WESTERN ENERGY
ALLIANCE

May 22, 2016

Donald Kranendonk
Big Piney Ranger District
Bridger-Teton National Forest
10418 South U.S. Hwy 189, P.O. Box 218
Big Piney, WY 83113

Re: 2016 DSEIS for Oil and Gas Leasing on Portions of the Wyoming Range in the Bridger-Teton National Forest

Dear Mr. Kranendonk:

Western Energy Alliance (Alliance) strongly objects to the U.S. Forest Service's (USFS) plans to unlawfully cancel leases via the 2016 Draft Supplemental Environmental Impact Statement (DSEIS) for Oil and Gas Leasing on Portions of the Wyoming Range in the Bridger-Teton National Forest. The justification USFS provides for cancelation is based on overstated environmental impacts not supported by the evidence provided in the DSEIS, and is a mask to a pre-determined policy. We oppose USFS's preferred Alternative 1, under the misnomer of "No Action Alternative," and urge USFS to adopt Alternative 2 which would lift the suspensions of issued leases, and issue those leases for which high bids were accepted.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees. Alliance members have a strong interest in the federal oil and natural gas leasing process and the orderly leasing, exploration, and development of federal oil and natural gas resources. Western Energy and its member companies will be adversely affected by a decision of USFS to rescind, cancel or delay issuance of any of the leases at issue here. We adopt and incorporate by reference the comments submitted by Stanley Energy, Inc.

In this case, after Western Energy Alliance, Stanley Energy, Wold Oil Properties, Inc., Impact Energy Resources, LLC, and Sublette County filed administrative appeals challenging the Forest Supervisor's selection of the "No Action Alternative" in the 2011 SEIS Record of Decision (ROD), which would also have withdrawn all the lease, the Forest Supervisor withdrew the 2011 ROD. While indeed the remedy for that is additional NEPA, that NEPA cannot likewise arrive at the same unlawful conclusion. **T**he proper remedy is performance of additional NEPA analysis to determine if any additional mitigation measures should be included on future authorization of exploration and development

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activities on the leases. Rather than doing so, USFS has engaged in flawed analysis, identified mild or speculative impacts to other resource values such as wildlife species and air quality, overlooked the measures available to mitigate those impacts, and arrived at a pre-determined conclusion to cancel the leases.

The Alliance is fundamentally opposed to any cancelation of existing lease rights based on this retroactive analysis. The entire federal onshore oil and natural gas program is founded on contracts entered into between the federal government and private entities. The lease contracts in question have always been and continue to be valid, as they were entered into in good faith by all parties, including BLM, USFS, and the purchasers of the leases. These lease contracts represent valid existing rights, and are expressly protected under the Federal Land Policy and Management Act of 1976 (FLPMA), which states that all BLM actions are "subject to existing rights."[1] Furthermore, under the Mineral Leasing Act (MLA), BLM and USFS do not have the authority to cancel leases except in specific and extremely circumscribed situations, none of which pertain to these leases.[2] That authority is vested in the courts, and applies only to cases in which the lessee has failed to meet the terms of the contract.

The plain facts of the leases in question support moving forward with development on the leases, not cancelation. Ninety-seven percent of the 39,490 leased acres are located in areas planned for development in the 1990 plan, which lawfully authorized the leases, and avoid areas where the primary management goals are preservation of lands with wilderness characteristics, recreation or wildlife. The Wyoming Legacy Act, which removed much of the Bridger-Teton National Forest from future leasing and development, does not allow for the cancelation of leases sold prior to the enactment of the act in 2009, well after the leases were sold and high bids accepted. The leases at issue are valid property rights which were not rescinded by Congress in the Wyoming Legacy Act nor does USFS and the Department of the Interior (DOI) have the ability to rescind them now.

Western Energy Alliance also strongly objects to USFS harassing small businesses. All remaining interested lease holders are very small businesses that have invested significantly in the leases. Perhaps if these companies were larger with more lobbying clout USFS wouldn't feel so emboldened to cancel their leases. There is leasing and development nearby these leases by much larger companies that the federal government rightly has not attempted to stop. All the small businesses with the leases in question would like to proceed in like manner to obtain a return on their investments. They made these investments in conjunction with their good-faith contracts with USFS and DOI, and have the right to proceed with their planned environmentally responsible development that assures impacts to identified natural resource values in the project areas are limited and mitigated.

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[1] 43 USC 1701 note (h)
[2] 30 USC 181 et seq.

