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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN ENERGY ALLIANCE, *et al.*,	)	
	)	Case No. 2:10-cv-00226-NDF
Petitioners,	)	The Hon. Nancy D. Freudenthal
v.	)	
	)	
KEN SALAZAR, Secretary of the Interior, *et al.*,	)	
	)	
Respondents,	)	
	)	
WYOMING OUTDOOR COUNCIL, *et al.*,	)	
	)	
Respondent-Intervenors.	)	
	)	

RESPONSE BRIEF OF RESPONDENT-INTERVENORS WYOMING OUTDOOR COUNCIL, ET AL.

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RELATED APPEALS

Per 10th Cir. R. 28.1(C), there are no prior or related appeals to this case.

EXHIBIT LIST

Exhibit 1	BLM, Instruction Memorandum No. WY-2010-112 (Dec. 29, 2009)
Exhibit 2	BLM, Instruction Memorandum No. WY-2010-113 (Dec. 29, 2009)
Exhibit 3	*Wyoming Outdoor Council*, IBLA 2006-184 (July 10, 2006)
Exhibit 4	*Bill Barrett Corp.*, IBLA 2007-193, 4-5 (2010)
Exhibit 5	Hearing Before the Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, House of Representatives on H.R. 933, H.R. 2851 (July 28, 1987)
Exhibit 6	Hearing Before the Senate Subcommittee on Mineral Resources Development and Production of the Committee on Energy and Natural Resources, 100th Cong. 100-4H4 (June 30, 1987)

STATEMENT OF ISSUES

(1) Whether Petitioners' claims are moot because the Bureau of Land Management (BLM) has either issued or determined that it will issue leases to the high bidders;

(2) Whether Petitioners' Mineral Leasing Act claims are barred by laches or equitable estoppel;

(3) Whether the Secretary loses all discretion to determine the lands "to be leased" under the Mineral Leasing Act by holding a competitive auction;

(4) Whether the Mineral Leasing Act compels the Secretary to issue leases where the Secretary has resolved administrative appeals in favor of Respondent-Intervenors (the Conservation Groups) and decided not to lease, or where the Secretary is still reviewing such administrative appeals; and

(5) Whether Petitioners are entitled to relief that would force the Secretary of the Interior to violate federal environmental laws.

STATEMENT OF THE CASE

Petitioners Western Energy Alliance, *et al.* (WEA) and American Petroleum Institute (API) seek a court order compelling Federal Defendant the Secretary of the Interior (Secretary) to issue 118 oil and gas leases covering more than 150,000 acres, including environmentally sensitive wilderness-quality lands and important wildlife habitat. As an initial matter, the majority of Petitioners' case is moot because BLM has already issued seventy-one of these leases or has indicated that it will do so shortly.

Petitioners are challenging BLM's policy of auctioning leases at competitive lease auctions but delaying issuance of the lease until after the agency resolves administrative appeals, or "protests," challenging the legality of BLM's decision to lease. This policy benefits Petitioners by allowing them to obtain the right to the lease if BLM decides to issue it; the alternative to this practice is for BLM not to auction the lease at all. Although Petitioners agreed

to the terms of BLM's policy at successive auctions over the course of five years, they are now seeking to belatedly change the rules of the game and force BLM to issue their leases. Because Petitioners' delay in bringing this case harms BLM and the Conservation Groups, Petitioners' claims are barred by laches and equitable estoppel.

Moreover, Petitioners' interpretation of the Mineral Leasing Act is flawed and would overturn decades of federal case law holding that the Secretary has the exclusive right to determine which lands are "to be leased" for oil and gas development, even after determining the party entitled to the lease if it were to be issued. Petitioners' requested relief would also overturn BLM decisions—made in response to the Conservation Groups' administrative appeals—not to lease twenty of these parcels because leasing would violate federal environmental laws and BLM policies. Additionally, Petitioners' requested relief would preempt BLM's review of the legality of at least twenty-seven other leases where the Conservation Groups' administrative appeals are still pending.

STATEMENT OF FACTS

Petitioners request that this Court order BLM to issue 118 leases that BLM auctioned between November 2005 and August 2010. *See* WEA Pet. for Review at 7-8 (Dec. 30, 2010) (Dkt. #38); *see also* WEA Compl. Exhs. B-E (Oct. 18, 2010) (Dkt. #1); API Pet. for Review (Dec. 21, 2010) (Dkt. #22-1, Exh. C). Petitioners challenge BLM's longstanding policy allowing BLM to auction lease parcels at competitive auctions without first resolving administrative appeals challenging the legality of the lease sale. *See* WEA Appellate Review of the Inaction of Federal Agencies at 2 (Apr. 29, 2011) (Dkt. #59) (WEA Br.); Brief of API at 6-7 (Apr. 29,

2011) (Dkt. #60) (API Br.). Under this policy, the high bidder obtains a valuable preference right to the lease, but ultimately obtains the lease itself only if BLM denies the administrative appeal. BLM adopted this policy to allow the high bidders to get a foot in the door for a particular lease where BLM is unable to resolve the protests prior to auction. The alternative to this practice is for BLM to withdraw the lease parcel from the auction.

During the time period at issue in this case, BLM offered hundreds of leases each year in Utah and Wyoming.[1] Many of these leases were controversial, including those at issue in this case, because they include remote areas that the Conservation Groups have proposed for wilderness protection, lands with irreplaceable historic artifacts, and important wildlife habitat. *See* Conservation Groups' Mot. to Intervene at 2 (Jan. 26, 2011) (Dkt. #44). Because BLM failed to adequately consider these values under relevant environmental laws, the Conservation Groups filed administrative appeals—or "protests"—challenging the leases. *Id.*

Because BLM was auctioning parcels at a faster pace than it could resolve protests, it created a backlog of unresolved protests. BLM has recently taken steps to alleviate that backlog and prevent a similar backlog from occurring in the future. In fact, BLM has decided to issue seventy-one of the 118 leases at issue in this case, leaving only forty-seven leases still in dispute.

[1] In Wyoming, BLM held between four and six lease auctions per year between 2005 and 2010, and offered an average of 160 parcels per auction. *See* http://www.blm.gov/wy/st/en/programs/energy/Oil_and_Gas/Leasing/historical_index.html#2006. In Utah, BLM held between three and four auctions per year between 2005 and 2010, and offered an average of 104 leases per auction. *See* http://www.blm.gov/ut/st/en/prog/energy/oil_and_gas/oil_and_gas_lease.html; *see also* WO 000053.

With respect to those remaining forty-seven leases, BLM recognized the legal deficiencies and granted protests for twenty of those leases.[2] For the other twenty-seven leases, BLM has yet to resolve pending protests.[3] WEA's requested relief—an order compelling lease issuance—would force violations of federal environmental law, overturn BLM's decisions on the Conservation Groups' protests, and nullify the protests that BLM has yet to resolve.

I. BLM'S LEASING PROCEDURES UNDER THE MINERAL LEASING ACT

Under the Mineral Leasing Act, the Secretary of the Interior has responsibility for oil and gas leasing on more than 500 million acres of federal public lands. *See* 30 U.S.C. § 226(a). The Secretary, through BLM, has discretion to determine what lands are available for lease. *Id.* ("All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may be leased* by the Secretary." (emphasis added)). The Mineral Leasing Act specifies certain requirements that BLM must follow in issuing oil and gas leases, but these apply only after BLM has exercised its discretion to determine that the subject lease parcels constitute lands "to be leased." *Id.* §§ 226(b)(1)(A), (c). For lands subject to competitive leasing, BLM must issue the lease to the "highest responsible qualified bidder" identified at an oral auction. *Id.* § 226(b)(1)(A). For lands subject to noncompetitive leasing, BLM must issue the lease to the "first qualified applicant." *Id.* § 226(c)(1).

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[2] *See* BLM 009718 (UTU084607, 84608, 84609, 84610, 84611, 84612, 84644, 84645, 84646, 84647, 84648); BLM 009763 (WYW-178932); BLM 003576 (WYW-177175); BLM 000057 (WYW-177766); BLM 000086 (WYW-177767); BLM 000149 (WYW-178020); BLM 000184 (WYW-178021); BLM 000220 (WYW-178525); BLM 009816 (WYW-178965).

[3] *See* WO 000067-72 (chart of Utah leases showing those with protests pending).

BLM must first attempt to lease most public lands competitively through an oral auction before offering them noncompetitively. *Id.* §§ 226(b)(1)(A), 226(c). At least forty-five days prior to the auction, BLM notifies the public and potential bidders of the location of any lease parcels that may be auctioned. *See* 43 C.F.R. § 3120.4-2. BLM provides the public with an opportunity to challenge the validity of the lease through an administrative appeal—or "protest"—that must be filed prior to an auction. *See id.* § 3120.1-3; *see also* WO 000037-38 (BLM Competitive Leases Manual H-3120-1 (Section G) (Nov. 26, 1993)). BLM identifies all the necessary steps that bidders and protesters must following in the Notice of Sale released when BLM announces an upcoming auction. *See, e.g.*, BLM 007970.

