May 4, 2010

Kniffy Hamilton, Forest Supervisor
Bridger-Teton National Forest
P.O. Box 1888
Jackson, WY 83001

Dear Kniffy,

The Wyoming Outdoor Council received a copy of Stanley Energy, Inc.'s ("Stanley's") March 22, 2010 comments on the draft supplemental environmental impact statement ("DSEIS") for oil and gas leasing in the Wyoming Range. I write to respond to these comments in an effort to refute Stanley's misunderstanding of the nature of the decision to be made and its misstatements of law relative to the authority of the Forest Service and BLM to reject high bids and to cancel the leases that were issued improperly.

I. The Forest Service and BLM retain full authority to reject contested lease offers.

Stanley submits to the Forest Service the same argument it made to the IBLA in its appeal of the BLM's decision to reject its offers to lease parcels in the June 2006 oil and gas lease sale. Stanley states it "was the qualified high bidder and therefore is entitled to the seven leases from the June 2006 lease sale" and argues the BLM is "legally obligated to issue a lease to a qualified high bidder following a lease sale." Stanley's comments on the DSEIS ("SC") at 2 and 6 (emphasis added). The IBLA recently rejected Stanley's incorrect interpretation of the laws and regulations governing the sale of oil and gas leases, and the Forest Service should do the same.

In its March 23, 2010 decision, the IBLA properly dismissed Stanley's misunderstanding of the leasing process and the interests that result from a sale, stating, "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)(Exhibit 1). 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. The IBLA noted that every BLM lease sale notice mentions the possibility that protest resolution can result in the withdrawal of parcels from leasing. Id. at 12 n. 7 (citing the BLM's Notice of Competitive Oil & Gas Lease Sale, June 6, 2009 at viii.)

That a protest may lead the agency to a different decision is a logical outcome of the protest process. If withdrawal of parcels were not a potential outcome, the protest process would be meaningless. Thus, in contrast to Stanley's argument, rejection of high bids on lease parcels that have been the subject of valid protests is a foreseeable, common sense and legal outcome. Athough the IBLA ultimately found the BLM's reasons for rejecting these high bids for Wyoming Range parcels sold in the June and August 2006 lease sales were insufficiently articulated by the agency (as communicated in BLM's brief letter to high bidding companies), it nevertheless upheld the BLM's authority to take such action.

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.; see also 43 C.F.R. § 3120.2-2 (stating, "All competitive leases shall be considered issued when signed by the authorized officer."); Beverly M. Harris, 78 IBLA 251, 253 (1984) ("The signing of an oil and gas lease by the authorized officer of the BLM is the act that constitutes issuance of the lease and creates a binding contract."); Satellite 8305141, 85 IBLA 307, 309 (1985) ("Appellant did not possess any 'contract for the lease.' Appellant had merely offered to lease the subject land. [U]ntil BLM accepts a lease, an offeror simply has no contract rights whatsoever.")

Stanley suggests that the repeated use of the word "shall" in § 17(b) of the post-1987 Mineral Leasing Act and its implementing regulations indicates a Congressional abrogation of the Secretary's authority to decline lease bids. SC at 5-6. This is an untenable interpretation. First, in amending the Mineral Leasing Act in 1960 and 1987 (as well as in 1935 and 1946) Congress explicitly retained § 17(a), which gives general discretionary authority to the Secretary to decide whether to lease. Second, Stanley's argument that the Reform Act added all of the "shall" language and, as a result, now restricts the discretionary authority the Secretary enjoyed prior to 1987, is incorrect. See SC at 5 (stating "the revised Act also materially changed the point in time when BLM . . . may exercise its discretion on whether or not to lease particular lands for oil and gas development.") The very same "shall" language existed prior to the 1987 amendments and courts have never interpreted this language as compelling the Secretary to accept lease offers once he notices parcels for sale.

The Court of Appeals for the District of Columbia Circuit cited the language of the Mineral Leasing Act of 1920 as it read in 1965, "When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding . . . ." Duesing v. Udall, 350 F.2d at 750 (emphasis added); see also Haley v. Seaton, 281 F.2d at 625-26 (discussing the language of the Mineral Leasing Act after its 1946 amendment which also included the phrase "shall be leased"). The court found that this language did not divest the Secretary of his authority; it merely required the Secretary's adherence to rules establishing a hierarchy amongst bidders.

> Under Section 17 it is permissive or discretionary whether or not the Secretary will issue a lease on lands believed to contain oil or gas deposits. What is mandatory is who is to get the lease if it is decided that a lease will be issued—if there is a known geological structure, the highest bidder, if not, the applicant first in line.

350 F.2d at 750 (emphasis added).

What the 1987 Reform Act rejected was the requirement that BLM use the concept of known geological structures in determining which lease sales should be subject to competitive bidding. Congress nevertheless retained the basic premise that lands "shall be leased . . . to the highest responsible qualified bidder by competitive bidding." 30 U.S.C. § 226(b)(1)(A)(emphasis added). In this, the Mineral Leasing Act today is nearly identical to its pre-Reform Act version. And, just as with the pre-Reform Act version, the "shall" language cited by Stanley is properly construed as direction concerning the hierarchy among bidders rather than a divestiture of the Secretary's long-established leasing discretion.

