Nos. 22-5036, 22-5037 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH et al.,
Plaintiffs-Appellees

v.

DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior, et al.,
Defendants-Appellees

AMERICAN PETROLEUM INSTITUTE
Intervenor-Defendant-Appellant

STATE OF LOUISIANA
Intervenor-Defendant-Appellant

Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-02317 (Hon. Rudolph Contreras)

FEDERAL DEFENDANT APPELLEES' RESPONSE TO PLAINTIFFS-APPELLEES MOTION TO DISMISS

Following the district court's January 27, 2022, opinion and order vacating the record of decision underlying the Department of the Interior's November 2021 offshore oil and gas lease sale, Intervenors-Defendants American Petroleum Institute ("API") and Louisiana each filed notices of appeal. API, with Louisiana's consent, then filed an emergency motion asking this Court to expedite the

proceedings and issue a judgment by June 30, 2022. Plaintiffs-Appellees have opposed that request, and also have filed a cross-motion to dismiss disputing this Court's appellate jurisdiction.

Pursuant to this Court's February 23, 2022, order, Federal Defendants-Appellees Debra Haaland, in her official capacity as Secretary of the Interior; Laura Daniel-Davis, in her official capacity as Principal Deputy Assistant Secretary of the Interior for Land and Mineral Management[1]; the United States Department of the Interior; and the Bureau of Ocean Energy Management (collectively, "Interior") respond to Plaintiffs-Appellees' motion to dismiss. Interior also responds to the Court's direction that Federal Defendants-Appellees address "whether they agree with the other parties that the Leasing Program's scheduled expiration does not prevent the U.S. Department of Interior from awarding leases pursuant to Lease Sale 257 if this court reverses the district court's vacatur of that sale after June 30, 2022."

The United States has decided not to appeal the district court's decision. Nonetheless, Interior agrees with Intervenor-Defendant API that this Court has jurisdiction to consider these appeals. Additionally, Interior agrees with the other parties that, in the event this Court reverses the district court's vacatur, the

[1] Since January 20, 2021, Laura Daniel-Davis has exercised the delegable functions and duties of the Assistant Secretary for Land and Mineral Management.

expiration of the five year program on June 30, 2022, does not prevent Interior from awarding leases pursuant to Lease Sale 257 after that date—although, as discussed herein and in Interior's response to the district court's January 20, 2022, Minute Order, *see* D. Ct. ECF 74, Interior has the authority to decline to award the leases at that juncture.

I. Statutory Background

Since the passage of the 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA), Interior has, in accordance with 43 U.S.C. § 1344(a), developed five year leasing programs. *See* 43 U.S.C. § 1344(a); H.R. Rep. No. 590, 95th Cong., 1st Sess. 151 (1977) ("A new program must be prepared at least every five years."); *see generally* Past Five Year Programs, available at https://www.boem.gov/oil-gas-energy/leasing/past-five-year-programs.

As Interior explained before the district court, OCSLA provides that Interior may not hold lease sales unless the sales are on the schedule of an approved five year leasing program. *See* D. Ct. ECF 74 at 4-5; *see also Annual Review, Revision, and Reapproval of 5-Year OCS Oil and Gas Leasing Programs*, M-36932, 88 Interior Dec. 20, 23, 1981 WL 143125 (1981) (explaining that the same procedures preceding the adoption of a five year program must be used to schedule "any sales" beyond the existing five year program.); *cf. id.* ("[43 U.S.C. § 1344(a)] clearly limits the approval of a lease sale schedule to five years."). No party disputes that

Interior cannot hold lease sales that are included in a particular five year program after the expiration of that five year program. *See* Intervenor-Appellant API's Emergency Mot. at 13-14 (not disputing Interior's position that it may not legally hold Lease Sale 257 after June 30, 2022).

While OCSLA precludes Interior from holding any *sale* included in a five year program after its expiration, nothing in the statute limits the agency's ability to complete the procedures for issuing leases following a sale conducted during that five year program after the program has expired, so long as the leases are consistent with the five year program. By contrast, interpreting OCSLA to require leases sold during a five year program to also be issued before that five year program expires would unnecessarily read into the statute additional constraints that would, contrary to the statute's language and Congressional intent, effectively shrink the period available to the Secretary to hold sales from five years to less than four years and nine months.

