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

| | |
|---|---|
| WILDEARTH GUARDIANS, PHYSICIANS FOR SOCIAL RESPONSIBILITY<br><br>Plaintiffs,<br><br>v.<br><br>DAVID BERNHARDT, *et al.*,<br><br>Federal Defendants,<br><br>and<br><br>AMERICAN PETROLEUM INSTITUTE, *et al.*,<br><br>Intervenor-Defendants. | Case No. 1:20-cv-00056-RC<br>The Honorable Rudolph Contreras |

**PLAINTIFFS' RESPONSE TO**
**FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND**

Plaintiffs WildEarth Guardians and Physicians for Social Responsibility (Citizen Groups) hereby respond to Federal Defendants' (collectively U.S. Bureau of Land Management's or BLM's) motion for voluntary remand. Dkt. 41. As stated in BLM's motion, Citizen Groups "do not oppose partial remand" but oppose the motion "to the extent that it seeks remand *without vacatur*." *Id*. at 2 n.1 (emphasis in original). BLM seeks to remand the Environmental Assessments (EAs), Findings of No Significant Impacts (FONSIs) and determinations of National Environmental Policy Act (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." *Id*. at 2. BLM has determined that additional NEPA analysis is necessary to support twenty-four of the challenged leasing decisions because the existing analyses suffer from deficiencies similar to those this Court found unlawful for five Wyoming leasing decisions

encompassing 282 lease parcels in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). *Id*. at 6. However, voluntary remand of the twenty-four deficient leasing decisions unaccompanied by an explicit commitment from BLM to vacate or suspend those decisions, or otherwise prevent lease development during the remand period, could foreclose the full suite of decisions available to BLM at the completion of the remanded analyses, including deciding not to authorize the leases. Thus, Citizen Groups request that the Court impose reasonable conditions on the voluntary remand to protect the public interest and ensure that (1) no development occurs on the leases, and (2) that BLM's post-remand decisions are not limited by the agency's sense of obligation to the lessees. Citizen Groups also request that the Court retain jurisdiction over the remanded leasing decisions, as it did in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 85.

## BACKGROUND

Citizen Groups filed this action on January 9, 2020, challenging BLM's approval of 2,067 oil and gas leases over nearly two million acres of public lands across Colorado, Montana, New Mexico, Utah, and Wyoming, for violations of NEPA, 42 U.S.C. §§ 4321 *et seq*. In particular, Citizen Groups' alleged that BLM: (1) failed to take a hard look at the severity of direct, indirect and cumulative impacts of greenhouse gas pollution; and (2) failed to provide a convincing statement of reasons justifying its decisions to forego an EIS analyzing the impacts of authorizing over 2000 new leases. Dkt. 1 at 47-49.

### I. The Wyoming Leasing Decision and BLM's Post-Decision Activity in *WildEarth Guardians v. Zinke*.

As BLM's motion identifies, the present action shares similarities with a prior case, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 67-77, in which this Court held that BLM's Wyoming leasing EAs violated NEPA because each EA:

(1) failed to quantify and forecast drilling-related GHG emissions; (2) failed to

> adequately consider GHG emissions from the downstream use of oil and gas produced on the leased parcels; and (3) failed to compare those GHG emissions to state, regional, and national GHG emissions forecasts, and other foreseeable regional and national BLM projects.

The Court characterized these deficiencies as a "serious failing" that "leaves the Court in doubt as to whether the agency chose correctly in making its leasing decisions." *Id*. at 84-85 (quotes and citations omitted). The Court also provided specific guidance as to how BLM must deal with these deficiencies on remand to comply with NEPA's hard look requirement. In so doing, the Court structured its remedy to ensure that BLM "giv[e] serious consideration to the Court's concerns," and "not to treat remand as an exercise in filling out the proper paperwork *post hoc*." *Id*. at 85 (citation omitted). To ensure this result, the Court retained jurisdiction over the remand until it determines that BLM has complied with NEPA for the Wyoming leases, and provided Plaintiffs with an opportunity to address whether BLM had fulfilled its NEPA obligations. *Id*.

Although the Court declined to vacate the Wyoming leases, it did enjoin BLM from authorizing any development on the Wyoming leases "[u]ntil BLM sufficiently explains its conclusions that the Wyoming Lease Sales did not significantly affect the environment." *Id*. The Court expressed concerns with BLM's position that GHG and climate impacts analyses were more appropriate at the site-specific drilling stage where the agency authorizes individual wells, given the "cumulative nature of climate change" and BLM's irreversible commitment to drilling that occurs upon lease issuance. *Id*. at 83. Because of this irreversible commitment to drill upon lease issuance, and "the possibility that BLM did not choose correctly the first time around," the Court enjoined BLM from further drilling authorizations. *Id*. at 85. This remedy preserved BLM's ability to change its mind about selling any of the Wyoming leases once the agency completed environmental analyses that complied with NEPA.

