No. 98-1952

In the Supreme Court of the United States

MARATHON OIL COMPANY, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner lacked standing to compel the Secretary of the Interior to offer particular public lands for oil and gas leasing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 166 F.3d 1221 (Table). The opinion of the district court (Pet. App. 6a-10a) is reported at 966 F. Supp. 1024.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1999. A petition for rehearing was denied on March 9, 1999 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on June 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, local Bureau of Land Management (BLM) offices prepare Resource Management Plans (RMPs) that establish the uses for which federal land under BLM's jurisdiction is to be managed. See, *e.g.*, 43 C.F.R. Pt. 1600, Subpt. 1610. Along with preparation of a RMP, FLPMA required BLM to conduct a 15-year "wilderness study" identifying those areas of public lands "having wilderness characteristics" as described in the Wilderness Act of 1964, 16 U.S.C. 1131 *et seq.*, and to recommend to Congress specific areas appropriate for designation as wilderness. 43 U.S.C. 1782(a) and (b). Areas not designated as wilderness are typically available for leasing under the Mineral Leasing Act (MLA), 30 U.S.C. 181 *et seq.* The MLA does not require, however, that land be leased in any particular circumstance. Rather, the MLA provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary." 30 U.S.C. 226(a) (emphasis added).

2. In 1991, the Colorado office of BLM completed its 15-year wilderness inventory. In 1993, BLM transmitted to Congress its conclusion that some 400,000 acres of land were appropriate for wilderness designation. In early 1994, the Colorado Environmental Coalition (CEC) wrote BLM to suggest that BLM had improperly failed to include thousands of acres of public lands within its Wilderness Study Area. C.A. App. 302-317. Recognizing that oil and gas production on federal lands could limit or destroy their potential value as wilderness, BLM concluded in 1996 that it would postpone any decisions to open the potential wilderness

areas identified by CEC to oil and gas leasing until it could develop a formal process for evaluating CEC's claims. See C.A. App. 209-210. BLM issued its formal policy in May 1997. C.A. Supp. App. 24-28. Pursuant to that policy, BLM conducted a comprehensive review of the lands identified by CEC, see C.A. Supp. App. 26-28, 40-48, and, on November 23, 1998, decided to initiate a process that could lead to formal amendments to existing RMPs.

In August 1996, petitioner wrote to BLM indicating that it was interested in bidding on several parcels of land in Moffat County, Colorado, and suggested that BLM should open those lands to competitive bidding for oil and gas leases during its next scheduled sale in November 1996. C.A. App. 138-147. On September 25, 1996, BLM announced that it would accept bids for leases on 66 parcels of land in Colorado, including many in which petitioner expressed an interest. C.A. App. 149-194. The first page of the notice announcing the sale contained the following clause: "RIGHT TO WITHDRAW PARCELS: The Bureau of Land Management reserves the right to withdraw any or all parcels prior to or at the sale." C.A. App. 149.

Two weeks before the sale occurred, BLM realized that some of the properties being offered at the lease fell within the areas that CEC had identified as potential wilderness. See C.A. App. 213, 313-317. In order to remain consistent with its May 1997 policy of protecting the wilderness option by holding such lands in abeyance from leasing until the land could be evaluated, BLM, on November 6, 1996, issued addenda to the sale notice that removed nine parcels from the sale and amended two others. C.A. App. 196-200.

Petitioner filed an administrative appeal with the Interior Board of Land Appeals (IBLA). See C.A.

Supp. App. 1-23. Petitioner also filed this action in the district court, alleging that BLM's decision to withdraw the subject parcels from the sale unlawfully converted the property into wilderness without following the procedures necessary to permanently withdraw land for wilderness purposes. The district court dismissed the suit, holding that petitioner lacked standing because its alleged injuries could not be redressed by the court. Pet. App. 6a-10a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-5a. The court of appeals concluded that the district court had properly relied on prior circuit precedent, which held that plaintiffs lacked standing to challenge the Secretary of the Interior's authority over the disposition of federal lands because their injuries were not redressable by a favorable judicial decision. *Id.* at 2a-3a. The court of appeals further concluded that nothing in this Court's decisions in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), and *Bennett* v. *Spear*, 520 U.S. 154 (1997), affected the holdings of the court of appeals' earlier decisions. Pet. App. 3a-4a.

4. Before the court of appeals issued its decision, the IBLA issued a decision in petitioner's administrative appeal. See *Marathon Oil Co.*, 139 I.B.L.A. 347 (1997). The IBLA concluded that, although BLM had authority to "eliminate specific parcels from leasing even where they had been designated in an RMP as generally suitable for leasing," such a decision should have been made only after a "site-specific analysis as to the particular parcels involved." *Id.* at 356. Because no such analysis had occurred in this case, the IBLA vacated BLM's decision and remanded the matter to BLM. *Ibid.*

On remand, BLM initiated the analysis ordered by the IBLA. BLM subsequently announced that it would proceed with a formal amendment to the existing RMP and would continue to hold all discretionary actions affecting the parcels, including oil and gas leasing, in abeyance pending completion of that plan. BLM Colo. State Office, BLM News Release (Nov. 23, 1998). Earlier this year, petitioner "appealed" that announcement to the IBLA. IBLA Docket No. 99-133. The IBLA has recently issued an order dismissing the appeal as unripe until BLM has had time to complete the land-use planning process. Order in IBLA Docket No. 99-133 (May 26, 1999).

