



To: Citizens for the Wyoming Range
From: Lisa McGee, National Forests and Parks Program Director
Date: January 7, 2013
Re: Disposition of 44,720 contested oil and gas lease acres in the Bridger-Teton NF

MEMORANDUM

The 44,720 acres in the Wyoming Range at issue in the Bridger-Teton National Forest's forthcoming supplemental draft EIS have a complex history and status. These acres were offered in four consecutive oil and gas lease sales beginning in December 2005. Sales followed in April, June and August 2006. Each sale was protested by numerous and diverse stakeholders, many of whom cited outdated NEPA analysis as a reason not to lease, explaining that circumstances had changed in the nearly 15 years since the environmental assessments used to defend the leasing decision were published. Today, seven years since the controversial lease sales occurred, there are additional reasons that support a decision not to lease, including passage in 2009 of federal legislation withdrawing 1.2 million acres of National Forest land in the Wyoming Range from future oil and gas leasing, and a historic conservation purchase in 2012 of 58,000 acres of valid oil and gas leases adjacent to the contested 44,720 that will soon be retired permanently.

This memo addresses the history and significance of the 44,720 contested lease acres, as well as the authority the Forest Service and BLM have at the conclusion of this upcoming supplemental NEPA analysis, not to lease.

Procedural History

Despite requests from the public that the agency not lease, and that, at minimum, it first update the old NEPA analyses it cited as support for its leasing decision, in 2005 the Forest Service gave its consent to the BLM to proceed with leasing 44,720 acres in the Wyoming Range. In turn, the BLM offered the parcels for lease sale. Upon denial of the numerous protests filed, the BLM accepted companies' high bids and issued the leases from these two sales. Appeals and a request for stay were filed with the Interior Board of Land Appeals. The IBLA found the parties were likely to succeed on the merits of their appeals—indicating that evidence provided in the appeals suggested the NEPA analysis upon which the agencies relied was incomplete—and granted the stay requests. Suspensions were placed on the leases issued to the high bidders pending final outcome of the appeals. The BLM held two additional lease sales in June and August 2006. Based on the IBLA's stay decisions regarding the first two sales, however, the BLM upheld the lease protests on these final two sales. High bidders were identified, but these leases were deferred and not issued.

Before the IBLA could rule on the merits of the appeals, however, the BLM requested a remand, in order that it and the Forest Service could address the NEPA deficiencies. Appellants

objected to remand without concurrent lease cancellation, citing concerns that the existence of leases could unduly influence the outcome of any supplemental NEPA analysis. The BLM argued this was unnecessary because cancellation remained an option for the agencies at the conclusion of the updated NEPA process. “As the leases are voidable pending additional NEPA review, cancellation is not required.” BLM’s Response Brief to Appellants’ Request for Clarification and Objection to BLM’s Request for Remand, Feb. 7, 2007 at 8.

[B]ecause the leases are voidable, ample opportunity exists to structure any future NEPA process in a manner that preserves an adequate no-leasing alternative. By way of example, an alternative under which leases would be cancelled and no further leasing could occur would appear to constitute a legally sufficient no action alternative.

Id. at 13; see also *id.* 16 (“Inasmuch as the leases remain voidable, but may still issue upon completion of additional environmental review and decision records, suspension provides adequate relief consistent with [the IBLA’s] preliminary determination.”)

The IBLA granted the BLM’s request for remand so that new and updated information could be considered as part of the legally required pre-leasing NEPA analysis. This process of reevaluation left open the possibility that the original decision to lease could be altered. Although appellants would have preferred cancellation at that time in order to ensure a “clean slate” upon which the Forest Service and BLM could embark on an objective, pre-leasing supplemental NEPA analysis, the BLM’s repeated statements that cancellation was a viable potential outcome of the supplemental NEPA process were reassuring. Even more important was the IBLA’s acknowledgment that, “Following further analysis on remand, BLM may decide that is it necessary to cancel the leases.” Remand Order, Greys River Trophies, et al., IBLA 2006-249, Feb. 14, 2007.