Notably, Stanley fails to mention one dramatic change that resulted from the 1987 amendments to the Mineral Leasing Act. Prior to 1987, the Forest Service had little decision-making authority with respect to mineral leasing on national forest lands. With the passage of the Reform Act, however, "The Secretary of the Interior may not issue a lease on any National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture." 30 U.S.C. § 226(h). Similarly, prior to 1987, the Forest Service "had no existing regulations for management of oil and gas lease activity on national forest land . . . ." Thomas L. Sansonetti & William R. Murray, A Primer on the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and its Regulations, 25 LAND & WATER L. REV. 375, 384 (1990). There are now specific regulations the Forest Service follows with respect to oil and gas leasing and surface management. See 36 C.F.R. § 228.100 et seq. The significance of these changes cannot be overstated.

As mentioned above, the IBLA recently held that, although the BLM has ample authority to reject lease bids, it had not provided a sufficient rationale to support rejecting Stanley's bids. The IBLA remanded the case to the BLM for further action consistent with the IBLA's opinion. The Forest Service's SEIS could play a central role in the BLM's actions moving forward. If the Forest Service, based on the reasoning outlined in the SEIS, retains the preferred no action alternative as its final decision, the BLM will be wholly without authority to issue the contested leases as it is prohibited to issue leases on national forest land over the objection of the Secretary of Agriculture. 30 U.S.C. § 226(h).

II. The Forest Service and BLM have full authority to cancel contested leases that were issued improperly in 2005 and 2006.

With respect to leases sold and issued, but under suspension since 2006 as a result of Wyoming Outdoor Council, et al.'s favorable stay petitions before the IBLA, Stanley asserts, "Neither the Forest Service nor the BLM may administratively cancel a federal oil and gas lease which was validly issued and for which the lessee has complied with statutory and regulatory requirements governing a lease." SC at 4. Stanley's citations to case law, regulations and a

solicitor's opinion rely on the assumption that these leases are valid. As will be discussed in more detail below, this assumption is wrong. If the Forest Service decided to proceed with leasing—something it has indicated in the DSEIS it likely will not do—the leases would not be valid until the NEPA violations and other potential deficiencies that were present at the time of lease sale were remedied and the suspensions lifted. Until that time, the leases are not valid, but voidable.

In 2007, the BLM requested remand of the two appeals Wyoming Outdoor Council, et al. brought before the IBLA. Stanley Energy supported this request. Wyoming Outdoor Council, et al., however, opposed the BLM's request for remand absent a decision to first cancel the leases. We argued that as long as the issued leases remained in place—even under suspension—that a subsequent NEPA process would be nothing more than a paper work exercise used to justify a decision we believed had already been made. The BLM and Stanley argued zealously that cancellation was not necessary to effectuate an objective and fair pre-leasing environmental review.[1]

In its brief in support of remand with the leases held under suspension rather than cancelled outright, the BLM repeatedly characterized the leases as voidable. "As the leases are voidable pending additional NEPA review, cancellation is not required." BLM's Response to Appellants' Request for Clarification and Objection to BLM's Request for Remand, Feb. 7, 2007 at 8 (Exhibit 2). To refute our concern that any future NEPA review and decision based upon it would reach a predetermined result, the BLM explained,

> [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.") This understanding comports with prior IBLA decisions. 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.")

At the time, Stanley never objected to the BLM's characterization of the leases as voidable. It was fully aware that any supplemental NEPA review would be a pre-leasing document and all of the options the Forest Service had prior to the lease sales—including the option not to lease—would remain with the Forest Service at the conclusion of the process. The

[1] Of course, as we later learned, Stanley Energy had for a short time period positioned itself impermissibly as an overseer and co-drafter of the initial DSEIS. This was hardly the objective analysis we expected given the nature of the EIS as a pre-leasing document. We appreciate that the Forest Service took steps to remedy this improper relationship.

IBLA was clear in its remand order that, although cancellation of the leases was not necessary prior to undertaking further environmental review, "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 two years ago the Forest Service and BLM explained the purpose and need for the supplemental analysis, which was "to determine whether and to what extent analysis of new issues and information might alter the oil and gas leasing decision…." Revised Notice of Intent to Prepare a Supplemental EIS, 73 Fed. Reg. 16621 (March 28, 2008). Thus, there has always been a recognition that the supplemental NEPA analysis being prepared could lead to a different outcome than the original decision to lease. Now that the Forest Service has identified the no action alternative as its preferred alternative—something all of the parties to the prior appeal understood or should have understood was a reasonably foreseeable outcome—Stanley presents for the first time its theory that the leases from the December 2005 and April 2006 lease sales "were not erroneously issued" and are in fact "valid." SC at 4.

