UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

WYOMING OUTDOOR COUNCIL, GREATER YELLOWSTONE COALITION, THE WILDERNESS SOCIETY,	)	**IBLA Docket No. 2006-208**
Appellants,	)	Appeal of the Dismissal of Protest of the Sale of Oil and Gas Lease Parcels WY-0604-147, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159 April 4, 2006 Lease Sale
v.	)	
BUREAU OF LAND MANAGEMENT,	)	
Respondent.	)	**IBLA Docket No. 2006-184**
	)	Appeal of the Dismissal of Protest of the Sale of Oil and Gas Lease Parcel WY-0512-176, December 6, 2005 Lease Sale
	)	BLM Wyoming State Office

APPELLANTS' REQUEST FOR CLARIFICATION AND OBJECTION TO THE BLM'S REQUEST FOR REMAND

The Appellants object to the BLM's January 8, 2007 Request for Remand in IBLA No. 2006-184 and IBLA No. 2006-208. Based on terminology used in the Request, the Appellants questioned whether the disputed leases in both appeals had already been issued by BLM. After contacting BLM's counsel on January 10, 2007, the Appellants learned for the first time that the BLM had in fact issued the leases from the December 2005 and the April 2006 lease sales.[1]

[1]On June 1, 2006, the day after the BLM dismissed the April lease sale protests, the BLM issued the eleven disputed leases. BLM apparently issued these leases despite the requirements of 43 C.F.R. § 4.21(a)(1), stating that "[a] decision will not be effective during the time in which a person adversely affected may file

By filing timely appeals and petitions requesting that this Board stay the BLM's decisions to issue the disputed leases, Appellants assumed that the issuance of the leases was contingent upon the outcome of their stay petitions. This assumption was supported by the BLM's proper characterization of the Appellants' stay request in its responsive brief in IBLA No. 2006-208: "Said appeal included a Petition for Stay requesting that BLM be prohibited from issuing the lease until it fully complies with its legal obligations" under NEPA and the Endangered Species Act. BLM's August 21, 2006 Response to Petition for Stay and Supplement to the Record at 1. At no time did the BLM correct the Appellants' misunderstanding of the status of the leases, nor did it alert this Board that the Appellants' requested relief would be impossible for the Board to grant, as the leases had been issued months prior. Without this disclosure, the Appellants had no reason to suspect that the stays the Board granted in both IBLA No. 2006-184 (Order, July 10, 2006), and IBLA No. 2006-208 (Order, September 21, 2006) were anything but the stays of lease issuance they had specifically requested. Thus, it was the Appellants' understanding that the two stay orders signified that the BLM had been prevented from conveying the leases and with them developments rights to more than 20,000 acres of sensitive National Forest land pending this Board's decision on the merits of the appeals. That is the relief Appellants requested and which this Board granted when it ruled unconditionally that "the petition[s] for stay [are] granted." Order, Wyoming Outdoor Council, IBLA 2006-184, at 12 (July 10, 2006); Order, Wyoming Outdoor Council, IBLA 2006-208, at 10 (September 21, 2006).

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a notice of appeal." The BLM issued the one lease from the December 2005 lease sale on April 12, 2006 See BLM LR 2000 Database Case Recordation Serial Reports for April and December parcels (Exhibit 1).

The BLM now requests the Board remand the two appeals so that it may "take action consistent with the Board's most recent Stay Orders." BLM's Request for Remand at 1. Although the BLM does not mention what action it plans to take if its remand request is granted, presumably the BLM in conjunction with the Forest Service will attempt to remedy the deficiencies the Board identified under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., concerning the 1993 MA-24 EA, the pre-leasing NEPA document the agencies improperly used to authorize both the December and April lease sales. No new pre-leasing analysis can occur at this point, however, given the post-leasing status of the two appeals—that is, the leases have already been issued, thereby conveying surface use development rights to the leaseholders. See 43 C.F.R. § 3101.1-2.