Within weeks of the *WildEarth Guardians v. Zinke* decision, BLM completed a draft supplemental EA for the Wyoming leasing decisions, which it released for public comment on the evening of April 12, 2019, and for which BLM provided a truncated 10-day comment period. Dkt. 102 in Case No. 1:16-cv-01724-RC. Two weeks after the close of the 10-day comment period, BLM finalized the supplemental EA for the Wyoming leasing decisions, and signed a new FONSI and decision record affirming the agency's prior leasing decisions. Dkt. 106 in Case No. 1:16-cv-01724-RC.

The speed with which BLM has completed supplemental NEPA analysis for the Wyoming leases, with limited opportunity for public engagement, show that BLM considers remand as merely an exercise in filling out paperwork to reaffirm decisions the agency has already made. Because the supplemental EA for the Wyoming leases did not include a robust analysis of leasing's climate impacts that followed the Court's guidance, and merely "padded" the record so that BLM could make the same decision, Citizen Groups in that case amended their Complaint to challenge the supplemental NEPA analysis. Dkt. 126 in Case No. 1:16-cv-01724-RC. Briefing on the amended complaint in that case was completed on May 22, 2020, and is awaiting a decision from the Court.

## II. The Utah/Colorado Leases and Voluntary Remand in *WildEarth Guardians v. Zinke*.

Subsequent to the Court's decision in *WildEarth Guardians v. Zinke*, BLM acknowledged that that the climate change analyses in the EAs for the Utah and Colorado lease sales at issue in that case were "similar" to the analyses in the Wyoming EAs that the Court found did not comply with NEPA's hard look requirement. Dkt. 107 at 4 in Case No. 1:16-cv-01724-RC. BLM sought, and was granted, permission to voluntarily remand those analyses so the agency could perform additional analyses for the Utah and Colorado lease sales consistent

with the Court's direction in *WildEarth Guardians v. Zinke*. *Id.*; *see also* May 29, 2019 Minute Order in Case No. 1:16-cv-01724-RC.

## ARGUMENT

To preserve the full suite of decisions available to BLM at the completion of the remanded analyses, the Court should place reasonable conditions on the grant of voluntary remand. First, vacatur of the leases provides the strongest incentive for BLM to conduct a comprehensive analysis of impacts that complies with NEPA's requirements and would lead to truly objective leasing decisions—including the option to decide not to issue leases—and which would be unencumbered by a sense of obligation to lessees who obtained leases through BLM's unlawful decision-making process. Second, issuing lease suspensions may also provide a reasonable check on BLM's tendency to perform rapid supplemental analyses on remand (to shore up decisions the agency has already made) and is not open to changing. Finally, and at the very least, the Court should enjoin BLM from authorizing any development on the leases until the agency has completed an analysis that complies with NEPA.

### I. Vacatur Is an Appropriate and Reasonable Condition.

BLM argues that vacatur is not appropriate here because: (1) the Court did not order vacatur in *WildEarth Guardians v. Zinke*, (2) the Court lacks authority to impose vacatur where there has been no merits ruling, and (3) Citizen Groups will have an opportunity to challenge the remanded analysis and can seek vacatur at that time. Dkt. 41 at 6-7. These arguments lack merit.

First, the Court is not bound by its prior remedy in *WildEarth Guardians v. Zinke*, especially where BLM was not "able to substantiate its decision on remand" with respect to the supplemental EA for the Wyoming leasing decisions. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 84 (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp.

3d 91, 97 (D.D.C. 2017)); *see also* Dkt. 143 at 19-40 (Motion for Summary Judgment) in Case No. 1:16-cv-01724-RC (detailing BLM's failure to address the deficiencies identified by the Court following a rushed assessment on remand). In declining vacatur of the leases, the Court applied the principle from *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir 1993), that vacatur is not necessary where an agency is likely to explain and, therefore, substantiate its decision on remand. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 84. BLM, however, treated its supplemental analysis on remand "as an exercise if filling out the paper *post hoc*," contrary to the Court's direction that the agency give "serious consideration" to the Court's concerns. *Id*. at 85. BLM's past actions with respect to remand of the Wyoming leasing decisions serve as a prologue to what BLM will likely do on remand of the leasing decisions in this case. To ensure that bureaucratic momentum does not relegate the remand process in this case to a paperwork exercise, vacatur of the remanded leasing decisions is appropriate. *Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983) ("Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'").

