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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

ALBANY COUNTY CONSERVANCY and J.
MICHAEL LOCKHART,

Petitioners,

v.

TIMOTHY NOVOTNY, in his official capacity
as field manager of the Rawlins Field Office of
the U.S. Bureau of Land Management, *et al.*,

Federal Respondents,

and

ROCK CREEK WIND, LLC,

Intervenor-Respondent.

Civil Case No. 2:23-cv-00134-ABJ

UNOPPOSED MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

Federal Respondents respectfully request that the Court remand, without vacatur, the Bureau of Land Management’s (“BLM”) decision to grant a right-of-way across federal land for the Rock Creek Gen-Tie Line (“Gen-Tie Line”), which is the subject of this suit. Federal Respondents seek a remand so that BLM may conduct further National Environmental Policy Act (“NEPA”) analysis regarding the right-of-way. Given that the remand would result in a new agency decision, Federal Respondents also request that the present Petition be dismissed or, in the alternative, that the case be stayed pending completion of further NEPA review and a new agency decision on remand. Petitioners and Respondent-Intervenor Rock Creek Wind, LLC do not oppose voluntary remand without vacatur or dismissal without prejudice.

BACKGROUND

Petitioners in this case allege that BLM’s decision to grant a right-of-way across federal land for a portion of the Gen-Tie Line violated NEPA. NEPA is a procedural statute that requires federal agencies to pause and consider the potential environmental impacts of their actions before acting. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). NEPA “prohibits uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). “[I]t is [] well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350. Under NEPA, an agency may prepare an Environmental Assessment (“EA”) to determine whether its action “is likely to ‘significantly affect[] the quality of the human environment.’” *Richardson*, 565 F.3d at 703 (quoting 42 U.S.C. § 4332(2)(C)) (alteration in original). If the agency determines a significant effect is not likely, it may issue a Finding of No Significant Impact (“FONSI”) and proceed. *Id.* But if a significant effect is likely, the agency must prepare a more extensive Environmental Impact Statement. *Id.*

In 2017, Rock Creek Wind applied to BLM for a right-of-way to “construct, operate, maintain, and eventually decommission a 4.7-mile section” of the Gen-Tie Line on BLM-administered public lands. Rock Creek Gen-Tie Line Env’t Assessment at 1, attached as Ex. 2 (“EA”). The Gen-Tie Line will connect a new wind energy facility located entirely on non-federal land to the electric grid.¹ *Id.* To comply with NEPA, BLM prepared an EA evaluating the potential environmental impacts of the right-of-way. In preparing the EA, BLM decided that “external scoping to the public was not needed . . .” *Id.* at 6. Because the analysis in the EA led to the conclusion that granting the right-of-way would not have potentially significant impacts on the environment, in March 2023 BLM issued a FONSI and granted the right-of-way.

Petitioners filed their Petition for Review of Final Agency Action challenging BLM’s decision to grant the right-of-way in July 2023. ECF No. 1. The Petition brings several claims challenging various aspects of BLM’s NEPA review. In broad terms, Petitioners allege that the scope of the EA’s analysis was impermissibly narrow, that the EA improperly tiered to a prior programmatic EIS, that BLM did not adequately involve the public in the NEPA process, and that BLM should have prepared an EIS rather than an EA. Claims for Relief, *Id.* at 24-26.

After additional review and consideration, BLM has decided that further NEPA analysis is warranted to give the public an opportunity to provide input on the potential environmental impacts of the right-of-way. Decl. of Timothy M. Novotny ¶ 2, Oct. 10, 2023, attached as Ex. 1 (“Novotny Decl.”). BLM would then issue a new decision record affirming, modifying, or revoking the existing decision record granting the right-of-way. *Id.* ¶ 3. Federal Respondents

¹ Rock Creek Wind’s application to BLM represented that Rock Creek Wind would still pursue building the Gen-Tie Line even if BLM chose not to grant the right-of-way, although on a different route that avoids federal lands. EA at 20. We assume Rock Creek Wind would hold that same intent if BLM decided on remand to reverse its prior decision to grant the right-of-way.

therefore seek a voluntary remand of the right-of-way approval without vacatur so that additional review can take place.

ARGUMENT

Because Federal Respondents have determined that they wish to revisit the NEPA analysis underlying the decision to grant the right-of-way for the Gen-Tie Line, the Court should remand that decision to BLM to undertake the additional analysis. And given that construction cannot yet begin in the right-of-way, remand without vacatur is appropriate. To allow the parties to focus on additional environmental review, this case should be dismissed, or in the alternative, stayed pending completion of further NEPA review and a new BLM decision.