This erroneous conclusion ignores the five-year factual and procedural history associated with these contested leases. It is undisputed that, due to acknowledged deficiencies in the pre-leasing NEPA documentation, the IBLA suspended the leases that were issued improperly. The leases have remained in this suspended state awaiting the conclusion of the supplemental NEPA process. If taken to its logical end, Stanley's assertion that its leases are valid and that the agencies are foreclosed from taking any action short of lifting the present suspensions would mean: 1) the inclusion of the no action alternative is just a formality, not a legal and completely reasonable outcome of a pre-leasing, supplemental NEPA process; and 2) the appeals process whereby stays are granted and suspensions placed on leases that are improperly issued provides no relief—absent updated analysis—for parties who successfully challenge lease sales on public land. Neither of these results is tenable and both illustrate the flaws inherent in Stanley's assertions.

There is no doubt given the facts of this case that the Forest Service would be fully authorized to withdraw its consent to lease and instruct the BLM to cancel the leases. The BLM's regulations are clear: "Leases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). Although improper issuance does not automatically void a lease, cancellation is an option. In this case the IBLA granted the BLM's request for remand so that the agencies could consider new and updated information as part of their legally required pre-leasing NEPA review. This process of reevaluation left open the possibility that the original decision to lease could be altered. If the Forest Service retains the no action alternative as its final decision, the Forest Service would withdraw its consent to lease and instruct the BLM to cancel the voidable leases.

There is recent precedent for such action. 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 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 suspended the leases pending further administrative action. Rather than moving forward to issue the leases, 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 authorized the Minerals Management Service to refund the bonus bids and rentals accompanying the leases. BLM decision letter, August 12, 2009 (Exhibit 3).

Stanley's assertion that its leases are valid and that the agencies are without authority to cancel them defies any reasonable understanding of the law. Stanley's leases have been contested from the date of sale, suspended by the IBLA for inadequate NEPA analysis, deemed voidable by BLM, and are presently subject to cancellation upon further review by the agencies. Given this unique procedural history, the Forest Service retains the discretion to withdraw its consent to lease and to instruct the BLM to cancel the leases.

III. Canceling improperly issued leases is consistent with the Forest Service's multiple use mandate and current forest plan.

Stanley next asserts that the Forest Service's canceling of contested leases would violate its multiple use objective and would be contrary to the direction set forth in the Bridger-Teton National Forest's 1990 forest plan. This is wrong. Although oil and gas development is a recognized use of national forest lands, there is no mandate that lands legally available for lease in a forest plan actually be leased. Although some final decisions are made in forest plans, suitability and availability determinations do not authorize or mandate any action on the part of the agency. See Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) (holding that a challenge to a timber suitability determination in forest plan was not ripe for review). Lands that are administratively available for oil and gas leasing on the Bridger-Teton have the potential to be leased, but are not required to be leased. Leasing decisions are completely within the discretion of the agency.

Reflecting this governing law, the Forest Service made clear in establishing its own oil and gas leasing regulations that the agency's discretion upon being presented with a leasing proposal may include the decision "that leasing of the lands is not appropriate despite the fact that such leasing would be consistent with the forest plan." Oil and Gas Resources, Final Rule, 55 Fed. Reg. 10,423, 10,430 (Mar. 21, 1990) (emphasis added); see also Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Service, 12 Fed. Appx. 498, 500 (9th Cir. 2001) (recognizing that "the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration").

There is also nothing in the Multiple Use Sustained Yield Act (MUSYA) of 1960, 16 U.S.C. §§ 528-531, that mandates the Forest Service authorize a certain amount of leasing or any leasing at all.[2] SC at 7. In response to challenges claiming the Forest Service violated its multiple

[2] MUSYA and its implementing regulations do not even specifically apply to questions regarding oil and gas leasing, since unlike outdoor recreation, timber, range, watershed and fish and wildlife resources, oil and gas

use mandate, courts have routinely found the general concepts of multiple use as contained in MUSYA give the Forest Service wide latitude for its management decisions. In a challenge to the Bridger-Teton's1990 forest plan, plaintiffs claimed it did not guarantee sufficient mineral and timber production. The court rejected the argument and held:

> [T]he MUSYA does not contemplate that every acre of National Forest be managed for every multiple use. Congress recognized 'that some land will be used for less than all of the resources.' 16 U.S.C. § 531 (1988). Courts that have considered this issue have held that the MUSYA grants the Forest Service 'wide discretion to weigh and decide the proper uses within any area.'

Wind River Multiple-Use Advocates v. Espy, 835 F.Supp. 1362, 1372 (D. Wyo. 1993) (internal citations omitted)(overruled on other grounds). MUSYA "can hardly be considered [to place] concrete limits upon agency discretion. Rather it is language that 'breathe(s) discretion at every pore,'" Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (internal citations omitted). The Forest Service simply has no obligation to offer a certain amount of acreage—or any acreage—for leasing. Stanley is incorrect to advocate otherwise.

