



May 17, 2016

Don Kranendonk, District Ranger
Big Piney Ranger District
Bridger-Teton National Forest
P.O. Box 218
Big Piney, WY 83113

RE: Comments on the draft supplemental EIS regarding oil and gas leasing in portions of the Wyoming Range in the Bridger-Teton National Forest

Sent via electronic mail at:

<https://cara.ecosystem-management.org/Public//CommentInput?Project=48737>

Dear Mr. Kranendonk,

Please accept the following comments from the Wyoming Outdoor Council, The Wilderness Society, Wyoming Wilderness Association, Sierra Club and Jackson Hole Conservation Alliance regarding the second draft supplemental environmental impact statement to consider oil and gas leasing of 39,490 acres in the Wyoming Range. We commend the Forest Service for identifying Alternative 1—the no leasing alternative—as the preferred alternative and ask that it adopt this alternative as the agency’s final decision.

A no leasing decision for these contested and highly controversial Wyoming Range parcels is the right course of action. Whether it’s the opportunity to experience quiet and solitude, to observe dark night skies, to enjoy crystal clear streams, stunning fields of wildflowers, clean air and sweeping mountain vistas, the no leasing alternative best retains the Wyoming Range’s sense of place and its largely undeveloped character. The no leasing alternative also best protects the superlative, and indeed, irreplaceable, fish and wildlife habitat found in the Wyoming Range. It is the alternative that will safeguard existing cherished public uses such as camping, hiking, hunting, fishing, outfitting, guiding, wildlife watching, as well as the many forms of winter recreation people enjoy. It is also the only

alternative that responds directly to the plain and simple, unwaivering desire of an overwhelming number of citizens who have participated in good faith in this decade-long administrative process to see no new oil and gas leasing in the Wyoming Range.

I. Background and context

A decision whether to lease 39,490 acres in the Wyoming Range—eleven years after the initial improper offering—should only be made with an adequate understanding of the history and context, including an understanding of the subsequent citizen-led success stories that have occurred in the Wyoming Range during this time period.

In 2005 the Forest Service consented to lease 44,720¹ acres along the eastern front of the Wyoming Range. In a series of four lease sales, the BLM auctioned this acreage to various high bidders. The Wyoming Outdoor Council and others protested the first two sales and the BLM dismissed these protests, which prompted appeals and requests for stay to the Interior Board of Land Appeals. We argued that changed circumstances on the Bridger-Teton National Forest and in the surrounding valley warranted updated analysis prior to the BLM's decision to lease. The IBLA found that we were likely to succeed on the merits of our appeals and imposed stays.

The stays resulted in suspensions on the leases issued improperly in the first two sales, which remain in place today. As a result of the IBLA stay decisions, the BLM upheld protests filed on Wyoming Range parcels offered in the final two lease sales. These leases were not issued and remain pending. In response to the stay decisions, the BLM requested a remand to allow the Bridger-Teton National Forest to update the environmental analysis upon which a new (and valid) leasing decision could be made.

In response to these lease sales, citizens came together to talk about the future of the Wyoming Range. Two coalitions formed: Citizens for the Wyoming Range and Sportsmen for the Wyoming Range. The groups had a shared goal of preventing future oil and gas leasing in the Wyoming Range and ensuring the contested oil and gas leases were not authorized. Citizens for the Wyoming Range is a group of local ranchers, hunters, anglers, outfitters, tourism advocates, main street business owners, and labor union members who are not opposed to energy development, but believe some places, like the Wyoming Range, should be managed for other uses. From these coalitions emerged the idea of crafting federal legislation to ensure permanent protection for the Wyoming Range from future oil and gas leasing.

¹ Voluntary withdrawals from some high bidding companies have decreased the acreage addressed in this DEIS to 39,490.