Lack of Legal Authority

The 2016 DSEIS offers no legal authority for its lease proposal to cancel existing leases or to rescind binding high bids for leases that were lawfully auctioned. This is a fatal flaw in USFS's analysis. Accordingly, USFS must reject Alternative 1 and proceed with legally defensible Alternative 2, which contains appropriate measures to mitigate impact from development.

USFS has no legal or discretionary authority under the Mineral Leasing Act, 30 U.S.C. 181, et. seq. MLA or USFS regulations, 36 C.F.R. § 228.102(e) or otherwise, to withdraw its prior June 15, 2005 leasing authorization for the lease parcels offered, sold and issued by BLM. Even assuming, *arguendo*, that USFS has statutory and legal authority to do so, its retroactive withdrawal of its lease authorization to BLM has no legal effect upon the 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 DSEIS represents a governmental taking of property rights without compensation in violation of the Fifth Amendment of the U.S. Constitution.

The DSEIS Alternative 1 also violates the MLA. USFS does not have the legal or discretionary authority to require DOI, through BLM, to violate its statutory mandates under the MLA by retroactively withdrawing and canceling valid existing leases that BLM issued ten years ago.

The intention to cancel leases also violates the National Environmental Policy Act (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. USFS cannot utilize NEPA to craft new substantive remedies, such as voiding the agency action analyzed under NEPA. USFS is exceeding the statutory parameters of NEPA, utilizing post-hoc supplemental NEPA analyses as an unlawful basis to retroactively nullify $2.5 million worth of legitimate lease bids, and eliminating investment-backed expectations associated with these leases. The DSEIS is a drastic and unprecedented violation of NEPA, and also offends the most basic tenets of American contract law.

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.") and reaffirmed in *Western Energy Alliance v. Salazar* Case No. 10-CV-0226.

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.")

The following overview of the Forest Service's regulations regarding its role in BLM's leasing process is provided to place the Alliance's arguments into proper legal and regulatory context. Prior to offering National Forest Lands for leasing, BLM must obtain the authorization of USFS. *See* 30 U.S.C. § 226(h), 43 C.F.R. § 3101.7-1., 36 C.F.R. § 228.102. The process underlying USFS'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 USFS "shall authorize" BLM to offer oil and natural gas leases on National Forest Service lands. USFS's regulatory language "shall authorize" conveys the same legal non-discretionary action mandated to DOI under the MLA to issue leases. *Compare MLA,* 30 U.S.C. § 226(b)(1)(A).

The first step of USFS's procedure is a "leasing analysis." 36 C.F.R. § 228.102(c). At this stage, USFS 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 USFS to authorizing BLM to offer lands for lease. Rather, it ensures that USFS has evaluated the environmental effects of potential development scenarios on USFS 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 of this process, USFS 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, USFS 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, USFS 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).

USFS 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 USFS 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 BLM, first under the USFS’s initial leasing analysis, and second when it makes leasing decisions for specific lands. See id. § 228.102(c) and (e).

Here, USFS 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 natural 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 natural gas leases. This decision and the supporting environmental analysis were reviewed, and some of the constraints on oil and natural 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, USFS 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.[3] On June 15, 2005, USFS authorized BLM to offer the subject lands for lease with specified stipulations in accordance with 36 C.F.R. § 228.102(e).

On June 25, 2005, USFS authorized BLM to offer certain lands in the Wyoming Range for lease with specified stipulations in accordance with 36 C.F.R. § 228.102(e). 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 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

[3] 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.

(2000) (federal oil and gas leases are governed by the law of contracts between private individuals).

As explained by USFS 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 leases, the lease sale process was consummated and the lessees had a vested property right.

Section 228.102(e) establishes a temporal limitation on USFS's leasing authority and provides that its 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).

Upon issuance of the leases, USFS 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 its decision-making authority under the National Forest Management Act (NFMA) and Mineral Leasing Act were complete. 30 C.F.R. § 228.102(e). USFS is therefore without any legal or discretionary authority to re-review its previous leasing decisions and Alternative 1 in the DSEIS is unlawful.

The issued leases 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 "[USFS] 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, USFS's attempted unilateral and retroactive withdrawal of leasing authorization has no legal effect as to the 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 USFS.

Importantly, these leases were, and continue to be, valid and have been in existence for ten years. The circumstances here are not akin to federal court and the IBLA cases that allowed the retroactive cancelation of leases. In those cases, the court found that the subject leases had been a nullity at the outset because either USFS had not authorized the land to be leased, BLM did not own the minerals in the land, or 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.