When a lease is protested, BLM has several options. BLM may resolve any protests prior to the auction and determine, based on the outcome of the protest, whether to auction the lease. Where BLM is unable to resolve protests prior to the auction, the agency may exercise its discretion not to include the lease at auction. *See* 43 C.F.R. § 3120.1-3 ("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."). Petitioners concede that BLM has the discretion not to include a protested lease parcel in an auction. *See* WEA Br. at 9; API Br. at 12.

A second option is also available to BLM when it is unable to resolve protests prior to an auction. Rather than foregoing leasing at the auction altogether, BLM may auction the parcels subject to protests, and resolve the protests after the auction. *See*, *e.g.*, WO 000037-38 (BLM Competitive Leases Manual H-3120-1 (Section G) (Nov. 26, 1993)) ("If a protest is received on … the inclusion of a specific parcel in the sale, while the merits of the protest are being

considered, the State Director may either elect to hold the sale or suspend the entire lease sale (or offering of the parcel)."). Petitioners are challenging this policy—which has been in place for almost two decades—in this case.

At an auction, a high bidder makes a "binding lease offer" to BLM. 43 C.F.R. § 3120.5-3(a); *see also* BLM 007968 (sale notice stating that the bid form is a "legally binding offer by the prospective lessee to accept a lease and all its terms and conditions"). By paying the minimum bonus bid and first year rentals on the day of the auction and the balance of the bonus bid within ten days of the auction, the high bidder secures its position as the party entitled to the lease if it is issued. *See* 43 C.F.R. §§ 3120.5-2, 3120.5-3. BLM places the money in a non-interest bearing suspense account. *See* WEA Br. at 5. BLM does not accept the high bidder's offer and issue the lease, if at all, until it resolves the protest. *See* WO 000037; *see also* 43 C.F.R. § 3120.2-2 (lease is not issued until signed by the authorized officer). If BLM grants a protest, the offer is not accepted, and BLM refunds the bonus bid and first year rentals. *See, e.g.*, BLM 007971. Under this approach, the Secretary does not exercise his discretion to determine the lands "to be leased" under the Mineral Leasing Act until after resolving protests. 30 U.S.C. § 226(b)(1)(A).

BLM's protest policy benefits potential bidders by allowing them to get a foot in the door for a particular parcel instead of having BLM pull the parcel from the auction. *See, e.g., Rowe v. United States*, 464 F. Supp. 1060, 1080 n.102 (D. Alaska 1979) ("[BLM's] method of soliciting binding offers while retaining a discretion to not accept is not wholly unlike the course of events characteristic of an option contract or an irrevocable offer. The 'consideration' from the Secretary would be his promise to lease only to the offeror, if he decided to lease at all.")

(internal citation omitted), *aff'd*, 633 F.2d 799 (9th Cir. 1980). By bidding on a protested parcel, the high bidders obtain a financial stake in the lease if it is issued, as opposed to nothing at all.

BLM notifies all potential bidders prior to the sale if it is leasing particular parcels subject to protest. *See, e.g.,* BLM 007430; BLM 000658 (Notices of Sale). The Notice of Sale also clearly states that BLM will not issue a lease for a protested parcel unless it denies the protest. *Id.* BLM requires each bidder to sign a "bid form" agreeing to these auction terms. *See, e.g.*, BLM 000044; BLM 006680; BLM 007436.[4]

BLM's decision to issue a lease is significant because it is the point at which there is an "irretrievable commitment" of resources. *New Mexico ex. rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009) (*Richardson*). Once BLM issues a lease, the lessee has "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. § 3101.1-2. Therefore, lease issuance is the point at which BLM effectively authorizes oil and gas development, and the impacts associated with that development, on the public lands. Until that time, a high bidder merely has a hope or expectation that a lease will issue.

[4] Although the bidders are well aware of the possibility that BLM may not issue a lease if it grants a protest, the Government Accountability Office (GAO) found in a report published in 2010 that this uncertainty has not systematically affected the price that companies are willing to bid. *See* GAO-10-670, BLM's Management of Public Protests to Its Lease Sales Needs Improvement at 1 (API Br. Exh. A) (GAO Report). As the GAO concluded, "despite industry concerns, protest activity and delayed leasing have not significantly affected bid prices for leases; if protests or subsequent delays added significantly to industry cost or risk, it would be expected that the value of, and therefore bids for, protested parcels would be reduced." *Id.*

II. THE LEASES AT ISSUE IN THIS CASE

A. BLM's Decision to Offer the Oil and Gas Leases at Issue in this Case Violated Federal Environmental Law

The forty-seven leases still at issue in this case include remote areas that the Conservation Groups have proposed for wilderness protection, lands with irreplaceable historic artifacts, and "core" habitat for the greater sage grouse. *See* Conservation Groups Mot. to Intervene at 3. The U.S. Fish and Wildlife Service (FWS) has identified the sage grouse as a species that warrants protection under the Endangered Species Act (ESA) due, in part, to threats from oil and gas development. *See* 75 Fed. Reg. 13910, 14007-08 (Mar. 23, 2010). Because BLM failed to adequately consider the environmental, historic, and recreational values of the affected lands, in violation of federal environmental laws, the Conservation Groups protested BLM's decision to auction the leases. *See* Conservation Groups Mot. to Intervene at 3; *see also* WO 000067-72 (chart of Utah protests).

For example, BLM auctioned leases in Utah without considering significant new information regarding their wilderness characteristics as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C). *See, e.g.,* BLM 009244-46 (November 2005 protest identifying NEPA violations related to wilderness in Utah). In Wyoming, BLM violated NEPA by auctioning leases within "core" sage grouse habitat without considering new information that demonstrated the inadequacy of existing mitigation measures (*e.g.* lease stipulations) to protect the sage grouse. *See, e.g.,* BLM 004653, 004655, 004654 (August 2008 protest identifying NEPA violations related to sage grouse in Wyoming).

B. The High Bidders Bid on Leases Knowing that BLM Would Issue Them Only if the Agency Denied the Conservation Groups' Protests

BLM did not resolve the Conservation Groups' protests prior to the auctions. Pursuant to its longstanding policy, BLM auctioned the leases subject to the protests. *See* WO 000037-38. The Notices of Sale for these lease auctions informed all potential bidders that (1) BLM would not issue any leases subject to a protest until the agency resolved the protest, and (2) if BLM granted a protest, the agency would return any payments and would not issue the lease. *See, e.g.,* BLM 007430-31 (notice for the November 2005 Utah sale); BLM 000658 (notice for the August 2008 Wyoming sale). Prior to each auction, BLM identified all leases subject to protests. *See, e.g.*, BLM 000658, 000765, 007720.

The WEA Petitioners were the high bidders for leases protested by the Conservation Groups at multiple lease sales between August 2005 and August 2010. *See* WEA Pet. for Review ¶ 7.[5] At each successive sale, the high bidders signed bid forms agreeing that they were bound by all of the terms and conditions of the auctions. *See, e.g.*, BLM 000044; BLM 006680; BLM 007436. Those terms and conditions included the fact that BLM would only issue leases if and when the agency denied the protests.

[5] Baseline was the high bidder for parcels at thirteen different Utah and Wyoming sales between 2005 and 2010; Double Deuce was the high bidder for parcels at two Wyoming sales in 2008 and 2009; Nerd was the high bidder for parcels at seven different Wyoming sales between 2008 and 2010; Double Deuce was the high bidder for parcels at three Wyoming sales in 2009 and 2010. *See* WEA Pet. for Review ¶ 7.

C. BLM Has Now Resolved Protests in Favor of the Conservation Groups and Recognized Legal Deficiencies

During the time period at issue in this case, BLM was auctioning leases faster than it could resolve protests. This resulted in a backlog of unresolved protests. However, BLM has now taken steps to resolve the backlog and ensure that future backlogs do not occur.

With respect to the leases at issue in Utah, BLM granted the Conservation Groups' protests for eleven leases on May 10, 2007, and has yet to resolve protests for twenty-seven leases. *See* BLM 009718-20. BLM decided not to issue eleven leases because it recognized its legal duty to complete additional environmental review to comply with the Utah district court's decision in *S. Utah Wilderness Alliance* (*SUWA) v. Norton*, 457 F. Supp. 2d 1253 (D. Utah 2006). *See* BLM 009718-20; *see also* BLM 007216. In *SUWA v. Norton*, the court held that BLM's decision to offer sixteen oil and gas leases violated NEPA because BLM failed to consider significant new information concerning the impact of leasing on the wilderness character of the Flat Tops proposed wilderness. 457 F. Supp. 2d at 1264-69. BLM identified the same legal flaws with respect to the eleven leases at issue here and determined that it needed to undertake further analysis to comply with NEPA. *See* BLM 009718; *see also* BLM 007216. Notwithstanding BLM's decision four years ago to grant the Conservation Groups' protest, Petitioners demand that BLM issue these leases.

