WESTERN ENERGY ALLIANCE
Formerly IPAMS

March 22, 2011

Via Email and Mail

Harv Forsgren
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**Re: Appeal of Record of Decision for Bridger-Teton Oil and Gas Leasing Supplemental Environmental Impact Statement**

Dear Regional Forester Forsgren:

Western Energy Alliance (Western Energy) files this Appeal and Protest under 36 C.F.R. Part 215 to the Forest Service's January 25, 2011 Record of Decision (ROD or Decision) for the Supplemental Environmental Impact Statement (SEIS) for Oil and Gas Leasing in the Wyoming Range. Western Energy submitted timely comments on the Draft SEIS and incorporates by reference those comments and arguments into this appeal. As explained below, on behalf of its members, Western Energy has a strong interest in the federal oil and gas leasing process and the orderly leasing, exploration, and development of federal oil and natural gas resources.

By this letter and appeal, Western Energy seeks to participate in any and all oral hearings, meetings, proceedings, or any other matters regarding this Appeal and any other discussion regarding the issues related to the Forest Service's oil and gas leasing decisions in the Bridger-Teton National Forest and the Wyoming Range. In addition, Western Energy requests a copy of all Forest Service appeal decisions as well as all Wyoming Bureau of Land Management (BLM) decisions related to the leases and high bids at issue in this appeal.

Western Energy adopts and incorporates by reference the appeal filed by Stanley Energy, Inc. to the Forest Service ROD and SEIS, including but not limited to those arguments related the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA), the Energy Policy Act of 2005, Canada Lynx, U.S. Fish and Wildlife consultation, air quality, and the overstatement of impacts and underutilization of mitigation measures.

## I. Interest in the Decision at Issue

Western Energy represents over 400 companies engaged in environmentally-responsible exploration and production of natural gas and oil in the Rocky Mountain West, including Wyoming. Western Energy's member companies participate in the oil and gas lease process and have an interest in the orderly leasing, exploration and development of federal oil and gas resources in Wyoming. As a result, Western Energy has a substantial interest in the Forest Service, BLM and Wyoming leasing process and the decisions related to parcels purchased at the December 2005, and April, June and August 2006 Wyoming BLM lease sales, including Forest Service's January 25, 2011 Decision for the SEIS.

Western Energy and its member companies will be adversely affected by a decision of Forest Service and/or BLM to rescind, cancel or delay issuance of any of the leases at issue here.

## II. Executive Summary

The Forest Service has no legal or discretionary authority, under the Mineral Leasing Act, 30 U.S.C. 181, et. seq. (MLA) or Forest Service regulations, 36 C.F.R. § 228.102(e) or otherwise, to withdraw its prior June 15, 2005 leasing authorization for the twelve lease parcels offered, sold and issued by BLM. Even assuming, *arguendo*, that the Forest Service has statutory and legal authority to do so, its retroactive withdrawal of its lease authorization to BLM has no legal effect upon the twelve leases issued by BLM on May 1, 2006 and July 1, 2006. These leases represent vested property rights. Any infringement upon a lessee's valid existing property rights resulting from the Forest Service's Decision represents a governmental taking of property rights without compensation in violation of the Fifth Amendment of the U.S. Constitution.

The Forest Service's Decision also violates the MLA. The Forest Service does not have the legal or discretionary authority to require the Department of the Interior, through BLM, to violate its statutory mandates under the MLA by retroactively withdrawing and cancelling the valid existing leases that BLM issued over five years ago.

The Forest Service's Decision also violates NEPA. NEPA is a procedural statute and it is well established that the proper remedy on remand for procedural violations of NEPA is only procedural, such as performing more NEPA analysis to inform whether to include additional mitigation measures or conditions of approval regarding specific resources of concern. Forest Service cannot utilize NEPA to craft new substantive remedies, such as voiding the agency action analyzed under NEPA. The Forest Service exceeded the statutory parameters of NEPA, utilizing post-hoc supplemental NEPA analyses as an unlawful basis to retroactively nullify 2.5 million dollars worth of legitimate lease bids, and eliminated any investment-backed expectations associated

with these leases. The Forest Service's Decision is drastic and unprecedented violation of NEPA, and also offends the most basic tenets of American contract law.

