No. 20-2146

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS,

Plaintiff-Appellant,

v.

DEBRA HAALAND, in her official capacity as U.S. Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT,

Defendants-Appellees,

and

WESTERN ENERGY ALLIANCE; AMERICAN PETROLEUM INSTITUTE,

Defendant Intervenors-Appellees.

On Appeal from the United States District Court for the District of New Mexico,
Civil Action No. 1:19-cv-00505-RB-SCY
Honorable Robert C. Brack, District Judge

AMERICAN PETROLEUM INSTITUTE'S RESPONSE TO JOINT MOTION TO ABATE CASE FOR MEDIATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1 Intervenor-Defendant American Petroleum Institute discloses that it is a not for profit corporation, that it has no parent corporation, and that no corporation holds any stock in the American Petroleum Institute.

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Defendant Intervenor-Appellee
American Petroleum Institute

Dated: June 14, 2021

Defendant-Intervenor Appellee American Petroleum Institute ("API") hereby responds to Appellant's and Federal Appellees' Joint Motion to Abate Case for Mediation ("Joint Motion"). The oil and gas lease sales at issue in this case took place in 2017 and 2018, and were upheld by the District Court in a thorough decision on August 18, 2020. To vindicate important private and national interests, this Court should decline to grant Appellant's and Federal Appellees' open-ended abatement request, and allow this already long-delayed appeal to progress on the merits. At the very least, the Court should set a date certain for conclusion of the proposed mediation to alleviate the cloud this litigation continues to cast over lessees' valuable property and contractual rights.

PROCEDURAL BACKGROUND

Appellant claims that the Bureau of Land Management's ("BLM") decision to conduct three oil and gas lease sales in 2017 and 2018 based upon Environmental Assessments ("EA") and Findings of No Significant Impact ("FONSI") should be vacated until Environmental Impact Statements ("EIS") are completed. Appellant further contends that BLM violated NEPA, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*., by issuing an internal BLM policy document revising agency guidance for its personnel in conducting the lease sale process. To remedy these alleged violations, Appellant

asks the Court—as it asked the District Court—to vacate the agency decisions authorizing the challenged lease sales and issued leases. *See* Appellant's Opening Br. at 58.

For its part, the District Court rejected Appellant's request for vacatur. *WildEarth Guardians v. Bernhardt*, 501 F. Supp. 3d 1192, 1200 (D.N.M. 2020).[1] The District Court determined that BLM's environmental reviews of the challenged lease sales complied with NEPA by, among other things, adequately considering cumulative environmental impacts and taking the requisite hard look at the potential air quality, water quantity, and water quality impacts of the Federal Appellees' challenged leasing decisions. *See id*. at 1207–11, 1213–16. Accordingly, the District Court concluded that BLM properly determined that no EIS was required under NEPA. *See id*. at 1216–18.[2]

[1] The District Court initially issued its decision on August 18, 2020. The Court subsequently issued an amended opinion on November 19, 2020 to clarify the scope of its remedial order with respect to the prospective effect of BLM's internal Instruction Memorandum 2018-034.

[2] Although the District Court determined that BLM's Instruction Memorandum 2018-034 was not final agency action independently challengeable by Appellant, *see id*. at 1223–25, it concluded that, in the event that BLM abided by the language of Instruction Memorandum 2018-034 with respect to future oil and gas lease sales, it could violate the statutory requirements of NEPA and the FLPMA, *see id*. at 1224. The Court instead "urge[d] BLM to alter" certain language in Instruction Memorandum 2018-034 to avoid conflict with the statutes. *Id*. at 1225. As indicated in the Joint Motion at 2, BLM issued new guidance on April 30, 2021 that superseded Instruction Memorandum 2018-034.

Appellant appealed the District Court's decision on October 16, 2020, and filed its opening brief on January 4, 2021. Thereafter, Federal Appellees filed — on January 26, February 25, and April 1—three motions for extension of the deadline to file responsive briefs. In granting the motions, the Court indicated that further extensions would not be granted "absent extraordinary circumstances." *See* Order at 1–2 (April 2, 2021). The Court has since granted two additional extensions—on April 30 and June 3—by its own motion. Appellant and Federal Appellees have followed these extensions with the present Joint Motion.

ARGUMENT

Despite the District Court's conclusion that BLM's decisional process for the three challenged lease sales fully complied with NEPA and the fact that the recent adoption of a new Instructional Memorandum moots the only issue for which the District Court "urge[d]" some governmental relief, *see supra* n.2, the Federal Appellees now join with Appellant to request abatement of this appeal to "facilitat[e] settlement discussions." Joint Motion at 7. The Joint Motion proposes no end date for this abatement, merely the filing of "status reports every 45 days to aid the Court in determining whether and when to lift the abatement." *Id.*[3]

[3] Given the strict confidentiality of mediation statements, *see* 10th Cir. R. 33(D), it is not clear what, as a practical matter, could end the abatement other than a statement by Appellant and the Federal Appellees that a settlement cannot be reached.