As of April 21, 2011, BLM had resolved all of the outstanding protests in Wyoming.[6] BLM granted the Conservation Groups' protests and decided to withhold nine Wyoming leases from issuance. *See* WEA Br. at 7; *see also* WEA Br. at 3 n.4-6.[7] BLM deferred at least five parcels in Wyoming because they did not comply with BLM's policies for protecting sage grouse.[8] BLM developed screening criteria based in part on the significant new information identified by the Conservation Groups in their protests regarding the mitigation measures necessary to protect the sage grouse. BLM uses these screens to determine whether oil and gas development is appropriate within sage grouse habitat and what protective measures are necessary if leasing occurs. *See* BLM, Instruction Memoranda (IM) Nos. WY-2010-012 and 2010-013 (Dec. 29, 2009) (attached as Exhs. 1 and 2).[9] BLM deferred other Wyoming parcels

[6] Current protest and protest resolution information for Wyoming is available at: http://www.blm.gov/wy/st/en/programs/energy/Oil_and_Gas/Leasing/historical_index.html. Utah protest and protest resolution information is available at: http://www.blm.gov/ut/st/en/prog/energy/oil_and_gas/oil_and_gas_lease.html.

[7] BLM has decided to issue all of Peititioner Wold's and Double Deuce's leases. *See* WEA Comp. Exhs. C and E (Dkt. #1); *see also* WEA Br. at 3 n.5 (conceding all of Double Deuce's leases have been issued); *id.* at 5, n. 9-10 (WEA's list of unissued leases include no Wold leases). Thus, any claims by these Petitioners are moot.

[8] BLM 005357, 005369-005372, 005387 (BLM Decision on December 2008 Lease Protests deferring Parcel 130/WYW-177766 and Parcel 131/WYW-177767); BLM 005843, 005854-57, 005877 (BLM Decision on August 2009 Lease Protests deferring Parcel 46/WYW-178525); BLM 010057-58, 010070-74, 010097 (BLM Decision on February 2010 Lease Protests deferring Parcel 13/ WYW-178932 and Parcel 46/WYW-178965).

[9] These protective measures are critical components of both the State of Wyoming's and the Federal Government's efforts to protect the sage grouse. In its ESA listing decision, FWS identified the sage grouse as a species in need of protection, but delayed action because there were other more pressing priorities. *See* 75 Fed. Reg. at 14007-10. FWS relies on BLM and

pending completion of BLM land use plan revisions, which will address new information regarding sage grouse and oil and gas development.[10]

In addition to resolving the backlog of protests, BLM has taken steps to reform the leasing process to address both the Conservation Groups' and industry's concerns. *See* WO 000102 (BLM IM No. 2010-117 (May 10, 2010)). In announcing the reforms, Secretary Salazar recognized:

> The previous Administration's 'anywhere, anyhow' policy on oil and gas development ran afoul of communities, carved up the landscape, and fueled costly conflicts that created uncertainty for investors and industry. . . . We need a fresh look – from inside the federal government and from outside – at how we can better manage Americans' energy resources.

WO 000039.[11] To this end, the new policies provide for greater emphasis on planning and environmental analysis prior to auctions and more public participation in the leasing process. *See* WO 000105-08 (master leasing plans), 000108-112 (interdisciplinary review of lease

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Wyoming's measures to protect sage grouse from oil and gas impacts. *See id.* at 13974-75, 13982. To the extent these measures are not implemented, the sage grouse's priority for listing under the ESA will go up.

[10] *See* BLM 004910, 004921-23, 004945 (BLM Decision on August 2008 Lease Protests, deferring Parcel 107/WYW-177175); BLM 005587, 005601-005603, 005624 (BLM Decision on February 2009 Lease Protests deferring Parcel 63/WYW-178016 and Parcel 67/WYW-178020).

[11] The reforms stemmed from a controversial Utah lease auction in 2008 which—like the auctions at issue in this case—included leases within citizen proposed wilderness and other sensitive lands. Plaintiffs challenged the lease sale in federal district court. *See SUWA v. Allred*, No. 08-2187, 2009 WL 765882, at *1 (D.D.C. Jan. 17, 2009). The court held that plaintiffs were likely to succeed on the merits of their NEPA claims and issued a temporary restraining order (TRO) prohibiting BLM from issuing the leases, which BLM had auctioned subject to protest but had not issued. *Id.* at *1-2. In response, the Secretary withdrew the lands from sale and assigned an interdisciplinary team to study what went wrong in that case. The results of this study led to many of the reforms adopted by the Secretary. *See* WO 000039.

parcels), 000112-113 (site-specific NEPA documents). The policies also ensure that BLM will have more time to resolve protests prior to auction. *See, e.g.*, WO 000108, 000114. According to BLM Director Bob Abbey, "the increased opportunity for public participation and a more thorough environmental review process and documentation can help reduce the number of protests filed as well as enhance BLM's ability to resolve protests prior to lease sales." WO 000039; *see also* WO 000114 (stating that the policy "will help identify, address, and resolve most issues before the lease sale").

D. Petitioners' Requested Relief Will Force Violations of Federal Environmental Law and Nullify the Conservation Groups' Pending Protests

Although the high bidders agreed to bid on the leases subject to the protests, Petitioners later filed this case claiming that the Mineral Leasing Act mandates that BLM issue the leases to the high bidder regardless of the merits or existence of any protests. *See* WEA Compl. ¶ 20; WEA Pet. for Review ¶¶ 6-8, Prayer for Relief; API Pet. for Review ¶¶ 1-2. Moreover, although WEA claims that they are "neither challenging the rights of individuals and groups to protest leases nor the right of the Secretary to duly consider the merits of each protest," *see* WEA Br. at 15, the relief that Petitioners request would have exactly that effect.

WEA seeks a court order compelling BLM to issue all of the leases in this case to the highest bidders. *See* WEA Br. at 9. Although API has not identified any specific leases for which its members were the high bidders at auction, API seeks an order requiring BLM to issue "all leases" (presumably nationwide) that BLM has auctioned but not issued. *See* API Br. at 31.

Not only is Petitioners' interpretation of the Mineral Leasing Act incorrect, as discussed *infra*, but a court order compelling BLM to issue the leases would also force violations of federal environmental laws, as identified in the Conservation Groups' protests. An even broader order affecting all leases as requested by API would likely force numerous other violations of environmental law that are not before this Court. Petitioners' requested relief would also overturn BLM's decision granting the Conservation Groups' protests and prevent BLM from issuing decisions on still pending protests.

STANDARD OF REVIEW

Petitioners bring this case under the Administrative Procedure Act (APA) alleging agency action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under APA § 706(1), a court may only compel an agency to perform a ministerial or nondiscretionary act. *Norton v. SUWA*, 542 U.S. 55, 64-66 (2004).

SUMMARY OF ARGUMENT

Petitioners ask this Court to order BLM to issue 118 leases covering over 150,000 acres of public lands in Utah and Wyoming. Lease issuance is significant because it is the point at which BLM makes an "irretrievable commitment of resources," and the agency can no longer outright prohibit development. *Richardson,* 565 F.3d at 718. Accordingly, the Mineral Leasing Act affords BLM considerable discretion to determine whether lands are "to be leased" under the Act. *See* 30 U.S.C. § 226(b)(1)(A); *see also id.* § 226(a) (giving the Secretary discretion to determine whether lands "may be leased").

BLM maintains its discretion to determine the lands "to be leased" even after holding a competitive lease auction and identifying the high bidder. Accordingly, BLM legally auctioned these leases to the high bidders in this case subject to the Conservation Groups' protests. BLM chose not to exercise its discretion to determine the lands "to be leased" until after the protests were resolved.

Regardless of the merits or existence of the Conservation Groups' protests, Petitioners seek an order compelling BLM to issue all 118 leases at issue in this case. *See* WEA Br. at 9 (requesting an order compelling BLM to issue all leases at issue in this case); *see also* API Br. at 12 ("Regardless of the status of protests, no statute or regulation suggest that BLM may ignore the clear and mandatory deadline in MLA § 226(b)(1)(A)"). Although Petitioners acknowledge that BLM has discretion not to auction leases that are subject to protest, they claim that once BLM holds the auction and accepts initial payments from the high bidder, the agency loses all discretion not to issue the leases. *See* WEA Br. at 8.

As an initial matter, the majority of WEA's claims are moot. BLM has issued seventy-one of the leases challenged in this case. For these leases, there is no further relief that the Court can provide.

Petitioners' claims are also barred by laches and equitable estoppel. The high bidders delayed bringing this case for many years. Each high bidder participated in multiple successive auctions—dating back to as early as November 2005—at which BLM applied its policy of deferring protest resolution until after an auction. Not only did the high bidders fail to object to BLM's policy, but they signed bid forms agreeing to the terms of the auction. Had Petitioners

challenged BLM's policy prior to these auctions, BLM could have either resolved the protests prior to the auction or deferred the parcels from the auction, either of which would have preserved the Conservation Groups' protest rights. As it stands now, however, Petitioners' requested relief would force BLM to nullify outstanding protests and reverse protest decisions BLM has made in the Conservation Groups' favor. Because of this prejudice to the Conservation Groups, Petitioners should not be allowed to pursue their claims.

Furthermore, Petitioners' interpretation of the Mineral Leasing Act is inconsistent with the plain language of the Act and its legislative history, decades of federal case law, and Interior Board of Land Appeals (IBLA) decisions, all of which demonstrate that Congress intended to afford BLM considerable discretion to determine the lands "to be leased" even after the agency has identified the party entitled to receive the lease if it is issued—in this case, the "high bidders" at a competitive auction. Although Petitioners rely exclusively on language Congress added to the Mineral Leasing Act through the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), they fail to demonstrate that Congress had any intention of modifying the Secretary's longstanding discretion to determine the lands "to be leased."