Critically, the overarching concern that remand without vacatur would result merely in *post hoc* rationalization was central to the U.S. Supreme Court's recent decision in *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). As Chief Justice Roberts explained:

> Requiring a new decision before considering new reasons promotes "agency accountability," *Bowen v. American Hospital Assn.*, 476 U.S. 610, 643 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (internal quotation marks omitted). Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly

> functioning of the process of review," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), forcing both litigants and courts to chase a moving target.

*Dep't of Homeland Sec.,* 140 S. Ct. at 1909. Indeed, this decision may have altogether recast a court's ability to remand an agency decision without vacatur. Moreover, multiple courts in directly analogous cases also considering BLM oil and gas leasing decisions have found vacatur the appropriate remedy. In *Western Watersheds Project v. Zinke*, the court held that "because of the violations already welded into the … lease sale process, vacatur here will avoid harm to the environment and further the purposes of NEPA and FLPMA." 441 F. Supp. 3d 1042, 1088 (D. Idaho, 2020). In *WildEarth Guardians v. U.S. Bureau of Land Management*, the court explained that remand without vacatur was only appropriate in "limited circumstances," and so followed the "normal procedure in the Ninth Circuit" in vacating over 145,000 acres of federal oil and gas leases in Montana. No. 1:18-cv-00073-GF-BMM, 2020 WL 2104760, at *13 (D. Mont. May 1, 2020) (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

Second, BLM relies on an inapposite case to support its argument that the Court lacks authority to order vacatur absent a determination on the merits of the case. Dkt. 41 at 7. In *Carpenters Industry Council v. Salazar*, 734 F. Supp. 2d 126, 131-32 (D.D.C. 2010), plaintiffs challenged a critical habitat designation for the northern spotted owl, and the federal agency defendant sought leave to voluntarily remand and vacate the critical habitat rule so the agency could correct errors and issue a new rule. The court determined that it lacked authority to vacate the rule because doing so, without a determination on the merits, would allow the agency "to do what [it] cannot do under the APA, repeal a rule without public notice and comment." *Id.* at 135-36. Vacating BLM's leasing decisions here is not analogous to vacating a rule promulgated through notice and comment, the repeal of which is also subject to notice and comment. Where an agency has violated NEPA, vacatur is the normal remedy. *Humane Soc'y of U.S. v. Johanns*,

520 F. Supp. 2d 8, 37 (D.D.C. 2007). BLM has conceded that the environmental analyses underlying a subset of the leasing decisions challenged here do not comport with the Court's determination of what constitutes a legally adequate NEPA analysis. Dkt. 41 at 6. Thus, the Court has the authority to condition remand on vacatur of the remanded decisions to ensure BLM does not rush through the analyses to paper over serious deficiencies as the agency did for the remand analysis of the Wyoming leases in *WildEarth Guardians v. Zinke.*

Finally, BLM argues that vacatur is not needed here because "under *Zinke*, [BLM] must adequately analyze potential effects of GHG emissions before making further decisions concerning these leases" and Citizen Groups are free to challenge those decisions if they consider the decisions unlawful. Dkt. 41 at 7. But as discussed above, BLM's prior practice has been to fast-track analyses on remand, including instituting abbreviated public involvement periods, leaving Citizen Groups and the public to compel further litigation to rebut those decisions. Without a check like vacatur on BLM's rush to issue leasing decisions, Citizen Groups and the public have little assurance that this pattern will not continue.

## II. Lease Suspension Is an Appropriate and Reasonable Condition.

If the Court determines that vacatur is not appropriate here, in granting voluntary remand the Court should consider requiring BLM to impose lease suspensions on all lease parcels encompassed by the remanded leasing decisions. BLM is authorized to issue lease suspensions under a narrow set of established criteria. Suspensions of both operations and production are authorized when a drilling moratorium is "in the interest of conserving natural resources." 43 C.F.R. § 3103.4-4; *see also Hoyl v. Babbitt*, 129 F.3d 1377, 1380 (10th Cir. 1997); *Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595, 600 (D.C. Cir. 1981). This can include instances where BLM (1) orders a suspension of activity to protect natural resources that may be

otherwise destroyed or rendered inaccessible, (2) initiates environmental studies that prevent the commencement of drilling, (3) needs more time to arrive at a decision on the lessee's application for permit to drill or other proposals, and (4) where environmental litigation related to the lease prevents approval of an operational proposal. BLM Manual 3160-10.06.2.21.B.1. The lease suspension would terminate when the original justification for the suspension are no longer present. 43 C.F.R. § 3165.1(c).

