IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE; BASELINE MINERALS, INC.; DOUBLE DEUCE LAND & MINERALS, INC.; NERD GAS COMPANY LLC; WOLD OIL PROPERTIES, INC.; LARAMIE ENERGY II, LLC; and SAMSON RESOURCES COMPANY,

Petitioners-Appellants,

vs.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; ROBERT ABBEY, in his official capacity as Director, Bureau of Land Management; BUREAU OF LAND MANAGEMENT; DON SIMPSON, in his official capacity as State Director, Wyoming Bureau of Land Management of the Department of the Interior; JUAN PALMA, in his official capacity as State Director, Utah Bureau of Land Management of the Department of the Interior,

Respondents-Appellees.

Case No. 10-cv-0226

MEMORANDUM DECISION AND ORDER

Petitioners (collectively "the energy companies")[1] bring this lawsuit seeking an order and a declaration against the federal respondents based on the federal respondents' failure to issue oil and gas leases within sixty days of the dates the leases were paid for by the top qualified competitive bidders. Petitioners Baseline, Double Deuce, NERD, and Wold were declared the highest qualifying bidders and purchased various oil and gas leases at ten competitive lease sales held by the Wyoming Bureau of Land Management (BLM) State Office between August 2008 and August 2010 and the Utah BLM State Office between November 2005 and August 2006.[2] However, lease parcel protests were received by BLM in connection with these ten Wyoming and Utah lease sales. While some protested leases have now been issued or have been recommended for issuance by the BLM in decisions on

[1]Petitioner Western Energy Alliance and Intervenor-Petitioner American Petroleum Institute both represent oil and gas companies whose members routinely bid in competitive federal mineral lease sales and experience frustrations when money is taken and plans are stalled because of BLM's delays in issuing leases. For simplicity and ease of reference, petitioners and intervenor-petitioner are collectively referred to as "the energy companies."

[2]Petitioners Samson and Laramie Energy have contractual interests in some of the leases.

lease protests,[3] no protested lease was issued within the 60-day period following payment by the successful bidder.

The federal respondents oppose the energy companies' requests for relief. The Court granted intervenor-respondent status to Biodiversity Conservation Alliance, Wyoming Outdoor Council, Southern Utah Wilderness Alliance, and other environmental and conservation advocacy groups (collectively, "the conservation groups"). The conservation groups defend the federal respondents' position.

This case presents only one question of law. Is the failure to issue oil and gas leases within sixty days of the dates the leases were paid for by the top qualified competitive bidders a violation of the Mineral Leasing Act (MLA), specifically 30 U.S.C. § 226(b)(1)(A) which provides that "[l]eases shall be issued within sixty days following payment by the successful bidder. . . ." After considering the parties' briefs and oral arguments, the administrative record, and the relevant law, the Court enters the following Memorandum Decision and Order.

[3] Nine Wyoming leases and thirty-eight Utah leases are currently withheld. *See*, Doc. 70, pp.4-5 (table).

BACKGROUND

The MLA and the regulations promulgated thereunder[4] charge the Department of the Interior, through the BLM, with the responsibility for managing federal oil and gas resources. 30 U.S.C. §§ 189 & 223 *et seq*. The leasing of these resources is administered by the BLM state offices through lease sales. *Id.* at § 226(b)(1)(A). The lease sales at issue in this case are competitive lease sales, where entities bid competitively to buy the right to lease parcels for oil and gas exploration and development. The highest bidder is declared the winner and typically then buys a lease, paying the amount bid for the parcel(s). The lease holder also pays BLM rent each year on nonproducing land or royalties on the value of oil and gas that is extracted.

Prior to issuing lease sale notices, the parcels have undergone conventional reviews by BLM field officers looking for conformance with the applicable Resource Management Plan (RMP). *See, e.g.*, AR BLM01681 & 08112. The RMP is an area-wide land use plan which specifies what areas will be open to oil and gas development, and the conditions to be

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[4]The Mineral Leasing Act of 1920 (Pub. L. No. 66-146), as amended, and the Mineral Leasing Act for Acquired Lands (Pub. L. No. 80-382), as amended, provide the legislative authority for federal oil and gas leasing. BLM's oil and gas leasing regulations are located at 43 C.F.R. pt. 3100.

