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

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, et al., Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, et al., Federal Defendants.	Case No. 1:20-cv-00673-KG-JHR

FEDERAL DEFENDANTS' MOTION
FOR VOLUNTARY REMAND WITHOUT VACATUR

Federal Defendants respectfully request that the Court remand, without vacatur, the Bureau of Land Management's ("BLM") decisions with respect to the 42 leases issued as a result of the December 2018, November 2019, and February 2020 lease sales administered by BLM's Rio Puerco and Farmington Field Offices. Federal Defendants submit this motion in lieu of filing a response to Plaintiffs' Opening Merits Brief, ECF No. 46. Remand is appropriate here because BLM has identified substantial concerns with the National Environmental Policy Act ("NEPA") analysis underlying the leases and has initiated a process to review that analysis and the challenged decisions.

Per Local Rule 7.1(a), Federal Defendants have conferred with the parties regarding this motion. Plaintiffs oppose a motion for voluntary remand without vacatur. Intervenor-Defendant EOG Resources, Inc. is evaluating BLM's proposed remand and will respond after reviewing the motion and the terms of the remand.

BACKGROUND

This case involves a challenge to BLM's issuance of leases as a result of three BLM oil and gas lease sales in New Mexico: the December 2018 Rio Puerco Field Office lease sale, the November 2019 Rio Puerco Field Office lease sale, and the February 2020 Rio Puerco and Farmington Field Offices lease sale. *See* Supp. Pet. for Review of Agency Action ("Supp. Pet.") ¶ 1, ECF No. 33-1. Collectively, these three lease sales authorized the sale of oil and gas leases on 42 parcels. *Id.*

For each lease sale, pursuant to NEPA, BLM prepared an environmental assessment ("EA") to analyze the potential environmental impacts from the leases. *See* AR_Dec2018_10679 (EA for Dec. 2018 lease sale); AR_Dec2018_10807 (EA Addendum for Dec. 2018 lease sale); AR_Nov2019_72305 (EA for Nov. 2019 lease sale); AR_Nov2019_72432 (supplemental analysis for EA for Nov. 2019 lease sale); AR_Feb2020_137055 (Farmington Field Office EA for Feb. 2020 lease sale); AR_Feb2020_137167 (supplemental analysis for Farmington Field Office EA for Feb. 2020 lease sale); AR_Feb2020_137206 (Rio Puerco Field Office EA for Feb. 2020 lease sale); AR_Feb2020_137345 (supplemental analysis for Rio Puerco Field Office EA for Feb. 2020 lease sale).[1] Based on the EAs, BLM issued a Finding of No Significant Impact ("FONSI") for each lease sale. *See* AR_Dec2018_12 (FONSI for Dec. 2018 lease sale); AR_Nov2019_72422 (FONSI for Nov. 2019 lease sale); AR_Feb2020_137159 (Farmington Field Office FONSI for Feb. 2020 lease sale); AR_Feb2020_137335 (Rio Puerco Field Office

[1] These citations are to the administrative record lodged with the Court by Federal Defendants on June 28, 2021 on a flash drive. *See* ECF No. 39. For readability, Federal Defendants omit the preceding zeros in citations to the administrative record, such that the citation "AR_Feb2020_0000137345," for example, becomes "AR_Feb2020_137345."

FONSI for Feb. 2020 lease sale). BLM ultimately issued decision records for each lease sale authorizing the sale of the 42 leases to the successful bidders. *See* AR_Dec2018_2 (decision record for Dec. 2018 lease sale); AR_Nov2019_72301 (decision record for Nov. 2019 lease sale); AR_Feb2020_137052 (Farmington Field Office decision record for Feb. 2020 lease sale); AR_Feb2020_137202 (Rio Puerco Field Office decision record for Feb. 2020 lease sale).

Plaintiffs filed their original Petition for Review of Agency Action on July 9, 2020 challenging BLM's sale of 30 leases pursuant to the December 2018 lease sale. ECF No. 1. On January 19, 2021, Plaintiffs filed a Supplemental Petition, adding challenges to the November 2019 and February 2020 lease sales. ECF No. 33-1. Plaintiffs allege that BLM violated NEPA and the Federal Land Policy and Management Act ("FLPMA") by failing to take a hard look at the impacts of the leases on greenhouse gas emissions, climate change, health, and environmental justice; failing to allow for sufficient public participation; and failing to prepare an environmental impact statement. *Id.* ¶¶ 181-209. After two extensions to allow Federal Defendants and Plaintiffs to discuss settlement, Plaintiffs filed their Opening Merits Brief on November 23, 2021. ECF No. 46.

