WESTERN ENERGY ALLIANCE

July 16, 2015

Mr. Aden Seidlitz
State Director (Acting)
Bureau of Land Management
New Mexico State Office
P.O. Box 27115
Santa Fe, New Mexico 87502-0115

Re: Response to Protests of the BLM New Mexico October 22, 2014 Oil and Natural Gas Lease Sale

Dear Mr. Seidlitz:

Western Energy Alliance is concerned that nearly eight months have passed since the October 22, 2014 lease sale, and the winning bidders of the thirteen leases sold at that auction have still not been issued their leases, despite the fact that all leases have been paid for as required. The purpose of this letter is to provide BLM with information to help address the protests and move forward with issuance. Many of the protests lack rigor and validity, as many were merely generated via form letter. Many claims lack a firm basis in jurisprudence and fact, and disregard the state and federal regulatory procedures that ensure any impacts from oil and natural gas development are managed and minimized. We hope that providing some legal justification will help with dismissing the protests.

Regardless of the fact that often the arguments offered in protests have been found to be invalid by the Interior Board of Land Appeals (IBLA) or through other case law, anti-oil and natural gas advocacy groups continue to use them. We have even seen protests for particular resource values that do not even exist on protested parcels. We view a similar situation with the protests of the October 2014 sale. While there are some protests that have merit, the vast majority are simply form letters raising similar issues that should be easy to address and dismiss.

We do understand that some protest points have some validity. Therefore, the intention of this letter is to provide BLM with some legal justification to finally resolve all protests and move forward with leasing. The protests should not be viewed as justification for BLM to fail to meet its obligations under the Mineral Leasing Act to make leasing decisions within sixty days of receipt of payment.[1] Further, the protests should not be viewed as

[1] In *Western Energy Alliance v. Interior Secretary Ken Salazar*, the U.S. District Court of Wyoming ruled that the Mineral Leasing Act requires BLM to make a decision on leases within sixty days of receiving payment for the full bonus bid and annual rental for the first year.

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particularly onerous nor interpreted as representing a large problem to BLM's leasing program.

As you know, BLM conducted a solid analysis of the sale in the Leasing Environmental Assessment (DOI-BLM-NM-F010-2014-0154-EA). No matter how good BLM's analysis, there will be some group that will protest. Therefore, BLM should not attempt to institute bullet-proof analysis, but rather concentrate on resolving protests using the support of existing case law and reasonable standards of National Environmental Policy Act (NEPA) sufficiency. Our text below is designed to help with this process by providing legal language which can be used to resolve protests. We hope you find this input useful.

In particular, we address the points raised in the protest filed by the Western Environmental Law Center (WELC) et al. and echoed by various other protestors, collectively referred to as Protestors and the Protests. Once BLM has issued a decision on these lease protests, we respectfully request a copy of all BLM decisions adjudicating the Protests.

I. Introduction and Interest in the Protests

Western Energy Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in New Mexico and across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. Some of our members participated in and were winning bidders at the October 22, 2014 lease sale. Western Energy Alliance has an interest in the federal oil and gas leasing process and the orderly leasing and exploration of oil and natural gas.

By this letter and opposition to the Protests, Western Energy Alliance seeks to become a "party to the case" in accordance with the Interior Board of Land Appeals (IBLA) Order in *Contex Energy Company* and seeks to participate in any and all oral hearings, meetings or other communications regarding the case. *See Contex Energy Company*, *Order on Motion to Dismiss, Motion to Consolidate, and Petition for Stay*, IBLA 2006-51, 2006-52 (Feb. 10,2006). In that IBLA Decision, Contex sought IBLA review of BLM's decision to uphold a lease protest filed by Red Rock Forests. Under the *Contex* case and BLM's current lease protest procedures, it appears that for a party such as Western Energy Alliance to be a party to the case for a lease protest, it "must provide BLM with input concerning that protest prior to its decision."[2] *Contex*, IBLA 2006-51, 2006-52, *Order* at 2. Accordingly, by this letter, Western Energy Alliance provides input to: (1) submit a rebuttal to the protests; (2) offer further support for BLM's decision to lease the Parcels; and (3) become a party to this case.

[2] The Board held that "because Contex is not a party to the case for the Protest Decision, its appeal of that decision must be dismissed." *Contex*, at 2.