More than a year later the Forest Service undertook the preparation of a supplemental leasing EIS in response to the IBLA’s remand order. This EIS was intended to update the environmental assessments prepared in the early 1990s that the Forest Service relied on to make its controversial leasing decision in 2005. It would address changed circumstances and determine “whether and to what extent analysis of new issues and information might alter the oil and gas leasing decision...” on the entire 44,720 contested acres. Revised Notice of Intent to Prepare a Supplemental EIS, 73 Fed. Reg. 16621 (March 28, 2008) (emphasis added).

In a troubling turn of events, Stanley Energy—the high bidder on the majority of the voidable leases—had positioned itself impermissibly as an overseer and co-drafter of the initial supplemental draft EIS. It also had entered into an MOU with the Forest Service and was paying for the preparation of the EIS. This was hardly the objective analysis the appellants expected given the concerns they raised with the IBLA, and the very nature of the EIS as a pre-leasing document. When uncovered, many stakeholders, including Wyoming’s Governor Dave Freudenthal criticized this improper relationship. The Forest Service, which admitted publicly that “mistakes were made,” severed its contract with the third-party NEPA contractor and withdrew from its MOU with Stanley Energy. It then opted to turn over the preparation of the supplemental EIS to the Forest Service’s intermountain regional office.

In March 2009, after years of citizen advocacy spurred by the initial leasing of these 44,720 acres, the Wyoming Range Legacy Act was signed into law. It withdrew 1.2 million acres of the southern Bridger-Teton National Forest from future mineral leasing, including the 44,720 contested acres. The legislation did not determine the fate of these 44,720 contested acres, but instead left the decision to the discretion of the agencies. The language of the Act reflects the various dispositions of the leases that comprise the 44,720 acres, stating:

Nothing in this section prohibits the Secretary from taking any action necessary to issue, deny, remove the suspension of, or cancel a lease [*referring to leases in the December 2005 and April 2006 sales*] or any sold lease parcel that has not been issued [*referring to the June and August 2006 sales*], pursuant to any lease sale conducted prior to the date of enactment of this Action, including the completion of any requirements under [NEPA].

Public Law 111-11, 123 Stat. 1128, Section 3202(e), Subtitle C—Wyoming Range (citations omitted). Although the Act retains the Forest Service’s authority to decide whether to confirm or deny its prior leasing decision, if the Forest Service ultimately decides these acres should not have been leased, this area can never be leased again given the inclusion of the 44,720 acres within the legislative withdrawal boundary.

On January 25, 2011, the Forest Service issued a final EIS and Record of Decision regarding these contested acres. In explaining its “no action” decision, which in turn would have required the Forest Service to instruct the BLM to cancel leases improperly issued and to reject pending bids on leases deferred, the Forest Supervisor was clear that “no single factor” lead to the decision, but rather it was the “combination” of issues and concerns expressed, which were thoroughly outlined in the Record of Decision. Record of Decision for Oil and Gas Leasing on the Bridger-Teton National Forest at 3, January 25, 2011. Many relevant factors—air and water quality, wildlife, recreation, tourism, hunting and fishing, sense of place, socioeconomics and others—legitimately informed the agency’s discretionary decision not to lease, and provided a rational and defensible basis for that decision.

The Forest Service’s decision was widely celebrated. It was the highly controversial and improper leasing of these 44,720 acres in the Wyoming Range that galvanized a diverse, grassroots coalition of citizens to advocate successfully for passage of the Wyoming Range Legacy Act. This was the outcome the majority of stakeholders hoped to see. The decision also met with opposition from two of the high bidding companies, including Stanley Energy who decried the authority of the agency to make such a decision. The Sublette County Commission raised concerns not with the decision per se, but with agency’s rationale, which it worried could set a precedent in limiting other uses on the forest. Although the Forest Service had a firm foundation upon which to base its decision, it opted to withdraw its decision and undertake further analysis.

The additional analysis has been ongoing for nearly two years, yet the release of a new supplemental draft is not anticipated until the fall of 2013. Apparently, and despite its original decision to cancel and withdraw the offering of these leases, there is now disagreement within the agency regarding its authority at this stage not to lease.

Authority to cancel leases issued improperly

The BLM's own regulations are clear: "Leases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). A violation of NEPA at the leasing stage is one example of improper lease issuance, causing the leases in question to be deemed voidable. See Clayton Williams, 103 IBLA 192, 212 (1988) (stating that even if "the Forest Service and BLM were correct in their assertions that inadequate NEPA review had been conducted prior to lease issuance, this would not render the lease void. Rather, inasmuch as a lease might still issue after the completion of the environmental review, premature issuance of a lease renders the lease voidable.")

