

No. 20-2146

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS,
Plaintiff/Appellant,

v.

DEBRA HAALAND,
in her official capacity as Secretary of the Interior, et al.,
Defendants/Appellees,

Appeal from the United States District Court for the District of New Mexico
No. 1:19-cv-00505-RB-SCY (Hon. Robert C. Brack)

OPPOSED JOINT MOTION TO ABATE CASE FOR MEDIATION

Appellants and Federal Appellees respectfully request that the Court abate this appeal to permit further mediation of a possible settlement. After an initial mediation conference on May 20, the parties were not unanimous in their desire to continue discussing possible settlement. Thus, after consultation with the mediation office, Appellants and Federal Appellees now move for an abatement to permit the parties to continue discussing a possible settlement that would avoid the need for further litigation of this appeal. The movants propose filing status reports

every 45 days during the pendency of the abatement for purposes of mediation. Intervenor Appellees Western Energy Alliance and American Petroleum Institute oppose this request, but Western Energy Alliance does not currently anticipate filing a response.

BACKGROUND

This case involves oil and gas leasing on public lands. Plaintiff challenges several Bureau of Land Management leasing decisions in New Mexico as violating the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA). Plaintiff also challenges a Bureau instruction memorandum addressing public participation in the leasing process—called the “2018 IM”—as violating NEPA, FLPMA, and the Administrative Procedure Act (APA). *See* Updating Oil and Gas Leasing Reform—Land Use Planning and Lease Parcel Reviews, Instruction Memorandum 2018-034 (Jan. 31, 2018) (attached as Exhibit A). After the district court granted summary judgment to the Bureau, Plaintiff appealed and filed its opening brief in January 2021. Federal Appellees subsequently sought and obtained three extensions of their briefing deadline: one unopposed extension grounded in counsel’s obligations in other cases and two opposed extensions grounded in the new Administration’s need for additional time to evaluate the federal policies and decisions at issue in this litigation. *See* Order (Jan. 26, 2021); Order (Feb. 25, 2021); Order (Apr. 2, 2021).

Officials in the new Administration used the additional time granted by the Court to review the policies and decisions at issue in this litigation and determined to pursue a resolution of this matter that does not involve further litigation of the appeal. With respect to the guidance portion of the case, the Bureau issued new guidance on April 30 that superseded the challenged 2018 IM issued by the previous Administration. *See* Oil and Gas Leasing – Land Use Planning and Lease Parcel Reviews, IM 2021-027 (Apr. 30, 2021) (attached as Exhibit B). In the Government’s view, the adoption of this “2021 IM” moots some of the issues in the appeal. With respect to the leasing challenges, the Bureau requested a mediation conference to explore settlement possibilities. 10th Cir. R. 33.1(G). The Bureau sought to discuss a possible settlement that would avoid requiring this Court to adjudicate the appeal.

The mediation office held a conference on May 20 and extended the briefing schedule to permit the parties to explore settlement. 10th Cir. R. 33.1(E), (F). Intervenor Appellees Western Energy Alliance and American Petroleum Institute have expressed reservations about further exploration of settlement. Appellants and Federal Appellees nonetheless believe that further discussions will be productive and seek to continue mediation. But given these objections, and after consulting with the mediation office, the movants now request that this Court hold the case in abatement to permit the parties to continue with mediation.

ARGUMENT

An abatement should be granted to permit the mediation office to continue facilitating settlement discussions. Courts have “broad discretion to stay proceedings.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). This authority is “incidental to the power inherent in every court to control the disposition of the causes on its docket.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); accord *United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003); *United States v. Hardage*, 58 F.3d 569, 574 (10th Cir. 1995). The Court may grant a stay (or here, an abatement) when it would serve “economy of time and effort for itself, for counsel, and for litigants.” *Landis*, 299 U.S. at 254; see also, e.g., *Doe v. Jones*, 762 F.3d 1174, 1178 (10th Cir. 2014). Although the mediation office has independent authority to manage the docket, 10th Cir. R. 33.1(F), this Court should issue an abatement in light of the Intervenor Appellees’ reservations about continued mediation, for three reasons.

First, further mediation is appropriate in this case. Plaintiff challenged actions taken by the Bureau; although the Government prevailed in district court, the Bureau is now interested in pursuing a possible settlement that would resolve Plaintiff’s claims without the need for further litigation. With the change in Administrations, the Bureau already has issued a 2021 IM that supersedes the challenged 2018 IM. The Bureau now seeks to determine whether the entirety of

the case can be resolved without requiring the Court to adjudicate the appeal. Given the complexity of the issues, the significance of leasing decisions at issue, and the interests of the parties, mediation will help the parties to identify any common ground and provide a venue for the parties to share their perspectives with the Government. At the very least, mediation will help to narrow any disagreements between the parties. And the Federal Rules expressly provide that the Court may direct counsel “to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.” Fed. R. App. P. 33.

Second, an abatement is necessary to facilitate further mediation. In the Government’s view, continuing with briefing this appeal could require the Bureau to unnecessarily take positions on issues that could be addressed through mediation. During the normal course of transition between Administrations, the Government will review policies, issues, and litigation and may seek to resolve pending disputes without further litigation. Requiring the parties to simultaneously brief the appeal while mediating a possible resolution could prejudice settlement discussions by requiring the Bureau to take positions on issues in their briefing. Moreover, continuing to litigate the appeal could require the Court to expend judicial resources on a case that could be resolved through the mediation office. The Court may manage its docket in the interest of judicial economy, *Landis*, 299

U.S. at 254, and the Federal Rules expressly provide that the Court may “enter an order controlling the course of the proceedings” for purposes of mediation conferences. Fed. R. App. P. 33

Third, an abatement accompanied by regular status reports will not prejudice the other parties. Intervenor Appellees have expressed reservations about continuing with settlement discussions rather than litigating the appeal, but the judgment below is favorable to the Appellees. The challenged leasing decisions remain in effect, and the Bureau continues to process applications for development of the leases. Concerns about the pendency of settlement discussions do not weigh heavily against an abatement of briefing, as settlement discussions could proceed even if the parties are required to brief the case—meaning those concerns would exist regardless. But movants nonetheless propose filing regular status reports with the Court every 45 days to inform the Court of the status of the mediation and enable the Court to determine whether to lift the abatement and resume briefing. The movants’ joint objective will be to conclude any settlement discussions within 90 days.

In sum, the parties have engaged in only one mediation conference, and the movants seek to engage in further mediation to continue exploring settlement possibilities. The Federal Appellees currently anticipate completing a proposal for the parties’ discussion by approximately June 24. An abatement of briefing is

necessary to permit the mediation office to continue facilitating those discussions, and the parties can file regular status reports to permit the Court to understand any objections and supervise this process.

CONCLUSION

For these reasons, Appellants and Federal Appellees respectfully request that the Court abate the case to permit the mediation office to continue facilitating settlement discussions and order status reports every 45 days to aid the Court in determining whether and when to lift the abatement.

Respectfully submitted,

s/ Daniel Halainen

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June 11, 2021
DJ 90-1-4-15767

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and
- (3) the digital submissions have been scanned for viruses with the most re-cent version of a commercial virus scanning program, Windows Defender Antivirus Version 1.341.464.0 (updated June 10, 2021), and according to the program are free of viruses.

s/ Daniel Halainen

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Counsel for Federal Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to counsel for other parties in this case.

s/ Daniel Halainen
DANIEL HALAINEN

Counsel for Federal Appellees