## III. The Mineral Leasing Act Mandates that BLM Must Issue the Leases; Forest Service Has No Legal or Discretionary Authority to Retroactively Withdraw its Authorization to Lease

The Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA or Reform Act) amended the MLA and provides a non-discretionary mandatory duty on BLM to issue leases within 60 days of final payment. Specifically, the MLA provides, "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). The BLM's mandate under the statute is clear, as explained by the U.S. Court of Appeals for the Tenth Circuit, "'Shall' means shall." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (Reasoning "[t]he Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command.").

The MLA 60-day requirement for BLM issuance of leases is a statutory mandate to compel agency action and the MLA does not afford any agency discretion to evade this requirement or retroactively withdraw prior lease issuances. *See generally S. Utah Wilderness Alliance v. Norton*, 542 U.S. 55, 64 (2004) ("[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.").

These principles were recently confirmed by the U.S. District Court, District of Utah in *Impact v. Salazar*, where the court found that once the Secretary of the Interior offered parcels for lease, and declared high bidders, he was without legal or discretionary authority to withdraw those bids. *Impact Energy Resources, LLC v. Salazar*, 2010 WL 3489544 *4-8 (Utah 2010). Thus, the Secretary was mandated by the MLA to issue those leases. The MLA contains a non-discretionary duty to issue leases within 60 days of full payment. *Id*. at *7; *see also* 30 U.S.C. §226 (b)(1)(A).

## IV. Forest Service's Leasing Framework under 36 C.F.R. § 228.102

The following overview of the Forest Service's regulations regarding its role in BLM's leasing process is provided to place Western Energy's arguments into proper legal and regulatory context. Prior to offering National Forest Lands for leasing, BLM must obtain the authorization of the Forest Service. *See* 30 U.S.C. § 226(h), 43 C.F.R. § 3101.7-1., 36 C.F.R. § 228.102. The process underlying the Forest Service's power to authorize leasing in National Forests is exhaustive and is designed to first ensure, and later verify, that the activity complies with NEPA. 36 C.F.R. § 229.102(c), (d).

Section 228.102 of the Code of Federal Regulations outlines this authorization process and establishes a two-step procedure for determining whether the Forest Service "shall authorize" the BLM to offer oil and gas leases on National Forest Service lands. The Forest Service's regulatory language "shall authorize" conveys the same legal non-discretionary action mandated to the Department of the Interior under the MLA to issue leases. *Compare MLA,* 30 U.S.C. § 226(b)(1)(A).

The first step of the Forest Service's procedure is a "leasing analysis." 36 C.F.R. § 228.102(c). At this stage, the Forest Service identifies lands subject to the operation of the mineral leasing laws which it will agree to make administratively eligible for leasing. This analysis is conducted in accordance with the Forest System land and resource management planning regulations and through the preparation of NEPA documents. *Id.* The outcome of this analysis does not commit the Forest Service to authorizing the BLM to offer lands for lease. Rather, it ensures that the Forest Service has evaluated the environmental effects of potential development scenarios on Forest Service lands, including constrained development scenarios limited by lease stipulations, see 36 C.F.R. § 228.102(c)(ii) and/or no-leasing alternatives, see *id*. § 228.102(c)(1)(iii) and § 228.102(c)(2). At the conclusion this process, the Forest Service determines whether some or all of the lands studied in the leasing analysis should be made administratively available for oil and gas leasing.

At the second stage, the Forest Service makes "leasing decision[s] for specified lands" and reviews "specific lands [that] are being considered for leasing" to determine whether it will authorize BLM to offer them for leasing. *Id.* § 228.102(e). When making these leasing decisions, the Forest Service revisits the analysis conducted at the first stage to "verif[y] that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document and is consistent with the Forest land and resource management plan." *Id.* § 228.102(e)(1). The Forest Service also ensures that the "conditions of surface occupancy identified in [the previous stage] are properly included as stipulations in resulting leases," and "[determines] that operations and development could be allowed somewhere on each proposed lease except where stipulations will prohibit all surface occupancy." *Id.* §§ 228.102(e)(2), (3). Once the Forest Service concludes that these requirements are met, it "shall authorize the Bureau of Land Management to offer specific lands for lease." *Id.* § 228.102(e).

Thus, a given lease parcel that has been authorized for leasing under section 228.102(e) has often undergone NEPA review at least twice prior to its offer for sale by the BLM—first under the Forest Service's initial leasing analysis, and second when the Forest Service makes leasing decisions for specific lands. See id. § 228.102(c) and (e).

