UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS et al.,

Plaintiffs,

v.

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

Federal Defendants,

and

AMERICAN PETROLEUM INSTITUTE, STATE OF WYOMING, and WESTERN ENERGY ALLIANCE,

Defendant-Intervenors.

Case No. 1:20-cv-056-RC
The Honorable Rudolph Contreras

FEDERAL DEFENDANTS' SECOND MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR AND MEMORANDUM IN SUPPORT

MOTION

The United States Bureau of Land Management ("BLM"), an agency of the United States Department of the Interior ("Interior"), and the federal officials named herein as defendants (collectively, "Federal Defendants"), hereby move the Court for a voluntary remand without vacatur of the environmental assessments ("EAs") and Findings of No Significant Impact ("FONSIs") for the three remaining oil and gas leasing decisions challenged in this case, so that BLM may conduct further analysis under the National Environmental Policy Act ("NEPA"). Specifically, Federal Defendants request that the Court remand the EAs and FONSIs for the December 5, 2018 New Mexico leasing decision and the December 11, 2018 and March 27, 2019 Montana leasing decisions.

The Court previously granted a similar motion to remand the NEPA documentation for twenty-four challenged leasing decisions in this case following the Court's decision in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). *See* Order Granting Fed. Defs.' Mot. for Voluntary Remand Without Vacatur, ECF No. 46. At that time, only Plaintiffs opposed the motion for remand, and only insofar as BLM requested remand without vacatur. *See* ECF No. 41, at 2 n.1.

Since the Court's subsequent decision in *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020), Federal Defendants have determined that an additional remand is appropriate. Undersigned counsel has conferred via email with counsel for the other parties and advises (1) Intervenor-Defendant American Petroleum Institute will oppose this motion, (2) Intervenor-Defendant State of Wyoming takes no position on the motion, and (3) Intervenor-Defendant Western Energy Alliance and Plaintiffs will need to review the motion before taking a position.

MEMORANDUM

1. Background

This case involves a challenge to twenty-seven decisions under the Mineral Leasing Act of 1920, which collectively authorized the sale of oil and gas leases on more than 2,000 parcels of public land in the states of Colorado, Montana, Utah, Wyoming and New Mexico.[1] Those decisions were issued from September 2016 to March 2019, when the Court issued its decision in *Zinke*. Ten months later, Plaintiffs brought this action alleging that the twenty-seven challenged decisions violated NEPA, based primarily on the Court's *Zinke* decision in Case No. 16-cv-1724. *See* Compl. ¶¶ 9–10, 33, 55, 102–103, 105, 115, 141, 149, ECF No. 1.

In *Zinke*, the Court concluded that the NEPA analyses for the challenged Wyoming lease sales were insufficient because they did not (1) quantify and forecast direct, drilling-related emissions of greenhouse gases ("GHGs"); (2) adequately consider the indirect GHG emissions from downstream use of oil and gas; and (3) compare those GHG emissions to regional and national GHG emissions forecasts. *Zinke*, 368 F. Supp. 3d at 83. The Court remanded the Wyoming EAs and FONSIs and directed that BLM supplement those documents to address the noted deficiencies in the environmental analyses. *Id*. at 84. The Court did not vacate the decisions, nor did it vacate the associated leases, but it enjoined BLM from approving applications for permits to drill ("APDs") for those leases until the agency supplemented the EAs and FONSIs. *Id*. at 85.

In Case No. 16-cv-1724, Federal Defendants then moved for a voluntary remand without vacatur of the NEPA documents for the Utah and Colorado lease sales in Case No. 16-cv-1724.

[1] While the Complaint challenges only twenty-three lease sales, Plaintiffs have confirmed that they are challenging twenty-seven leasing decisions, as some of the sales consisted of multiple decisions.

The Court granted that motion, remanding the NEPA documentation for the Utah and Colorado leasing decisions. Mem. Op., at 5–6, *WildEarth Guardians v. Haaland*, No. 16-1724 (RC), ECF No. 121 (July 19, 2019). In granting that motion, the Court rejected Plaintiffs' argument that remand should be conditioned on an injunction preventing BLM from approving APDs. *See id.*

Following the Court's *Zinke* decision, Interior reassessed the adequacy of the NEPA analyses supporting the leasing decisions challenged in this case. Based on that assessment, BLM concluded that voluntary remand for further analysis under NEPA was appropriate for twenty-four of the twenty-seven challenged lease sale decisions. Federal Defendants thus requested that the Court remand without vacatur the NEPA documentation for those twenty-four decisions; Plaintiffs opposed the request insofar as the remand would not require vacatur. ECF Nos. 41 & 42. On October 23, 2020, the Court granted Federal Defendants' request, remanding 24 leasing decisions without vacatur to BLM for further NEPA analysis. Order Granting Fed. Defs.' Mot. for Voluntary Remand Without Vacatur, ECF No. 46.

On November 13, 2020, the Court in Case No. 16-cv-1724 issued its *Bernhardt* decision rejecting the supplemental NEPA analysis that BLM had prepared following the Court's *Zinke* decision. The Court concluded that BLM's supplemental NEPA analysis (1) failed to adequately analyze GHG emissions from other lease sales in the region and the country, *id.* at 247–51; (2) failed to take a hard look at GHG emissions by considering only yearly rather than total emissions, *id.* at 251–53; (3) used inconsistent per-acre GHG rates, *id.* at 253–54; and (4) insufficiently considered carbon budgeting, *id.* at 254–56. Again, the Court did not vacate the leasing decisions, but it enjoined BLM from approving APDs for those leases until the agency substantiated its supplemental NEPA analysis on remand. *Id.* at 259. The Court further "urge[d] BLM to conduct a robust [remand] analysis, using conservative estimates based on the best data,

analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *Id.* at 259 n.16.