ARGUMENT

1. This case does not present a controversy that is ripe for review by this Court or, indeed, by any court, in light of intervening administrative developments.[1] Before the IBLA, petitioner sought and received relief from the same BLM action that it challenged in the district court and the court of appeals. The IBLA vacated BLM's decision withdrawing the parcels at issue from the proposed sale and ruled that BLM could

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[1] Petitioner correctly notes (Pet. 2) that the government did not argue ripeness before the district court. At the time, however, the government did not believe that the IBLA had jurisdiction over an appeal from BLM's decision, see, *e.g.*, 139 I.B.L.A. at 350-356, and therefore agreed with petitioner not to raise the issue of ripeness in the district court, C.A. App. 366, 513. That agreement, however, explicitly did not extend to any future dispositive motions, see *id.* at 366, and the government argued that the case was unripe in the court of appeals. Gov't C.A. Br. 14-18. In any event, this Court is "obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278 (1977) (citing *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976)).

not permanently refuse to offer parcels of land for leasing without site-specific analysis describing why such a limitation is appropriate. See 139 I.B.L.A. at 356-357. As a result, there no longer is "final agency action" subject to challenge under the Administrative Procedure Act (APA), 5 U.S.C. 704, on the ground petitioner raised below, much less action that is ripe for judicial review. In short, the IBLA, at petitioner's behest, has already granted the same relief that a court may grant in a challenge to agency action under the APA. See 5 U.S.C. 706(2) (reviewing court shall "hold unlawful and set aside" agency action found to be arbitrary, capricious, or otherwise contrary to law).

Furthermore, on November 23, 1998, BLM issued a statement indicating that the agency intended to initiate the process of amending existing RMPs to determine whether the property in question should remain open to leasing in the future (as it is now), or whether it is more appropriately characterized as wilderness, in which case it would be permanently withheld from leasing under the MLA. BLM Colo. State Office, BLM News Release (Nov. 23, 1998). Depending on the outcome of that administrative process, all, some, or none of the parcels at issue here may be opened to leasing in the near future. And after that process is complete, petitioner will have the opportunity to challenge any leasing decisions or other decisions that affect the land at issue here, to the extent consistent with applicable justiciability requirements. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726 (1998). Thus, until the administrative process is complete, there will be no "final" agency action ripe for

review. 5 U.S.C. 704; see *Abbott Lab.* v. *Gardner*, 387 U.S. 136, 149-150 (1967).[2]

2. Even if this case involved "final agency action" and it was ripe for review, the court of appeals' unpublished decision would not merit this Court's review. The decision merely applies previous circuit precedent, Pet. App. 2a-3a, and is therefore not likely to be cited in future cases. See 10th Cir. R. 36.3. Moreover, petitioner identifies no conflict in the circuits on the question presented. Until such a conflict arises, this Court need not devote its time to addressing what is, even accepting petitioner's arguments, merely a single erroneous unpublished decision. See Sup. Ct. R. 10(a).[3]

3. In any event, the court of appeals properly concluded that petitioner lacked standing to challenge BLM's decision not to offer the parcels of public lands at issue for leasing at this time.

a. Petitioner argues (Pet. 19-23) that, although BLM retains the discretion whether to lease the subject lands, under this Court's decision in *FEC* v. *Akins*, 524 U.S. 11, 23 (1998), it has standing to challenge BLM's

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[2] Petitioner therefore errs in contending (Pet. 11-12) that the court of appeals' decision conflicts with *Ohio Forestry Ass'n*, 523 U.S. at 738-739, because petitioner here challenges a "final BLM decision to close a specific area to oil and gas leasing." No such final decision has yet been made.

[3] Petitioner contends (Pet. 12-13) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *Utah* v. *Babbitt*, 137 F.3d 1193 (1998), in which the court of appeals found that the plaintiffs had standing to raise procedural challenges under FLPMA. Any conflict between the court of appeals' decision and *Utah* v. *Babbitt*, however, would not merit this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), especially since the decision in *Utah* v. *Babbitt* is published and therefore would presumably take precedence over the unpublished decision in this case.

exercise of discretion as violating the requirements under FLPMA applicable to the elimination or withdrawal of public lands from mineral exploration and production. That contention, however, mischaracterizes the nature of and legal basis for BLM's action.