Here, the Forest Service determined in the Bridger-Teton National Forest Land and Resource Management Plan adopted on March 2, 1990 that the subject land would be administratively available for oil and gas leasing, subject to certain constraints, in

accordance with 36 C.F.R. § 228.102. The Forest Plan also contains goals, objectives, standards, and guidelines that impose further limitations on activities that may affect surface resources, such as operations and development related to oil and gas leases. This decision and the supporting environmental analysis were reviewed, and some of the constraints on oil and gas leasing activities further refined for each of the involved Management Areas in three environmental assessments and Decision Notices prepared in 1990, 1991 and 1993. Then in January and February of 2004, the Forest Service completed a Supplemental Biological Assessment, Supplemental Biological Evaluation, and a Supplemental Information Report, determining that no further environmental analysis would be needed to authorize BLM to offer the subject lands for lease.[1] On June 15, 2005, the Forest Service authorized the BLM to offer the subject lands for lease with specified stipulations in accordance with 36 C.F.R. § 228.102(e).

### *A. The Forest Service has no legal authority to withdraw previous leasing authorizations for the twelve previously-issued lease parcels because BLM has already leased these lands.*

On June 25, 2005, the Forest Service authorized the BLM to offer certain lands in the Wyoming Range for lease with specified stipulations in accordance with 36 C.F.R. § 228.102(e). SEIS ROD at p.1. In December 2005, and April 2006, BLM offered these lease parcels for sale at its regularly scheduled quarterly oil and gas lease sales. In May and July of 2006, respectively, BLM issued leases for twelve parcels.

It is well settled that federal oil and gas leases are valuable property interests and contracts. *Union Oil Co. of California v. Morton*, 512 F.2d 743,747, 750–751 (9th Cir. 1975) (federal oil and gas lease is a property interest protected by the Takings Clause); *see also Mobil Oil Exploration & Producing Southeast, Inc. v. United States,* 530 U.S. 604, 607–608 (2000) (federal oil and gas leases are governed by the law of contracts between private individuals).

As explained by the Forest Service in issuing its regulations for leasing (30 C.F.R. § 228.102), "[The Forest Service] has determined that leases that are issued for National Forest System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease." 55 Fed. Reg. 10,423-10,452, 10,430 (Mar. 21, 1990). Thus, once BLM issued the twelve leases, the lease sale process was consummated and the lessees had a vested property right.

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[1] The sufficiency of the Supplemental Information Report was challenged in *Wyoming Outdoor Council*, IBLA 2006-184 (July 10, 2006). This challenge resulted in a stay of BLM's April 5, 2006 lease sale. And while the IBLA held that appellants had satisfied the legal criteria to obtain a stay of BLM's decision, appellants did not definitively establish that the environmental analysis was insufficient; they merely established that it *may* have been. Furthermore, the IBLA decision does pertain to nor bind the Forest Service and has no precedence for purposes of this appeal.

Section 228.102(e) establishes a temporal limitation on the Forest Service's leasing authority and provides that the Forest Service's leasing analysis and authorization shall occur "[a]t such time as specific lands are being considered for leasing." 36 C.F.R. § 228.102(e).

Here, upon issuance of the leases, the Forest Service no longer had any legal authority to change its December 2005 authorization or reconsider that decision because the lands were no longer "being considered for leasing" and the Forest Service's decision-making authority under the NFMA and Mineral Leasing Act were complete. 30 C.F.R. § 228.102(e). The Forest Service is therefore without any legal or discretionary authority to re-review its previous leasing decisions and the January 25, 2011 ROD is unlawful and has no legal effect as to the twelve previously-issued parcels.

***B. The Forest Service's retroactive withdrawal of authorization for leasing has no legal effect as to the twelve leases issued by BLM because those leases represent vested property rights.***

The leases at issue are valuable property interests and contracts. *Union Oil Co. of California*, 512 F.2d at 750–751; *see also Mobil Oil Exploration*, 530 U.S. at 607–608. Likewise "[the Forest Service] has determined that leases that are issued for National Forest System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease." 55 Fed. Reg. 10,423-10,452, 10,430 (Mar. 21, 1990). As vested property rights, these leases may not be retroactively nullified by the Forest Service.

Thus, the Forest Service's unilateral and retroactive withdrawal of leasing authorization to BLM has no legal effect as to the twelve federal oil and gas leases issued by BLM because these were validly issued by BLM in December 2005 and April 2006 and represent vested property rights that cannot be extinguished by a subsequent decision of the Forest Service.