As long as the issued leases remain in place, BLM's proposed remand can lead to nothing more than a paperwork exercise to justify a lease issuance decision that has already been made. This is not what the Appellants sought when seeking stays before this Board, nor is it consistent with NEPA's over-arching "look before you leap" mandate for federal environmental decision-making. See 40 C.F.R. § 1502.5 ("The [EIS] shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.") (citations omitted). In order to vindicate this Board's stay orders and NEPA's fundamental requirements, any BLM remand procedures must be undertaken on a "clean slate" in which the full range of agency leasing options remains available—including, most significantly, the options not to issue the challenged leases, or to issue the leases

with new and different stipulations that are calculated to address the significant environmental issues raised by the Appellants in these Board proceedings.

Accordingly, the Appellants hereby request that the Board clarify its July 10 and September 21, 2006 stay orders by specifying that the stays specifically prohibit issuance of the leases pending resolution of the merits of these appeals, and require BLM to cancel the improperly issued leases. Unless and until the BLM cancels the challenged leases, the Appellants object to BLM's proposed remand. However, if the BLM cancels the leases, Appellants will withdraw their objection to the remand.

I. BLM CANNOT COMPLY WITH NEPA'S PRE-LEASING REQUIREMENTS ON REMAND WHERE THE LEASES ARE ALREADY ISSUED

BLM proposes a "remand" to "take action consistent" with this Board's stay orders. Yet this Board's stay orders identified NEPA deficiencies in BLM's pre-leasing environmental analysis concerning the challenged leases. The BLM's proposed remand cannot "take action consistent" with these orders, because no pre-leasing environmental analysis can be conducted after the leases are issued.

A "lease first, analyze impacts later" approach transforms the NEPA process into little more than an empty formality. For this reason, NEPA's implementing regulations are clear: "Agencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f). At this post-leasing stage, the BLM cannot ensure an objective and meaningful consideration of all alternatives—particularly the no leasing alternative—when, as in this case, the agency has already leased the disputed parcels, ultimately committing them to some level of development. For non-NSO oil and gas leases, such as those at issue here, courts and this Board have required a thorough NEPA analysis prior to leasing.

> The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposed to lease public lands for oil and gas purposes, because leasing without NSO stipulations constitutes an irreversible and irretrievable commitment to surface-disturbing activity, in some form and to some extent.

Southern Utah Wilderness Alliance, 166 IBLA 270, 276-77 (2005). See also Wyoming Outdoor Council et al., 156 IBLA 347, 357-59 (stating that the BLM must prepare a NEPA analysis that considers "reasonable alternatives available in a leasing decision, including whether specific parcels should be leased, appropriate lease stipulations, and NSO and non-NSO areas."); Pennaco Energy, Inc. v. U.S. Dept. of the Interior, 377 F.3d 1147, 1160 (10th Cir. 2004) (affirming this Board's decision and analysis "in light of the Wyodak's EIS' failure to consider the pre-leasing options"); Bob Marshall Alliance v. Hodel, 852 F.2d 1123, 1229 (9th Cir. 1988) (holding that prior to issuing oil and gas leases, NEPA "requires that alternatives—including the no-leasing option—be given full and meaningful consideration.").

Once an agency has committed to a decision, as the BLM has here (in fact, BLM has more than committed to a decision, it has already acted on its decision by issuing the leases), it is not possible for the agency to take the legally required pre-decisional "hard look" at a range of alternatives, particularly the no-action alternative. The inherent danger in allowing the BLM to proceed as it suggests is evident:

> The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up.

Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983). As this Board stated in its September 21, 2006 Order, post-leasing analyses such as the Jonah EIS and the Pinedale

Anticline EIS could not substitute for an up-to-date and comprehensive pre-leasing analysis, which is what is required prior to offering any oil and gas lease for sale and what was lacking specifically in both the December 2005 and April 2006 lease sales. Order at 9. Thus, absent a decision to first cancel the leases it improperly issued, any NEPA analysis the BLM undertakes at some future date will be in the same flawed category of post-leasing analyses this Board already has found to be insufficient.