The DSEIS Alternative 1 is unlawful because a retroactive cancelation of these leases has no legitimate legal basis. Further, Alternative 1 violates the most basic tenets of property and contract law. Cancelation of these leases would also be contrary to USFS's regulations issued with 30 C.F.R. § 228.102, and the DOI Solicitor'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). Alternative 1 therefore has no legal effect as to the previously-issued federal oil and gas leases because these were validly issued by BLM in December 2005 and April 2006.

Even assuming, *arguendo,* that USFS's underlying NEPA analysis on the previously issued parcels is somehow inadequate to support USFS's January 15, 2005 leasing authorization, any outcome that involves canceling 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 Alternative 1 is severe. The lessees hold valid, vested property rights in federal oil and natural gas leases. By withdrawing its authorization, USFS would eliminate BLM's ability to lease these parcels, render them null and void, and deprive the lessees of any opportunity to 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 in the issued oil and gas leases, and expect 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 natural 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 natural 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 the leases were issued 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. Alternative 1 would make 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. USFS'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. USFS's plans to withdraw them eleven years after its original authorization and ten years after lease issuance 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 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 subject leases *ten years prior* to the DSEIS. The lessees also complied with the statutory and regulatory requirements governing the leases, including 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 natural 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 natural 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. Alternative 1 with its planned withdrawal of leases and effective cancelation thereof is a taking of lessee's property rights under the Fifth Amendment.

As explained above, USFS lacks the legal authority to retroactively withdraw its 2005 consent to lease and cannot otherwise effect cancelation of leases issued by BLM. Likewise, USFS and BLM lack the legal authority to withdraw the consent to lease for parcels that were offered and sold but not yet issued by BLM. After USFS 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 accepted payment in full. At that point, USFS 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.

BLM lacks the legal authority to retroactively withdraw the high lease bids and USFS cannot, through the DSEIS, force BLM to take an unlawful action in violation of the MLA 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. 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).

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 provides 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.

The lessees fulfilled all terms and conditions for consummation of a competitive leasing contract specified under the MLA, and complied with all of USFS's and DOI'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 lessees 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 USFS 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 USFS 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 natural gas leases to the successful bidders upon submission payment of the required bonus and rental. The statute leaves no discretion for 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."). USFS's own regulations state that it "shall authorize" BLM leasing. Once authorized, USFS 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 USFS that would violate the MLA, FLPMA, NEPA or any other applicable statute or regulation.

USFS lacks statutory authority to direct BLM to retroactively withdraw the lessees parcels from the lease sales by withdrawing its consent to leasing, whether those leases have been issued or not. No statute or regulation authorizes BLM to contravene its statutory responsibilities under the MLA, and BLM is not otherwise authorized to retroactively withdraw the lessees' high bids at USFS's direction.

Upon accepting the high bids and all required payments from lessees, BLM does not have discretion, under statute, regulation or otherwise, to retroactively withdraw the lease parcels. The MLA and regulations demand certainty in the leasing process.

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 USFS lost any discretion to withdraw its consent for BLM to lease the parcels. Accordingly upon accepting the bids, BLM "bound" itself to "issuance of the lease[s]," *Exxon* 97 IBLA at 335, and could not thereafter act in contravention of its contractual duties to the lessees. For the same reasons, USFS is prohibited from withdrawing its consent to leasing.

USFS cannot force BLM to violate federal law through the DSEIS. The unlawful attempt in Alternative 1 to withdraw of its authorizations to lease ten 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. One agency cannot force another agency to take an unlawful action. Thus, Alternative 1 cannot be adopted.

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).

The purpose and need for the DSEIS is very generally framed around the procedural aspects of the NEPA process, and completely disregards the purpose and need for oil and natural gas development under USFS's multiple-use mandate, which was the initial reason for leasing the 39,940 acres at issue in the DSEIS.

A proper statement of purpose and need for the DSEIS should include reference to USFS's multiple-use mandate, 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 natural gas. It should highlight the Forest Plan's directive prior to the Wyoming Range Legacy Act to make the area available for leasing. 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.

Retroactive Cancelation of Leases

Even assuming arguendo, that USFS's underlying NEPA analysis 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 DSEIS, USFS evasively describes the lease cancelation alternative as the "No Action Alternative," and designates it as the preferred alternative.