Western Energy Alliance and its member companies would be adversely affected by a decision of BLM to suspend, rescind or delay issuance of any of parcels. BLM had full authority to offer the parcels for lease under applicable federal statutes, implementing regulations, federal and IBLA case law, and current BLM policies. BLM should dismiss the Protests and issue the leases to the high bidders.

II. The Protestors Have Failed to Present Objective Proof

In filing a Protest, the Protestor bears the burden of proof to demonstrate error in BLM's leasing decisions. The Protestor must "come forward with objective, countering evidence to show, **as to each parcel**, that BLM erroneously relied on the environmental analysis in the Resource Management Plan/Environmental Impact Statement (RMP/EIS) to support the decision to offer these parcels for sale." *Wyoming Outdoor Council*, 164 IBLA 84, 104 (2004) (emphasis added). "Mere differences of opinion provide no basis for reversal." *Wyoming Outdoor Council*, 158 IBLA 155, 160 (2003).

The Protestors have not demonstrated a legally cognizable interest in the land at issue or injury to its interests, and thus do not have standing to bring this challenge. *See Wyo. Outdoor Council*, 153 IBLA 379, 382-83 (2000); *Storm Master Owners*, 103 IBLA 162, 177 (1988). It is well settled that the "mere concern of a group or individual opposing a BLM action does not constitute a cognizable legal interest." *Wyo. Outdoor Council*, 153 IBLA at 382; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (stating that the relevant showing "is not injury to the environment but injury to the plaintiff.")

The Protestors' utilization of snippets of case law and conclusory statements to fit the facts of these leases does not meet the standard necessary to alter BLM's decision to offer the Parcels for sale. *See Western Slope Environmental Resource Council*, 163 IBLA 262. The Protestors perspective and differences of opinion as to whether the Parcels should be leased, likewise, provide no legal basis for their Protests.

The Protestors have not met the burden of proof by providing objective evidence to contradict BLM's decision to offer the Parcels for oil and gas leasing. *See, e.g., Oregon Natural Resources Council*, 131 IBLA 180, 186 (1994) ("The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.") (citations omitted). The Protestors have failed to place before the BLM objective evidence that would require reversal of the BLM's decision to sell the Parcels for lease.

III. Summary of Lease Protests

In the Protests, the Protestors claim among others that:

- BLM cannot lease the subject parcels while the Mancos Shale/Gallup formation RMPA and EIS remain uncompleted
- BLM has failed to take a hard look at the effects of leasing under NEPA because the 2003 Farmington RMP is outdated
- BLM must fully analyze the environmental consequences of leasing and consider the most updated information on wildlife, water, air quality and climate change
- BLM is required to conduct a site-specific NEPA analysis of the impacts prior to leasing
- BLM did not consider a reasonable range of alternatives in the existing NEPA documents that support leasing
- BLM failed to conduct direct, indirect and cumulative impacts analysis
- BLM has the discretion not to lease the parcels
- Leasing violates the Federal Land Policy and Management Act (FLPMA) and NEPA by failing to consider the impacts to air quality
- BLM failed to address global warming, climate change and greenhouse gas emissions
- BLM must prevent unnecessary and undue degradation under FLPMA.

As explained in detail below, the Protestors have failed to provide any objective proof regarding any of its claims for any specific parcel. Thus, the Protests are without merit and should be rejected.

IV. BLM Complied Fully with NEPA

NEPA is a procedural statute promulgated to ensure that an agency makes a fully informed and well-considered decision. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978). NEPA "prescribes the necessary process [and] does not mandate particular results." *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1240 (10th Cir. 2000). It is well settled legal precedent that NEPA "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1022 (10th Cir. 2002); *Utah*

Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 1207 (10th Cir. 2002).[3] The Protestors have a fundamental misunderstanding of the oil and natural gas leasing and development process. As explained below, issuance of an oil and natural gas lease is the first step in a series of steps before a lessee can begin to develop.

BLM's existing NEPA documents for each Field Office provide more than adequate analysis to support leasing. BLM took the requisite "hard look" before deciding to lease the protested Parcels and the RMP/EIS adequately analyzes the impacts of oil and gas leasing.

Furthermore, each Protest has failed to explain, with objective proof, how BLM's lease stipulations attached to each lease is inadequate or ineffective. The RMP/EIS addresses the impacts of oil and gas leasing on all the areas of interests expressed by the Protests. Moreover, the Protests fail to specifically address how the attached mitigation measures will be ineffective. The Protests make mere vague allegations with no supporting specific documentation. Thus, the Protests must be rejected and leases issued for each parcel.