Petitioners are also not entitled to a court order compelling lease issuance because such relief would force a violation of federal environmental law. With respect to remedy, industry's interest in obtaining these leases does not outweigh the public's interest in ensuring a fully informed decision by BLM about whether oil and gas development is appropriate, as required by NEPA.

ARGUMENT

I. THE MAJORITY OF WEA'S CLAIMS ARE MOOT

For at least seventy-one leases at issue in this case, BLM has either issued or determined that it will issue the leases in question. *See* WEA Br. at 3 n.3-6, 5 n.9-10. For these leases, Petitioners' claims for injunctive relief are moot. *See McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1256 (10th Cir. 2010) (claim is moot because "any declaration regarding the cancellation of [plaintiff's livestock grazing permit] would be of no effect in the real world"); *Wyo. v. U.S. Dep't of the Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009) (noting a claim is moot where "the complaining party winds up with 'all the relief the federal court could have given him.'") (quoting *Hayes v. Evans,* 70 F.3d 85, 86 (10th Cir.1995)). There is no further remedy this Court could provide. Therefore, Petitioners' claims with respect to these leases should be dismissed.[12]

II. BECAUSE PETITIONERS UNREASONABLY DELAYED BRINGING THEIR CLAIMS TO THE DETRIMENT OF CONSERVATION GROUPS, PETITIONERS' CLAIMS ARE BARRED BY LACHES AND EQUITABLE ESTOPPEL

Petitioners acknowledge—as they must—that BLM has the discretion to withhold protested leases from an auction if it is unable to resolve the protests prior to the auction. *See*

[12] Petitioner API has also failed to demonstrate standing to support its request that this court order "BLM to promptly issue *all leases* [presumably nationwide] to successful bidders that BLM has unlawfully withheld beyond 60 days after payment by the bidder." API Br. at 31 (emphasis added). API has not even identified the specific leases for which it seeks relief. *See* API Pet. for Review; API Mot. to Intervene, at 3-4, 7-9 (Dec. 21, 2010) (Dkt. #22); API Br. at 8, 18. Without more, API has not demonstrated standing. *See Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009) (holding a plaintiff must allege "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction") (emphasis in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

WEA Br. at 9 (citing 43 C.F.R. § 3120.1-3, which authorizes BLM to "suspend the offering of a specific parcel while considering a protest or appeal"). Accordingly, BLM's policy of leasing parcels subject to protests benefits the high bidders by giving them a right to the lease if it is issued, as opposed to nothing at all.

Although BLM applied this policy at numerous successive auctions at which Petitioners were the high bidders on protested parcels over the course of five years, Petitioners did not challenge the policy. In fact, they repeatedly signed bid forms agreeing to BLM's terms and conditions. Now, however, they have filed this case seeking to retroactively change the ground rules to which they agreed and force BLM to issue the leases to the detriment of the Conservation Groups and their protest rights. Because Petitioners' delay in filing results in prejudice to the Conservation Groups, Petitioners' claims are barred by laches and equitable estoppel.

A. Petitioners' Claims are Barred by Laches

A claim is barred by laches where there has been (1) unreasonable delay in bringing the suit, and (2) prejudice to the party asserting the defense as a result of this delay. *Jicarrilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982); *see also Kan. v. Colo.*, 514 U.S. 673, 687 (1995) (same). Prejudice includes "some change in the condition of the property or in the relations of the parties which makes enforcement of the right inequitable." *Yates v. Am.*

Republics Corp., 163 F.2d 178, 180 (10th Cir. 1947). The doctrine of laches is "vigorously enforced in cases involving mineral properties." *Jicarilla Apache Tribe*, 687 F.2d at 1337.[13]

Petitioners' unreasonable delay in challenging BLM's protest policy in this case prejudices the Conservation Groups. BLM's policy of resolving protests after auctions dates back to 1993. *See* WO 000037. At each auction at issue in this case, BLM notified the bidders that it would not issue the leases until after it resolved protests and, if protests were granted, that it would not issue the leases and would refund the high bidders' payments. *See, e.g.,* BLM 007430 (Notice of Sale for November 2005 auction); BLM 000765 (Notice of Sale for October 2008 auction); BLM 000940 (Notice of Sale for December 2008 auction); BLM 001318 (Notice of Sale for August 2009 auction). Accordingly, Petitioners were well aware of BLM's policy when they chose to bid on leases at numerous auctions that took place over the course of five years. *See* WEA Pet. for Review ¶ 7. Not only did the high bidders fail to object, they signed forms agreeing to the terms and conditions of the auctions. *See, e.g.,* BLM 006636; BLM 000363; BLM 000475 (all stating "[e]xecution of this form . . . constitutes a binding lease offer including all applicable terms and conditions").

Although BLM failed to issue the leases within 60 days after each auction—as Petitioners claim is required by the Mineral Leasing Act—the high bidders continued to participate in successive quarterly BLM competitive lease auctions. For example, Baseline

[13] The tribe also challenged the government's failure to follow the notice provisions of its own regulations. *Id.* at 1328-29. The court held that this claim was not barred by laches because the court could fashion particular relief to avoid the prejudice to defendants. *Id.* at 1337. In this case, the only way to avoid prejudice to the Conservation Groups is to uphold BLM's resolution of their protests and to allow BLM to resolve the outstanding protests.

Minerals was the high bidder in thirteen separate lease sales between November 2005 and August 2010 at which BLM deferred issuing leases. *See* WEA Pet. for Review ¶ 7. Yet Petitioners unreasonably delayed filing suit until October 2010. *See Jicarilla Apache Tribe*, 687 F.2d at 1339-40 (holding that a three to six year delay in bringing suit after a lease auction was unreasonable).

Petitioners' delay harms the Conservation Groups. *See id.* (relying on harm to third party lessees as prejudice sufficient to support a claim of laches). Had Petitioners challenged BLM's policy prior to the first auction, BLM could have pulled the protested leases from the sale and not auctioned protested leases in future sales. *See* 43 C.F.R. § 3120.1-3. As a result, BLM could have avoided the harm to the Conservation Groups' interests that will result from Petitioners' belated request for relief—*i.e.*, the overturning of BLM protest decisions in the Conservation Groups' favor and the nullification of pending protests. *See Grand Canyon Trust v. Tuscon Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004) (noting a party can show prejudice when a defendant "took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly") (quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001)); *Apache Survival Coal. v. United States*, 21 F.3d 895, 908 (9th Cir. 1994) (holding claim barred by laches when the party could have identified the problems earlier, giving the agency an opportunity to change its conduct). Because Petitioners unreasonably delayed bringing their suit to the prejudice of the Conservation Groups, laches bars Petitioners' claims.

B. Petitioners' Claims are Barred by Equitable Estoppel

Petitioners' claims are also barred under the doctrine of equitable estoppel. Equitable estoppel "prevent[s] a party from taking a legal position inconsistent with an earlier statement or action that places his adversary at a disadvantage." *Spaulding v. United Transp. Union*, 279 F.3d 901, 909 (10th Cir. 2002) (quoting *Penny v. Giuffrida*, 897 F. 2d 1543, 1545 (10th Cir. 1990)); *see also Fed. Deposit Ins. Co. v. Palermo*, 815 F.2d 1329, 1338 (10th Cir. 1987) ("One can be 'estopped' from asserting a right who has acted in such a way that another party is reasonably led to believe that the right will not be asserted.").

In this case, Petitioners are estopped from arguing that the Mineral Leasing Act mandates lease issuance after an auction. By repeatedly signing bid forms after BLM provided them with notice of the ground rules for the auctions, they induced BLM to continue its practice of auctioning protested parcels. *See Yates,*163 F.2d at 180; *see also Saverslak v. Davis-Cleaver Produce Co.,* 606 F.2d 208, 213 (7th Cir. 1979) ("[A] party to a contract may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for non-compliance.") *cert. denied,* 444 U.S. 1078 (1980); *Hubshman v. Louis Keer Shoe Co.*, 129 F.2d 137, 140 (7th Cir. 1942) ("[O]ne cannot by a long course of conduct lead another to believe that he will not insist upon the strict performance of a duty imposed by law or contract, and then without notice insist upon strict performance.").

BLM relied on Petitioners' conduct not only to its own detriment but also to the detriment of the Conservation Groups. *See Wyo. v. United States*, 310 F.2d 566, 580 (10th Cir. 1962) (applying estoppel in favor of the government based on detriment to third parties that had

obtained rights to the lands in question). Given the high bidders' failure to challenge its policy, BLM continued to auction more and more leases without resolving the Conservation Groups' protests. Had Petitioners timely challenged BLM's policy, BLM could have avoided the harm to the Conservation Groups' protest rights that will result if Petitioners are successful in their claims. Because Petitioners agreed to BLM's auction terms that they now challenge, to the detriment of BLM's and the Conservation Groups' interests, Petitioners are estopped from pursuing their claims.