Since the Court's *Bernhardt* decision, Interior has reassessed the adequacy of the NEPA analyses supporting the three remaining leasing decisions challenged in this case. Based on that assessment, BLM now concludes that voluntary remand for further analysis under NEPA is appropriate for the three remaining lease sale decisions. For the reasons set out herein, Federal Defendants ask that the EAs and FONSIs for the December 5, 2018 New Mexico leasing decision and the December 11, 2018 and March 27, 2019 Montana leasing decisions be remanded to the agency without vacatur for further NEPA analysis.

2. Discussion

Courts "commonly grant motions to remand an administrative record to allow an agency to consider new evidence that became available after the agency's original decision." *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 523–24 & n.3 (D.C. Cir. 1993)). This approach serves dual purposes: permitting agencies to exercise their "inherent power to reconsider their own decisions," *id.* (quoting *Prieto v. United States*, 655 F.Supp. 1187, 1191 (D.D.C.1987)); and conserving judicial resources by "allow[ing] agencies to cure their own mistakes," *id.* (quoting *Ethyl*, 989 F.2d at 524). Because remands further these purposes, even without a confession of error, courts in this Circuit "generally grant an agency's motion to remand so long as 'the agency intends to take further action with respect to the original agency decision on review.'" *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Limnia, Inc. v. Department of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017)).

Remand is especially "appropriate if the agency's motion is made in response to 'intervening events outside of the agency's control, for example, a new legal decision or the

passage of new legislation.'" *Id.* at 436 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)). Such remands "comport[] with the general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review." *Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 899 F.2d 1244, 1249–50 (D.C. Cir. 1990). Thus, "where an intervening event may affect the validity of the agency action at issue, a remand is generally required." *Sierra Club*, 560 F. Supp. 2d at 23 ("noting that it can be 'an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action'" (quoting *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004))).

In the instant case, Federal Defendants have determined that a remand is appropriate so they may further analyze the impacts of the remaining challenged leasing decisions. This determination is informed by the Court's recent *Bernhardt* decision, *viz*., the "intervening event" that draws into question "the validity of [BLM's] actions." *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). In the *Bernhardt* ruling, the Court found that BLM failed to take a sufficiently hard look at the GHG emissions-related climate change impacts of oil and gas leasing, based on the supplemental NEPA analyses supporting the leasing decisions. 502 F. Supp. 3d at 259. The analyses supporting the three remaining challenged leasing decisions are similar in some respects to those that the Court considered in *Bernhardt*. Remand to allow the agency to address these matters would serve the public interest because an agency's "reconsideration of the potential environmental impacts of a project furthers the purpose of NEPA." *Pellissippi Parkway*, 375 F.3d at 418.

Further, remand without vacatur is appropriate because there is "at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Standing Rock*

Sioux Tribe v. U.S. Army Corps of Eng'rs, 282 F. Supp. 3d 91, 97 (additional citations omitted), *subsequent determination by* 280 F. Supp. 3d 187 (D.D.C. 2017). As the Court recognized in *Bernhardt*, "nothing suggests that the agency would not be able to substantiate its prior conclusions." 502 F. Supp. 3d at 259. Because Plaintiffs "challenge only one aspect of [many] lease sales that otherwise complied with NEPA," *Zinke*, 368 F. Supp. 3d at 84, the "probability that [BLM] will be able to justify retaining [its prior leasing decisions] is sufficiently high that vacatur . . . is not appropriate." *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (additional citations omitted)). The same consideration should govern here.

The Court should not vacate the lease sales for two additional reasons. *First*, the Court lacks authority to "order vacatur . . . without an independent determination that [the challenged leasing decisions were] not in accordance with the law." *Carpenters Indus.*, 734 F. Supp. 2d at 135. Thus, the Court should "preserve scarce judicial resources by allowing agencies 'to cure their own mistakes,'" *id.* at 132, rather than undertake an evaluation on the merits of decisions that the agency wishes to revisit. *Second*, BLM recognizes that, under *Zinke* and *Bernhardt*, it must adequately assess potential effects of GHG emissions before making further decisions concerning these leases. Should BLM make decisions that Plaintiffs or Intervenors consider unlawful, those parties may challenge those decisions and, if appropriate, may seek to block their implementation by pursuing injunctive relief. But there is presently no need for the Court to vacate the challenged decisions without the customary showing that Plaintiffs are entitled to such relief. *See* Mem. Op., at 5–6, *WildEarth Guardians v. Bernhardt*, No. 16-1724 (RC), ECF No. 121 (July 19, 2019) (declining to enjoin approval of APDs on remand because "Plaintiffs have not filed a motion for preliminary injunction . . . and articulated why 'irreparable injury is likely

in the absence of an injunction'" (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008))).

For all these reasons, the Court should exercise its inherent authority to manage its docket and its equitable power to grant remand, without any determination on the merits as to the three lease sale decisions described above. This will avoid judicial resolution of issues that may well be resolved upon remand and further study.

Respectfully submitted this 30th day of July, 2021.

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