Courts have consistently found that when leases were issued in violation of a statute—including NEPA—they are either voidable or void. See Northern Cheyenne Tribe v. Lujan, 804 F.Supp. 1281, 1286-87 (D. Mont. 1991) (holding "the government's failure to comply" with a number of laws, including NEPA, "renders the leases voidable" and the coal leases at issue "were made invalid by the government's own failure to comply with the law"); Sangre de Cristo Development Co., Inc. v. United States, 932 F.2d 891, 896 (10th Cir. 1991) ("the United States' initial approval of the lease was invalid because the applicable NEPA requirements had not been met"); Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292 (D. Mont. 1992) (holding procedural violations of NEPA, particularly the lack of consideration of a no-action alternative warranted lease cancellation to ensure analysis would occur on a "clean slate.") Id. at 1297-98.

In a recent case in which plaintiffs successfully challenged the BLM's decision to lease parcels on the scenic and popular Roan Plateau in Colorado, the court acknowledged the BLM's authority to cancel leases issued in violation of NEPA. Colorado Environmental Coalition v. Salazar, ___ F. Supp. 2d. ___, 2012 WL 2370067 (D. Colo. 2012). The court found that the BLM had failed to address a reasonable alternative in its NEPA analysis. Because it was this flawed analysis that the BLM relied upon when it decided to lease these controversial acres, the court vacated the BLM's decision to lease and remanded the issue to BLM for further analysis.

The plaintiffs requested that the court require cancellation of the leases issued. Although the court declined to do so, it left open the possibility that should the BLM's additional analysis lead it to a different decision, the issued leases may indeed be canceled. The court stated:

[I]t may very well be that, upon reconsideration of the issues addressed herein, the BLM may nevertheless reach the same decision (albeit upon a more complete record or more specific RMP/EIS). If reconsideration leads the BLM to conclude that the RMP/EIS needs to be modified in substantive ways that might implicate the validity of the existing leases, the question of whether and how the leases should be unwound can be addressed at that time.

Id. at 37-8 (emphasis added).

There are several similarities between the contested leases on the Roan Plateau and the 44,720 contested Wyoming Range acres. In both cases, lease sales received numerous protests and in each case the BLM dismissed these protests and issued the leases. Appeals or lawsuits

followed. Further, in both cases the lease sales resulted in substantial revenue for the federal government, and the applicable states. In fact, the Roan Plateau lease sale resulted in the highest dollar amount ever generated by a federal oil and gas lease sale in the lower 48 states: \$113.9 million. Nearly half of this figure was allocated to the state of Colorado. The Wyoming Range leases issued after the December 2005 and April 2006 lease sales resulted in nearly \$2.4 million in revenue, of which Wyoming received half. Although this distribution of funds complicates the issue, in neither instance is it a reason why leases cannot or should not be canceled. The most significant commonality is the “voidable” status of both sets of leases. This means the Forest Service and BLM have the authority to alter their initial leasing decisions.

In another fairly recent example, BLM canceled leases issued improperly based on insufficient NEPA analysis. In 2004, the Forest Service consented to lease and the Colorado State Office of the BLM offered for oil and gas lease sale, three parcels on the White River National Forest. Numerous protests resulted, which claimed in part that the underlying NEPA analysis was inadequate to authorize a leasing decision. The BLM dismissed the protests, issued the leases, and appeals to the IBLA followed. The IBLA found that the BLM had not complied with NEPA in that it neither prepared its own analysis, nor did it formally adopt the analysis of the Forest Service in deciding to make the parcels available for leasing. Bd. of Comm’r of Pitkin County and Wilderness Workshop, et al., 173 IBLA 173, 181 (2007). The IBLA reversed the BLM’s decision to dismiss the lease protests on this basis. Id. at 184.

The BLM then suspended the leases pending further administrative action. Rather than moving forward to issue the leases, however, which would have required remedying the NEPA violations, the BLM instead decided to cancel the leases outright. In a decision letter BLM stated, “The suspension of operations and production decision is vacated and the leases are declared invalid ab initio, retroactively withdrawn from the date of issuance and are hereby canceled,” and it authorized the Minerals Management Service to refund the bonus bids and rentals accompanying the leases. BLM decision letter, August 12, 2009. The company in this instance did not challenge the BLM’s decision to cancel the leases.