placed on such development. Also prior to BLM issuing lease sale notices, state reviews are performed to identify conflicts with wildlife, habitat, wilderness, planning or other resource values, interests, or characteristics. Finally, prior to the lease sale notice, the BLM field office has conducted an interdisciplinary team review of all the lands to decide whether a determination of NEPA adequacy (DNA) can be signed. If the NEPA analysis is no longer valid for purposes of signing a DNA, the BLM field office can perform an environmental assessment before the lease sale. *See, e.g.*, AR BLM 02796-3186. These various, pre-leasing review processes result in parcel recommendations, rejections, deferrals, and/or lease stipulations to mitigate potential impacts of leasing. AR WO 0063-64.

Following these review procedures, BLM identifies eligible parcels in a public "notice of competitive lease sale," which is published no less than 45 days before the sale.[5] The publication of a lease sale notice includes a public protest period during which entities can file a protest to BLM's inclusion of any or all parcels in that lease sale notice. 43 C.F.R. §3120.1-3; AR BLM 001599. The BLM field offices in Wyoming and Utah routinely receive protests on posted lease sale offerings, and received protests for the ten sales at issue in this case. AR BLM 004626-4908, 004954-5349, 005389-5585, 005879-070, 006071-

[5]*See, e.g.,* Notices of Lease Sales, AR BLM 00650, 00757, 00932, 01093, 01209, 01311, 01372, 01440, 01504, 01590, 07424, 07715, and 07823.

6345, 006374-6470, and 009236-9717; *see also*, AR WO 0044-53. Many times the BLM does not receive protests until very close to the day of a sale, and may not receive the supporting statement of reasons until after the sale. This limits the BLM State Directors in their review of the reasons for the protest, in terms of deciding whether to withdraw a protested parcel from the sale. AR WO 0042.

If the BLM State Director chooses to hold the sale for a protested parcel while the protest is under review, this election is announced at the beginning of the oral auction. AR BLM 001599. If a bid is received on a parcel involved in the protest, the BLM manual prescribes that the protest "must be resolved before issuance of the involved lease." AR WO 0037 (emphasis in original). Although BLM strives to review and resolve protests in a timely manner, the number, timing and complexity of protests typically cause BLM to fail to issue the protested leases within the 60-day window specified in the MLA. AR WO 0042; WO 0098-101.

For each of the ten sales at issue in this case, BLM posted the results identifying the entities that were the highest qualifying bidders, and collected a total of $2,017,144.50 for the Utah and Wyoming leases purchased by the energy companies.[6] AR BLM 0001-00649.

[6]In those circumstances where the BLM decided to defer a final determination on whether lands were to be leased, the high bidders were given the option of either receiving a full refund of their bid payment, or awaiting a final determination after the

The energy companies have not received all the leases from the ten protested lease sales,[7] and many leases were not issued within the 60-day window.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. § 702 *et seq.*, requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "A claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it *is required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S.Ct. 2373 (2004) (emphasis in original). The energy companies argue that the plain language of the MLA requires the Secretary to issue leases "within sixty days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease." 30 U.S.C. § 226(b)(1)(A). Therefore, the energy companies argue that federal respondents' policy and practice to withhold leases from their rightful buyers for indefinite periods of time violates the MLA and

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BLM compiled additional information or completed further analysis. *See, e.g.*, AR BLM 0057-61. Lease payments for unissued leases are placed in a BLM-administered, non-interest bearing suspense account. AR WO 00045-48. If BLM eventually grants a protest, the offer is not accepted and BLM refunds the bonus bid and first year rentals. *See, e.g.*, AR BLM 07971.

[7]BLM has not resolved pending protests for twenty-seven leases. AR WO 0067-72.

the APA, and requires the court to compel the federal respondents to issue the unlawfully withheld leases under 5 U.S.C. § 706(1) and 28 U.S.C. § 1361. The energy companies further request an order under 28 U.S.C. § 2201, directing federal respondents to issue all oil and gas leases in the future within sixty days of receiving payment as specified by 30 U.S.C. § 226(b)(1)(A).

Federal respondents and the conservation groups offer various arguments against the relief requested by the energy companies. However, their primary argument is that the MLA does not bind the Secretary to issue any lease and thus, any time prior to the execution of the lease, which denotes acceptance of the bid, the Secretary may decide to delay or refuse to issue a lease upon any ground properly within his discretion.