Accordingly, Interior has previously issued leases after the expiration of a five year program when the sales were held during the period that the five year program was in force. API provides the example of combined Lease Sales 216/222, which Interior held on June 20, 2012, 10 days before the expiration of the 2007-2012 Five Year Program on June 30, 2012. *See* Intervenor-Appellant API's Emergency Mot. 6–7. Although Lease Sales 216/222 occurred within the

existence of the 2007-2012 five year program, bids were accepted and leases issued several months after the 2007-2012 program expired. As another example, Interior held Lease Sale 166 in March 1997, but not all bids were accepted or rejected and leases were not issued until mid-July 1997, after the expiration of the 1992-1997 Five Year Program.

In sum, Interior has authority under OCSLA to award leases on Lease Sale 257 after the expiration of a five year program on June 30, 2022, because the sale was held before the program's expiration date. All parties agree on this point. *See* Intervenor-Appellant API's Emergency Mot. at 6 ("in the event [the] Court reverses the District Court, Interior will have the authority to complete the sale it held on November 17, 2021 by issuing leases to the high bidders even after June 30"); *id.* at 10 ("API believes that Interior has the authority to accept bids and issue leases after June 30, 2022."); Appellees' Combined Response to Intervenor-Appellant's Emergency Motion to Expedite and Cross-motion to Dismiss, at p. 6, Doc. #1935890 ("[Appellees] have already agreed that if this Court reverses the district court . . . after June 30, 2022, Interior could continue its review of the bids received for Lease Sale 257 pursuant to 30 C.F.R. § 556.516 and exercise its discretion to accept or reject the high bids submitted in November 2021.").

II. This Court has appellate jurisdiction over Intervenor-Defendants' appeals.

A district court's remand order is not ordinarily a final decision under 28 U.S.C. § 1291; parties must generally wait to challenge an agency's decision until the agency completes the remand. *See Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 881 (D.C. Cir. 2000). But this Court has recognized several exceptions to this general rule. In limited instances, for example, a remand order may, in fact, constitute a final decision. *See, e.g.*, *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 515 (D.C. Cir. 2020) (the primary consideration for finality is whether "significant proceedings" are required on remand).

This Court has also permitted appeals from an otherwise non-final remand order pursuant to the collateral order doctrine. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330–32 (D.C. Cir. 1989); *see also Lakes Pilots Ass'n v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004). In order to qualify as an appealable order under that doctrine, a non-final order must (1) conclusively determine the disputed question; (2) resolve an important issue separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546–47 (1949). When the Government appeals from a remand order, it satisfies the *Cohen* criteria. *See Lakes Pilot Ass'n, Inc.*, 359 F.3d at 625. But, as this Court has recognized, in most instances, private parties cannot satisfy the third of *Cohen*'s

criteria. *See Occidental Petroleum Corp.*, 873 F.2d at 331–32 ("[W]hile a private party may not, in most cases, immediately appeal a district court order remanding a case for further agency proceedings, the agency may do so. That asymmetry derives, however, from the formulation of the *Cohen* test, under which the question of appealability turns to a great extent on whether a putative appellant could challenge the remand order after a final determination on the merits."). But this Court has also refused to foreclose the possibility that a private party might be able to satisfy *Cohen*'s third criterion in some limited instances. *See, e.g.*, *Lakes Pilot Ass'n, Inc.*, 359 F.3d at 625.

This is such a case. Interior's view of this Court's appellate jurisdiction is informed by the statutory backdrop described above. Appellants will not have another opportunity to obtain judicial review of any decision by Interior on remand, as fixed statutory and regulatory deadlines make it impossible for Interior to complete the analysis and procedural steps on remand prior to expiration of the current five year program on June 30—and, after that date, Interior will not have the authority to hold a new Lease Sale 257 because it has not been approved pursuant to an operative five year program.

In order to hold a new Lease Sale 257 on remand, before that new sale could be held, Interior would undertake the following tasks:

(1) Prepare a new draft supplemental Environmental Impact Statement ("SEIS") addressing the greenhouse gas accounting deficiencies identified by the district court and notice that document for public comment;

(2) Issue a Proposed Notice of Sale;

(3) Review, consider, and address comments received on the draft SEIS and prepare and publish the Final SEIS;

(4) Issue a Record of Decision;

(5) Issue a Final Notice of Sale; and

(6) Hold the sale.