The multi-year, grassroots effort to protect the Range culminated in the passage in March 2009 of the Wyoming Range Legacy Act, which was part of the Omnibus Public Land Management Act, Pub. Law. 111-11, 123 Stat. 1128. The Act, sponsored by Senator Barrasso and supported by Senator Enzi and former Governor Freudenthal, withdrew 1.2 million acres in the southern Bridger-Teton Forest from future oil and gas leasing.

Although the 39,490 acres of contested oil and gas leases fall within the “Wyoming Range Withdrawal Area,” the fate of these acres was not resolved with passage of the Act. The Act makes clear, and citizens understood correctly that, the decision whether to authorize the leases or to withdraw consent for leasing, rests entirely with the Forest Service. Further, a decision about the fate of these contested leases would be made only at the conclusion of a thorough and updated NEPA process.

Concurrent with the controversial offering of these acres for oil and gas lease sale was a proposal from Texas company PXP to drill 136 gas wells in the Upper Hoback Basin. Issuance of PXP’s leases on the national forest pre-dated the Wyoming Range Legacy Act, but the leases were included in the legislative withdrawal boundary. This meant that although the Act didn’t prohibit development of the leases, if PXP decided to voluntarily sell or donate its leases, the acreage could never be leased again.

After many years and after the preparation of three environmental impact statements, it was clear that drilling in the Upper Hoback Basin presented impacts that would be difficult, if not impossible, to mitigate. The stipulations that were attached to PXP’s leases—stipulations that the Forest Service didn’t acknowledge until the third draft EIS—would have severely limited its drilling plans. Citizens and conservation groups launched a public campaign to support the “buy-out” alternative in the EIS, which generated the highest number of comments ever received on any project proposed on the Bridger-Teton. At the same time, the Trust for Public Land was attempting to negotiate a deal with the company to purchase and retire its leases—a deal they successfully brokered in 2012.

This positive outcome was dependent on multiple factors: The work of citizen and conservation advocates who never ceased demanding that any drilling proposal authorized must adhere to all the protective stipulations and Forest Plan standards and guidelines; the extraordinary work of the Trust for Public Land; two generous major donors; and the enthusiasm and support of more than 1,000 individual donors who gave whatever they could afford to help raise the \$8.75 million needed to close the deal in a record three-months time. It is worth noting too that without the hard work of Citizens for the Wyoming Range and Sportsmen for the Wyoming Range (and their partners) to see passage of the Wyoming Range Legacy Act—legislation that ensured this national forest land would never again be offered for oil and gas lease sale—those donors would have had little motivation to contribute and no security upon which to make such an investment.

Both the Wyoming Range Legacy Act and the buy-out and retirement of PXP's oil and gas leases in the Upper Hoback Basin are testaments to the incredible work citizens accomplished, despite overwhelmingly difficult odds, to safeguard this treasured landscape. It is within this context that we offer our comments on this draft EIS regarding new oil and gas leasing in the Wyoming Range. We ask the Forest Service to make a final determination that "no leasing" in the Wyoming Range is the highest and best use of these treasured national forest lands.

II. Myriad resources in and around the Wyoming Range would benefit from a no leasing decision

The DEIS analyzes oil and gas resources, social and economic conditions, recreation and related resources, scenic resources, terrestrial and aquatic wildlife, surface and groundwater resources, air quality, cultural resources and botanical resources. Please find our comments specific to many of these resources in the sections below.

a. Terrestrial and aquatic wildlife

Few places can boast the tremendous fish and wildlife resources as are found in the Wyoming Range. This doesn't happen by accident. Rather, it is the result of intentional management decisions to safeguard intact habitat. While the Wyoming Range has experienced its fair share of active management over the years, and has recently been the location of several large wildfires, it is primarily an undeveloped landscape that provides superlative habitat to an array of big game, sensitive, threatened and aquatic species. A no leasing decision protects this habitat better than the other alternatives.