A. BLM Cannot Lease the Parcels While the Mancos Shale/Gallup Formation RMPA and EIS Remains Uncompleted

Several of the Protests argue that BLM should defer leasing all parcels in the planning area for the Mancos RMP as well as within the RFD analysis area until BLM completes its planned RMP. For the following reasons, this argument is without merit and not supported by applicable case law or BLM policies. BLM has full discretion to continue leasing parcels pending completion of the land use plan update process.

The IBLA has rejected the argument that BLM must suspend action in conformance with an existing land use plan when it decides to prepare a new plan. *See S. Utah Wilderness Alliance*, 163 IBLA 14, 28 (2004); *Sierra Club Legal Defense Fund, Inc.*, 124 IBLA 130, 140 (1992). The Board has also specifically held that BLM is not required to suspend oil and gas leasing pending the RMP update process. *See Wyoming Outdoor Council*, 156 IBLA 377, 384 (2002).

This tenet of land use planning law is also firmly established in BLM's existing guidelines and policies. BLM's Land Use Planning Handbook provides that "[e]xisting land use plans decisions remain in effect during an amendment or revision until the amendment or revision is completed and approved." H-1601-1, VII. E. at 47. Similarly, BLM IM No. 2004-

[3] The IBLA and BLM will only overturn decisions that "are premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed actions." *Coalition of Concerned Nat'l Park Serv. Retirees*, 169 IBLA 366, 369 (2006). "To meet its burden on appeal, an appellant must demonstrate, by a preponderance of the evidence and with objective proof, that BLM's decision is based on a clear error of law or demonstrable error of fact, failed to consider a substantial environmental question of significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA." *S. Utah Wilderness Alliance*, 177 IBLA 29, 34 (2009) (emphasis added).

110, provides that lands open for leasing under an existing RMP may be leased during a revision or amendment process. BLM IM 2004-110 discourages deferring lands for more than one year when adequate NEPA analysis exists. BLM reasoned that, "a decision not to lease that extends beyond . . . one year could be considered a change in land use allocation outside of the planning process that effectively removes large parcels of land from mineral development without following appropriate planning procedures." A slight modification to this IM explains that BLM State Directors have discretion to defer oil and gas leasing during land use planning "when there are legitimate BLM-recognized resource concerns." BLM IM No. 2004-110, Change 1. It also re-iterates, however, that fluid mineral leasing shall continue when BLM determines that leasing will not constrain the reasonable choice of alternatives under consideration in the planning process.

Moreover, federal court and IBLA legal precedent reiterate that under FLPMA, BLM can continue to authorize proposed actions in conformance with an existing RMP, while the RMP is in the process of being revised. *See ONRC Action v. BLM*, 150 F.3d 1132, 1138 (9th Cir. 1998) (rejecting the notion that BLM is precluded from taking specific action pending revision of an RMP, even when revision is warranted.); *Biodiversity Associates v. United States Forest Service*, 226 F. Supp. 2d 1270, 1308 (D. Wyo. 2002); *Wyoming Outdoor Council*, 156 IBLA 377, 384 (2002) (citing *Sierra Club Legal Defense Fund, Inc.*, 124 IBLA 130, 140 (1992), in which IBLA rejected the argument that BLM must suspend action in conformance with an existing land use plan when it decides to prepare a new plan).

Importantly, Instruction Memorandum 2004-110 Change 1 also states that it would be "inconsistent with Bureau planning requirements" to impose an area-wide moratorium on leasing while land use plans are updated. *Id*. Instead, it said that the intent behind BLM's policy is "to provide flexibility and to re-emphasize the discretionary authority of the State Director" when making lease deferral decisions. *Id*. In sum, BLM is not required to defer leasing pending the completion of the Mancos Shale/Gallup Formation RMP. BLM has full authority to offer these parcels for lease. Accordingly, the Protestors' argument is without merit and must be rejected.

B. BLM's Multi-Phase Oil and Gas Process

Oil and gas leasing on federal lands typically involves four steps: (1) BLM prepares or revises its RMP to determine the acres within a given planning area that are suitable for oil and gas leasing (RMP phase); (2) BLM identifies the particular parcels to be offered at a competitive public auction (leasing phase); (3) the oil and gas lessee submits an Applications for Permit to Drill (APD) to BLM outlining the lessee's drilling proposal (exploration phase); and (4) the lessee or operator may request BLM's approval for a larger number of wells to bring a field into commercial production (development phase). Courts have acknowledged this phased decision making and environmental review process. For example, in a decision involving a NEPA analysis of an oil and natural gas lease sale in Alaska, the Ninth Circuit held that "[oil and gas] projects generally entail separate stages of leasing, exploration and development. At the earliest stage, the leasing

stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006).