IV. The purpose and need statement in the DSEIS is adequate.

Stanley suggests the Forest Service's focus on the procedural aspects of the EIS process, specifically the "consideration of impacts" as reflected in the purpose and need statement "impermissibly ignores the purpose and need for oil and gas leasing in the first place." SC at 9. On the contrary, given the supplemental nature of the EIS, the purpose and need statement is completely appropriate. Earlier in its comments, Stanley concludes the Forest Service's initial decision to lease "represented the culmination of fifteen years of extensive land use planning and multiple comprehensive environmental reviews." SC at 1. Further, the Forest Service prepared an EIS in 1990 in conjunction with its revised forest plan and prepared EAs in the early 1990s "that specifically analyzed the impacts of oil and gas leasing…." SC at 2. Because this EIS supplements those existing documents, it is understandable that its purpose and need statement is more narrowly focused.

That being said, one of the eight main issues identified in scoping is: "Not authorizing the BLM to issue leases for the 44,720 and/or applying additional constraints to leases could prevent effective recovery of energy resources in the area." DSEIS at iv. This issue—that of the need for recovering energy resources—is carried through the entire document and plays a significant role in the agencies' consideration of all of the alternatives. Thus, the EIS addresses this issue even though it is not specifically mentioned in the purpose and need statement.

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development is not one of the statute's enumerated renewable resources. 36 C.F.R. § 219.1; see also Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Service, 157 F.Supp.2d 1142, 1145 (D. Mont. 2000) (stating that "NFMA and MUSYA do not apply to oil and gas leasing…").

V. Canada lynx and air quality are just two reasons of many that provided the Forest Service sufficient rationale for identifying the no action alternative as its preferred alternative.

Stanley's premise that neither the analysis of impacts to Canada lynx nor the analysis of impacts to air quality "justifies" canceling the leases misrepresents the nature of the decision to be made. Despite the unique fact that leases were issued to high bidders, these are not valid leases. Rather, because the leases were issued improperly and suspended as a result, they are voidable based upon further review. Because this is a pre-leasing DSEIS, the Forest Service has the discretion not to lease. There is no heightened standard the Forest Service must meet in order to "justify" its discretionary decision. It needs only to show that it conducted a thorough review and that its decision is well informed. The DSEIS identified numerous reasons—impacts to Canada lynx and air quality being just two—that provide a more than an adequate rationale to support the no leasing alternative.

a. Canada lynx

Given the historic and current importance of this area of the Wyoming Range for lynx survival in this region, the Forest Service would be correct to take a cautious approach and decide not to lease based on threats to lynx. The Wyoming Outdoor Council submitted documentation in 2006—now part of the administrative record—illustrating that expert wildlife biologists noted not only the importance of the project area for lynx, but also the substantial risks inherent in the proposed action. See Wyoming Natural Diversity Database, Habitat Mapping and Field Surveys for Lynx (*Lynx canadensis*) on Lands Administered by the USDI—Bureau of Land Management in Wyoming at 9 (Oct. 10, 2001) (stating that this area and its environs [i.e. the Bridger-Teton National Forest holdings on the Overthrust Belt/Wyoming Range in northern Lincoln and western Sublette counties] are "generally regarded as the best lynx habitat anywhere in the state [of Wyoming].); see also Letter from Bill Wichers, Wyoming Game and Fish Department to Greg Clark, Big Piney District Ranger, at 4 (May 26, 2005)(warning that "[a]dditional loss of lynx habitat and construction of new roads in the area as a result of oil and gas activity may well be the final threshold for the continued existence of this species in the Wyoming Range.")

The DSEIS correctly points out "[a]ctivities associated with oil and gas leasing (short/long-term habitat loss, extended presence of humans, increased risk of mortality) are inherently negative for Canada lynx and especially so in the context of the Wyoming Range because of its great importance to recovery of the species and the tenuous condition of the lynx population." DSEIS at 4-111. In addition, "[o]il and gas leasing presents no benefit to lynx and in fact induces negative effects." Id. at 4-107. "[E]nergy development inherently removes any existing value of the habitat for lynx for the short and long-term, directly within and surrounding development. Increased roading and human activity contribute to higher risk of mortality." Id.

Even Stanley doesn't deny that oil and gas leasing and development would negatively affect lynx. See SC at 16 (conceding that "there will undoubtedly be some adverse effects of leasing [to lynx]…"). Stanley claims, however, that the Forest Service "overstates the potential impacts of oil and gas leasing on Canada lynx" and fails to adequately consider mitigation

measures. SC at 10. Its argument is flawed from the inception. Stanley seems to suggest that the Forest Service is required to lease unless impacts to lynx are estimated to be catastrophic to the population or mitigation measures are shown to be wholly ineffective. Of course, this is not the standard, and because this is a discretionary decision, the Forest Service has the full authority to consider even minor impacts to a threatened species unacceptable. Nevertheless, there are statements and assumptions Stanley makes regarding lynx, its habitat and the potential for new development in the Wyoming Range to adversely impact lynx that are either wrong or taken out of context, and warrant correction.

