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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 WESTERN ENERGY ALLIANCE, *et al*. Intervenor-Defendants.	Case No. 1:16-cv-1724-RC The Honorable Rudolph Contreras

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(H)(3)

Federal Defendants respectfully submit this reply in support of their motion to dismiss this trio of cases for lack of subject matter jurisdiction.[1] Intervenor-Defendants concede that the Court's subject matter jurisdiction presents a threshold issue that must be resolved before their partial motions to dismiss for failure to state a claim.[2] Intervenor-Defendants also concede that their oppositions to Plaintiffs' motions for voluntary dismissal request "a variety of advisory opinions." *Compare* Mot. 1, 3–4, *with* Opp'n 1–7. Given those concessions, the Court should grant Plaintiffs' pending motions for voluntary dismissal *with prejudice*, while declining to issue the advisory opinions sought by Intervenor-Defendants because the Court has no jurisdiction to do so, as explained below.

Although the lack of subject matter jurisdiction is conclusively established by *Util. Solid Waste Activities Grp. v. Env't Prot. Agency (USWAG)*, 901 F.3d 414, 437–38 (D.C. Cir. 2018), *see* Mot. 1–2, Intervenor-Defendants address that governing precedent in only one paragraph of their opposition. *See* Opp'n 6–7. Their terse response notes that *USWAG* principally analyzed party prejudice rather than subject matter jurisdiction. *Id.* But Intervenor-Defendants overlook that this context only makes *USWAG* more—not less—relevant to the ultimate disposition of these three cases. Courts analyze prejudice when evaluating either voluntary remand motions, as in *USWAG*, or voluntary dismissal motions, as brought by Plaintiffs. In *USWAG*, the D.C. Circuit held that intervenors seeking to defend an agency action are not prejudiced by the

[1] In the interests of brevity, Federal Defendants submit the same reply in all three cases. Unless otherwise indicated, docket references are to *WildEarth Guardians v. Haaland*, No. 21-cv-175 (D.D.C. filed Jan. 19, 2021). The other two cases before the Court are *WildEarth Guardians v. Haaland*, No. 16-cv-1724 (D.D.C. filed Aug. 25, 2016), and *WildEarth Guardians v. Haaland*, No. 20-cv-56 (D.D.C. filed Jan. 9, 2020).

[2] *Compare* Mot. to Dismiss for Lack of Subject Matter Jurisdiction Under Fed. R. Civ. P. 12(h)(3) (Mot.) at 3, ECF No. 81, *with* Intervenor-Defs Am. Petroleum Inst.'s, Wyo.'s, NAH Utah, LLC's and Anschutz Exploration Corp.'s Opp'n to Mot. to Dismiss for Lack of Subject Matter Jurisdiction (Opp'n), ECF No. 82.

termination of a challenge to that action, even if they would prefer to terminate the challenge in a different way. 901 F.3d at 438. It explained that "no party will suffer prejudice from remand without vacatur" because "[t]he Rule remains in force and Industry Petitioners cannot bring another challenge until and unless the EPA takes additional regulatory action." Similarly here, Intervenor-Defendants are not prejudiced because Plaintiffs' voluntary dismissal would keep the challenged leasing decisions in place and prevent Plaintiffs from bringing another challenge "until and unless the [agency] takes additional regulatory action." *Id.*

Intervenor-Defendants' broader suggestion that *USWAG* does not control subject matter jurisdiction is simply incorrect. *See* Opp'n 6–7. Although analyzing party prejudice, the D.C. Circuit held that intervenors would not be prejudiced precisely because the court lacked jurisdiction to opine on a withdrawn challenge. 901 F.3d at 438 (holding that "any opinion we issue regarding these provisions would be wholly advisory[,] would resolve no active case or controversy and would award no relief" because the only party seeking to continue the litigation "did not challenge any of the relevant provisions in their petition; rather they *defended* the provisions as Intervenors"). While the court declined to remand provisions *challenged* by intervenors, *id.* at 436–37, it determined that the case was "non-justiciable" as to the provisions defended by intervenors because the court was "unable to grant concrete relief to any party" since the industry petitioners had effectively "withdrawn their petition," *id.* at 438 (citation omitted). Following Plaintiffs' voluntary dismissal here, there are likewise no longer justiciable cases or controversies before the Court, as "all parties *agree*" that the cases should be dismissed with prejudice without vacating the challenged leasing decisions. *Id.*