Courts have held, however, that lease cancelation 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 natural gas leases under the Administrative Procedures Act (APA) and NEPA. The Court recognized its very limited role was to review the procedures BLM undertook prior to offering specific lands for oil and natural gas development, and not to review the substantive policy choices made implicit in that leasing decision. Although the court eventually determined that BLM's NEPA analyses were not sufficient to support leasing, the Court did not cancel the oil and natural 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 USFS leasing decisions. In such situations, the normal procedure is to place the disputed leases in suspense, thus prohibiting any surface-disturbing operations, until additional NEPA is completed. *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 cancelation 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 cancelation of the leases prior to additional NEPA analysis). Here, no such circumstances exist. USFS complied with the letter of NEPA. While certain parties may, albeit illegitimately, debate the sufficiency of USFS'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. USFS does not have the authority to retroactively cancel the leases based upon the perceived need to perform further analyses.

The flimsy justification that USFS gives for canceling the leases is impacts to other resource values, but the analysis is either speculative and not based on sound evidence, or by a careful reading, indicates very small impact on other resource values that is mitigated by the measures and stipulations contained in Alternative 2 and can be further mitigated by Conditions of Approval on approved Applications for Permit to Drill. Some of the overstated impacts, which fail to support the unlawful act of lease cancelation, are detailed below.

Overstated Impacts

The DSEIS provides no authority for USFS to cancel the leases on the basis of anticipated impacts from oil and gas leasing and development on Canada Lynx, Colorado Cutthroat Trout, other aquatic species, mule deer, elk, recreation, air quality or any other natural resource values. Furthermore, the DSEIS fails to acknowledge that the impacts from oil and natural gas leasing actually identified are small. The analysis in the DSEIS fails to take into account mitigation measures available that avoid and minimize impacts. The impact analysis is either based on speculation and unsupported conclusory assumptions without reference to credible information.

Canada Lynx

The impact analysis for the Canada Lynx in the DSEIS contains many of the same material deficiencies that were present in the 2011 SEIS. The analysis overstates the potential impacts of oil and natural gas leasing on the species, and fails to take into account mitigation measures available to avoid or minimize impacts. The DSEIS is based on speculation and unsupported conclusory assumptions without reference to credible information. Most importantly, even if minor negative impacts may occur to the lynx, that is insufficient justification for canceling existing leases or rejecting the high bids on leases offered at previous sales, especially when measures to mitigate those small impacts are identified.

For example, the DSEIS 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 p. 191. This statement is significant because much of the impact analysis relies on the alleged importance of the project area habitat compared to other habitat in the Greater Yellowstone area. Yet the only references are to personal communications with two researchers from 2008 and 2009. These opinions are contained in informal emails from lynx researchers to USFS personnel. The emails cite neither the factual basis for the researchers opinions and provide no citation to scientific authority. Nor does the DSEIS otherwise discuss the basis for the researchers' opinions or references to materials relied upon to form those opinions. Thus, USFS violated NEPA. Western Energy Alliance defers to the detailed comments on the lynx analysis in Stanley Energy's comments. The evidence that Stanley provides convincingly show that impacts to the lynx are clearly not a sound basis for canceling the leases.

Most convincing is the fact that direct disturbance associated with the leases would amount to 107 acres of the critical lynx habitat in the Greater Yellowstone Area, which encompasses 9,500 square miles. That equates to 0.0000176% of critical habitat that would be disturbed. The amount of habitat disturbance is negligible from the leases, and doesn't pass the straight-faced test. Surely that infinitesimal impact to habitat from the leases, which contain stipulations to further reduce that impact, are not credible justification for the unprecedented and unlawful cancelation of leases.

Even if minor negative impacts may occur to the lynx, which has not been seen in the area of the leases for the last six years, or its habitat, there are mitigation measures in place to protect the resources of concern that negate the need to unlawfully the leases in question. The DSEIS fails to fully consider the reduced impacts from the plethora of mitigation stipulations included in the leases. USFS 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.

<u>Other Species</u>

The DSEIS concludes that "negative effects" on the Colorado River Cutthroat Trout, Boreal Toad, and the Columbia Spotted Frog would occur under Alternative 2. SEIS p. 419. It states that the primary concerns stem from increased risk to aquatic habitat from surface disturbance, chemical contamination, sedimentation, and vehicular mortality. Id. But those conclusions are not supported by the facts.

Only 2,243 acres of leases are considered riparian or wetlands that fall within the primary management areas for cutthroat trout. DSEIS, pg. 402.This represents less than 5.8 percent of the leased area. Further, out of the 39,940 leased acres within the project area, 22,194 acres would be covered by no-surface-occupancy restrictions and 14,914 acres would be subject to controlled surface use or timing limitation under Alternative 2 to protect these species. DSEIS, pg. 408. Moreover, the amount of road construction or reconstruction accounts for only 9.6 miles, with the further stipulation that "riparian areas and stream crossings would be avoided if possible." *Id.* These facts all lead to the conclusion that impacts to aquatic habitat for the cutthroat trout would be extremely small.