1. The Wyoming Range provides important habitat for Canada lynx.

Stanley seeks to refute information in the DSEIS that the Wyoming Range and particularly the area in and around the 44,720 acres is "of very high value to lynx." SC at 18 (citing DSEIS at 4-64.) It cites the 2008 Greater Yellowstone Lynx Report that shows more surveyed locations of lynx in the Togwotee Pass area than in the Wyoming Range. Id. Not only does this not disprove that the Wyoming Range remains high quality and important habitat (it only shows lynx are distributed to other areas in the Greater Yellowstone Ecosystem), the numbers can be explained. The field crew for the survey was based out of the Blackrock Ranger Station on the Bridger-Teton National Forest. Berg, pers. comm., 4/27/10. As a result, the crew spent 60-70% of its time in the Togwotee area, and only 30-40% of its time in the Wyoming Range. Id. The team "was not set up to survey the Wyoming Range as intensively" and the staging location at Blackrock "influenced the number of tracks found." Id.

Track locations are not the only indicator of high quality habitat, however. In addition to surveying for lynx tracks, the team conducted prey base surveys and found snowshoe hare concentrations were "much greater" in the Wyoming Range than anywhere else surveyed. Id. "Importantly, hare densities were particularly high in the Wyoming Range, where fecal pellet numbers were higher in all older forest structural types surveyed than anywhere else on the BTNF." Endeavor Wildlife Research Foundation Greater Yellowstone Lynx Study, 2008 at 23(emphasis added) (Exhibit 4). As the report explained:

> Our findings are significant because they demonstrate that hare densities can reach and even surpass levels thought to be necessary for Canada lynx recruitment as outlined by others. (Ruggiero et al. 2000, Steury and Murray 2004). We have documented the highest hare densities ever recorded in the Western United States (Ellsworth and Reynolds 2006). This bodes well for the short-term and long-term future of lynx in the GYE and indicates that there is some favorable prey base for the species in at least some portion of the ecosystem.
>
> Our findings have likely uncovered a large piece of the puzzle as to how and why lynx have managed to persist in the GYE from historic times up until the present without any apparent period of absence (Murphy et al. 2005). Lynx habitat in the GYE is somewhat disjunct from the Canadian border and yet it still maintains a lynx population, while many other disjunct populations in the Western United States have apparently blinked out. This alone speaks well for the quality and spatial arrangement of habitat found in the GYE.

Id. at 25. The superlative snowshoe hare prey base in the Wyoming Range contributes to the report's finding that the "eastern slope of the Wyoming Range near Horse, Cottonwood and Beaver Creeks" is one of three important "core areas" in the GYE for lynx.[3] Stanley's attempt to discredit the findings of the report is unavailing. The report aptly confirms—and the DSEIS properly acknowledges—the importance of the 44,720-acre project area and its surrounding lands to the threatened Canada lynx population.

Next, Stanley cites an email from Bob Oakleaf, the Nongame Coordinator for the Wyoming Game and Fish Department to further its argument that oil and gas development is appropriate in the Wyoming Range. It draws incorrect conclusions from Mr. Oakleaf's statements about past clear cuts and fires to suggest that habitat in the Wyoming Range is "degraded" and "compromised." SC at 20. As mentioned above, the Wyoming Game and Fish biologists have long advocated against leasing and development in the 44,720-acre project area. Mr. Oakleaf confirmed that his email simply reiterated that past management decisions have adversely affected lynx and its habitat, presenting an even more compelling argument to support the no leasing alternative. Oakleaf, pers. comm., 4/29/10. When asked about his remarks to the Forest Service, he replied:

> My comment was intended to emphasize that there is very little habitat left and what remains is very fragmented. Therefore, we should not expect a thriving population of lynx; rather we should focus on protecting what little is left and developing long-term strategies to improve it. Lynx are the most sensitive of the dozen or more species that are considered obligates of the Boreal Forest and occur at the southern extension of their range in Wyoming. Certainly it is a habitat that warrants special attention.

Oakleaf, pers. comm., 4/29/10. There is nothing in the administrative record or in the most recent published quantitative data or in any personal communications with two highly regarded lynx biologists, Mr. Bob Oakleaf and Mr. Nate Berg, that supports Stanley's novel theory that the Wyoming Range is of questionable importance to lynx. More importantly, the Forest Service is not required to prove the high quality of this habitat in order to justify its decision not to lease. Within a pre-leasing analysis, the Forest Service can determine that it intends to err on the side of caution and manage the area to the best of its ability to conserve lynx.