These steps cannot be accomplished before June 30. Once Interior prepares a draft SEIS, that draft SEIS must be given to the Environmental Protection Agency ("EPA") for publication of a notice of availability of the SEIS in the Federal Register. *See* 40 C.F.R. § 1506.11(a). EPA must receive a draft SEIS by Monday for Friday publication of the notice (although federal holidays may prolong the period between receipt and publication).[2] Once the notice of availability of the draft SEIS is published in the Federal Register, Interior must wait at least 90 days before it may take the "final action" analyzed in the draft SEIS. *See* 40 C.F.R. § 1506.11(b). Because Interior considers its Final Notice of

[2] *See* https://www.epa.gov/nepa/environmental-impact-statement-filing-guidance#:~:text=EPA%20prepares%20a%20weekly%20report,publication%20will%20be%20on%20Thursday.

Sale to be the final agency action for purposes of holding an OCS oil and gas lease sale, Interior must wait at least 90 days after the draft SEIS is published by EPA to issue a Final Notice of Sale.[3] The actual sale may not take place less than 30 days after that Final Notice of Sale is issued. *See* 43 U.S.C. § 1337(a)(8); 30 C.F.R. § 556.308. Thus, Interior needs a minimum of 124 days from today to accomplish the remand and hold another sale. Fewer than 124 days remain on the calendar between now and June 30.

In other words, even assuming that Interior were to provide EPA a draft SEIS today, February 28, the earliest it could be published in the Federal Register by EPA would be Friday, March 4. Pursuant to NEPA regulations, Interior could not take final agency action (i.e., issue the Final Notice of Sale) for another 90 days—that is, until June 2.[4] Once the Final Notice of Sale issues, the earliest Interior could hold the sale is July 2, which is 30 days after June 2. Thus, even if

[3] Interior must also wait 30 days after publication by EPA of its Final SEIS before taking final agency action. *See* 40 C.F.R. § 1506.11(b)(2). But this deadline would not add to the time required as, in theory, the 30-day period could be entirely subsumed within the 90-day period between the draft SEIS and the final agency action.

[4] In addition to the fixed deadlines mentioned in text and in footnote one, Interior must comply with other fixed deadlines before any sale could be held. These other deadlines, however, do not necessarily add additional time to the 125 days Interior would need to complete the remand and hold a sale. For example, pursuant to the Coastal Zone Management Act, Interior must submit to affected states a consistency determination at least 90 days prior to the Final Notice of Sale. The applicable regulation provides, however, that an alternative timeline may be agreed to by the states. *See* 15 C.F.R. § 930.36(b)(1).

Interior were to provide EPA with a draft SEIS today, the absolute earliest a new Lease sale 257 could occur is July 2, which is after the expiration of the current five year program.

The expiration of the current five year program on June 30 precludes Interior's ability to hold a new Lease Sale 257 on remand. Consequently, this is not a case where Intervenors "will be able again to seek judicial review, including review in the court of appeals, raising not only new issues but all those on which it got no satisfaction in its original challenge." *Lakes Pilots Ass'n, Inc. v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004).

To be sure, Interior may decide to hold lease sales in the Gulf of Mexico that put up for sale the same blocks offered in the November 17, 2021, sale. But that possibility is pre-decisional and speculative at this time, as there will not be a new leasing program in place after June 30 until Interior adopts a new five year program. This Court accordingly has appellate jurisdiction.

III. In the event this Court reverses the district court's vacatur of the Record of Decision for Lease Sale 257, the five year program's scheduled expiration on June 30, 2022, does not prevent Interior from awarding leases pursuant to Lease Sale 257.

As explained above, *supra* at 4–5, Interior agrees with the parties that, if this Court were to reverse the vacatur, the August 31, 2021, Record of Decision and November 17, 2021, sale would once again be effective and Interior could award leases to the high bidders from the November 2021 sale. To be clear, however,

while the five year program's scheduled expiration would not prevent Interior from awarding leases pursuant to Lease Sale 257 if this Court reverses the vacatur, Interior would still retain its authority and discretion to decide whether to accept the bids and award the leases.[5]

Respectfully submitted,

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[5] Consistent with Interior's practice and agency regulations, the Final Notice of Sale reserved Interior's right "to withdraw any block from this lease sale prior to issuance of a written acceptance of a bid for the block" and to "reject any and all bids, regardless of the amount offered." 86 Fed. Reg. 54,734 (Oct. 4, 2021); *see also* 30 C.F.R. § 556.516(b) ("[Interior] reserves the right to reject any and all bids received, regardless of the amount offered."). For details on the steps Interior needs to take to award the leases, please see the First Thomas Decl., D. Ct. ECF 19-1.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,424 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ *Michelle Melton*
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