Before the MLA was amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (1987 Reform Act),[8] it is quite evident that the Secretary had no obligation to issue any lease on public lands. In *Udall v. Tallman*, 380 U.S. 1, 4, 85 S.Ct. 92, 795, 13 L.Ed.2d 616 (1965), the Supreme Court said that even though the MLA "directed that if a lease were issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract." This principle was specifically recognized by the Tenth Circuit in *Justheim Petroleum Co. v. Dep't of the*

[8]Pub. L. No. 100-203, title V, subtitle B, 101 Stat. 1330.

Interior, 769 F.2d 668, 670 (10th Cir.1985), a case which arose after BLM rejected lease applications concluding they were no longer subject to non-competitive bidding. The Circuit Court concluded that "[t]he mere application for a lease thus vests no rights in the applicant . . . except the right to have the application fairly considered under the applicable statutory criteria." *Id.* at 670. "In addition, the Secretary is under no requirement to issue or reject lease applications with a certain time limit." *Id.* (citations omitted).

In a subsequent case, *McDonald v. Clark*, 771 F.2d 460 (10th Cir.1985), the issue concerned whether the Secretary had the discretion to withdraw a lease from noncompetitive leasing even after he had determined the first qualified applicant. *Id.* at 463. The Court held that, "even where an application for a lease is both first in time and filed in response to a government notice that it will receive offers, no legal claim against the government arises." *Id.* (citations omitted). "Rather, the 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.* (citations omitted). Therefore, until the Secretary acts to issue the lease, the applicant has only a "hope or expectation of a lease" and not a vested right. *Id.* (citing *Arnold v. Morton*, 529 F.2d 1101, 1106 (9th Cir.1976)).

While the parties make numerous arguments in this case, the only relevant question is whether the 1987 Reform Act changed the holdings of *Justheim* and *McDonald*. The

Court concludes that the 1987 Reform Act did change the holdings of these cases, but not to the extent argued by the energy companies. A top qualified bidder has no legal claim for, nor any vested right to the issuance of federal oil and gas lease, but the successful bidder does have a right to a final decision by the federal respondents on whether the lands are or are not "to be leased" within sixty days of payment of the remainder of the bonus bid, if any, and the annual rental for the first lease year.

In considering the affect of the 1987 Reform Act on this case, some history is important. Prior to 1987, BLM initiated competitive bidding only for those parcels within a "known geologic structure of a producing oil or gas field" (KGS). 30 U.S.C. § 226(b)(1). All other areas were leased through a noncompetitive lease process. The burden fell on the government, through the Department of the Interior and BLM, to define the existence and scope of KGS areas, which became a daunting task. Consequently, many federal oil and gas leases were awarded through the noncompetitive process, which explains why most pre-1987 Reform Act cases arise in this context.

As is clear by its title, the 1987 Reform Act reformed the federal onshore leasing process by eliminating the KGS process and replacing it with a process where all federal land to be leased was made available initially by competitive bid, with a minimum bid fixed by statute at $2.00 per acre plus $1.50 per acre rental for the first five years. Only those lands

not receiving the minimum bid become available on a noncompetitive basis. Like its predecessor, the 1987 Reform Act continues to vest the Secretary with considerable discretion to determine which public lands will actually be leased - "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits **may be leased** by the Secretary." 30 U.S.C. § 226(a) (emphasis added).

However, the 1987 Reform Act interjected a sentence in the competitive bidding paragraph, providing that "[l]eases shall be issued within sixty 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). It is this sentence that the Court is asked to reconcile with the provision in Section 226(a) which is well recognized as vesting considerable leasing discretion with the Secretary. Thus the Court is called upon to decide whether the leases "shall issue" within that sixty day time period, or whether the Secretary continues to retain discretion to determine whether the lands are or are not "to be leased"[9] even after the lease sale, payment by the successful bidder and the expiration of the sixty day time period.

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[9]The first sentence in Section 226(b)(1)(A) provides, "[a]ll lands **to be leased** . . . shall be leased as provided in this paragraph . . . ." *Id.* (emphasis added).