2. The Forest Service's consideration of mitigation measures is adequate.

Stanley faults the Forest Service for downplaying the potential mitigation measures the agency could impose if it chose to lease, stating, "The decision to ignore potential mitigation measures in the impact analysis is typical throughout the DSEIS and violates NEPA's requirements to identify and discuss the effectiveness of potential mitigation measures." SC at 12 (citing South Fork Band Council of Western Shoshone of Nevada v. Dep't of the Interior, 588 F.3d 718, 727 (9th Cir. 2009)). The Forest Service hardly "ignored" potential mitigation measures. It considered a range of mitigation measures—some seventeen different possibilities

[3] Core areas are defined as "areas where lynx were detected on five or more occasions, on two or more consecutive winter field seasons." EWR Report at 9.

in all—and even acknowledged, "[T]hese and other mitigations to be determined, could reduce effects to lynx." DSEIS at 4-108. Unlike the mitigation measures shown to be relatively protective of other species, however, the agency concluded these same measures "are not likely to be sufficient for lynx." Id. The Forest Service explained that the very low population level at present, large home ranges, difficulty in timely discovery of den sites, vulnerability to poaching and the crucial importance of the habitat in and surrounding the project area all make mitigation for lynx less likely to be successful. Id.

Again, however, the mere fact that impacts of oil and gas development could, to some extent, be mitigated, does not mean that the Forest Service is obligated to proceed with oil and gas leasing. It is well within the agency's legitimate discretion to decide not to authorize even mitigated impacts associated with oil and gas development activities. Moreover, Stanley's claim that the Forest Service violates NEPA's requirement to address mitigation measures is inapplicable to the case at hand, where the no action alternative is the preferred course of action. Mitigation measures must be considered "before environmentally harmful actions are put into effect." South Fork Band Council, 588 F.3d at 727 (internal citations omitted). In this situation, the Forest Service has indicated it will not lease. Thus, no environmentally harmful actions are proposed. It stands to reason that a decision not to lease requires a less robust analysis of mitigation measures than the action alternatives would.

Arguably, the Forest Service could withdraw its consent to lease and instruct the BLM to cancel leases improperly issued without preparing any formal NEPA analysis, let alone a thorough consideration of mitigation measures. The IBLA recently acknowledged this:

> The purpose of preparing an SEIS was to provided (sic) the necessary NEPA documentation to support lifting the suspension on issued leases, as well as to support the issuance of leases for sold parcels, including the parcels involved in this case. It is not necessary to complete the SEIS in order to reject high bids for leased parcels, though BLM may choose to await the completion of that analysis before acting to reject the bids. What is necessary, in either event, is a decision supported by a rational and defensible basis for taking that action.

Stanley Energy, Inc., 173 IBLA 8, 16 (2010)(emphasis added)(Exhibit 1).

This finding is supported by extensive case law. NEPA requires the preparation of an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(emphasis added). It does not require an EIS for decisions, like this one (assuming the no action alternative is retained as the final decision), that authorize no changes on the ground, but simply retain the environmental "status quo." Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232 (9th Cir. 1995). "[W]here a proposed federal action would not change the status quo, an EIS is not necessary." Id. at 235.

Although the agencies must complete an EIS to proceed with a decision to lease, NEPA does not require preparation of an EIS to implement a decision that would make no "change to the physical environment," such as a decision not to lease. Metropolitan Edison Co. v. People

Against Nuclear Energy, 460 U.S. 766, 774 (1983). Accordingly, "[a]n EIS need not discuss the environmental effects of continuing to use land in the manner which it is presently being used." Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 679 (5th Cir. 1992) (holding no EIS required for federal acquisition of conservation easement on wetlands habitat that foreclosed construction of reservoir; "NEPA may require an EIS whenever a reservoir is built; but NEPA does not require preparation of an EIS whenever a reservoir is not built.")(quotation and citation omitted); see also Utah v. Babbitt, 137 F.3d 1193, 1214 (10th Cir. 1998) (holding no EIS required, hence plaintiff lacked standing to pursue NEPA claim, where challenged wilderness inventory of public lands did not change management use of lands); National Wildlife Fed'n v. Espy, 45 F.3d 1337, 1343-44 (9th Cir. 1995) (holding no NEPA analysis required for federal land transfer that maintained livestock grazing status quo on ranch); Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) (holding no EIS required where government leased parking lot to new parking management because no change in environmental status quo).

Because the Forest Service's decision not to lease is not an action for which an EIS is even required, the EIS it did prepare is a more than adequate review of new information and mitigation measures. Stanley's attempt to find NEPA violations in a situation that doesn't even require the preparation of a NEPA document is unavailing.

3. The cumulative impacts analysis appropriately considers potential development on the Bridger-Teton National Forest.

Stanley makes two inaccurate statements in its comments regarding cumulative impacts. First, it argues the Forest Service should not have considered other future energy development projects in the Wyoming Range because the "Wyoming Range Legacy Act withdrew the Wyoming Range from future oil and gas leasing." SC at 15. While the Act does prohibit new leasing, it does not prohibit development on any of the 77,000 valid oil and gas leases that currently exist in the Wyoming Range. Unfortunately, it is not only reasonably foreseeable that other nearby energy development projects on the Bridger-Teton could occur that would negatively impact lynx, other wildlife species, regional air quality, water quality, forest users' sense of place and opportunities for backcountry recreation, but it is even likely that such projects may be implemented, given a pending draft EIS slated to be released this summer that considers approval of 136 new gas wells in the Hoback Basin. DSEIS at 4-104.