Importantly, these leases were, and continue to be, valid and have been in existence for almost five years. The circumstances here are not akin to federal court and the IBLA cases that allowed the retroactive cancellation of leases. In those cases, the court found that the subject leases had been a nullity at the outset because either the Forest Service had not authorized the land to be leased, the BLM did not own the minerals in the land, or the BLM did not own the land itself. 43 C.F.R. § 3108.3(d); *see also, e.g., Boesche v. Udall*, 373 U.S. 472 (1963), *Celeste C. Grynberg*, 169 IBLA 178, 183 (2006); *High Plains Petroleum Corp.*, 125 IBLA 24, 26 (1992). Here, in contrast, the leases were not legally or administratively defective upon issuance. These leases remain valid property rights and the lessees maintain valid contractual rights.

Ultimately, the Forest Service's Decision has no legal effect because a retroactive cancellation of these leases has no legitimate legal basis. Further, the Forest Service's action violates the most basic tenets of property and contract law. Cancellation of these leases would also be contrary to the Forest Service's regulations issued with 30 C.F.R. § 228.102, and the Solicitor for the Department of the Interior's unequivocal legal opinion that once an oil and gas lease has been issued and property right vests, the Secretary cannot cancel that vested right. *See* Solicitor's Opinion M-36910 (Supp.), 88 Interior Dec. 909, 912 (1981). The Forest Service's withdrawal of authorization therefore has no effect as to the twelve previously-issued federal oil and gas leases because these were validly issued by BLM in December 2005 and April 2006.

### *C. Any diminution of property rights caused by the Forest Service's withdrawal of leasing authorization represents a taking in violation of the Fifth Amendment of the U.S. Constitution.*

Even assuming, *arguendo,* that the Forest Service's underlying NEPA analysis on the twelve previously-issued parcels is somehow inadequate to support the Forest Service's January 15, 2005 leasing authorization, any outcome that involves cancelling the leases, or otherwise diminishing their value, without adequate compensation, represents a taking under the Fifth Amendment.

"In identifying a 'taking' forbidden by the Taking Clause, three factors should be considered: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *In re CF & I Fabricators of Utah, Inc.,* 150 F.3d 1233, (10th Cir. 1998); *see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-129 (1978).

The economic impact of the Forest Service's withdrawal of authorization is severe. The twelve lessees hold valid, vested property rights in federal oil and gas leases. By withdrawing its authorization, the Forest Service eliminated BLM's ability to lease these parcels and rendered these leases null and void and deprived the lessees of any opportunity pursue their rights to "explore and drill for, extract, remove, and dispose of oil and gas deposits" that may be found on the leases.

The lessees have invested over 2.5 million dollars in the twelve issued oil and gas leases, and likely expected to derive substantial profits from the venture. The Tenth Circuit has recognized that the value of a lease includes fair market value of the oil and gas as determined by the income that could be realized for the minerals. *See*, *e.g. United States v. 179.26 Acres of Land in Douglas County, Kansas*, 644 F.2d 367 (10th Cir. 1981). Moreover, oil and gas companies invest millions in geologic research, and other expenses that far exceed the value of the leases actually paid at a public auction held by BLM. When they were issued the oil and gas leases in May and July of 2006, the lessees

justifiably believed that they would be able to develop these leases. Moreover, these expectations were reasonable because the leases are valuable property interests and contracts that are protected by law. *Union Oil Co. of California*, 512 F.2d at 750–751; *Mobil Oil Exploration & Producing Southeast, Inc.*, 530 U.S. at 607–608. The Forest Service's withdrawal of authorization makes it impossible for lessees to realize any profit, value, or income from their investments.

And third, the chronology of events shows that the egregiousness of the government action here. The Forest Service's original authorization for these leases was granted on June 15, 2005. These leases were sold in December of 2005 and April of 2006, and issued in May 2006 and July 2006, respectively. The Forest Service's withdrawal of authorization was issued on January 25, 2011—approximately five and a half years after its previous authorization and approximately four and a half years after the twelve leases were issued. This retroactive cancellation of the leases, almost five years after that contract was made and the associated property rights were vested, is grossly inequitable. The proposition that an individual could successfully void or withdraw from a valid contract years after it was made violates the most basic principles of contract law. *See United Nuclear Corp. v. United States*, 912 F.2d 1432, 1438 (Fed.Cir. 1990) (holding that the Secretary's refusal to approve a mining plan submitted by a mining company that had been awarded leases on Indian reservation constituted a taking under the Fifth Amendment, rather than a proper exercise of fiduciary duty).