At the planning phase, BLM must prepare a planning EIS in conjunction with its preparation and approval of a new or revised RMP. *See* 43 C.F.R. § 1601.0-6. BLM's extensive planning process allows multiple opportunities for public involvement and comment on the agency's proposed uses for the resource area in question, including future oil and gas development. *See* 43 C.F.R. § 1610.2.

At the leasing stage, BLM will determine if the impacts of oil and gas leasing on the parcels to be offered for sale have been sufficiently analyzed in an existing NEPA document or whether additional NEPA analysis is required. BLM typically documents this determination in a DNA which confirms that an action is adequately analyzed in existing NEPA documents and is in conformance with the land use plan.[4]

Third, upon receiving an APD, BLM must undertake an environmental review to determine what additional level of NEPA analysis might be required. Accordingly, before approving any exploratory or development APD, BLM must undertake the appropriate NEPA analysis. *See* 43 C.F.R. § 3162.5-1. "When BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken." *Park County Res. Council v. Dep't of Agric.*, 817 F.2d 609, 624 (10th Cir. 1987), overruled on other grounds by *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). Here, BLM will again consider the impacts of oil and natural gas development on air quality, water resources and all other resources of concern. Additionally, BLM will conduct an on-site review prior to approving any APD to assess the specific resources of concern at the proposed drilling location. BLM must approve the lessee's proposed drilling and surface use plans before the lessee is allowed to perform any surface disturbing activities. *See* 43 C.F.R. § 3162.3- Finally, BLM will repeat the process if the project goes into commercial production with plans for a large number of wells.

For the October 22, 2014 lease sale, BLM further complied with the requirements of NEPA by analyzing those environmental impacts that were readily known and quantifiable at the leasing stage while foregoing additional, more detailed analysis for the development stage. BLM will also perform additional NEPA analysis prior to any actual surface disturbance or approving an APD. BLM recognized that it would have more refined and relevant information about specific development activities when a lessee applies for an APD. The Protests have presented no objective proof that BLM has not complied with the

[4] BLM may rely on existing environmental analysis document in its entirety, and new NEPA analysis will not always be necessary. *See Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004) (confirming that DNAs are not themselves NEPA documents, but that "agencies may use non-NEPA procedures to determine whether new NEPA documentation is required.")

requirements of NEPA for the specific parcels at issue. Accordingly, each Protest should be denied.

C. Supplementation of the Existing NEPA Documents is Not Necessary

The Protestors have not met their burden of proving that BLM needs to supplement the NEPA analyses relied upon for its leasing decisions. Supplementation of an agency's NEPA analysis is only required when the agency makes substantial changes in the proposed action or when there is significant new information of the environmental impacts of the proposed action that were not previously considered by the agency. *See* 40 C.F.R. §1502.9(c)(1)(i) and (ii); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989). Supplementation is only appropriate when the new information presents a "seriously different picture of the likely environmental harms stemming from the proposed action." *Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984). The Protests have not provided information to demonstrate that a different picture exists as to potential environmental harms.

As the U.S. Supreme Court has explained, "[a]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh* 490 U.S. at 373; *see also Friends of the River v. FERC*, 720 F. 2d 93, 109 (D.C. Cir. 1983) (An agency is not required to "release and circulate a formal supplemental EIS, or a formal document explaining why the agency believes a supplemental EIS is unnecessary, every time some new information comes to light.")

Protestors have not met their "burden to demonstrate by a preponderance of the evidence with objective proof that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(c) of NEPA." *Id*. at 5.

In order to prevail on a supplementation claim, Protestors have the burden of demonstrating that the new information presents significant environmental consequences that were not previously considered by the agency and the agency's decision not to consider this information was arbitrary and capricious. *Marsh*, 490 U.S. at 374, 378. The Protests provide no specific or objective information why the lease notice and stipulation attached to the Parcels is inadequate to protect the environmental issue of concern. Accordingly, the Protestors' arguments are without merit and must be rejected and the Protests must be denied.