On December 21, 2021, BLM published a notice of intent to review the challenged leasing decisions on its website.[2] *See* Decl. of Melanie Barnes ¶ 6, attached as Exhibit A ("Barnes Decl."). As explained in the attached Declaration of Melanie Barnes, Acting State Director of BLM's New Mexico State Office, BLM has identified substantial concerns with the NEPA analysis underlying the challenged leasing decisions, including the analysis of the

[2] The notice is available here: https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing.

potential impact of the leases on air quality, greenhouse gas emissions, and environmental justice. *Id.* ¶ 4. To ensure compliance with NEPA and new applicable policies, BLM intends to prepare a Supplemental Environmental Assessment ("Supplemental EA") for the lease sale decisions. *Id.* ¶¶ 5, 7. BLM is aiming to complete a draft Supplemental EA by April 15, 2022 and has committed to making the draft Supplemental EA available for a 30-day public comment period. *Id.* ¶ 7. Upon completion of the final Supplemental EA, BLM will decide whether to issue decisions affirming BLM's original decisions for the leases, issue new decisions for those leases, or conduct additional NEPA analysis. *Id.* ¶ 8.

ARGUMENT

Because BLM has identified substantial concerns with the NEPA analysis underlying the challenged decisions and embarked on a process to address those concerns, the Court should remand the decisions to the agency to allow BLM to reconsider them via the administrative process. The Court should not vacate the leasing decisions in the interim period because vacatur requires a decision on the merits, whereas this motion seeks remand in lieu of a merits decision to allow the agency to address its concerns in the first instance. Vacatur would also be unnecessarily disruptive to the lessees who hold the leases.

I. The Court Should Remand BLM's Challenged Leasing Decisions to the Agency.

Remand is appropriate here because BLM has identified substantial concerns with the challenged leasing decisions and has committed to reconsidering those decisions through its own administrative process.

"[A]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v.*

Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). A remand is "generally required" if "intervening events outside of the agency's control" "affect the validity of the agency action." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). But "even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position." *Id*. at 1029; *see also Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *2 (D.N.M. Sept. 27, 2021) (relying on *SKF USA* for same). Courts "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. Env't Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (citation omitted); *see also Coal. of Arizona/New Mexico Cntys. for Stable Econ. Growth v. Salazar*, No. 07-CV-00876 JEC/WPL, 2009 WL 8691098, at *3 (D.N.M. May 4, 2009) (noting that "federal courts 'commonly' grant agency motions for voluntary remand" (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993))).

An agency need not confess error to seek and receive a voluntary remand. *See, e.g., SKF USA*, 254 F.3d at 1029; *Ethyl Corp.*, 989 F.2d at 524; *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004). Rather, remand is appropriate if an agency has identified "a substantial and legitimate" concern regarding the challenged decision. *See SKF USA*, 254 F.3d at 1029; *Navajo Nation*, 2021 WL 4430466, at *2; *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1239 (D. Colo. 2011); *TransWest Express LLC v. Vilsack*, No. 19-CV-3603-WJM-STV, 2021 WL 1056513, at *3 (D. Colo. Mar. 19, 2021). Remanding where an agency has identified such a concern allows agencies "to cure their own

mistakes" consistent with their inherent authority to reconsider, and conserves judicial resources. *Ethyl Corp.*, 989 F.2d at 524.

BLM satisfies these requirements here. First, BLM has identified "substantial and legitimate concerns" with its decisions authorizing the leasing of 42 parcels pursuant to the December 2018, November 2019, and February 2020 lease sales. As explained in the attached declaration and on the notice on BLM's website, BLM has identified substantial concerns regarding the NEPA analysis for the leases, specifically the analysis of the potential impacts, including the cumulative impacts, of the leases on air quality, greenhouse gas emissions, and environmental justice. Barnes Decl. ¶ 4. In addition to NEPA, BLM is concerned about ensuring compliance with other applicable policies, such as Executive Order 13990, which directs agencies to "immediately commence work to confront the climate crisis," 86 Fed. Reg. 7,037, 7,037 (Jan. 25, 2021); Secretary's Order 3399, which "prioritizes action on climate change"[3]; and the 2020 BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends from Coal, Oil, and Gas Exploration and Development on Federal Mineral Estate.[4] Barnes Decl. ¶ 5. These concerns substantially overlap with the issues raised by Plaintiffs in their claims challenging the lease sale decisions. *See* Supp. Pet. ¶¶ 102-38, 181-86, ECF No. 33-1 (challenging BLM's consideration of greenhouse gases and climate change); *id.* ¶¶ 173-75, 194-97 (challenging BLM's consideration of environmental justice).