III. UNDER THE MINERAL LEASING ACT, BLM HAS DISCRETION TO DETERMINE THE LANDS "TO BE LEASED" AFTER HOLDING AN AUCTION

The Mineral Leasing Act affords the Secretary considerable discretion to determine whether or not to lease public lands for oil and gas development. *See* 30 U.S.C. § 226(a) ("All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may be leased* by the Secretary." (emphasis added)). The Act dictates that the "highest responsible qualified bidder" at a competitive auction is the party entitled to a lease, but only if the Secretary has exercised his discretion to determine that the affected lands are "to be leased." *See id.* § 226(b)(1)(A). BLM does not exercise its discretion to determine the lands "to be leased" until it resolves all administrative protests, whether before or after the auction. Decisions by the Supreme Court, numerous federal circuit courts, and the Interior Board of Land Appeals all support BLM's reasonable interpretation of the Act.

Petitioners seek to reverse this longstanding interpretation of the Mineral Leasing Act by focusing on a single provision in isolation. According to Petitioners, this Court must order BLM

to issue the leases because the Act states that lands "shall be leased to the highest responsible qualified bidder" and "shall be issued within 60 days following payment by the successful bidder of the [initial payments]," which occurs within 10 days of the auction. *See* WEA Br. at 8-9 n.20, 11; API Br. at 19 (same). Petitioners' only relevant support is dicta in *Impact Energy LLC v. Salazar*, Nos. 2:09-CV-435, 2:09-CV-440, 2010 WL 3489544 (D. Utah Sept. 1, 2010), *appeals docketed,* No. 11-4043 (10th Cir. Mar. 13, 2011); No. 11-4047 (10th Cir. Mar. 31, 2011). *See* WEA Br. at 12 n.1; API Br. at 10, 22. However, the court's reasoning in *Impact* is flawed and inconsistent.

The *Impact* court found that Congress intended to "considerably limit the Secretary's discretion" when it adopted the language on which Petitioners rely on in FOOGLRA. 2010 WL 3489544 at *4. No such intent is expressed in the plain language of the statute or its legislative history. In fact, the plain language and legislative history demonstrate that Congress intended to maintain the Secretary's exclusive discretion to determine the lands "to be leased." *See* 30 U.S.C. § 226(b)(1)(A).

A. The Plain Language of the Mineral Leasing Act, as Interpreted by Numerous Federal Courts, Gives the Secretary Discretion to Determine the Lands "To Be Leased" After Holding an Auction

To evaluate whether BLM's interpretation of the Mineral Leasing Act is lawful, this Court must look first to the plain language of the Act. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842 (1984). Under the Mineral Leasing Act, "[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). Furthermore, the competitive leasing provision provides:

> All lands *to be leased . . . shall be leased* as provided in this paragraph to the highest responsible qualified bidder by competitive bidding . . . . The Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. Leases *shall be issued* within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year.

30 U.S.C. § 226(b)(1)(A) (emphases added). Notably, the mandatory "shall be leased . . . to the highest responsible qualified bidder" and "shall be issued within 60 days" language only applies to lands that the Secretary has determine are "to be leased." *Id.*

Since Congress enacted the Mineral Leasing Act in 1920, it has afforded the Secretary the discretion to determine the lands that "may be leased." Mineral Leasing Act of 1920, ch. 85, § 17, 41 Stat. 450 (1920). Later versions of the Act—much like its structure today—included language stating that for all lands "to be leased," the Secretary "shall" issue the lease to a particular party. The federal courts have been uniform in reconciling these discretionary and nondiscretionary provisions: the Act's mandates to issue a lease to a particular party are not triggered until the Secretary exercises his discretion to decide to lease the lands.

In 1965, the Supreme Court interpreted the Act's noncompetitive leasing section, which stated "[i]f the lands *to be leased* are not within any known geological structure of the producing oil or gas fields, the person first making application for the lease who is qualified to hold a lease … *shall be entitled* to a lease of such lands without competitive bidding." *Udall v. Tallman*, 380

U.S. 1, 2 (1965) (emphases added) (quoting the 1960 Mineral Leasing Act in part).[14] As the Court held, "[a]lthough the Act directed that if a lease was issued on [available public lands], 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." *Id.* at 4.

Numerous federal circuit courts have also interpreted the Mineral Leasing Act in this manner. For example, the D.C. Circuit held that the first qualified applicant for a noncompetitive oil and gas lease could not compel the Secretary to grant him the lease. *Haley v. Seaton,* 281 F.2d 620, 624-25 (D.C. Cir. 1960). Although the court acknowledged that the first qualified applicant "shall be entitled to a lease," it held that this language was qualified by the Secretary's considerable discretion to determine the lands available for lease. *Id.* The court expressly relied on both the Act's "may be leased" language and the fact that the leasing requirements applied only to lands "to be leased." *Id.* Given the Secretary's considerable discretion, the court held that the first qualified applicant "acquired a preference right as against third persons, [but] he acquired no vested rights as against the United States." *Id.* at 624; *see*

[14] At the time, the relevant section of the Mineral Leasing Act (§ 17) provided:

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may be leased* by the Secretary.
> (b) If 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 under general regulations . . .
> (c) If the lands *to be leased* are not within any known geological structure of the producing oil or gas fields, the person first making application for the lease who is qualified to hold a lease under this chapter *shall be entitled* to a lease of such lands without competitive bidding.

McDonald v. Clark, 771 F.2d 460, 462 n.1 (10th Cir. 1985) (quoting the 1960 version of the Act) (emphases added).

also McDonald, 771 F.2d at 463; *Arnold v. Morton*, 529 F.2d 1101, 1105-06 (9th Cir. 1976); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1976); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969); *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965); *Pease v. Udall,* 332 F.2d 62, 63-64 (9th Cir. 1964) (all holding the same).

The Secretary may exercise his discretion to determine the lands "to be leased" up to the point of lease issuance, even if that occurs after the Secretary has solicited and received offers to lease. As the Tenth Circuit held, "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." *McDonald*, 771 F.2d at 463. The Secretary had the authority to "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.* (emphasis added); *see also Haley*, 281 F.2d at 623-26 (holding that Secretary could decide not to lease after soliciting and receiving offers but not issuing the lease). As the court held in *Pease*, the Secretary was free to reject the offer before lease issuance if he determined "that such leasing would be detrimental to the public interest." 332 F.2d at 63-64.

Consistent with this case law, the Mineral Leasing Act's requirement that BLM lease to the high bidder within 60 days applies only if BLM determines the lands are "to be leased." BLM does not determine the lands "to be leased" until it resolves the protests, whether before or after an auction. *See* WO 000037; *see*, *e.g.*, BLM 007971. By submitting "binding lease offers" at the auction and making their initial payments, the high bidders obtained a preference right to the lease as against third parties, but no vested right to compel BLM to issue the lease. *See* 43

C.F.R. § 3120.5-3(a); BLM 007968. BLM was thus free to reject those offers at any point prior to lease issuance.[15] Therefore, at any point before signing and issuing a particular lease, BLM had discretion to grant the Conservation Groups' protests and defer leasing, as it did for twenty leases at issue in this case. BLM also maintains the discretion to resolve the Conservation Groups' protests on the twenty-seven parcels where protests are still outstanding.

B. Interior Board of Land Appeals Decisions Uphold the Secretary's Discretion To Determine the Lands "To Be Leased" After Holding an Auction

The statutory language and long-established case law discussed above make clear BLM's lawful discretion under the Mineral Leasing Act to take the actions challenged in this case. But even if there were any ambiguity in the Mineral Leasing Act, this Court should defer to the reasonable interpretation of the IBLA and BLM. *See Chevron,* 467 US at 844 (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). Through its adjudications, the IBLA renders the Department of the Interior's final decisions on public land issues, including interpretations of the Mineral Leasing Act. *See* 43 C.F.R. § 4.1(b)(2). Accordingly, the IBLA's interpretation is

[15] BLM accepts an offer to lease at a competitive auction when the lease is signed by the authorized officer and issued to the high bidder. *See* 43 C.F.R. § 3120.2-2 ("All competitive leases shall be considered issued when signed by the authorized officer."); *see also Justheim Petroleum Co. v. Dep't of the Interior*, 769 F.2d 668, 670-72 (10th Cir. 1985) (holding leases do not "vest" until signed by authorized officer); *Rowe*, 464 F. Supp. at 1079 n.98 ("[L]ease execution is the only manner in which acceptance by the United States of a lease offer may be indicated."); *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973) (noting that signature by the authorized officer is the only recognized method for the United States to indicate its acceptance of an oil or gas lease offer); *Wyo. Outdoor Council*, IBLA 2006-184 at 9 n.13 (July 10, 2006) (attached as Exh. 3) ("No lease is actually issued until, by signature of the authorized officer, BLM accepts the bidder's offer.").

entitled to deference. *See Hoyl v. Babbitt*, 129 F.3d 1377, 1386 (10th Cir. 1997) (affording deference to IBLA interpretation); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754-55 (D.C. Cir. 2007) (same); *Brandt–Erichsen v. U.S. Dep't of the Interior*, 999 F.2d 1376, 1381 (9th Cir. 1993) (same).

The IBLA has consistently interpreted the Mineral Leasing Act to afford BLM the discretion to resolve protests and decide not to lease after an auction. For example, in *Stanley Energy*, the Secretary exercised his discretion not to issue protested competitive leases after holding an auction and identifying the high bidders. *See Stanley Energy*, 179 IBLA 8, 9-11 (2010). Under these circumstances, the IBLA held that "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.* at 12;[16] *see also Continental Land Res.,* 162 IBLA 1, 3, 7 (2004) (holding that BLM could, after a competitive auction, reject lease offers made by high bidders pending a more in-depth analysis of the impacts of development on important environmental values).