Similarly, the fact that the lands underlying the twelve issued leases might still be under administrative review does not fairly indicate that lessees should have anticipated that their leases would be effectively canceled. The lessees bid on, won, and were issued the twelve subject leases *five years prior* to this decision. The lessees also complied with the statutory and regulatory requirements governing the leases, for leases in their primary 10-year term and are not yet in production, these requirements include timely payment of annual rentals. 43 C.F.R. §§ 3103.2, 3108.2-1.

Finally, lessee's expectations were based on the fact that only Congress has the authority to cancel validly issued oil and gas leases. As courts have noted, "Congress itself can order the [federal oil and gas lease] forfeited . . . subject to payment of compensation. But without congressional authorization, the Secretary [of the Interior] or the executive branch in general has no intrinsic powers of condemnation." *Union Oil Company*, 512 F.2d at 750; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

Ultimately, the federal oil and gas leases issued by the BLM pursuant to the December 6, 2005 and April 4, 2006 lease sales were not erroneously issued, and the holders of these leases have complied with all of the agency's legal requirements with respect to these leases. The leases are therefore valid property interests. The Forest

Service's withdrawal of authorization for these leases and effective cancellation thereof is a taking of lessee's property rights under the Fifth Amendment.

## V. The Forest Service Lacks the Authority to Withdraw Its Authorization for Parcels That Have High Bids

As explained above, the Forest Service lacks the legal authority to retroactively withdraw its 2005 consent to leasing to cancel leases and cannot otherwise effect cancellation of the leases issued by BLM. Likewise, the Forest Service and BLM lack the legal authority to withdraw the consent to leasing for parcels that were offered and sold but not yet issued by BLM. After the Forest Service consented to leasing for the December 2005, and the April, June and August 2006 lease sales, BLM declared the lessees to be the successful high bidders at the each of the lease sales and BLM accepted payment in full for the Lease Parcels, the Forest Service was without authority to, and prohibited from, retroactively withdrawing its consent to leasing. BLM is likewise without the authority to withdraw the lessees' high bids.

### *A. BLM Lacks Authority to Retroactively Withdraw Lease Parcels.*

BLM lacks the legal authority to retroactively withdraw the high lease bids and the Forest Service cannot force BLM to take an unlawful action in violation of the Mineral Leasing Act or BLM's implementing regulations. Neither the MLA, NFMA nor FLPMA afford the Secretaries of the Interior or Agriculture any discretion to retroactively withdraw or cancel any validly sold and issued leases or sold yet still unissued lease parcels.

#### 1. The Mineral Leasing Act of 1920 (MLA).

The MLA mandates that:

> All lands to be leased . . . shall be leased as provided in this paragraph to the highest responsible bidder by competitive bidding under general regulations . . . . The Secretary **shall** accept the highest bid from a responsible qualified bidder [at the Lease Sale] which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. 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) (emphasis added). Thus, the MLA imposes a mandatory, non-discretionary duty on the Secretary of the Interior to issue leases for parcels sold after receipt of payment by the successful bidders of the full bonus bid and first year rental. *See also Exxon Corp*., 97 IBLA 330 (1987).

**2. The MLA Implementing Regulation (43 C.F.R. 3120.5-3).**

BLM's regulation regarding lease bids, titled "Award of lease," states in pertinent part:

> (a) A bid shall not be withdrawn and shall constitute a legally binding commitment to execute the lease bid form and accept a lease, including the obligation to pay the bonus bid, first year's rental, and administrative fee. Execution by the high bidder of a competitive lease bid form approved by the Director constitutes certification of compliance with subpart 3102 of this title, [and] shall constitute a binding lease offer . . . .

43 C.F.R. § 3120.5-3(a) (emphasis added).

BLM's MLA implementing regulation further provide that "[a]lease shall be awarded to the highest responsible qualified bidder. A copy of the lease shall be provided to the lessee after signature by the authorized officer." 43 C.F.R. § 3120.5-3(b) (emphasis added). BLM's regulation reserves no authority for BLM to retroactively withdraw a lease parcel once sold. Nor do any BLM or Forest Service regulation afford Forest Service the authority to retroactively withdraw its lease authorization decision.

**3. BLM has no legal authority to withdraw the lease bids.**

The lessees fulfilled all terms and conditions for consummation of a competitive leasing contract specified under the MLA, and complied with all of the Forest Service's and Interior's implementing regulations and BLM's procedures governing competitive oil and gas lease sales. BLM determined each lessee to be the highest responsible qualified bidder for their respective lease parcels and Plaintiffs timely paid for the lease parcels BLM sold to them.