II. THE CHALLENGED LEASES SHOULD BE CANCELED

Because no lawful remand NEPA process can occur while the challenged leases remain issued, this Board should require cancellation of the challenged leases and should not remand this matter until BLM has first completed such a cancellation. The correct remedy for situations in which leases are improperly issued is cancellation. 43 C.F.R. § 3108.3(d) ("Leases shall be subject to cancellation if improperly issued."); see Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992) (holding that cancellation of leases is the only way to address procedural violations of NEPA: "[F]ull and meaningful consideration of the no-action alternative can be achieved only if all alternatives . . . are developed and studied on a clean slate.")(emphasis added); see also Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128-1129 (9th Cir. 1998) (ordering rescission of water contracts that did not comply with procedural obligations of NEPA and the Endangered Species Act.)

While BLM suggests that the challenged leases will be suspended pending completion of a remand process, see Request for Remand at 2, 3 n.1, suspension is not the equivalent of canceling the leases. See 43 C.F.R. § 3103.4-4. This is because suspension, unlike cancellation, does not allow the agencies to study and consider all

alternatives—particularly the no-leasing alternative—in an impartial manner. Despite the fact that during the time in which the leases are in suspension the leaseholders cannot proceed with surface disturbing activities, the leases nevertheless remain valid and the BLM's underlying decision to issue the leases remains in place. Moreover, the leases continue to convey surface development rights that, while suspended, are not extinguished and continue to constrain BLM's range of options. See 43 C.F.R. § 3101.1-2. The BLM cannot claim that a suspension decision transforms the issuance of the leases into anything less that an irretrievable and irreversible commitment of resources. Because a pre-leasing NEPA analysis is required before the agencies may make such a commitment, only cancellation will resolve this basic problem. Further, the only way to ensure that all new and significant information, such as threats to air quality and the Canada lynx and all reasonable alternatives are fairly evaluated on a "clean slate" prior to leasing is to cancel the leases that were issued improperly. Short of cancellation, any remedial NEPA analysis risks being at most a post-hoc rationalization "to justify decisions already made," something NEPA and its implementing regulations prohibit. 40 C.F.R. § 1502.5.

Setting aside the leases is the correct procedure and is also consistent with the BLM's recent decision to defer issuance of thirteen additional Bridger-Teton National Forest leases sold in the June 2006 lease sale "until the concerns raised by the IBLA [with respect to the December and April lease sales] are sufficiently addressed." BLM's January 8, 2007 Protest Decision re: June 6, 2006 oil and gas lease sale at 9 (Exhibit 2). Thus, based on the same NEPA issues this Board identified, the BLM itself has determined that issuance of leases auctioned in the same area of the Wyoming Range

should not occur until the issues can be resolved. There is no basis for treating the December and April leases differently. Until the BLM sets aside the December and April leases, remand to the agency is not the appropriate remedy.

CONCLUSION

Prior to the dates upon which the Board granted the Appellants' petitions for stay in IBLA Nos. 2006-184 and 2006-208, the BLM issued the disputed leases to the industry high bidders. In light of this newly acquired information, Appellants hereby request that the Board clarify its July 10 and September 21, 2006 stay orders by specifying that the stays specifically prohibit issuance of the leases pending resolution of the merits of these appeals, and require BLM to cancel the improperly issued leases. Canceling the leases will ensure upon remand that the agencies give all alternatives including the no leasing alternative fair consideration. Unless and until BLM cancels the leases, the Appellants object to the remand as proposed by BLM, and this Board should deny BLM's request. If the BLM cancels the leases, however, Appellants will withdraw their objection to the remand.

Respectfully submitted this 19th day of January, 2007.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2007 I caused to be served a true and correct copy of the foregoing **Request for Clarification and Objection to BLM's Request for Remand** via facsimile copy and certified priority mail, return receipt requested to:

Interior Board of Land Appeals
Office of Hearings and Appeals
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and also hereby certify that on this 19th day of January, 2007 I caused to be served a true and correct copy of the foregoing **Request for Clarification and Objection to BLM's Request for Remand** via certified priority mail, return receipt requested to:

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