While largely overlooking *USWAG*, Intervenor-Defendants also make three unavailing arguments in opposition to Federal Defendants' dismissal motion. *First*, Intervenor-Defendants

oppose dismissal based on Congressional policy in 30 U.S.C. § 226-2. *See* Opp'n 1–3. But Intervenor-Defendants never explain how a statute of limitations established by Congress can *create* subject matter jurisdiction under Article III of the Constitution, and the Supreme Court has repudiated such notions. *E.g.*, *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: . . ."). Because § 226-2 cannot create subject matter jurisdiction beyond Article III's minimum requirements, the Court has no jurisdiction to evaluate the now-moot dispute between Plaintiffs and Intervenor-Defendants about the scope of § 226-2.

Second, Intervenor-Defendants incorrectly claim that the settlement agreements are "fully contingent upon remand of the challenged leasing decisions to BLM for additional NEPA review." Opp'n 7 (citing Stipulated Settlement Agreement 3, ECF No. 71-1). Intervenor-Defendants tellingly quote no text in the settlement agreements establishing such a contingency. To the contrary, the settlement agreements establish that they are "binding on Plaintiffs and Federal Defendants once signed by both parties." *E.g.*, Stipulated Settlement Agreement ¶ 12, ECF No. 71-1. Nowhere do those agreements establish a contingency based upon action by the Court, such as approving remand or granting dismissal. *See generally id.*

As best can be gleaned from their opposition, Intervenor-Defendants appear to contend that the settlement agreements must be "contingent upon remand," Opp'n 7, because a judicial remand is the only way to "return all of the challenged lease sale decisions to the Bureau of Land Management ('BLM') for further National Environmental Policy Act ('NEPA') analyses and decision-making," Opp'n 1. Not so. Because the Court no longer has jurisdiction following Plaintiffs' voluntary termination of their claims, *see supra* 1–2, remand is not necessary to return the challenged leasing decisions to BLM. Instead, BLM has independent authority to revisit the

NEPA analyses for its leasing decisions. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472, 478 (1963) ("Since the Secretary's connection with the land continues to subsist, he should have the power, in a proper case, to correct his own errors."); 40 C.F.R. § 1502.9(d)(2) (providing that an agency may "prepare supplements when the agency determines that the purposes of [NEPA] will be furthered by doing so"); *see also* 43 C.F.R. § 31083(d) ("Leases shall be subject to cancellation if improperly issued.").

Third, Intervenor-Defendants cite several inapposite cases for the proposition that the Court retains jurisdiction to review settlement agreements.[3] Each of those cases involved more than a voluntary settlement agreement, as the courts were being asked to take further judicial action by approving a settlement agreement, adopting a consent decree, or vacating an agency action. *Local No. 93*, 478 U.S. at 528 (reviewing whether the district court "could approve a consent decree"); *Geren*, 514 F.3d at 1320 (reviewing "the district court's approval of the Agreement"); *Waller*, 828 F.2d at 581–82 (same); *Wheeler*, 427 F. Supp. 3d at 97 (reviewing plaintiff's request "that the court should also vacate the underlying decision"); *Salazar*, 660 F. Supp. 3d at 4 (reviewing the government's request "to vacate the SBZ Rule"). In contrast, here, the Court has not been asked to take further action, such as approving the settlement agreement or vacating the leasing decisions. Instead, the Court is being asked only to dismiss with prejudice Plaintiffs' claims—a result that "all parties *agree*" upon. *USWAG*, 901 F.3d at 438.

Because all Parties agree that these cases should be dismissed with prejudice, any opinion the Court issues regarding Plaintiffs' challenges to the leasing decisions at issue "would be

[3] Opp'n 3–6 (citing *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008); *Waller v. Financial Corp. of Am.*, 828 F.2d 579 (9th Cir. 1987); *Am. Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95 (D.D.C. 2019); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3 (D.D.C. 2009)).

wholly advisory." *Id.* Accordingly, the Court should grant Plaintiffs' motions for voluntary dismissal with prejudice, while declining to issue the advisory opinions sought by Intervenor-Defendants.

Respectfully submitted this 5th day of May, 2022.

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