The Secretary is "bound by the regulations which he himself ha[s] promulgated . . . ." *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959). BLM and the Forest Service are also "bound by the terms of a contract lawfully entered into," such as the lessees' legally binding offers accepted by the Government. *United States v. Essley*, 284 F.2d 518, 521 (10th Cir. 1960). Accordingly, BLM is statutorily and contractually obligated to issue the leases once the lessees fulfilled these conditions and terms. Neither BLM, nor the Forest Service are afforded any authority or discretion to retroactively withdraw the leases from the sale or otherwise prohibit BLM from issuing the leases.

The MLA requires the Secretary of the Interior to issue oil and gas leases to the successful bidders upon submission payment of the required bonus and rental. The statute leaves no discretion in the Secretary of the Interior to withdraw a lease already sold and paid for by the successful bidder. As explained in *Forest Guardians v. Babbitt*,

174 F.3d 1178, 1187 (10th Cir. 1999) (emphasis in original) regarding the interpretation of statutory language: "'***Shall*' *means shall***. The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *See also United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997) ("It is a basic canon of statutory construction that use of the word "shall" indicates a mandatory intent."). The Forest Service's own regulations state that it "shall authorize" BLM leasing. Once authorized, the Forest Service has no legal or discretionary authority to retroactively change that authorization. *See id*. Nor does BLM have any legal authority or discretion to comply with an unlawful directive from the Forest Service that would violate the MLA, FLPMA, NEPA or any other applicable statute or regulation.

The Forest Service lacks statutory authority to direct BLM to retroactively withdraw the lessees parcels from the lease sales by withdraw its consent to leasing. No statute or regulation authorizes BLM contravene its statutory responsibilities under the MLA, and BLM is not otherwise authorized to retroactively withdraw the lessees' high bids at the Forest Service's direction.

Upon accepting the high bids and all required payments from Plaintiffs, Defendants did not have discretion, under statute, regulation or otherwise, to retroactively withdraw the Lease Parcels sold to Plaintiffs and to refund Plaintiffs' payments. The MLA and regulations demand certainty in the leasing process.

**4. Even if the Secretary retains discretionary authority under the MLA to withdraw lease parcels from leasing, such discretion may not be exercised subsequent to entering into a contract to lease.**

As explained above, once BLM accepts the high bid for a lease parcel at a lease sale, it is bound by that acceptance absent a particular parcel being improperly placed for bid Interior's own administrative adjudicatory body, the Interior Board of Land Appeals, found that there is a finite point at which BLM no longer has discretion to withdraw a lease parcel or reject a competitive lease bid. *Exxon Corp*., 97 IBLA 330, 334 (1987)("In effect, . . . having once determined that the bid was acceptable, the Secretary was estopped from changing his mind and ordering its rejection. We hold, in accordance with this division, that once the authorized officer has communicated acceptance of a high bid he is thereafter estopped from rejecting the bid . . . ."). "[O]nce the Government notifies a high bidder that the bid is acceptable, the Government **has contractually obligated itself to issue the lease upon fulfillment of the conditions** specified in 43 CFR 3120.5(b). *Id.* at 335 (emphasis added).

Here, the lessees fulfilled all of the statutory and procedural required for lease issuance. At this point, BLM lost the ability to not issue the leases and the Forest Service lost any discretion to withdraw its consent for BLM to lease the parcels. Accordingly

upon accepting the bids, the BLM "bound" itself to "issuance of the lease[s]," *Exxon* 97 IBLA at 335, and could not thereafter act in contravention of their contractual duties to the lessees. For the same reasons, the Forest Service is prohibited from withdrawing its consent to leasing. As a result, the Forest Service's withdrawal of its consent to leasing violates the MLA.

## VI. The Forest Service Cannot Force BLM to Violate Federal Law

The Forest Service's unlawful retroactive withdraw of its authorizations to lease six years after the lease sale would require BLM to take an action that it cannot lawfully take. As explained above, BLM has no legal authority to cancel valid existing leases or to withdraw leases that have been lawfully established. The Forest Service' Decision in the ROD would require BLM to take an action that it cannot lawfully take. One agency cannot force another agency to take an unlawful action. Thus, the Forest Service's ROD and the decision to retroactively withdraw its leasing authorization is unlawful and must be reversed.

## VII. The Forest Service Violated the National Environmental Policy Act (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).