To discern the intent of Congress, the court must first look to the statutory language, and then must review the legislative history and other traditional aids of statutory interpretation. *Ebrahimi v. E.F. Hutton & Co., Inc.*, 852 F.2d 516,521 (10th Cir.1988). Section 226(b)(1)(A) was enacted by Congress following years of courts construing other mandates in the MLA to afford broad discretion allowing the Secretary to delay and reject lease applications at any time prior to lease issuance. As an example, prior versions of Section 226 mandated that "lands to be leased . . . **shall be leased** to the highest responsible qualified bidder" and also mandated that "the person first making application for the lease who is qualified to hold a lease under this chapter **shall** be entitled to a lease . . . ." 30 U.S.C. § 226(b) & (c) (emphasis added). The Tenth Circuit considered such so-called mandates to merely mean that the Secretary must issue a lease to the first qualified applicant or successful qualified bidder, "*if he is going to lease at all.*" *Justheim*, 769 F.2d at 671, (citing *Southwestern Petroleum v. Udall*, 361 F.2d 650, 654 (10th Cir.1996) (emphasis in original)).

Had Congress intended to change this long-settled principle notwithstanding that the Secretary had made no final decision on what lands are to be leased at the time of the lease sale, Congress could have amended Section 226(a) in order to subject the Secretary's historically-recognized broad discretion to the limitations that followed within the new subsections of the 1987 Reform Act. *See Director, Office of Workers' Compensation*

Programs v. Perini N. River Assocs., 459 U.S. 297, 319, 103 S.Ct. 634, 648, 74 L.Ed.2d 465 (1983) (legislatures, in enacting or amending statutes, are presumed to know the law). However, such an action was not taken by Congress and, like the previous version of the MLA, the 1987 Reform Act vests the Secretary at the outset with considerable discretion to determine which public lands are suitable for leasing. Furthermore, the energy companies can point to no legislative history in support of their argument that Congress intended to override the Secretary's discretion in this respect.[10]

In light of the longstanding recognition of the legal principle of broad Secretarial discretion under the MLA, which discretion does not terminate until the Secretary indicates his acceptance of an application or an offer by issuance of the lease "with the signature of the appropriate officer affixed thereto," *Justheim*, 769 F.2d at 672, the continued viability of this legal principle does not appear inconsistent with the congressional intent underlying the 1987 Reform Act. Under this reasoning, therefore, the federal determination that the competitive bidder is the highest responsible qualified bidder and payments made by the bidder, result in nothing more than "a hope, or expectation, rather than any vested right" or valid claim against the Government, to the issuance of a lease. *Id.* at 671.

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[10]This is in contrast to the legislative history supplied by the conservation groups, which supports the argument that Congress did not intend to affect the Secretary's discretion in determining which lands would be suitable for leasing. Doc. # 71-5 & 71-6.

This conclusion is consistent with the analysis in *Wyoming Outdoor Council v. Dombeck*, 148 F.Supp.2d 1 (D.D.C. 2001). That case described BLM's eight-step process to implement the provisions of the 1987 Reform Act as follows: "(1) leasing analysis; (2) leasing decision; (3) verification; (4) BLM assessment; (5) sale by BLM; (6) issuance of lease; (7) application for permit to drill; and (8) application for permit to drill to develop a field." *Id.* at 10. In *Dombeck*, the federal agencies (BLM and Forest Service) withdrew the contested leases after step five - the sale by BLM. Because the contested leases had only been sold and not issued, the federal agencies argued there was no sufficient final agency action and plaintiffs' allegations of a NEPA violation were premature. The district court agreed, concluding the key point in time occurred only after the BLM actually issued the leases, i.e., "only after the agencies had completed step six in the eight-step process." *Id.* (citing *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 49 (D.C. Cir. 1999)). Up until that point, "[t]he Forest Service was free to engage in further efforts to fulfill its NEPA obligations before the leases were issued." *Id.*

In *Wyoming Outdoor Council v. Dombeck*, there was no question by the court or the parties that lease issuance was the one and only point of "irreversible and irretrievable commitment of resources." *Id.; see also, New Mexico ex. Rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir.2009) (in considering whether the lease constitutes an irretrievable

commitment of resources, the court held "[b]ecause BLM could not prevent the impacts resulting from surface use after a lease issued, it was required to analyze any foreseeable impacts of such use before committing the resources"). Thus, prior to step six - lease issuance, and not just the lease sale, there is no final agency action, no irretrievable commitment of resources, and no final determination by the Secretary that the lands are "to be leased" under Section 226(b)(1)(A). Consequently, there is no claim or vested right to lease issuance which is automatically gained simply because of payments made by the highest qualified responsible bidder.

