Wyoming Outdoor Council

To: Citizens for the Wyoming Range
From: Lisa McGee
Date: October 20, 2014
Re: 41,583 acres of contested oil and gas leases in the Wyoming Range

MEMORANDUM

The 41,583 acres in the Wyoming Range at issue in the Bridger-Teton National Forest's forthcoming supplemental draft EIS have a complex history and status. This memo addresses the history and significance of these contested lease acres, the many years of good faith citizen participation in various administrative processes, and the Forest Service's authority to alter its improper original leasing decision.

Procedural History

Despite requests from the public that the agency not lease, and that, at a minimum, it first update the NEPA analysis from the early 1990s it cited as support for its leasing decision, in 2005 the Forest Service gave its consent to the BLM to proceed with leasing 44,720 acres in the Wyoming Range.[1] These acres were offered in four consecutive oil and gas lease sales beginning in December 2005. Sales followed in April, June and August 2006. The BLM denied all of the numerous protests filed on the first two sales, accepted companies' high bids and issued the leases.

Outfitting businesses, sportsmen's organizations, an outdoor leadership school and conservation groups filed appeals and requests for stay with the Interior Board of Land Appeals. The IBLA found that the parties were likely to succeed on the merits of their appeals—indicating the record suggested the NEPA analysis upon which the agencies relied was incomplete and outdated—and granted the stay requests. Suspensions were placed on the leases issued to the high bidders pending final outcome of the appeals.

The BLM held two additional lease sales in June and August 2006. The State of Wyoming joined other concerned stakeholders in protesting these sales. Based on the IBLA's stay decisions regarding the first two sales, the BLM upheld the lease protests on these final two sales. High bidders were identified, but these leases were deferred and not issued.

Based on the likelihood that the appellants would have prevailed in their IBLA challenges, the BLM requested a remand from the IBLA in order that it and the Forest Service could address the NEPA deficiencies identified in the appeals. The appellants objected to remand without concurrent lease cancellation, citing concerns that the existence of leases could unduly influence the outcome of any supplemental NEPA analysis purporting to make a pre-leasing decision. The BLM argued this was unnecessary because cancellation remained an option for the agencies at the conclusion of the

[1] The contested acres now total 41,583 acres as one high bidding company sought and received a refund of its bonus bids on leases overlaying roughly 3,000 acres of national forest land.

updated NEPA process. "As the leases are voidable pending additional NEPA review, cancellation is not required." BLM's Response Brief to Appellants' Request for Clarification and Objection to BLM's Request for Remand, Feb. 7, 2007 at 8.

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

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

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

More than a year later, the Forest Service undertook the preparation of a supplemental leasing EIS in response to the IBLA's remand order. As the agency stated, the analysis would address changed circumstances and determine "whether and to what extent analysis of new issues and information might alter the oil and gas leasing decision…" on the entire 44,720 contested acres. Revised Notice of Intent to Prepare a Supplemental EIS, 73 Fed. Reg. 16621 (March 28, 2008) (emphasis added).

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

In March 2009, as the agency was at work on the supplemental environmental analysis, and after years of citizen advocacy spurred by the initial leasing of the 44,720 acres, the Wyoming Range Legacy Act was signed into law. It withdrew 1.2 million acres of the southern Bridger-Teton National Forest from future mineral leasing. The legislation did not determine the fate of the 44,720 contested acres, but instead left the decision to the discretion of the agencies. The language of the Act reflects the various dispositions of the leases and the range of options available to the agencies, stating:

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

Public Law 111-11, 123 Stat. 1128, Section 3202(e), Subtitle C—Wyoming Range (citations omitted). Although the Act retains the Forest Service's authority to decide whether to confirm or deny its prior leasing decision, if the Forest Service ultimately decides these acres should not have been leased (by selecting the "no action" alternative), these acres can never again be leased because they fall entirely within the legislative withdrawal boundary.

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

The Forest Service's decision was widely celebrated. It was the highly controversial and improper leasing of these acres in the Wyoming Range that galvanized a diverse, grassroots coalition of citizens to advocate successfully for passage of the Wyoming Range Legacy Act. This was an outcome the public was told—and all stakeholders understood—was possible, and it was the outcome the vast majority of stakeholders hoped to see.

The decision met with opposition from only two of the high bidding companies: Stanley Energy, who, along with Western Energy Alliance, decried the authority of the agency to make such a decision, and Wold Oil Properties who proposed accepting NSO stipulations on its parcels. No other companies or high bidders appealed. The Sublette County Commission raised concerns not with the decision per se, but with the agency's rationale regarding Canada lynx, which it worried could set a precedent that would limit other uses on the forest. Although the Forest Service had established a firm factual and legal foundation upon which to base its decision, it opted to withdraw the decision and undertake further analysis in response to the appeals. The Forest Service has stated its intention to release a second supplemental EIS in early 2015.