In support of this open-ended abatement, the Joint Motion suggests that the request "will not prejudice the other parties" because "the judgment below is favorable to the Appellees," "[t]he challenged leasing decisions remain in effect, and the [BLM] continues to process applications for development of the leases." *Id*. at 6. Appellant's and Federal Appellees' unsupported assertion, however, ignores the legal and practical realities of oil and gas rights and development.

Whether or not "settlement discussions could proceed even if the parties are required to brief the case," *id*., delaying the briefing prolongs the litigation, and thus prolongs the legal uncertainty clouding oil and gas leaseholders' significant interests in leases obtained nearly 3-4 years ago. *See*, *e.g.*, 30 U.S.C. § 226(b)(1)(A); 43 C.F.R. § 3120.1-2(b); *id*. § 3120.5-3 (describing lease bidding process). Those leases constitute valuable contractual and property interests. *See*, *e.g.*, *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000); *Union Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). Indeed, lessees submitted more than $1.1 billion in bids to the United States in exchange for their lease interests.[4]

[4] *See* Department of the Interior, BLM, New Mexico Oil and Gas Lease Sales, *available at* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/new-mexico (last visited June 14, 2021). This Court may take judicial notice of government records and materials available on government websites. *See*, *e.g.*, *Banks v. Warner*, No. 94-56732, 1995 WL 465773, at *1 (9th Cir. Aug. 7, 1995) ("It is entirely proper for a court to take (continued…)

Each issued lease carries "a primary term of 10 years." 30 U.S.C. § 226(e). The lease only continues after that term if the lease is producing oil or gas in paying quantities or "actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time[.]" *Id*. Before any of this necessary drilling activity can begin, however, the lessee must undertake lengthy preparatory operations to "submit . . . for approval an Application for Permit to Drill [("APD")] for each well." 43 C.F.R. § 3162.3-1(c). *See also id*. ("No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized [BLM] officer's approval of the permit."); 30 U.S.C. § 226(g). And NEPA requirements must be satisfied before BLM can issue a permit, *id*. § 226(p)(2)(A), with the NEPA review "used in determining whether or not an [EIS] is required and in determining any appropriate . . . conditions of approval of the submitted plan." 43 C.F.R. § 3162.5-1(a). Issuance of the lease therefore starts an immediate ticking clock in which the lessee must invest significant sums in the years-longs process of submitting an APD, subjecting that

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judicial notice of records and reports of administrative agencies."); *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015) (finding "the accuracy of these public records contained on the Mississippi . . . and the Virginia State . . . websites cannot reasonably be questioned"); Fed. R. Evid. 201(b) (permitting a court to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned"); Fed. R. Evid. 201(c) (A reviewing court "must take judicial notice if a party requests it and the court is supplied with the necessary information.").

APD to NEPA review, and, if approved, undertaking the drilling process toward oil and gas production. The penalty for falling behind on this schedule is loss of the lease, and the investments that went into obtaining the lease and preparing for development.

In other words, lessees are under an imperative to invest in costly development on their valuable property and contractual interests. Having prevailed against Appellant's legal challenges in the District Court, those statutorily-incentivized investments should not be subjected to further prolonged uncertainty by ever-pending litigation challenging the issuance of the leases.

In addition to these private interests, the Joint Motion's proposed further delay impedes well-established national policy under the Mineral Leasing Act "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (quotation omitted). *See also*, *e.g.*, 30 U.S.C. § 226(b)(1)(A) (directing that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly"); *Conway v. Watt*, 717 F.2d 512, 514 (10th Cir. 1983) (congressional purpose behind the MLA "was the development of western portions of the country").

By extending the cloud of legal uncertainty over the leases issued pursuant to the challenged leasing decisions, the Joint Motion's abatement request

undermines Congress's purpose "[t]o promote the mining of . . . oil . . . on the public domain." Act of Feb. 25, 1920, ch. 85, § 32, 41 Stat. 437. *Cf. United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (2001) (explaining that where Congress has "decided the order of priorities in a given area" a court must follow the "balance that Congress has struck") (quotation omitted).

Taken together, the Joint Motion's request to delay final resolution of claims already thoroughly addressed by the District Court would undermine both the national policies established by Congress and the resulting lessees' necessary investments in, and use of, their valuable interests in leases issued in 2017 and 2018.

CONCLUSION

For the foregoing reasons, this Court should deny the Joint Motion's request for abatement and instead allow briefing in this case to move forward. In the alternative, this Court should establish a date certain for mediation to conclude.

Respectfully submitted,

June 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2021, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, and served via the Court's CM/ECF system upon all counsel of record for the parties in this case.

June 14, 2021

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