Additionally, in 2004, the IBLA squarely rejected the same argument that WEA makes in this case in the context of a noncompetitive lease. *Richard D. Sawyer (Sawyer I)*, 162 IBLA 339, 342-43 (2004). Appellants in *Sawyer I* were the first qualified applicants for land that BLM made available for noncompetitive leasing. *Id.* at 340-42. BLM failed to act on the applicants'

[16] In *Stanley*, the IBLA found that while the agency had the discretionary authority under the Mineral Leasing Act to refuse to issue the leases, the agency had not adequately supported its decision not to lease in that case. *Id.* at 13-17.

offer to lease for four years, during which time Congress withdrew the lands from availability for leasing subject to valid existing rights. *Id.* Appellants argued that under the Act, as amended by FOOGLRA, they had valid existing rights because BLM was mandated to lease them the lands within 60 days of their application. *Id.* at 342; *see also* 30 U.S.C. § 226(c) (stating that "[l]eases shall be issued within 60 days of the date on which the Secretary identifies the first responsible qualified applicant").

The IBLA rejected this argument, holding instead that the mandate that leases "shall be issued within 60 days" applies only if BLM determines that the lands are "to be leased" in the first place. *Sawyer I,* 162 IBLA at 342-43. Therefore, the Secretary was free to reject the lease offers four years after the applicant filed them because the offer had not been accepted through issuance of the lease. *Id.* at 342.[17] This Court should defer to the IBLA's reasonable interpretation of the Act.

C. Petitioners' Only Support for Their Argument is the Legally Flawed Dicta in *Impact Energy v. Salazar*

Petitioners ignore the Mineral Leasing Act's discretionary language and the extensive federal case law and IBLA decisions interpreting that language. Instead they focus solely on the

[17] The IBLA's consistent interpretation that BLM is not required to issue a lease for a protested parcel within 60 days is also evidenced in *Bill Barrett Corp.*, IBLA 2007-193, at 4-5 (Apr. 28, 2010) (attached as Exh. 4). There the IBLA rejected as moot a high bidder's challenge to BLM's grant of a protest, which occurred far more than 60 days after the sale. *Id.* BLM had granted the protest because it determined the agency needed to complete supplemental NEPA analysis. *Id.* The IBLA held that the high bidders' challenge was moot because the supplemental NEPA analysis was finished and "BLM's *decision whether to reject BBC's high bids or to issue leases to BBC for the parcels in question*, and the terms of those leases, will be based on *all* relevant NEPA documentation." *Id.* (first emphasis added, second in original).

Act's statement that "[l]eases shall be issued within 60 days following payment by the successful bidder of the [initial payments]," which occurs within ten days of the auction. *See* WEA Br. at 8-9 n.20, 11; API Br. at 19 (same). As the Supreme Court has admonished, however, "[i]n reading a statute [courts] must not 'look merely to a particular clause,' but consider it 'in connection with the whole statute.'" *Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008).[18] Reading the statute as a whole, the courts have uniformly held that it affords the Secretary considerable discretion to determine the lands "to be leased" despite the mandatory leasing language.

Indeed, Petitioners fail to identify a single decision where a court has compelled the Secretary to issue an oil and gas lease under this provision. Petitioners' only relevant support is dicta in *Impact Energy LLC v. Salazar*, 2010 WL 3489544 (D. Utah Sept. 1, 2010). *See* WEA Br. at 12 n.1; API Br. at 10, 22 (citing *Impact*).[19] The court's reasoning in *Impact* is flawed.

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[18] Furthermore, the Supreme Court has held that even when a statute imposes a mandatory timeframe for taking action, the courts should not presume Congress intended to eliminate the Secretary's discretion with respect to the substance of that act. *See Brock v. Pierce County*, 476 U.S. 253, 259-60 (1986). This is particularly true "when important public rights are at stake." *Id.* at 260.

[19] In *Impact*, high bidders challenged the Secretary's decision to withdraw leases from sale after an auction. The Secretary decided to withdraw the leases in response to a court order prohibiting BLM from issuing the leases because the agency had relied on legally flawed environmental analysis. *See SUWA v. Allred*, 2009 WL 765882, at *2 (granting temporary restraining order). The high bidders launched a collateral attack on the order in the District of Utah, arguing that the Secretary lacked the authority to withdraw the leases because the Mineral Leasing Act mandated that BLM issue the leases to the high bidder after an auction. *See Impact Energy LLC*, 2010 WL 3489544, at *3. The District of Utah held that the high bidders' claims were barred by the Mineral Leasing Act's 90-day statute of limitations. *Id.* at *8. In dicta, however, the court found that the Mineral Leasing Act requires BLM to issue leases once they are auctioned. *Id.* at *4-8.

Like Petitioners in this case, the *Impact* court relied on the Mineral Leasing Act's 60 day provision, which Congress added to the Act through FOOGLRA. *See* Pub. L. 100-203, tit. V, § 5101(a), 101 Stat. 1330 (1987). The *Impact* court concluded that both the plain language of FOOGLRA and its legislative history "considerably limit the Secretary's discretion." 2010 WL 3489544, at *4. The court is wrong on both counts.

1. The plain language of FOOGLRA does not limit the Secretary's discretion to determine the lands "to be leased" after holding an auction

The *Impact* court found that the only plausible reading of the Mineral Leasing Act is that BLM "shall issue leases to the high bidder" once it holds an auction. 2010 WL 3489544 at *7. Although the court acknowledged that the Secretary has discretion under the Mineral Leasing Act to determine whether lands should be leased, it determined that discretion only applies to "pre-sale decisions about whether or not to offer a parcel of land in a lease sale." *Id.* at *5 (acknowledging the "may" language of § 226(a)). The *Impact* court offered no support for this reading of the statute.

In fact, the Supreme Court and all other federal courts that have reconciled nearly identical discretionary and nondiscretionary language in the pre-FOOGLRA Mineral Leasing Act have held otherwise. *See, e.g.*, *Udall*, 380 U.S. at 4; *McDonald*, 771 F.2d at 463; *Haley*, 281 F.2d at 624-25. As the court in *Haley* held with respect to two prior amendments of the Mineral Leasing Act that maintained the same "may be leased" and "to be leased" language that exists in the Act today, Congress' "intent [was] to continue to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease." *Haley,* 281 F.2d at 625.

Moreover, just as this discretion existed pre-FOOGLRA despite Congress' addition of language stating that the first qualified applicant "shall be entitled to a lease," so too does this discretion exist today despite Congress' addition of the requirement that lands "shall be leased to the . . . highest responsible qualified bidder" and leases "shall be issued within 60 days" of initial payments. *Id.* at 624-25.[20]

Likewise, the IBLA has explicitly rejected the argument that "FOOGLRA changed the Mineral Leasing Act in a way that precluded the Secretary from exercising his discretion to lease or not to lease under section 226(a) after lease offers had been filed." *Sawyer I*, 162 IBLA at 342-43; *see also Richard D. Sawyer ("Sawyer II")*, 160 IBLA 158, 162 (2003) ("FOOGLRA's amendments to the [Mineral Leasing Act] did not change the fact that by statute the authority to issue oil and gas leases is within the discretion of the Secretary."). As the IBLA recognized, "[a]lthough the provision requiring issuance of a lease within 60 days was added by FOOGLRA, the mandatory term 'shall' appeared in [both the competitive and noncompetitive provisions of the Mineral Leasing Act] before FOOGLRA amended them." *Sawyer I*, 162 IBLA at 342-43. Therefore, just as the courts held in cases interpreting the pre-FOOGLRA language, the IBLA

[20] The *Impact* court attempts to distinguish *Haley* and the other pre-FOOGLRA case law based on the fact that those cases dealt with noncompetitive leases. *See Impact*, 2010 WL 3489544, at *5-6. However, the court's finding that the Secretary is required to issue the lease to the high bidder after a competitive auction is based entirely on the proposition that "shall means shall." Both the competitive and noncompetitive leasing provisions pre-FOOGLRA (and post-FOOGLRA) contain language stating that the Secretary "shall" issue the leases to the "highest responsible qualified bidder" and the first qualified applicant respectively. *See Haley,* 281 F.2d at 625; 30 U.S.C. § 226(b)-(c) (2009); n.14, *supra* (1960 language). Accordingly, there is no basis in the statutory language to draw a distinction between the competitive leases at issue in this case and the noncompetitive leases at issue in the pre-FOOGRLA cases.

held that the "shall" language dictates the party entitled to receive the lease, but only if BLM determines that the lands are "to be leased." *Id* .at 344. At a minimum, the statute is ambiguous, and the IBLA's interpretation is entitled to deference. *See Chevron,* 467 U.S. at 844. [21]

2. The legislative history of FOOGLRA demonstrates that Congress did not intend to constrain the Secretary's discretion to determine the lands "to be leased" after holding an auction

Nothing in the legislative purpose underlying the FOOGLRA indicates any intent to alter BLM's long-standing discretion to determine the lands "to be leased" even after conducting a lease auction. Although the *Impact* court argued that the legislative history demonstrates that Congress intended to limit the Secretary's discretion, the court failed to identify any legislative history that supports its view. *See* 2010 WL 3489544 at *4. In fact, the legislative history of FOOGLRA demonstrates that Congress did not intend to limit the Secretary's discretion.