Second, Stanley's criticism of the Forest Service for failing to address the beneficial effects of the legislation and "not address[ing] the fact that the rest of the Forest is now off limits to development" is misinformed. SC at 16. Not only does the Act not prohibit development on leases validly issued in the Wyoming Range prior to passage of the Act, there are, in addition, hundreds of thousands of acres on the forest that are administratively available for future oil and gas leasing and development outside the Wyoming Range. Thankfully, these areas remain unleased, but are not "off limits" as Stanley has asserted. Thus, passage of the Act alone does not ensure lynx protection because all of the leases that could be developed prior to the Act's passage have the potential to be developed still.

4. Consultation with the U.S. Fish and Wildlife Service is not required unless an action alternative is selected.

Just as Stanley misstates the requirements of NEPA, so too, does it misrepresent the consultation requirement under the Endangered Species Act ("ESA"). SC at 18-19 (citing 16 U.S.C. § 1536(a)(2)). After the Forest Service determined that implementing the proposed action "may affect and is likely to adversely affect Canada lynx" it would have been required to enter into formal consultation with the USFWS only if it proceeded with one of the action alternatives. The ESA does not require consultation when an agency determines, based on its initial review, to take no action whatsoever.

Again, Stanley mischaracterizes the nature of the decision to be made:

> [T]he fact that a threatened species exists in this area of the Forest does not preclude development of these leases, and certainly does not support canceling these leases. Even the FWS has acknowledged that some projects with adverse effects to lynx may be allowed to proceed in the National Forests. The key is in designing the projects to ensure the maximum protection for Canada lynx and its critical habitat.

SC at 19. The ESA may not preclude all development in the 44,720-acre project area to protect the lynx—although given the critical habitat under consideration and low population numbers, it might. Contrary to Stanley's argument, however, the Forest Service did not claim in the DSEIS that the ESA mandated its selection of the no action alternative as its preferred alternative. Thus, Stanley's attempted rebuttal is misplaced.

In this situation the Forest Service has indicated that its preferred course of action is not to lease. It is the no action alternative that will best "ensure the maximum protection" for lynx, much more so than authorizing leasing and development with mitigation measures. Mitigation is hardly the equivalent of protecting the resource from the outset. At best, mitigation reduces the severity of the harm. The Forest Service is simply not bound to mitigate leasing in a situation like this one in which it retains full discretion not to lease and has indicated it will likely not lease.

b. Air quality

Stanley asserts the Forest Service has no authority to cancel the leases based on projected impacts to air quality as a result of new leasing and development in the Wyoming Range. SC at 20. Just as the ESA may not mandate selection of the no action alternative with respect to lynx conservation, the Clean Air Act and the Wilderness Act may not demand selection of the no action alternative in order to protect air quality. Again, however, given the level of air quality impacts from other developments in the area, statutory obligations may well dictate a no leasing decision here. Regardless, nowhere in the DSEIS does the Forest Service state that, based on its air quality analysis, the Forest Service is required to select the no action alternative. That being said, the Forest Service certainly has the authority, as a result of its pre-leasing environmental review, to select the no action alternative based in part on its serious concerns for and affirmative

responsibility to protect air quality.

The DSEIS discloses the affected environment in the Upper Green River Basin with respect to air quality. First, data collected from monitoring sites show exceedances for the criteria pollutant ozone. Id. (stating that "high ozone readings in February of 2006, 2007 and 2008 are showing a violation of the new ozone standard of 75 parts per billion.") Governor Freudenthal has recommended to EPA that all of Sublette County and parts of Lincoln and Sweetwater Counties be designated as nonattainment areas for ozone. Id. at 3-141. Second, "[r]ecent air quality modeling completed for local natural gas projects have shown that impacts to visibility in the Bridger (and other) wilderness areas are currently occurring . . . ." Third, atmospheric deposition has been sampled in high elevation lakes for more than two decades. Id. at 3-150. This sampling shows that the nitrogen deposition levels are much higher than the level the Forest Service believes is allowable in order to protect of aquatic systems. Id. Notably, "some of the highest measured deposition has occurred in recent years since natural gas development began in the Pinedale area." Id. at 3-151. Finally, lake acidification data were collected. Id. at 3-152. "Statistical analysis of this data shows that there are long term significant changes occurring in the ANC, nitrogen and sulfur deposition in these lakes." Id.

Thus, with respect to all measurements of air quality—ozone exceedances, impacts to visibility in Class I areas and lake chemistry—there are serious, existing problems. Stanley is correct to point out that much of the problem results from nearby, large-scale oil and gas operations on BLM land. SC at 22. Stanley also notes that that "this development will continue regardless of whether the Forest Service and BLM approve oil and gas development on the 44,720 acres." Id. Stanley seems to suggest that since most of the impacts to air quality are already occurring (and will continue to occur) from projects off national forest land and because this proposal is relatively small and slated to have just "minor" impacts, the Forest Service can choose to contribute to the problem without a violation of the law.