However, this does not resolve the important and persuasive argument advanced by the energy companies that the sixty-day provision interjected within Section 226(b)(1)(A) by the Reform Act **must mean something**. Certainly, this Court recognizes the "cardinal principle of statutory construction" that a statute should be construed so that "no clause, sentence, or word shall be superfluous, void or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted). On this point, the Court agrees with the energy companies that Congress expressly directed Secretarial action. However, the Court does not agree that Congress directed lease issuance. Such a conclusion would either end Secretarial discretion prematurely, or would shift the discretion to the energy companies, triggered by their payments. Until the Secretary takes final agency action at the end of the 60-day period

on whether the lands are or are not to be leased, this Court will not prevent the Secretary from protecting both the public lands, as well as the integrity of the government's public land mineral leasing program. After all, the United States Supreme Court has frequently articulated "the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Brock v. Pierce County,* 476 U.S. 253, 260, 106 S.Ct. 1834 (1986) (citing *United States v. Nashville, C. & St. L.R. Co.,* 118 U.S. 120, 125, 6 S.Ct. 1006, 1008, 30 L.Ed. 81 (1886); *Guaranty Trust Co. v. United States,* 304 U.S. 126, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); *Stanley v. Schwalby,* 147 U.S. 508, 515, 13 S.Ct. 418, 421, 37 L.Ed. 259 (1893)).

Therefore, the Court agrees in part with the energy companies' argument that the Secretary has exceeded his authority, but not by disregarding the Reform Act's 60-day lease-issuance mandate, but by disregarding the Reform Act's 60-day decisional mandate. This disregard constitutes agency action unlawfully withheld or unreasonably delayed. Under the language in Section 216(b)(1)(A), Congress directed that a final decision must be made within a defined time period on whether the lands are or are not to be leased. Certainly, the successful bidder may relieve the Secretary from this choice and leave the lease (and the

monies) in suspense. However, there must be an end to Secretarial discretion and this end point has now been established in time by Congress.

Further, the Court would note that the Secretary's discretion on whether the lands are or are not to be leased is not unlimited. After declaring a highest responsible qualified bidder, the Secretary may only refuse lease issuance for sufficient reason capable of withstanding review as neither "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" nor "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A) & (C).

Finally, the Court's decision in this regard is not altered by the conservation groups' arguments concerning the application of laches, estoppel, mootness or violations of federal law. There is no harm to the conservation groups for the application of laches or estoppel, and the Court is not directing any violation of environmental law. Because the Court is not mandating lease issuance, all discretion that the federal respondents had before the lease sale is retained, with the exception of the discretion to not act. As to mootness, while some leases have now issued, none of the leases were acted upon by the federal respondents within the time period prescribed in the MLA. Therefore, the energy companies claims are not moot.

This Court certainly understands that its decision in this case runs contrary to the reasoning in *Impact Energy Resources, LLC v. Salazar*, 2010 WL 3489544 (D. Utah Sept.

1, 2010). On this point, reasonable minds differ and the Tenth Circuit at some point will resolve the differences.

In conclusion, the energy companies do not automatically gain an entitlement to lease issuance based merely on payments made under 30 U.S.C. § 226(b)(1)(A). However, the energy companies are entitled to a final decision on whether the lands are or are not to be leased within sixty days of the dates the leases were paid for by the top qualified competitive bidders under the Mineral Leasing Act.

THEREFORE, IT IS HEREBY ORDERED that 30 U.S.C. § 226(b)(1)(A) mandates a decision by the federal respondents on whether the lands are or are not to be leased within sixty (60) days of the date a lease is paid for by the top qualified competitive bidder unless such bidder affirmatively waives this deadline. Inasmuch as this time period has long expired, federal respondents shall take action on the nine withheld Wyoming leases and the thirty-eight withheld Utah leases within thirty (30) days of the date of this Order.

Dated this 29 day of June, 2011.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE