**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW MEXICO**

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| WILDEARTH GUARDIANS,<br><br>Plaintiff,<br><br>v.<br><br>DAVID BERNHARDT, in his official capacity as U.S. Secretary of the Interior, and UNITED STATES BUREAU OF LAND MANAGEMENT,<br><br>Federal Defendants,<br><br>and<br><br>AMERICAN PETROLEUM INSTITUTE, and WESTERN ENERGY ALLIANCE,<br><br>Applicant Defendant-Intervenors. | Case No. 1:19-cv-505-RB-SCY |

**FEDERAL DEFENDANTS' MOTION FOR CLARIFICATION**

Federal Defendants respectfully move this court to clarify one narrow point in the Court's August 18, 2020 Memorandum Opinion and Order, ECF No. 43. The Opinion states "the Court will strike the discretionary language [in IM 2018-034] and remind BLM that the law requires public participation in the process under NEPA, FLPMA, and their companion regulations." Mem. Op. & Order 46, ECF No. 43 ("Mem."). But in the Conclusion section of the Opinion, the Court instead states: "The Court GRANTS WildEarth's request to enjoin subsequent leases that do not allow for public participation, per IM 2018-034 . . . ." *Id.* at 47. Federal Defendants

seek an order clarifying that the Court did not intend to issue an injunction against leases not challenged in this case, and instead only intended to set aside certain language in IM 2018-034.

Federal Defendants have conferred with the other parties to this case regarding this motion. Plaintiffs take no position on the motion and reserve the right to file a response. Defendant-Intervenors American Petroleum Institute and Western Energy Alliance do not oppose this motion.

**STANDARD OF REVIEW**

"Motions for clarification are not formally recognized by the Federal Rules of Civil Procedure." *Overstreet v. SFTC, LLC*, No. 13-CV-0165 RB/LFG, 2013 WL 12415207, at *1 (D.N.M. Sept. 3, 2013). "[C]ourts addressing such motions often treat them as motions to alter or amend the judgment, apply the standards of Federal Rule of Civil Procedure 60(b), and clarify the mandate or judgment only when necessary to prevent injustice." *Id*. (citing *Home Life Ins. Co., N.Y. v. Equitable Equip. Co., Inc.*, 694 F.2d 402, 403 (5th Cir. 1982)). The Tenth Circuit has recognized that "a district court may also invoke Rule 60(a) to resolve an ambiguity in its original order to more clearly reflect its contemporaneous intent and ensure that the court's purpose is fully implemented." *Burton v. Johnson*, 975 F.2d 690, 694 (10th Cir. 1992). "[T]he interpretation must reflect the contemporaneous intent of the district court as evidenced by the record." *Id.* (citing *Blankenship v. Royalty Holding Co.*, 202 F.2d 77, 79–81 (10th Cir. 1953)).

**ARGUMENT**

In this case, Plaintiff challenged the leases issued pursuant to three Bureau of Land Management ("BLM") lease sales in BLM's Pecos District in New Mexico: the September 2017 lease sale, the December 2017 lease sale, and the September 2018 lease sale. Mem. 5-6. The

Court ruled against Plaintiff on all of their claims except for one. It held that an internal BLM guidance document, IM 2018-034, violated the Federal Land Policy and Management Act ("FLPMA") and certain regulations. The prior guidance document, IM 2010-117, had stated that "field offices *will* provide for public participation as [part] of the review of parcels identified for potential leasing." *Id.* at 44 (quoting IM 2010-117 at AR 12105[1]). IM 2018-034, however, stated that field offices "*may* provide for public participation." *Id.* at 45 (quoting IM 2018-034 at AR 12479). The Court held that the change in language from "*will* provide for public participation" in IM 2010-117 to "*may* provide for public participation" in IM 2018-034 was contrary to FLPMA's requirement that "the Secretary, by regulation, *shall* establish procedures . . . to give . . . the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands." *Id.* at 44-45 (quoting 43 U.S.C. § 1739(e)).

The Court said in the body of the order that it "will strike the discretionary language" in IM 2018-034 "and remind BLM that the law requires public participation in the process under NEPA, FLPMA, and their companion regulations." *Id.* at 46. It also "urge[d] BLM to alter this language in IM 2018-034 to make it consistent with the NEPA, FLPMA, and their regulations." *Id.* However, at the end of the order, in listing the relief granted and denied, the Court granted "[Plaintiff's] request to enjoin subsequent leases that do not allow for public participation." *Id.* at 47. Read literally, this constitutes an injunction against future leases not before the Court in

[1] This citation is to the administrative record which BLM lodged with the Court on a USB drive. ECF No. 34.

this case. Federal Defendants ask this Court to clarify that it did not intend to enjoin any leases not challenged here, but instead, consistent with the body of the order, intended to order BLM to require public participation for future lease sales by striking the discretionary language from IM 2018-034.

The Court does not have authority to issue an injunction against future agency action. Pursuant to the Administrative Procedure Act ("APA"), "an agency action is 'subject to judicial review' when it is either: (1) 'made reviewable by statute,' or (2) a 'final agency action for which there is no other adequate remedy in a court.'" *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1155 (10th Cir. 2004) (quoting 5 U.S.C. § 704). There is no statute that makes leases reviewable prior to issuance pursuant to a final decision by BLM. Rather, "[f]ederal courts have repeatedly considered the act of issuing a lease to be final agency action which may be challenged in court." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1159 (10th Cir. 2013). The fact that BLM may take action on other leases in the future, pursuant to future lease sales, is inapposite to this analysis: "An agency's intent to take action if requested does not constitute final agency action." *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1174 (10th Cir. 2000). Thus, where no lease has been issued, such as the "subsequent leases" referenced in the Court's opinion, there is no final agency action that can be reviewed by a court. And "absent a final action by the relevant agency, the case is not ripe for consideration by the Court." *Nat'l Wildlife Fed'n v. EPA*, 945 F. Supp. 2d 39, 47 (D.D.C. 2013) (citing *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012)); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) ("[W]e intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect."). This Court

therefore does not have jurisdiction to enjoin "subsequent leases" not before this Court and which have not yet been issued. *Cf. Dine Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031, 1087 (D.N.M. 2018), *rev'd in part on other grounds by*, 923 F.3d 831 (10th Cir. 2019) (holding court lacks jurisdiction over future drilling permits for which BLM has not yet issued a final decision).

For these reasons, Federal Defendants believe the Court did not intend to issue any injunction as to leases not challenged in this case and ask the Court to confirm Federal Defendants' interpretation of the Court's opinion as striking certain language in IM 2018-034, rather than enjoining any future leasing authorizations not before the Court. Federal Defendants believe this interpretation of the Court's Opinion is consistent with the Court's intent, as reflected elsewhere in the Court's Opinion.

**CONCLUSION**

For the reasons stated above, Federal Defendants request this Court enter an order clarifying that the Court's Memorandum Opinion and Order intended only to set aside the discretionary term "may" in IM 2018-034, and was not intended to enjoin future leasing decisions not currently before the Court.

Respectfully submitted this 16th day of September, 2020.

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*/s/ Caitlin Cipicchio*
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**CERTIFICATE OF SERVICE VIA CM/ECF**

I hereby certify that on September 16, 2020, I electronically filed the foregoing Federal Defendants' Motion for Clarification with the Clerk of the Court via the Court's CM/ECF system, which will send a notification of filing to all counsel of record.

*/s/ Caitlin Cipicchio*
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