[3] Secretary's Order 3399 is available here: https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf.

[4] The 2020 BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends is available here: https://www.blm.gov/content/ghg/.

Second, BLM has committed to a specific administrative process for addressing its concerns. *See Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (An agency does not need to "confess error or impropriety in order to obtain a voluntary remand" so long as it has "profess[ed] [an] intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge."). BLM has already publicly announced that it will "review the adequacy of NEPA analyses" for the challenged lease sale decisions,[5] and has committed to preparing a Supplemental EA and making that Supplemental EA available for public comment. Barnes Decl. ¶¶ 5-7. Once it finalizes the Supplemental EA, BLM will decide whether to issue decisions affirming its original authorization of the leases, issue new decisions, or conduct additional NEPA analysis. *Id.* ¶ 8.

Remand here is also in the interest of judicial economy and consistent with allowing an agency to reconsider its own decision in the first instance. Allowing BLM to review its decisions and address its serious concerns with the lease sales through the administrative process will preserve this Court's and the parties' resources. *See Util. Solid Waste*, 901 F.3d at 436; *see also B.J. Alan Co. v. Interstate Com. Comm'n*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) ("[A]dministrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts." (quoting *Pennsylvania v. Interstate Com. Comm'n*, 590 F.2d 1187, 1194 (D.C. Cir. 1978))). In contrast, continuing to litigate the very same issues that BLM is currently reconsidering would be inefficient and a waste of limited judicial resources. *See TransWest Express*, 2021 WL 1056513, at *5. Continuing to litigate this case would also interfere with BLM's ongoing reconsideration process

[5] *See* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing.

by forcing the agency to structure its administrative process around pending litigation, rather than the agency's priorities and expertise. *See Am Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013) (noting that because agency did "not wish to defend" the action, "forcing it to litigate the merits would needlessly waste not only the agency's resources but also time that could instead be spent correcting the rule's deficiencies"); *TransWest Express*, 2021 WL 1056513, at *3 (noting courts should generally grant a voluntary remand lest "judicial review is turned into a game in which an agency is 'punished' for procedural omissions by being forced to defend them well after the agency has decided to reconsider" (quoting *Citizens Against Pellissippi Parkway*, 375 F.3d at 416)).

Finally, voluntary remand would serve the public interest because, as the Sixth Circuit has explained, an agency's "reconsideration of the potential environmental impacts of a project furthers the purpose of NEPA." *Citizens for Pellissippi Parkway*, 375 F.3d at 418. Here, additional analysis and public input would advance the "twin aims" of NEPA, that is, facilitating informed agency decisionmaking and promoting public involvement. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983)).

For all of these reasons, the Court should remand the challenged leasing decisions to BLM for reconsideration through the administrative process.

II. The Court Should Remand the Leasing Decisions Without Vacatur.

In issuing a remand, courts retain discretion to fashion appropriate remedies. *See* 5 U.S.C. § 702 (nothing in the Administrative Procedure Act affects "the power or duty of the court to

dismiss any action or deny relief on any other appropriate legal or equitable ground"). Here, remanding without vacatur is appropriate for three reasons.

First, BLM seeks remand in lieu of a decision on the merits, and 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. Council v. Salazar*, 734 F. Supp. 2d 126, 135 (D.D.C. 2010). Although some courts in this Circuit have considered the "seriousness" of a challenged agency action's "deficiencies" in determining whether to vacate before a merits decision, *see, e.g., Navajo Nation*, 2021 WL 4430466, at *3, in a remand prior to a merits decision, a court has not yet found a violation of the law and therefore has no basis to vacate. *See Carpenters Indus.*, 734 F. Supp. 2d at 135 (citing 5 U.S.C. § 706(2)); *see also TransWest Express*, 2021 WL 1056513, at *5 ("If the Court were to remand with vacatur, the Court would irrevocably disrupt the status quo. Such a vast reshuffling of the parties' interests would be plainly inappropriate at this stage, particularly because the Court has not yet made any findings about whether the NRCS's actions were erroneous."); *WildEarth Guardians v. Bernhardt*, No. CV 20-56 (RC), 2020 WL 6255291, at *1 (D.D.C. Oct. 23, 2020) ("The Court remands the decisions without vacatur because it has not reviewed the EAs, FONSIs, and DNAs underlying the leasing decisions—therefore, it has no basis to vacate the agency action."). Even if the Court could reach the merits and consider the alleged deficiencies of the lease sales as a matter of law for purposes of determining whether to vacate, doing so would undermine a principal rationale for remand: "preserv[ing] scarce judicial resources by allowing agencies 'to cure their own mistakes.'" *Carpenters Indus.*, 734 F. Supp. 2d at 132 (quoting *Ethyl Corp.*, 989 F.2d at 524). It