Legal authority to cancel leases issued improperly

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

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

In 2004, in a situation similar to the 44,720 contested acres, the BLM canceled leases issued improperly based on insufficient NEPA analysis. In that case, the Forest Service consented to lease and the Colorado State Office of the BLM offered for oil and gas lease sale, three parcels on the White River National Forest. Numerous protests resulted, which claimed in part that the underlying NEPA analysis was inadequate to authorize a leasing decision. The BLM dismissed the protests, issued the leases, and appeals to the IBLA followed. The IBLA found that, the BLM had not complied with NEPA in that it neither prepared its own analysis, nor did it formally adopt the analysis of the Forest Service in deciding to make the parcels available for leasing. Bd. of Comm'r of Pitkin County and Wilderness Workshop, et al., 173 IBLA 173, 181 (2007). The IBLA reversed the BLM's decision to dismiss the lease protests on this basis. Id. at 184.

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

In another recent case in which plaintiffs successfully challenged the BLM's decision to lease parcels on the scenic and popular Roan Plateau in Colorado, the court acknowledged the BLM's authority to cancel leases issued in violation of NEPA. Colorado Environmental Coalition v. Salazar, 875 F. Supp. 2d. 1233 (D. Colo. 2012). The court found that the BLM had failed to address a reasonable alternative in its NEPA analysis. Because it was this flawed analysis that the BLM relied upon when it decided to lease the controversial acres, the court vacated the BLM's decision to lease and remanded the issue to BLM for further analysis.

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

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

Id. at 37-8 (emphasis added).

There are several similarities between the contested leases on Colorado's Roan Plateau and the now 41,583 contested acres in the Wyoming Range. In both cases, lease sales received numerous protests and in both cases the BLM dismissed these protests and issued the leases. IBLA appeals or lawsuits followed. Further, the lease sales resulted in substantial revenue for the federal government, and the applicable states. In fact, the Roan Plateau lease sale resulted in the highest dollar amount ever generated by a federal oil and gas lease sale in the lower 48 states: $113.9 million. Nearly half of this figure was allocated to the state of Colorado. The Wyoming Range leases issued after the December 2005 and April 2006 lease sales resulted in nearly $2.4 million in revenue, of which Wyoming received half. Although this distribution of funds complicates the issue, in neither instance is it a reason why leases cannot or should not be canceled.

The most significant commonality is the "voidable" status of both sets of leases. As the BLM has shown, and courts and the IBLA have acknowledged, if a leasing decision is challenged, and it is shown that the agencies erroneously justified that leasing decision based on incomplete NEPA analysis, the Forest Service and the BLM have the authority to alter the original leasing decision. If it were otherwise, there would be no relief for citizens who object to the leasing of discrete parcels of public land for oil and gas development, and who participate in good faith within the lease protest and appeal processes.

Legal authority to reject high bids for leases sold, but not issued

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

The IBLA has affirmed BLM's decision to reject lease bids offered at a competitive oil and gas lease sale. In Continental Land Resources, 162 IBLA 1, 2-3 (2004), the appellant was the high bidder for two parcels, and timely paid all fees and rentals. Several entities protested, including the Wyoming Game and Fish Department, on grounds that the parcels were in a crucial big game migration route. Id. at 3. In accordance with 43 C.F. R. § 3120.1-3, the BLM upheld the protests and suspended issuance of the parcels. Id. Ultimately BLM rejected the bids and refunded the monies paid. Id. In its decision affirming the BLM's action, the IBLA relied on an exhaustive body of federal case law and its own prior decisions. Starting with the premise that, "the Secretary of the Interior is vested by the Mineral Leasing Act of 1920 . . . with discretionary authority to lease or not to lease Federal public land which is otherwise available for oil and gas leasing," the IBLA explained that "[t]he offer to lease is but a hope, or expectation, rather than a valid claim against the Government." Id. at 7 (citations omitted).

Roughly half of the now 41,583 acres fall within a pending category in which high bidders were identified, but as a result of protests, lease issuance was deferred. In August 2009, more than 300 citizens gathered at an outfitter's hunting camp to celebrate passage of the Wyoming Range Legacy Act. At this event, which was attended by Senator Barrasso, Governor Freudenthal, and upper level Forest Service and BLM personnel, the BLM announced it had notified the high bidders

from the June and August 2006 lease sales that it was rejecting their high bids and refunding monies paid.

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

Conclusion

Although the now 41,583 contested lease acres have a complicated procedural history, there is nothing about their disposition that prevents the Forest Service from altering its prior unlawful decision to lease. Assuming its reasoning is rational and supported by adequate analysis, the Forest Service may lease, but it also has the discretion not to lease. The supplemental NEPA analysis now underway constitutes a pre-leasing document. All of the options the Forest Service had prior to the lease sales—including the option not to lease—remain with the Forest Service at the conclusion of this NEPA process. If the Forest Service decides again to select the "no action" alternative, it would instruct the BLM to cancel the voidable leases and reject high bids on pending leases. The 41,583 acres would then be governed by the terms of the Wyoming Range Legacy Act and would be withdrawn from future oil and gas leasing.