantiate its decision on remand.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 97 (additional citations omitted), *subsequent determination by* 280 F. Supp. 3d 187 (D.D.C. 2017). As the Court recognized in *Zinke*, Plaintiffs “challenge only one aspect of [many] lease sales that otherwise complied with NEPA.” *Zinke*, 368 F. Supp. 3d at 84. Accordingly, the “probability that [BLM] will be able to justify retaining [its prior leasing decisions] is sufficiently high that vacatur . . . is not appropriate.” *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (additional

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<sup>4</sup> Out of the twenty-four decisions for which remand is sought, twenty-one were issued prior to the Court’s *Zinke* decision, which issued on March 19, 2019. While the remaining three decisions were issued several days later in March 2019, substantial NEPA work related to those decisions had already been completed prior to the Court’s decision.

citations omitted)). The same consideration should govern here.

The Court should reject Plaintiffs’ request for vacatur for two reasons. First, the Court lacks authority to “order vacatur . . . without an independent determination that [the challenged leasing decisions were] not in accordance with the law.” *Carpenters Indus.*, 734 F. Supp. 2d at 135. Plaintiffs’ request for vacatur thus discards a principal rationale for remand: “preserv[ing] scarce judicial resources by allowing agencies ‘to cure their own mistakes.’” *Id.* at 132. It makes little sense for Plaintiffs to ask the Court to undertake an evaluation on the merits of decisions that the agency wishes to revisit. Second, BLM recognizes that, under *Zinke*, it must adequately assess potential effects of GHG emissions before making further decisions concerning these leases. Should BLM make a decision that Plaintiffs consider unlawful, Plaintiffs may challenge that decision and, if appropriate, may seek to block its implementation by pursuing injunctive relief. There simply is no need for the Court to vacate the challenged decisions without the customary showing that Plaintiffs are entitled to such relief. *Cf.* Mem. Op., at 5–6, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 121 (July 19, 2019) (declining to enjoin approval of APDs on remand because “Plaintiffs have not filed a motion for preliminary injunction . . . and articulated why ‘irreparable injury is likely in the absence of an injunction’” (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008))).

For all these reasons, the Court should exercise its inherent authority to manage its docket and its equitable power to grant remand, without any determination on the merits as to the twenty-four lease sale decisions described above. This will avoid judicial resolution of issues that may well be resolved upon remand and further study. Should the

Court grant this motion, Federal Defendants suggest that the litigation may continue along the currently established schedule for the three leasing decisions over which remand is not sought.

Respectfully submitted this 11th day of September, 2020.

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