When BLM decided to remove the parcels from the 1996 sale, it did not permanently bar leasing on those properties; rather, the agency merely concluded that, under the MLA, the parcels should not be leased out immediately so that their status (as available for possible leasing) could be reevaluated in light of the claims advanced by CEC. BLM's decision therefore was not action taken pursuant to FLPMA, whose requirements do not even apply to limitations on leasing.[4] Moreover, as discussed above, petitioner will have the opportunity to raise procedural or substantive challenges under FLPMA, if any, after BLM reaches a final decision regarding the use of the property, as reflected in any amendment to the existing RMP.

b. The court of appeals also properly held that petitioner's claims are not redressable by a favorable decision setting aside BLM's decision not to lease the subject lands as part of the 1996 sale. Petitioner asserts (Pet. 24-25) that a judicial victory "would result in the lands [petitioner] seeks being once more made available for lease, thus redressing its injury." Petitioner cannot demonstrate, however, that a victory on the merits of this case—which presumably would set

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[4] Under FLPMA, withdrawals are limits on "settlement," "location," "sale," and "entry" of public lands. 43 U.S.C. 1702(j). As this Court noted with respect to an identically-worded withdrawal provision, none of those terms include leasing, which does not involve a "transfer of title." *Udall* v. *Tallman*, 380 U.S. 1, 19-20 (1965).

aside BLM's decision because it was based on what petitioner alleges to have been an "unpublished policy" (Pet. 6) of refusing to lease lands upon a complaint by CEC—would lead the Secretary to open the lands for leasing. Following such a judicial ruling setting aside its prior decision, BLM would be free to decide not to lease the lands based on another, lawful ground. And indeed, BLM has *already* made such a decision on a temporary basis, pending its consideration of possible amendments to the RMP. Compare *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 145-146 (1940); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 n.21 (1983).

At this point, the only "injury" suffered by petitioner is an injury tied to the Secretary's exercise of his discretion over whether to lease the particular parcels of land at issue at the present time. No statutory or regulatory provision, however, requires the Secretary to offer that land for lease at any particular time. The MLA vests the Secretary with the "discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965); accord *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 419 (1931) ("there is ground for a plausible, if not conclusive, argument" that the MLA "goes no further than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare"); *Arnold* v. *Morton*, 529 F.2d 1101, 1105-1106 (9th Cir. 1976) ("Secretary has no obligation to issue any lease on public lands"); *Schraier* v. *Hickel*, 419 F.2d 663, 665-667 (D.C. Cir. 1969) ("The fact that the Bureau published a notice that it would receive offers to lease did not preclude a later exercise of discretion to decline to lease."). Courts therefore lack the power to "compel[] the executive branch to make land

available for competitive leasing under the [MLA]." Pet. App. 9a.[5]

Because the decision to offer land for leasing and the timing of that decision are within the Secretary's discretion, petitioner cannot demonstrate that the property it seeks to lease would likely be offered for lease even if it were successful on the merits of this suit. That conclusion is particularly warranted here, because BLM has since publicly decided that it will not lease the parcels for oil and gas development until its ongoing review is completed, because such action would irretrievably destroy their wilderness character. Under those circumstances, petitioner cannot demonstrate that the Secretary's evaluation of the "public welfare" (*McLennan*, 283 U.S. at 419) with respect to those properties would change at all in the absence of the challenged policy.[6]

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[5] The issue of redressability in this context resembles the issue under the APA of whether the agency decision is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and therefore not subject to judicial review. The MLA places no limits on the Secretary's decision not to open lands for leasing. It simply provides that the Secretary "may" open land for oil and gas leases. 30 U.S.C. 226(a). Furthermore, although FLPMA establishes procedures under which BLM identifies lands that may be available for oil and gas leasing, FLPMA neither locks in that future use nor specifies a time within which such leasing must occur. Absent "law to apply" regarding when lands must be offered for leasing, the decision not to issue oil and gas leases for particular land at a particular time is "committed to agency discretion by law" and not reviewable under the APA. See *Lincoln* v. *Vigil*, 508 U.S. 182, 190-191 (1993).

[6] Contrary to petitioner's assertion (Pet. 9-15), the court of appeals properly concluded that this case is distinguishable from *Bennett* v. *Spear*, 520 U.S. 154 (1997). In *Bennett*, the Court found that the petitioners had met their burden of showing that the Bureau of Reclamation "likely" would not impose water level

c. Petitioner also errs in arguing (Pet. 9-18, 24-28) that the court of appeals' decision is contrary to this Court's decision in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). In *Defenders of Wildlife*, *id.* at 561-562, the Court stated that if "the plaintiff is himself an object of the action (or foregone action) at issue[,] there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." But cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 106 n. 7 (1998) (explaining that redressability does not "always exist[] when the defendant has directly injured the plaintiff").

Contrary to its assertions (Pet. 25-29), petitioner is not the "object" of BLM's decision to withhold the property from the pool of property subject to leasing pending its decision regarding a formal amendment to existing RMPs. That decision affects all companies that might have bid with (or outbid) petitioner for the property withheld from sale. Furthermore, as discussed above, petitioner may present a challenge to any formal amendment to the RMP after there is final agency action by BLM, if applicable justiciability requirements are met at that time.

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restrictions if the Fish and Wildlife Service's Biological Opinion were set aside. *Id.* at 171. The Court explained that the Service's Biological Opinion had a "powerful coercive" and "virtually determinative" effect on the Bureau, and that, until issuance of the Service's opinion, the Bureau had operated the water at issue in the same manner throughout the 20th century. *Id.* at 169-170. Here, petitioner has not alleged similar facts establishing that, absent the challenged policy, BLM would likely lease the properties sought by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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