As with other incorrect assertions Stanley makes in its comments, however, the Forest Service's authority not to lease does not hinge on whether such leasing and development would violate substantive statutory obligations relating to air quality. The Forest Service need not justify its no leasing preferred alternative (or future no leasing decision) by showing catastrophic degradation to air quality related values or statutory violations. Even minor impacts may be unacceptable and the Forest Service has the discretion to choose not to contribute to continued air quality degradation.

Stanley is also wrong to conclude that the Forest Service is without authority or does not have a responsibility to protect the lands its manages—especially in this case where the additional new emissions would result for the first time from a project it authorized on its own lands. The DSEIS properly states that the Forest Service has an affirmative responsibility to protect air quality related values, including visibility over the lands within Class I areas, such as the Bridger Wilderness. DSEIS at 3-139, 3-145; see also 42 U.S.C. § 7475(d)(1)(B). The goal established by the Clean Air Act is that "any future" impairment of visibility must be prevented and that "any existing" impairment of visibility must be remedied. 42 U.S.C. § 7491(a)(1) (emphasis added). Likewise, air quality must be "preserve[ed], protect[ed], and enhance[ed]" in protected landscapes like wilderness areas, and the "affirmative responsibility" imposed on the

Forest Service for these prevention of significant deterioration areas is to "protect" them, not to allow them to be incrementally degraded. Id. §§ 7470(2), 7475(d)(1)(B). Moreover, wilderness areas are protected by provisions of the Clean Air Act. See 42 U.S.C. § 7401(b)(1) (stating that the purposes of the Clean Air Act are "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare…."); 42 U.S.C. § 7470(2), 7491(a)(1) (directing that air quality in protected landscapes and airsheds be protected). The DSEIS also acknowledges the requirement in the Wilderness Act that wilderness managers "protect and preserve wilderness areas from man caused degradation." DSEIS at 3-139.

The no action alternative is the only alternative that would not contribute to the problem of declining regional air quality, visibility in the Bridger Wilderness and alteration of lake chemistry in sensitive, high elevation lakes. The Forest Service's indication that it will choose the no action alternative is reasonable, responsible and fully within its discretion.

VI. In addition to Canada lynx and air quality, impacts to numerous other forest resources appropriately informed the Forest Service's decision to select the no action alternative as its preferred alternative.

Stanley disregards numerous other resources that would be adversely impacted as a result of transforming the eastern slope of the Wyoming Range into an industrial gas field. It states, "[A]ny adverse impacts [to trout, mule deer, elk, tourism or socioeconomics] would be small, localized, temporary and can be avoided or minimized through … mitigation techniques." SC at 23. Stanley provides no support for these conclusory and self-serving statements, nor can it.

As the DSEIS appropriately addresses, many factors and resources contribute to the Wyoming Range's unique and cherished landscape. In a somewhat analogous situation, in 1997, the Forest Service decided not to lease the entire Rocky Mountain Division of the Lewis and Clark National Forest (also known as the Badger-Two Medicine area). See Lewis and Clark NF Oil & Gas Leasing FEIS, Record of Decision, 8/28/97 at 4 (Exhibit 5). The Forest Service acknowledged the legitimacy of oil and gas development on national forest land, the economic revenue that derives from this use, and the fact that through technological advances and "closely controlled" development strategies, impacts to wildlife and surface resources could be mitigated to some extent. Id. at 4-5. It also considered public sentiment, stating that the "vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration" and gave particular attention to the "value of place" people attributed to the area. Id. Its thorough analysis of the competing interests and its careful articulation of its decision-making process in the Record of Decision ("ROD") withstood legal challenge.

> There is nothing arbitrary and capricious or unlawful under NEPA arising from the Forest Service decision not to open the Rocky Mountain Division to oil and gas leasing because the agency gave the question a sufficiently hard look and considered public opposition and many other relevant factors. The ROD shows that the agency examined the relevant data, and the ROD articulates a rational explanation for agency action.

Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Service, 157, F.Supp.2d 1142, 1144-45 (D. Mont. 2000)(citations omitted).

As in this case, it is the compilation of many relevant factors—air, water, wildlife, recreation, tourism, hunting and fishing, sense of place, socioeconomics and others—that legitimately informed the agency's discretionary decision to choose the no action alternative as its preferred course of action. These resources are well documented in the DSEIS. It is all of these factors that would also provide a rational and defensible basis to support choosing the no leasing alternative as the agency's final decision.

VII. Conclusion

Thank you for your consideration of this analysis and critique of Stanley Energy's comments on the DSEIS for oil and gas leasing in the Wyoming Range. I appreciate the Forest Service's close attention to the complex factual and legal context that surrounds the 44,720 acres of contested leases, as well as its acknowledgment of the long history of public involvement with this issue.

Sincerely,

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