The EIS explains the numerous and varied sources that informed the wildlife analysis, including: reports from the Wyoming Game and Fish Department, U.S. Fish and Wildlife Service, UW graduate students, the Wyoming Natural Diversity Database, other state and federal agencies as well as private research organizations. EIS at 184-5. The Forest Service also relied on peer reviewed technical papers and personal communications with state and federal wildlife biologists. *Id.* There should be little question that the best available science was analyzed and incorporated into the document.

i. Elk

Eighty-four percent of the project area (i.e. the 39,490 contested lease acres) provides habitat during some time of the year for elk. The Piney Elk Herd Unit (the area in which nearly all of the project area is found) provides "crucial winter, winter, spring parturition, summer and transitional habitat" for elk. EIS at 306. "Crucial winter range occurs in nine lease parcels totaling 3,507 acres. Winter/yearlong habitat is found in 17 lease parcels totaling 7,909 acres and parturition habitat occurs in 29 lease parcels totaling 21,799 acres." *Id.* at 307. Two southern lease parcels (WYW-173279 and WYW-173280) provide crucial winter range and show the highest use of any of the lease parcels in the spring and fall transition periods.

See Figures A-28 and A-31; EIS Appendix A at 32, 35. The wildlife values are extremely high in this southern lease area; and as a result, it's a popular hunting destination.

Increased road density and motorized traffic that accompanies oil and gas development poses a significant threat to elk. As the EIS explains, elk are particularly sensitive to the motorized use of roads, which has been documented to cause decreased habitat effectiveness (i.e. the measure of habitat functionality) for elk. EIS at 306, 308. Most of the 39,490 acres contains beneficial elk summer habitat—retaining “high” (70 percent) or “moderate” (50 percent) elk use. *Id.* at 310-11. In the southern portion of the leased area, there is a slightly lower level (48 percent)—as was documented in certain sub-groups of the leases. “High open road densities within these areas are directly related to low habitat effectiveness values.” *Id.* at 311. A no leasing decision—a decision that would involve no new well pads and associated infrastructure and no new roads or increased traffic on existing roads—would pose the least threat to habitat effectiveness and would offer the highest benefit to elk.

ii. Mule Deer

Nearly the entire project area (all except seven acres of the 39,490 according to Table 85) offers spring, fall, summer range and/or transitional habitat for mule deer. *Id.* at 315. Of the deer that use the contested lease acres, 85 percent belong to either the Wyoming Range Herd Unit or the Sublette Herd Unit. *Id.* at 313. “Gas field development”—resulting in direct and indirect habitat loss on the Mesa where the Sublette herd winters—“has and will continue to impact deer numbers in this herd unit.” *Id.* at 314. Because “[s]tudies have demonstrated that [these] deer [have] avoid[ed] areas with intensive winter gas development,” it is of the utmost importance to protect the non-winter seasonal ranges and transitional habitat the herd relies on in the Wyoming Range. *Id.*

The EIS provides important data regarding the Mesa and Ryegrass herds' use of migration corridors and stopover areas in “all” the leases in the northern block around Horse Creek and Beaver Creek. *Id.* at 316. The Mesa herd also uses the middle block of leases around North and South Cottonwood Creeks. *Id.* The Calpet Road herd uses the middle and southern blocks of leases for transition and summer habitat. *Id.* Thus, all of the contested oil and gas leases have an important role to play in supporting mule deer. The no leasing alternative is the one that will best protect mule deer habitat in the range; it is also the one that will best maintain wildlife viewing and hunting opportunities into the future.

iii. Moose

The Wyoming Range is home to more than half (56 percent) of all the Shiras moose in the State of Wyoming. EIS at 317. As Table 87 illustrates, all but six acres of the 39,490 acres of contested oil and gas leases provide either critical winter range, winter/yearlong range or spring/summer/fall habitat for moose. *Id.* at 319. The “core of the Sublette Moose Herd Unit” falls within the northern block of contested leases in the South Beaver, North Horse and Cottonwood drainages. *Id.* As the EIS

states, “These watersheds provide yearlong habitat for moose, highlighting the need to maintain and conserve their seasonal migratory routes and ranges.” *Id.* at 318. As with elk and mule deer, whose ranges often overlap with moose in the Wyoming Range, the no leasing alternative provides the highest level of habitat protection for moose.

