

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

WILDEARTH GUARDIANS,

Plaintiff,

v.

DAVID BERNHARDT, *et al.*,

Defendants,

and

AMERICAN PETROLEUM INSTITUTE,
and WESTERN ENERGY ALLIANCE,

Defendant-Intervenors.

Case No. 1:19-cv-505-RB-SCY

**PLAINTIFF’S RESPONSE TO FEDERAL DEFENDANTS’
MOTION FOR CLARIFICATION**

On September 16, 2020, Federal Defendants’ moved the court “to clarify one narrow point” in the Court’s merits decision in this matter. Specifically, Federal Defendants seek clarity regarding the appropriate remedy for BLM’s unlawful inclusion of discretionary language regarding public participation in Instructional Memorandum (IM) 2018-034. Plaintiff WildEarth Guardians does not oppose Federal Defendants’ request to clarify the relief appropriate to remedy the error identified by the Court with respect to IM 2018-034; however, Plaintiffs also note that the Court’s conclusions and order with respect to IM 2018-034 do not appear to fully comport with the Court’s underlying analysis. Accordingly, Guardians requests that the Court also amend its order to grant in part Guardians’ request for declaratory relief with respect to IM 2018-034, consistent with the Court’s merits opinion.

As explained in the Court’s opinion, “the law requires public participation in the [oil and gas leasing] process under NEPA, FLPMA, and their companion regulations, [and a]ny desire to take the public out of the process must go through Congress as it pertains to NEPA and FLPMA or through notice-and comment rulemaking with regard to their implementing regulations.” Mem. at 46. Accordingly, the Court took issue with amended language in IM 2018-034 that purported to make such public participation discretionary. *Id.* at 44. Specifically, where the prior guidance document, IM 2010-117, required that “field offices *will* provide for public participation as part of the review of parcels identified for potential leasing,” IM 2018-034 amended that mandatory language to the discretionary “*may*.” Mem. at 44. *Compare also* AR at 012105, with AR at 012479. As Federal Defendants’ acknowledge, the Court held that this amended language in IM 2018-034 “violated the Federal Land Policy and Management Act (‘FLPMA’) and certain regulations.” ECF No. 44 at 3. *See also* Memo Op. & Order at 43, ECF No. 44 (“Mem.”) (explaining that “this change in IM 2018-034 violates several associated FLPMA and NEPA regulations” (citing 43 C.F.R. §§ 3120.3–2; 3120.4–2; 46.235; 46.305; 46.435.))

Guardians does not oppose the remedy suggested by Federal Defendants – that the Court should strike the unlawful discretionary language in IM 2018-034, thereby clarifying that public participation in oil and gas lease sales is not discretionary under FLPMA or NEPA. ECF No. 44, at 4. However, Guardians notes that the Court’s conclusions and order regarding IM 2018-034 appear to be inconsistent with its substantive holding. The Court “took issue” with BLM’s inclusion of the discretionary “*may*” in IM 2018-034, holding that such change violated FLPMA and “several associated FLPMA and NEPA regulations,” Mem. at 44-45. Yet in its conclusions and order, the Court inconsistently denied Guardians’ “request to declare IM 2018-034 unlawful

under FLPMA, NEPA, the APA, and their regulations.” ECF No. 47. In light of the Court’s substantive holding, the Court should clarify its conclusions and issue an amended order granting in part, and denying in part Guardians’ request to declare IM 2018-034 unlawful.

CONCLUSION

For the reasons set forth above, Guardians requests this Court to clarify its holding that BLM’s inclusion of discretionary language in IM 2018-034 regarding public participation violated FLPMA and “several associated FLPMA and NEPA regulations,” and to issue an amended order granting in part Guardians’ request for declaratory relief.

Respectfully submitted this 30th day of September, 2020.

/s/ Daniel L. Timmons

Daniel L. Timmons
WILDEARTH GUARDIANS
301 N. Guadalupe Street, Suite 201
Santa Fe, NM 87501
Tel: (505) 570-7014
dtimmons@wildearthguardians.org

/s/ Samantha Ruscavage-Barz

Samantha Ruscavage-Barz
WILDEARTH GUARDIANS
301 N. Guadalupe Street, Suite 201
Santa Fe, NM 87501
Tel: (505) 401-4180
sruscavagebarz@wildearthguardians.org

Attorneys for Plaintiff WildEarth Guardians

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on September 30, 2020, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR CLARIFICATION with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to other participants in this case.

/s/ Daniel L. Timmons
DANIEL L. TIMMONS
WILDEARTH GUARDIANS
Counsel for Plaintiff WildEarth Guardians