### *A. The Purpose and Need Statement in the SEIS is Inadequate.*

The purpose and need for the leasing SEIS is very generally framed as a procedural response to the IBLA's decision regarding a remand by the IBLA and further environmental review for its leasing recommendation. This is inadequate. The purpose and need statement cannot include an action that the Forest Service is not legally authorized to take, i.e. retroactively changing its authorization to lease the BLM. As explained

The purpose and need for the SEIS must include reference to the Forest Service's multiple-use mandate to authorize oil and gas development, the availability of lands for leasing under the MLA, and the national policy encouraging the development of domestic energy resources and reducing the reliance on foreign supplies of oil and gas, as well as move toward cleaner fossil fuels such as natural gas. The need to

develop domestic energy resources and reduce reliance on foreign energy resources is a priority for the United States and must be included in any legal purpose and need statement.

### *B. BLM Failed to Take a Hard Look at the Mitigation Measures.*

The SEIS overstates the potential impacts of oil and gas leasing on a variety of resources including Canada lynx, mule deer and air quality. The analysis in the SEIS fails to take into account mitigation measures available that avoid and minimize impacts. The impact analysis is based on speculation and unsupported conclusory assumptions without reference to credible information. Even if minor negative impacts may occur to the lynx or its habitat, there are mitigation measures in place to protect the resources of concern that negate the need to unlawfully cancel existing leases or rejecting the high bids on leases offered at previous sales. The SEIS fails to fully consider the reduced impacts from the plethora of oil and gas mitigation measures included in the oil and gas leases. The Forest Service may not lawfully "elevate environmental concerns over other appropriate considerations" and must fully analyze the positive results of the lease mitigation measures and other restrictions on development. *Citizens' Comm. to Save Our Canyons*., 297 F.3d at 1022.

### *C. The SEIS Fails to Take a Hard Look at the Socioeconomic and Other Impacts from Withdrawing its Consent to Leasing.*

The Forest Service failed to take a hard look at the socioeconomic impacts of increased oil and gas leasing and development. Oil and gas development has significant impact at all economic scales. Development, or lack thereof, in the planning area and the leases at issue will have a negative national impact on the economy. *See* 40 C.F.R. §§ 1502.23 & 1508.14 (human environment includes economic impacts).

To comply with NEPA, the Forest Service must quantify the economic impact of oil and gas development as described by the RFD and the reduction in economic gain and other impacts that are associated with environmental restrictions. Positive impacts will be realized at the local level through employment and spending for goods and services necessary for the development. Production taxes, royalties and leasing bonus and rentals are realized at the Federal, state and county level.

The Forest Service must also consider the impact that planning and leasing decisions have on the commodity price at a national level. Natural gas is an extremely inelastic commodity and a small change in supply yields a large change in the price paid by families and industry. The decisions made by the Forest Service in the ROD will directly affect every family in the country. Research conducted by Energy and Environmental Analysis, an energy research that is respected by both energy suppliers and conservation organizations, indicates that a one percent change in national supply

causes a 20 percent change in the wholesale price of the commodity. The additional supply provided by timely development of oil and gas resources in the Bridger-Teton National Forest could have an impact of hundreds of millions of dollars a year. To comply with NEPA, the Forest Service must complete an adequate socioeconomic impacts analysis in the SEIS.

### *D. The SEIS Relies on Incomplete and/or Unavailable Information.*

The CEQ regulations require that when there is incomplete or unavailable information, the Forest Service disclose such information. Here the Forest Service heavily relies on speculative impacts without disclosing that it based it analysis on incomplete and/or unavailable information.

For example, the SEIS states that "[a]lthough few data are available, researchers believe that lynx in the Greater Yellowstone Ecosystem have a patchy distribution and the Wyoming Range may represent the most important lynx habitat in the Greater Yellowstone Ecosystem." SEIS, at 3-77. The SEIS failed to acknowledge all of the unavailable and the incomplete information in the discussion of lynx and its habitat. Thus, the Forest Service violated NEPA.

## VIII. Forest Service Cannot Retroactively Void Substantive Leasing Decisions Based Upon Alleged Procedural Violations of NEPA.

Finally, even assuming arguendo, that the Forest Service's underlying NEPA analysis on the twelve previously-issued parcels is somehow inadequate to support the Forest Service's January 15, 2005 leasing authorization, the Forest Service's Decision is unlawful and in contravention of well established legal precedent. In the ROD, the Forest Service evasively describes the lease cancellation alternative as the "No Action Alternative," and then designates it as the Preferred Alternative. The end result is the same however: twelve valid existing leases, which represent vested property rights, are effectively canceled after-the-fact.