FOOGLRA changed the Mineral Leasing Act's leasing structure so that the Secretary must first offer all leases through competitive bidding, and only if no bids are received may the Secretary offer lands through noncompetitive leasing. 30 U.S.C. § 226(a)-(c). The primary purpose of the FOOGLRA amendments was to eliminate the fraud and abuse that had plagued the old system. *See* 133 Cong. Rec. E 2682 (Jun. 30, 1987) (House sponsor Rep. Rahall's opening statement); 133 Cong. Rec. S 8323 (Jul. 13, 1987) (statement of Senate sponsor Sen.

[21] The *Impact* court also attempted to distinguish the IBLA decisions based on the fact that they addressed noncompetitive leases. *See Impact Energy LLC*, 2010 WL 3489544, *5-6. Not only is this irrelevant because the statutory language is nearly identical, it is also incorrect. The court ignores at least two IBLA decisions that addressed this issue in the context of a competitive lease sale. *See Stanley Energy*, 179 IBLA at 9-11; *Continental Land Res.,* 162 IBLA at 3, 7.

Melcher); *see also* Patricia J. Beneke, *The Federal Onshore Oil and Gas Leasing Reform Act of 1987: A Legislative History and Analysis*, 4 J. Min. L. & Pol'y 11, 18 (1988). In making these changes, Congress did not intend to alter the Secretary's discretion. "[N]owhere in the legislative history of [FOOGLRA] did Congress suggest that it modified the Secretary's discretion in any way." 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, 388 n.112 (1990).

In fact, the House sponsor, Representative Rahall, expressed his understanding that the Secretary would retain discretion "to reject lease offers … on the basis of land management consideration." Hearing Before the Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, House of Representatives on H.R. 933, H.R. 2851, at 67, 83 (July 28, 1987) (House Committee Hearing) (attached as Exh. 5). Likewise, the sponsor of one of the two Senate bills, Senator Melcher, stated his bill did "not change the Secretary's discretion in refusing to lease." Hearing Before the Senate Subcommittee on Mineral Resources Development and Production of the Committee on Energy and Natural Resources, 100th Cong. 100-4H4 at 108 (June 30, 1987) (Senate Committee Hearing) (attached as Exh. 6).

The Department of Interior had the same understanding. Testifying for the Department**,** Assistant Secretary Steven Griles told the House of Representatives that the legislation's new competitive leasing section (now § 226(b)(1)(A)), particularly the language "shall accept the highest bid from the qualified bidder," would "not change the Secretary's discretion to not lease lands as provided in [§ 226(a)] even though [the lands] had been offered and a bid received."

House Committee Hearing at 67. And in response to questions from Senator Melcher, BLM Director Bob Burford stated that "the Secretary has discretion to not lease … limited only by the need to not be capricious. Generally, denial of any leasing issuance that would result in unacceptable environmental impacts or unduly restrict other needed land uses is easily defended." Senate Committee Hearing at 159. Therefore, the legislative history confirms that Congress did not intend to constrain the Secretary's discretion when it passed FOOGLRA. For these reasons, this court should reject Petitioners' reliance on the reasoning in *Impact*.[22]

In sum, the plain language of the Mineral Leasing Act, federal case law, IBLA decisions, and the legislative history of FOOGLRA support BLM's policy allowing the agency to withhold lease issuance after auction until the agency resolves any pending protests. Accordingly, Petitioners' claims are meritless and should be rejected by this Court.[23]

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[22] API also relies on *William C. Francis*, 124 IBLA 119 (1992) and *SUWA*, 122 IBLA 17 (1992). *See* API Br. at 10. Neither case supports the argument that BLM does not have discretion to decide not to lease after holding an auction. In *William C. Francis*, the IBLA recognized that under the Mineral Leasing Act, "BLM is required to issue the lease to the [high] bidder." 124 IBLA at 120. The IBLA qualified that point, however, in a way that undercuts API's reliance on the case: "This requirement *does not preclude BLM from finding it inappropriate to lease the land for oil and gas development*." *Id.* at 120 n.4 (emphasis added). In *SUWA*, the IBLA did not address the issue of whether BLM loses its discretion not to lease after an auction. *SUWA*, 122 IBLA at 18. The mandatory language API quotes applies only once BLM determines the lands to be leased. *See Sawyer I*, 162 IBLA at 342-43.

[23] Petitioners request relief under APA § 706(1). Under § 706(1), a court may only compel an agency to perform a "ministerial or non-discretionary act." *Norton v. SUWA*, 542 U.S. at 64-66. BLM's decision to lease public lands for oil and gas development is discretionary not ministerial. Because of the discretion afforded BLM under the Mineral Leasing Act, the courts have uniformly refrained from compelling lease issuance. *See, e.g., McDonald*, 771 F.2d at 463 (holding the district court exceeded its authority by ordering the Secretary to issue oil and gas leases); *Arnold*, 529 F.2d at 1105-06 (rejecting plaintiffs' request that the court order lease

IV. PETITIONERS ARE NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE IT WOULD VIOLATE FEDERAL ENVIRONMENTAL LAW

Petitioners ignore the underlying legal claims identified in the Conservation Groups' protests. As BLM recognized for at least twenty leases where the agency granted protests and decided not to lease, these legal claims have merit. A court order compelling BLM to issue the leases would require the agency to overturn its own finding and lease lands without first complying with federal environmental law, including NEPA. This inequitable outcome would vest the Petitioners with oil and gas development rights to public lands where the issuing agency admits that the resulting environmental impacts to sensitive natural resources, and potential measures to mitigate those consequences, have not been adequately assessed or disclosed, thus undermining the very purpose of NEPA. *See Baltimore Gas and Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97 (1983) (NEPA's "twin aims" are to ensure that federal agency "consider[s] every significant aspect of the environmental impact of a proposed action" and "inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process" (quotations and citation omitted)).

The Conservation Groups protested thirty-seven leases in Utah because BLM failed to consider significant new information regarding their wilderness characteristics as required by NEPA, 42 U.S.C. § 4332(2)(C). *See, e.g.,* BLM 009245 (SUWA November 2005 protest identifying NEPA violations related to wilderness characteristics in Utah). BLM granted the

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issuance because "[i]t is quite evident that the Secretary has no obligation to issue any lease on public lands"); *Duesing,* 350 F.2d at 750-52 (refusing to compel Secretary to issue oil and gas lease). The court should do the same here.

Conservation Groups' protest with respect to eleven of these leases because BLM recognized that it needed to complete additional environmental review to comply with NEPA and the Utah district court's decision in *SUWA v. Norton*, 457 F. Supp. 2d at 1267. *See* BLM 009718-20; *see also* BLM 007216. In *SUWA v. Norton*, the court held that BLM's decision to offer oil and gas leases (not at issue in this case) violated NEPA because BLM failed to consider significant new information concerning the impact of leasing on the wilderness character of a number of Utah areas. 457 F. Supp. 2d at 1264-69. BLM identified the same legal flaws with respect to the eleven leases at issue here and determined that it needed to undertake further analysis. *See* BLM 009718; *see also* BLM 007216. Although BLM has yet to resolve the protests, the twenty-seven additional leases protested by the Conservation Groups suffer from the same flaws.

The Conservation Groups also protested leases in Wyoming based on BLM's failure to consider significant new information in violation of NEPA. *See* 40 C.F.R. §1502.9(c). For the Wyoming leases, the new information demonstrated that the mitigation measures BLM adopted to protect sage grouse were in fact inadequate. *See, e.g.*, BLM 004653, 004655, 004654.

BLM has acknowledged the need to consider this new information, and in fact has used this information to develop screening criteria to determine whether leasing is appropriate in certain areas as well as to establish the mitigation measures necessary to protect the sage grouse. *See* BLM IM Nos. WY-2010-012 and 2010-013 (Dec. 29, 2009). BLM deferred at least five parcels in Wyoming because they did not pass the sage grouse screening criteria.[24] BLM also

[24] BLM 005357, 005369-005372, 005387 (BLM Decision on December 2008 Lease Protests deferring Parcel 130/WYW-177766 and Parcel 131/WYW-177767); BLM 005843, 005854-57,

deferred another three parcels pending completion of BLM land use plan revisions, which will address new information regarding sage grouse and oil and gas development.[25] Accordingly, a court order compelling lease issuance will force BLM to violate NEPA.

Rather than forcing NEPA violations, this Court should read the Mineral Leasing Act and NEPA in harmony. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."). In contrast with Petitioners' interpretation of the Mineral Leasing Act offered in this case, the interpretation adopted by numerous federal courts, the IBLA, and BLM is in harmony with BLM's NEPA obligations. In response to the Conservation Groups' protests, BLM exercised its discretion—consistent with NEPA—to determine the lands were not "to be leased."

As numerous courts have recognized, in the remedial context, the industry's interest in lease issuance does not outweigh the public's interest in ensuring a fully informed agency decision about whether oil and gas development and its associated environmental impacts is appropriate. The courts, including the Tenth Circuit, have prohibited BLM from issuing a lease

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005877 (BLM Decision on August 2009 Lease Protests deferring Parcel 46/WYW-178525); BLM 010057-58, 010070-74, 010097 (BLM Decision on February 2010 Lease Protests deferring Parcel 13/WYW-178932 and Parcel 46/WYW-178965).