I. Voluntary remand is appropriate to allow for further NEPA review.

“Administrative 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). An agency may therefore “request a remand (without confessing error) in order to reconsider its previous position.” *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164, 1167 (D.N.M. 2021) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)). An intervening event or change in circumstances is not necessary to justify a remand. *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1239 (D. Colo. 2011). 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) (quoting *Limnia, Inc. v. Dep’t of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017)); see also *Coal. of Ariz./N.M. 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))).

BLM's desire to reconsider its decision to grant the Gen-Tie Line right-of-way warrants a voluntary remand. *See Navajo*, 254 F.3d at 1029; *Util. Solid Waste Activities Grp.*, 901 F.3d at 436. Federal Respondents believe that further input from the public would allow BLM to make a better-informed decision on whether to allow construction of the Gen-Tie Line on federal land and, should BLM decide after remand to affirm its decision to grant the right-of-way, whether additional conditions on the right-of-way are warranted. Novotny Decl. ¶¶ 1-4. A voluntary remand would allow BLM to focus on considering public input and allow Petitioners and other interested members of the public to focus on providing it.

A voluntary remand would also conserve party and court resources. BLM's desire to seek further public participation with respect to the potential Gen-Tie Line right-of-way directly overlaps with one of Petitioners' claims. Claims for Relief ¶ 3, Petition for Review at 24. Remand to allow for further NEPA analysis including public comment should therefore resolve at least one of Petitioners' claims. In addition, the remand will likely result in new or additional NEPA analyses and, at a minimum, will result in a new agency decision. Novotny Decl. ¶¶ 2-3. Thus, there is a potential that all or some of Petitioners' additional claims could be resolved. A voluntary remand would thus serve the interests of judicial economy and conserve party resources by avoiding litigation over claims that may soon become moot. *See TransWest Express LLC v. Vilsack*, No. 19-cv-3603-WJM-STV, 2021 WL 1056513, at *5 (D. Colo. Mar. 19, 2021); *Rural Empowerment Ass'n for Cmty. Help v. U.S. Env't Prot. Agency*, No. 18-2260 (TJK), 2022 WL 444095, at *2 (D.D.C. Feb. 14, 2022) ("Defendants' reconsideration may moot Plaintiffs' claims, providing their requested relief and saving the parties' and the Court's resources.").

II. Remand should be without vacatur and this case should be dismissed.

Even if vacatur of the BLM right-of-way was an option here, remand without vacatur is the appropriate course. For one, Rock Creek Wind cannot begin construction in the right-of-way until BLM issues a Notice to Proceed, which it will not issue until further NEPA review is completed on remand and if the agency decides to again approve the right-of-way. Novotny Decl. ¶ 4. Vacatur, or any other form of injunctive relief, is therefore not necessary to prevent a change to the status quo or any potentially resulting prejudice to Petitioners. Further, Petitioners do not oppose remand without vacatur. Should BLM decide on remand to affirm or modify its decision to grant the right-of-way, and should petitioners believe BLM's decision violates NEPA, they may challenge that new decision.

Should the Court grant Federal Respondents' motion for voluntary remand, there would be "no further business before the Court in this matter at this time, [and] the case [should] be dismissed." *Coal. of Ariz./N.M. Cnty.*, 2009 WL 8691098, at *5. Petitioners do not oppose dismissal without prejudice and could file a new petition challenging the decision made by BLM on remand if they believe it to be necessary. Thus, under the circumstances, there is no need for the Court to maintain the case on its active docket.

Alternatively, the Court could stay this case pending completion of further NEPA review and a new agency decision on remand. "A federal district court 'has broad discretion to stay proceedings as an incident to its power to control its own docket.'" *WPX Energy, Inc. v. Record TJ Ranch Lmt'd. P'ship*, Case No. 20-CV-00132-ABJ, 2021 WL 7366665, at *2 (D. Wyo. Dec. 7, 2021) (quoting *Clinton v. Jones*, 520 U.S. 681, 706 (1997)). A stay is appropriate "to provide for the efficient and economic use of judicial resources" where it would not "work injustice" on another party. *Id.* (quotations omitted). As discussed above, BLM's decision on remand may

resolve all or some of Petitioners' claims and continued litigation over those claims would be an inefficient use of party and Court resources. If the Court does not dismiss the Petition, a stay is appropriate. *See, e.g., TransWest*, 2021 WL 1056513, at *6.

CONCLUSION

Because BLM wishes to reconsider its decision to grant the right-of-way challenged in this suit, the Court should remand that decision to BLM without vacatur. This case should be dismissed or, in the alternative, stayed pending completion of further NEPA review and a new decision on remand.

Respectfully submitted this 13th day of October, 2023.

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