Courts have held, however, that lease cancellation is not an appropriate remedy in the event of insufficient NEPA analysis. Where, as here, only purported procedural violations of NEPA occurred, the remedies "are limited to procedural remedies." *Willow Creek Ecology v. U.S. Forest Service*, 225 F. Supp. 2d 1312, 1316 (D. Utah 2002) (citation omitted). For example, in *The Wilderness Society, et al, v. Wisely*, 524 F. Supp. 2d 1285 (D. Colo. 2007), plaintiffs challenged federal oil and gas leases under the Administrative Procedures Act (APA) and NEPA. The Court recognized its very limited role was to review the procedures the BLM undertook prior to offering specific lands for oil and gas development, and not to review the substantive policy choices made implicit in that leasing decision. Although the court eventually determined that the BLM's NEPA analyses were not sufficient to support leasing, the Court did not cancel the oil and gas

leases on remand. *Wisely*, 524 F. Supp. 2d at 1312 n12 ("The Court will not simply void the September 2005 decision to resume leasing—and all of the BLM's subsequent acts implementing that decision—as doing so might adversely affect property interests obtained by lessees as a result of the lease sale.").

The Court's holding in *Wisely* is consistent with the vast majority of other similar decisions in which courts have found procedural NEPA violations associated with BLM and Forest Service leasing decisions. In such situations, the normal procedure is to place the disputed leases in suspense, thus prohibiting any surface-disturbing operations, until the BLM has completed additional NEPA analysis. *See Conner v. Burford*, 848 F.2d 1441, 1461 (9th Cir. 1988) (enjoining all surface disturbing activities on oil and gas leases until an EIS was completed) (citing *Northern Ala. Envtl. Ctr. v. Hodel*, 803 F.2d 466 (9th Cir. 1986)); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)); *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 D. Mont. 2006) (determining the appropriate relief for NEPA violation is continued suspension of activity on the leases pending additional analysis); *Southern Utah Wilderness Alliance v. United States Dep't of the Interior*, No. 06-CV-342-DAK, 2007 WL 2220525, at *1 n. 3, *2 (D. Utah July 30, 2007) (holding that suspension of the leases rather than cancellation of leases was sufficient to comply with court's order regarding NEPA violations).

The only circumstances where a court may decide to cancel leases is if the agency fails to comply with a basic statutory requirement of NEPA, such as including analysis of a no action alternative. *See Bob Marshall Alliance v. Hodel*, 804 F. Supp. 1292, 1297-98 (D.Mont. 1992) (determining that BLM's failure to consider a "no action" alternative prior to issuing oil and gas leases required cancellation of the leases prior to additional NEPA analysis). Here, no such circumstances exist. Forest Service complied with the letter of NEPA. While certain parties may, albeit illegitimately, debate the sufficiency of the Forest Service's NEPA analysis, the issue of *whether* an analysis was conducted is not subject to such debate. Since an analysis was conducted, and therefore the appropriate remedy is only to perform more analysis to determine whether additional protection or mitigation measures may be needed. Forest Service does not have the authority to retroactively cancel the leases based upon the perceived need to perform further analyses.

In this case, the proper remedy is simply performance of additional NEPA analysis to determine if any additional mitigation measures should be included on any future authorization of exploration or development activities on the leases. Forest Service's authority under section 228.102(e) is limited to determining whether NEPA has been adequately addressed. If it is not, then the Forest Service must undertake additional NEPA and impose conditions and or stipulations appropriate with that analysis. Cancellation of the leases is not supported by law.

**IX. Requested Relief**

Western Energy requests that the ROD and SEIS be withdrawn and remanded until each complies with the MLA, NFMA, NEPA and all other federal statures and regulations.

**X. Lease Stipulations Are Sufficient to Proceed with Leasing**

BLM attached a lease stipulation for protection of wildlife, water resources, soils, habitat, and air quality to each of the Parcels. The Protestors have failed to demonstrate how the lease stipulations are ineffective or inadequate to protect each of these resources. Accordingly, the Protestors arguments are without merit and must be rejected.

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. Please send me a copy of the Forest Service or BLM decisions that adjudicate each protest.

Sincerely,

Kathleen M. Sgamma
Director of Government and Public Affairs

cc: Bob Abbey
Mike Pool