Authority to reject high bids for leases sold, but not issued

The law is clear: Until lease issuance occurs, the Secretary of the Interior retains “discretion to refuse to issue any lease at all on a given tract.” Udall v. Tallman, 380 U.S. 1, 4 (1965). This discretion is so great that the agency may decide not to allow leasing even after the lands have been offered for lease and a qualified applicant has been selected. See McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985). “[T]he Secretary may withdraw land from leasing at any time before the actual issuance of the lease, even if the offer was filed long before the determination not to lease was made.” Id.

The IBLA has affirmed BLM’s decision to reject lease bids offered at a competitive oil and gas lease sale. In Continental Land Resources, 162 IBLA 1, 2-3 (2004), the appellant was the high bidder for two parcels, and timely paid all fees and rentals. Several entities protested, including the Wyoming Game and Fish Department, on grounds that the parcels were in a crucial big game migration route. Id. at 3. In accordance with 43 C.F. R. § 3120.1-3, the BLM upheld the protests

and suspended issuance of the parcels.¹ *Id.* Ultimately BLM rejected the bids and refunded the monies paid. *Id.* In its decision affirming the BLM’s action, this Board relied on an exhaustive body of federal case law and its own prior decisions. Starting with the premise that, “the Secretary of the Interior is vested by the Mineral Leasing Act of 1920 . . . with discretionary authority to lease or not to lease Federal public land which is otherwise available for oil and gas leasing,” this Board explained that “[t]he offer to lease is but a hope, or expectation, rather than a valid claim against the Government.” *Id.* at 7 (citations omitted).

In August 2009—on the heels of the announcement that the Wyoming Range Legacy Act had become law—the BLM notified the high bidders from the June and August 2006 lease sales in the Wyoming Range that it was rejecting their high bids and refunding monies paid. A handful of companies, including Stanley Energy, appealed this decision to the IBLA.

In its March 23, 2010 decision, the IBLA found that, “BLM was fully entitled, for sufficient reason, to reject Stanley’s bids after the sale and after Stanley was declared the high bidder, since it retained discretionary authority under section 17 of the MLA, 30 U.S.C. § 226 (2006), to decide whether to lease Federal lands.” *Stanley Energy, Inc.*, 179 IBLA 8, 12 (2010)(emphasis and citations omitted). Further, “BLM is not required to accept the offer and issue a lease where inclusion of the parcel in the sale has been protested, and BLM thereafter decides, for sufficient reason, to uphold the protest and withdraw the parcel from leasing.” *Id.* Although the IBLA ultimately found that the BLM’s reasons for rejecting these high bids were insufficiently articulated (as communicated in the agency’s cursory letter to high bidding companies), it nevertheless upheld the agency’s authority to take such action. The BLM was aware that the Forest Service’s preparation of an EIS addressing leasing of the entire 44,720 acres was already underway, and opted not to take further action.

Conclusion

The 44,720 contested lease acres have a complicated procedural history. Nevertheless, nothing about the disposition of the leases affects the Forest Service’s authority not to lease these acres. The supplemental NEPA analysis now underway constitutes a pre-leasing document. All of the options the Forest Service had prior to the lease sales—including the option not to lease—remain with the Forest Service at the conclusion of this NEPA process.

There are no legal impediments that prevent the Forest Service from deciding not to allow oil and gas leasing in the 44,720 contested acres. Nothing in the Bridger-Teton’s current forest plan, nor in the Wyoming Range Legacy Act, dictates a specific decision. Assuming its reasons are rational and supported by adequate analysis, the Forest Service has the discretion not to lease these acres. If the Forest Service decides to uphold its no action alternative—the alternative it chose in January 2011, it would instruct the BLM to cancel the voidable leases and reject bids from the parcels sold, but not issued. The 44,720 acres would then be governed by the terms of the Wyoming Range Legacy Act, which supercede the availability determinations reflected in the Bridger-Teton’s forest plan, withdrawing these acres from future oil and gas leasing.

¹ 43 C.F.R. § 3120.1-3 states: “The authorized officer may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.”