V. Leasing Will Not Cause Unnecessary or Undue Degradation

Section 302(b) of FLPMA states that "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue

degradation of the lands." IBLA has recognized that "neither FLPMA nor implementing regulations defines the term unnecessary or undue degradation." *Colorado Envtl. Coalition*, 165 IBLA 221, 229 (holding that surface occupancy and drilling did not per se constitute unnecessary or undue); *Wyoming Outdoor Council*, 171 IBLA 108, 121 (2007); *see also Biodiversity Conservation Alliance*, 174 IBLA 1, 5 (2008). Through these decisions, the IBLA has maintained its position in regard to the "unnecessary or undue degradation" requirement:

> Notwithstanding the lack of a definition in the onshore oil and gas regulations, to show that an action results in undue or unnecessary degradation of leasehold lands, at a minimum, an appellant would have to show that a lessee's operations are or were conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not undertake that action pursuant to a valid existing right. 165 IBLA at 229 (emphasis added).

The Protestors have presented no objective proof that leasing or subsequent oil and natural gas exploration and development will be done in a manner inconsistent with the regulations or prudent practices. The Protestors have a clear misunderstanding of the definition and application of the "unnecessary or undue degradation" standard. Accordingly, the Protests are without merit and should be dismissed.

X. Climate Change, Global Warming and/or Air Quality

BLM's air quality analysis for the lease sale is sufficient under the three potentially applicable statutes relevant to air issues: NEPA, FLPMA, and the Clean Air Act (CAA). NEPA is only a procedural statute and does not impose substantive limits on an agency's action. As explained by the U.S. Supreme Court in *Robertson v. Methow Valley Citizens Council*, "[i]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." 490 U.S. 332, 350 (1989). So long as the EISs for each RMP adequately discloses the potential effects of the Project on air quality, NEPA's purpose and goals are satisfied.

It is important to place the scope of BLM's jurisdiction over air quality issues into perspective. Air quality analysis is a matter of special expertise where reviewing tribunals show the most deference to agencies conducting the analysis. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989). Moreover, unlike many other resources over which BLM has special jurisdiction, BLM's role over air quality regulation is extremely limited. Under the Clean Air Act (CAA), each State has the primary responsibility for assuring air quality within the State. 42 U.S.C. § 7407.

The State of New Mexico and Environment Department (NMED) have the authority and responsibility to achieve and maintain National Ambient Air Quality Standards (NAAQS) in

New Mexico. NMED has the authority not only to establish air quality standards, but to limit emissions from sources to achieve those standards, such as through the imposition of emission controls and required utilization of Best Available Control Technology (BACT). "The CAA, and not NEPA, is the primary force guiding states and localities into NAAQS compliance." *TOMAC v. Norton*, 433 F.3d 852, 863 (D.C. Cir. 2006).

BLM has fully satisfied its responsibilities under NEPA with respect to analysis of potential air quality, greenhouse gases and climate change. BLM analyzed and disclosed impacts to air and other resources in the EISs that accompany each RMP, where applicable, or as otherwise authorized to address these issues at the time of development in conjunction with NMED.

The Protestors also argue that BLM has violated Secretarial Order 3226 by failing to address global warming and climate change. Secretarial Order 3226 only applies to "long-range planning exercises, setting priorities for scientific research and investigations, and/or when making major decisions affecting DOI resources." Offering oil and natural gas leases do not fall into one of these three categories. BLM should address the requirements of Secretarial Order 3226 regarding global warming and climate change in the revisions to the RMPs which are considered long-range planning exercises. BLM need not take any further action regarding analysis of climate change or global warming at the lease sale stage.

VIII. BLM Should Dismiss the Protests and Issue the Leases

Western Energy Alliance respectfully requests that the Protests be denied and the leases be issued soon. The Federal Onshore Oil and Gas Leasing Reform Act of 1987 amended the MLA and provides a non-discretionary mandatory duty on BLM to issue leases within 60 days of final payment, "Leases shall be issued within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year." 30 U.S.C. § 226(b)(1)(A). This requirement was further clarified by the court in *Western Energy Alliance v. Salazar* which upheld the 60 day time requirement for an agency decision. It is long past time for BLM to meet this statutory obligation.

Thank you for your consideration. Please do not hesitate to contact me at (303) 623-0987 if you have any questions or would like additional information.

Sincerely,

Kathleen M. Sgamma
Vice President of Government and Public Affairs

Cc: Mike Nedd, Assistant Director – Energy, Minerals and Realty Management