Here, BLM's proposal to voluntarily reinitiate environmental studies for twenty-four of the challenged lease sales falls squarely within the instances in which BLM has authority to suspend leases. And suspending the leases pending completion of the voluntary remand would bolster BLM's assertion that "under *Zinke*, it must adequately analyze potential effects of GHG emissions before making further decisions concerning these leases." Dkt. 41 at 7. Moreover, BLM recently exercised its authority to suspend leases pending completion of a voluntary remand to perform NEPA analyses as part of a settlement involving oil and gas leases in Arizona. *Ctr. for Biol. Diversity v. Suazo*, No. 3:19-cv-8204-PCT-MTL (D. Ariz.), Dkt. 36 (attached as Exhibit 1). Thus, lease suspension will ensure that BLM does not authorize any activity on the leases, and also prevents harm to lessees by relieving them of their obligations for rental and royalty payments during the term of the suspension. 43 C.F.R. § 3103.4-4(d).

## III. Enjoining Lease Development Pending a Legally-Compliant NEPA Analysis Is an Appropriate and Reasonable Condition.

Enjoining lease development on the remanded leases until BLM produces a compliant NEPA analysis supporting those decisions is also a reasonable option to (1) ensure that BLM does not treat remand as a paper exercise, and (2) preserves BLM's ability to change its mind about selling any of the remanded leases once the agency completes the remand analyses. Although the Court declined to vacate the Wyoming leases in *WildEarth Guardians v. Zinke*, it

did enjoin BLM from issuing any drilling permits for the Wyoming leases "[u]ntil BLM sufficiently explains its conclusions that the Wyoming Lease Sales did not significantly affect the environment." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 85. Because of BLM's irreversible commitment to drilling that occurs upon lease issuance, and "the possibility that BLM did not choose correctly the first time around," the Court enjoined BLM from further drilling authorizations. *Id.*

The Court declined to enjoin drilling as part of the voluntary remand of the Colorado and Utah leasing decisions in *WildEarth Guardians v. Zinke*. Memorandum Opinion on Motions in Case No. 1:16-cv-01724-RC, Dkt. 121 (July 19, 2019). The Court determined that, absent a decision on the merits of the remanded leasing decisions, "the Court must assume that BLM will take its obligations seriously on remand." *Id*. at 6. The cursory analyses in supplemental EA produced for the Wyoming leases, and the hasty turnaround for completion of the remanded analysis, belies the Court's assumption. As discussed throughout this response, BLM's actions with respect to the Wyoming remand analysis show that the agency is not entitled to the benefit of the doubt. An explicit prohibition on issuance of new drilling permits during the pendency of the remand is necessary to preserve the status quo.

## IV. The Court Should Retain Jurisdiction Over the Remanded Decisions.

Citizen Groups request the Court to retain jurisdiction over this matter throughout the remand process. "District courts have the authority to stay court proceedings and retain jurisdiction over cases even when an agency's request for a voluntary remand is granted." *XP Vehicles v. U.S. Dep't of Energy*, 156 F. Supp. 3d 185, 193 (D.D.C. 2016), *rev'd on other grounds*, *Limnia v. U.S. Dep't of Energy*, 857 F.3d 379 (D.C. Cir. 2017)). "While this is not always done, courts have exercised their discretion to do so when, for example, the court wishes

to ensure that a voluntary remand will not, in fact, prejudice the non-movant." *Id*. BLM's practice of rushing to complete new analyses on remand, including the practice of setting unreasonably short periods for the public to review the agency's new NEPA analyses, supports the Court retaining jurisdiction.

Respectfully submitted on this 14th day of September 2020.

*/s/ Daniel L. Timmons*
Daniel L. Timmons
Bar No. NM002
WildEarth Guardians
301 N. Guadalupe Street, Suite 201
Santa Fe, NM 87501
(505) 570-7014
dtimmons@wildearthguardians.org

*/s/ Shiloh S. Hernandez*
Shiloh S. Hernandez
MT Bar No. 9970
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 204-4861
hernandez@westernlaw.org
(admitted *Pro Hac Vice*)

*/s/ Samantha Ruscavage-Barz*
Samantha Ruscavage-Barz
Bar No. CO0053
301 N. Guadalupe Street, Suite 201
Santa Fe, NM 87501
(505) 410-4180
sruscavagebarz@wildearthguardians.org

*/s/ Kyle Tisdel*
Kyle Tisdel
CO Bar No. 42098
Western Environmental Law Center
208 Paseo del Pueblo Sur, Suite 602
Taos, NM 87571
(575) 613-8050
tisdel@westernlaw.org
(admitted *Pro Hac Vice*)