In another example of flawed analysis, USFS concludes that boreal toads and the Columbia spotted frog will experience "negative effects" due to aquatic habitat impacts, but the DSEIS contains no discussion about the amount of aquatic habitat available for those species. DSEIS, 396-98. Instead, the habitat acreage for the cutthroat trout is used in USFS's primary discussion of habitat available for all aquatic species within the project area. Id. at 402-04. USFS admits that “[l]ittle information is available that describes conditions of aquatic habitat within the analysis area.” DSEIS, pg. 402. But absent such information, USFS’s conclusions regarding “negative effects” to the boreal toad and Columbia spotted frog are overstated and speculative, at best.

Council on Environmental Quality regulations require that when there is incomplete or unavailable information, agencies disclose such information. Here USFS heavily relies on speculative impacts without disclosing that it based the analysis on incomplete and/or unavailable information. Any impacts to aquatic species and their habitats will be minimal and can be adequately mitigated through best management practices during the application for permit to drill process, as recognized by USFS.

<u>Economic Impacts</u>

On the other hand, USFS has failed to take a hard look at the socioeconomic impacts of canceling the leases. Oil and natural 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, USFS must quantify the economic impact of oil and natural gas development and the reduction in economic gain and other impacts that are associated with environmental restrictions. Positive impacts should 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. To comply with NEPA, USFS must complete an adequate socioeconomic impacts analysis in the DSEIS.

<u>Air Quality</u>

The DSEIS provides no justification for USFS to cancel the leases on the basis of air quality. USFS is in effect stating that it may cancel leases for projects that are not likely to adversely impact air quality because there are other projects nearby. The federal government cannot break contracts with the lessees because there are other projects with other companies unrelated to the contracts. The quantitative modeling cited in the DEIS shows, “[b]ecause the direct impacts under each alternative are so small, the project will not contribute significantly to any cumulative air quality impacts.” 2016 DSEIS, pg. 449 That statement says it all.

Since USFS admits in the DSEIS that direct air quality impacts from oil and gas exploration and development on the 39,490 acres will be minimal, it cannot use air quality as a justification for canceling the leases. Similarly, USFS finds that “[i]t is not likely that emissions from this project alone would cause exceedances of National Ambient Air Quality Standards or have a noticeable impact on air quality related values (including visibility greater than 1 deciview) in nearby sensitive Class I and Class II wilderness areas and national parks." *Id*.

Not only is the overall number of proposed wells for the 39,940 acres very modest when compared to other gas fields in the region, but so too is the expected pace of development for this acreage. The DSEIS expects that no wells would be drilled in the first year of development and the entire development would occur during the span of fifteen years. DSEIS, pg. 465. USFS only expects that maximum emissions would result from drilling two wells per year in years 12 and 13, along with operation of 4 compressor stations. *Id*. Given the low number of overall wells, and very modest pace of development, the agency concludes the indirect effects of this project are "relatively small." *Id*. at 469.

Finally, USFS provides an extensive list of mitigation measures to minimize air quality emissions from oil and natural gas development. Alternatives 2, 3, and 4 require drill rig engines and associated generators to comply with Tier 2 emissions technology (or more better), but imposes forward-looking requirements for the use of lower emitting equipment under Tier 4 emissions standards as manufacturers begin to produce such equipment starting in 2016. While it is inappropriate for USFS or BLM to specify air control measures, as they do not have jurisdiction to do so, the Environmental Protection Agency and the State of Wyoming do indeed have air quality control authority and any development would have to comply with their requirements imposed through the Clean Air Act.

It is clear from the DSEIS that the air quality impacts from development of the 39,940 acres would be small and localized; can be mitigated to reduce any actual air quality impacts; must comply with state and EPA air control regulations; have not been shown that they will trigger a violation of any National Ambient Air Quality Standard; and will not have any noticeable impact on visibility or any other air quality related values in nearby Class I or Class II wilderness areas. Nothing in this analysis leads to the conclusion that the agency's proposed lease cancelation alternative is either legally nor substantively based on air quality impacts.

In conclusion, USFS has not shown any convincing evidence to support an unlawful and unprecedented cancelation of any of the leases in question. We urge USFS to adopt Alternative 2 in the ROD, which would balance economic development with protection of wildlife, air quality, and other resource values in the area. Development on the 39,460 acres in question would have minimal impacts that can be successfully mitigated to ensure appropriate multiple-use of the land and co-existence of responsible oil and natural gas with recreation and protection of the land.

Thank you for your consideration of our comments. 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 & Public Affairs