[25] *See* BLM 004910, 004921-23, 004945 (BLM Decision on August 2008 Lease Protests, deferring Parcel 107/WYW-177175); BLM 005587, 005601-005603, 005624 (BLM Decision on February 2009 Lease Protests deferring Parcel 63/WYW-178016 and Parcel 67/ WYW-178020).

to a high bidder identified at a competitive auction where the agency failed to comply with NEPA. In *Richardson*, plaintiffs challenged BLM's failure to comply with NEPA prior to offering leases at an auction. 565 F.3d at 694-95. Although the lands were auctioned, the parties agreed before the district court proceedings to stay issuance of the lease pending the outcome of plaintiffs' NEPA claim. *See New Mexico ex rel. Bill Richardson v. BLM*, 459 F. Supp. 2d 1102, 1116 (D.N.M. 2006). The Tenth Circuit affirmed the district court's conclusion that BLM had failed to comply with NEPA, and was prohibited from issuing the lease. *See Richardson*, 565 F.3d at 721; *New Mexico ex rel. Bill Richardson*, 565 F.3d at 1119 ("The Court therefore decides that, as to the BRU lease parcel, BLM has not yet complied with NEPA and may not execute the lease").

Likewise, in *SUWA v. Allred*, the court issued a temporary restraining order prohibiting BLM from issuing auctioned leases to the high bidders because plaintiffs had demonstrated that they were likely to prevail in their NEPA claims. 2009 WL 765882, at *3.

Additionally, as discussed above, in *SUWA v. Norton*, 457 F. Supp. 2d at 1264-69, the court held that BLM failed to consider significant new information regarding wilderness prior to auctioning leases. BLM auctioned the leases in November 2003, but did not resolve the protests until January 2005. *Id.* at 1259. The court explicitly recognized BLM's policy of resolving protests after a lease sale. *Id.* at 1256 ("BLM completes the leasing transaction by "issuing" the lease to the high bidder after the lease sale. . . . If a lease is protested by a member of the public, the lease is not issued until the protest is resolved.") (citation omitted). The court also struck down BLM's decision to deny plaintiffs' protest and issue the leases because of the NEPA

violations. *Id.* at 1269. Consistent with these cases, this Court should refrain from ordering BLM to issue leases because issuance would violate NEPA.[26]

V. API'S POLICY ARGUMENTS ARE IRRELEVANT AND INACCURATE

Petitioner API spends much of its brief discussing the alleged harms to the high bidders, domestic energy policy, and states and local communities from BLM's lease sale practices. This discussion is both inaccurate and largely irrelevant.

Petitioners first claim that the backlog of protests harms them by tying up their capital. *See* WEA Br. at 5-6; API Br. at 23-25. Any harm in this respect has been largely remedied at this point. BLM has issued the majority of the leases to the high bidders. When BLM issued its decision granting protests and deferring leases in Wyoming, it announced that it would return the high bidders' payments. *See, e.g.*, BLM 010109; BLM 010143; BLM 010066. For the twenty-seven leases in Utah where the protests are still pending, the Administrative Record includes a

[26] Even if Petitioners were correct that BLM's actions violate the Mineral Leasing Act—which they do not—the appropriate remedy would be to invalidate the auction, not to order BLM to issue the leases. Under the Property Clause, Congress possesses the exclusive right to determine how to dispose of federal property. *See* U.S. Const. art. IV, § 3, cl. 2. BLM cannot dispose of property without complying with the strict letter of the law. *See, e.g., United States v. Cal.*, 332 U.S. 19, 27 (1947) ("[N]either the courts nor the executive agencies, could proceed contrary to an Act of Congress [with respect to disposal of federal land]."). A sale of land which is not authorized by statute is void and neither confers any title on the purchaser nor divests the title of the United States. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917); 73B C.J.S. Public Lands § 59 (2011).

BLM spreadsheet indicating that refunds are available for these leases. WO 0100067. Accordingly, it is likely that BLM would return the funds if Petitioners asked.[27]

Furthermore, although BLM took Petitioners' payments, in return Petitioners received a preference right to the lease if BLM chose to issue it. As Petitioners' actions demonstrate, this right has value. When they bid at numerous successive auctions, Petitioners were well aware of BLM's policy of not issuing leases until after resolving protests, as well as the agency's past failure to resolve protests shortly after the auction. The high bidders knew the risks and made an informed decision to bid on the protested leases anyway. *See* pp. 19-21, *supra*.

Although API claims that uncertainty lowers bid prices, the GAO Report on which API relies contradicts their assertions on that point. *See* GAO Report at 1 ("[D]espite industry concerns, protest activity and delayed leasing have not significantly affected bid prices for leases; if protests or subsequent delays added significantly to industry cost or risk, it would be expected that the value of, and therefore bids for, protested parcels would be reduced.").[28] As API concedes, the "factors affecting the value of oil and gas leases are complex." API Br. at 25. The uncertainties associated with fluctuating prices, demand, geology, drill rig and pipeline

[27] API claims that BLM's position is that it will not refund payments for leases where it has not yet resolved protests. *See* API Br. at 24. To the extent that there is any question about whether BLM would return the funds, this Court may fashion an order in equity to ensure that Petitioners have this option. *See Jicarilla Apache Tribe*, 687 F.2d at 1333.

[28] The GAO Report also contradicts API's statement that "delays in issuing oil and gas leases also threaten domestic energy security." API Br. at 27. In fact, the GAO concluded that "because federal lands account for a small fraction of the total onshore and offshore nationwide oil and gas output, the effects of protests to BLM leasing decisions on U.S. oil and gas production are likely to be relatively modest." *See* API Br. Exh. A at 1.

availability are far more significant than any impact created by BLM's protest policy. *See* API Br. Exh. A at 1.

There is also no support for API's attempt to tie BLM's protest policy to a decline in lease sales and lease issuance between 2005 and 2010. *See* API Br. at 26. While the number of leases BLM has offered at Utah and Wyoming auctions may have declined since 2009, there is no evidence that this change was caused by the backlog of protests. *See* GAO Report at 23 (finding no measurable correlation between protests and number of leases offered). Instead, the change likely resulted from: (a) the dramatic 66 to 75% decline in natural gas prices starting in July of 2008 and continuing to the present,[29] and (b) the current Administration's more reasonable approach to leasing sensitive public lands. *See* WO 000039.[30]

Nor is there any support for API's claim that protests have led to any decline in state or local revenues. *See* API Br. at 29-30. The large majority of revenue to states and local governments comes from royalties paid during oil and gas production, not from initial lease

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[29] *See* U.S. Energy Information Administration, Henry Hub Gulf Coast Natural Gas Spot Prices, http://www.eia.gov/dnav/ng/hist/rngwhhdd.htm.

[30] In addition, API ignores other evidence of stable or increasing oil and gas activity in recent years. For instance, the total number of federal acres under lease in Utah and Wyoming is approximately the same as it was in 2005. *See* BLM, Total Number of Acres Leased to FY 2010, http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/oil___gas_statistics.Par.16715.File.dat/chart_2009_02.pdf. Drilling rates (spuds) in Utah were higher in 2010 than any single year from 1985-2005 or 2009. *See* http://oilgas.ogm.utah.gov/Statistics/SPUD_annual.cfm. And nationally, "[m]arketed natural gas production has been *growing steadily since 2005*." U.S. Energy Information Administration, Short-Term Energy Outlook (May 10, 2011), http://www.eia.gov/emeu/steo/pub/contents.html#Natural_Gas_Markets (emphasis added).

payments. Millions of acres of federal lands are currently leased but not being developed. *See* GAO Report at 23 (noting there are 12 million acres of federal leases that are producing while 33 million acres sit idle); *see also* The White House, Blueprint for a Secure Energy Future at 11 (Mar. 30, 2011) (API Br. Exh. I) (more than half of leased onshore acres are neither being explored nor developed). These undeveloped acres exceed by far any of the lease acreage that remains under protest. Even where companies have received approval to drill wells on these lands, they are not always proceeding to do so: thousands of approved drilling permits are currently going unused.[31] Accordingly, any concern for state and local budgets is more properly focused on unproductive existing leases and unused permits rather than on the relatively small number of parcels with outstanding protests at issue in this case.

CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully requests that the Court reject Petitioners' requests for relief under APA § 706(1).

[31] *Compare* Utah Oil and Gas Division APDs By Year, http://oilgas.ogm.utah.gov/Statistics/APD_annual.cfm (1170 APDs approved in 2009) *with* Utah Oil and Gas Division, Wells Drilled, http://oilgas.ogm.utah.gov/Statistics/SPUD_annual.cfm (514 wells drilled in 2009).

Respectfully submitted June 3, 2011,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C) and Local Civ. R. 83.7.2(d), I certify that this brief is proportionally spaced and contains 13,287 words. I relied on my word processor to obtain the count and it is Microsoft Office Word 2003.

I also certify that:

(1) all required privacy redactions have been made and that every document submitted in Digital Form or scanned PDF is an exact copy of the printed document filed with the Clerk;

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Dated: June 3, 2011.

/s/ Robin Cooley