makes little sense for the Court to undertake an evaluation on the merits of decisions that the agency is currently revisiting.

Second, vacatur here would constitute a "disruptive . . . interim change that may itself be changed." *Navajo Nation*, 2021 WL 4430466, at *3 (quoting *Allied-Signal, Inc. v. United States Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Vacatur of the leasing decisions would require termination of the leases and the return of over $11 million in revenue collected by BLM as a result of the lease sales, fifty percent of which was distributed to the State of New Mexico. *See* Barnes Decl. ¶ 3; *see also* AR_Dec2018_15028-33 (bonus bids for Dec. 2018 lease sale); AR_Nov2019_86127-89 (bonus bids for Nov. 2019 lease sale); AR_Feb2020_173486-173707 (bonus bids for Feb. 2020 lease sale). Vacatur would also terminate the lessees' property interest in the leases. *See San Luis Valley Ecosystem Council v. U.S. Bureau of Land Mgmt.*, No. 14-CV-00680-RM, 2015 WL 3826644, at *7 (D. Colo. June 19, 2015) ("Once the lease is issued, the lessee has a property right in the parcel and 'cannot be prohibited from surface use of the leased parcel.'" (quoting *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1159 (10th Cir. 2013)). Therefore, vacatur would be unnecessarily disruptive to the State and to leaseholders and operations on the leases, particularly if the agency were to ultimately affirm some or all of the leasing decisions.

Third and finally, any prejudice to Plaintiffs stemming from a remand without vacatur is limited here. BLM has committed to reconsidering the leasing decisions precisely to ensure compliance with NEPA, as Plaintiffs themselves seek in their Petition. *See* Supp. Pet. at 58, ECF No. 33-1. BLM has also committed to a 30-day public comment period for the Supplemental EA consistent with Plaintiffs' concerns regarding public participation for the original EAs. *See id.* ¶¶

198-203. Equally important, the leases do not themselves authorize the drilling of any oil and gas wells. For any wells a lessee wishes to develop, it must submit to BLM, and the agency must approve, an Application for Permit to Drill ("APD"). BLM conducts additional NEPA review prior to approving an APD. 43 C.F.R. §§ 3162.3-1(a), (c), 3162.5-1(a); *see also Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 1147, 1151-52 (10th Cir. 2004). BLM has also recently provided additional guidance to ensure that the agency adequately analyzes APDs in this specific situation where it is conducting additional NEPA analysis for the underlying leases. Permanent Instruction Mem. 2022-001[6]; Barnes Decl. ¶ 9. Because BLM must engage in additional NEPA analysis before any additional development can occur on the ground, and because Plaintiffs retain the ability to challenge any other final BLM decisions, including decisions approving APDs and any new decision(s) on the leases issued as part of BLM's reconsideration process, remand without vacatur is not prejudicial.[7]

CONCLUSION

Because BLM has identified substantial concerns with the NEPA analysis underlying the challenged leasing decisions and has committed to reviewing those decisions through the administrative process, the Court should remand to the agency without vacatur.

Respectfully submitted this 21st day of December, 2021.

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[6] Permanent Instruction Memorandum 2022-001 is available here: https://www.blm.gov/policy/pim-2022-001-0.

[7] BLM has already approved 118 APDs on the challenged leases, though only one of those wells has been spud. *See* ECF No. 46-1; Barnes Decl. ¶ 10. BLM has also approved a right-of-way to provide access to some of those APDs. Barnes Decl. ¶ 10. BLM prepared separate EAs analyzing the impacts of those APDs and of the right-of-way and issued separate decision records for the APDs and the right-of-way. *Id.* To date, no party has challenged BLM's decisions approving the APDs or the right-of-way. *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2021, I filed the foregoing electronically through the CM/ECF system which caused all parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

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