iv. Canada lynx

There are several reasons why biologists consider the Wyoming Range to have “some of the most important lynx habitat” in Wyoming and in the Greater Yellowstone Ecosystem. These include: 1) documented historic abundance of lynx in the range; 2) documented abundance of snowshoe hare; 3) continuous documentation of lynx presence; and 4) known den sites (notably, the only documented lynx dens ever found in Wyoming). EIS at 191. Finding the den sites—within the northern block of contested leases—is important because, as the U.S. Fish and Wildlife Service has stated, “Evidence of breeding populations is the best way to verify that the physical and biological features essential to lynx are present in sufficient quantity and special configuration to meet the needs of the species.” *Id.* at 198 (citing 74 Fed. Reg. 8616). More than 50 percent of the lynx records in Wyoming are located in the area of the contested oil and gas leases. *Id.* at 191.

Lynx have long been native to and documented in the Wyoming Range—the “project area” itself is important for “virtually all aspects of the lynx lifecycle.” *Id.* at 198. Further, the Wyoming Range has provided and may continue to provide habitat for collared lynx that were re-introduced by the Colorado Division of Parks and Wildlife. *Id.* at 191. These Colorado lynx migrated to and through Wyoming—using habitat and corridors in the Wyoming Range—illustrating the regional importance of this habitat to the recovery of the species. *Id.* The northern portion of the contested leases is part of a linkage corridor known as the “Bondurant Corridor” between the Northern and Southern Rocky Mountains. *Id.* at 192. As the EIS describes, “maintaining connectivity between these subpopulations may be critical to lynx recovery efforts.” *Id.*

Like any proposal that would remove and fragment currently occupied habitat, adverse impacts to wildlife—in this case lynx—often follow. The EIS correctly makes a distinction between oil and gas development and other “more common” national forest activities such as “vegetation treatments and prescribed fire.” *Id.* at 206-07. With oil and gas development in particular, the impacts would be long term. *Id.* As the EIS correctly states, “In the case of a production well, the area of the well pad and facilities is no longer functional in any capacity for wildlife and there is no potential for it to become so for forty or more years.” *Id.* at 207. Because of the Wyoming Range’s—and indeed, the project area’s—historic and current importance for lynx recovery, the no leasing alternative is the best course of action.

v. Colorado River cutthroat trout and surface water quality

The importance of the contested lease acres in the Wyoming Range to native trout species—particular Colorado River cutthroat trout—cannot be overstated. The historic range of stream miles occupied by Colorado River cutthroat trout has

been reduced to just 11 percent of what it once was. *Id.* at 394. Of its designated conservation population habitat remaining today on the Bridger-Teton (217 stream miles) 82 percent (178 stream miles) is located within the contested lease acres.² *Id.* at 415. North Cottonwood Creek, North Horse Creek, Lead Creek, South Beaver Creek and Chall Creek are particularly important habitat.

Oil and gas development and its associated impacts threaten the stream conditions native trout require. Stream sedimentation from increased road access, potential chemical contamination, as well as depletion of water quantity needed for energy development all have the potential to negatively affect trout.

The Forest Service should include in its analysis the recent study entitled, “*The effects of oil and natural gas development on water quality, aquatic habitat, and native fish in streams along the Wyoming Range.*”³ The thesis study, by (then) University of Wyoming graduate student Carlin Girard, documented the elimination of Colorado River cutthroat trout from the Dry Piney Creek drainage as a result nearby development in the LaBarge oil and gas field. In an interview Mr. Girard explained, “We found that streams within the developed drainages had degraded ecological conditions as indicated by the lack of sensitive macro-invertebrates, less willow cover along stream banks, predominantly run habitat and increased proportions of fine sediment.” *Stream Suffers Oil Field Fallout*, Jackson Hole News and Guide, May 13, 2015. South Beaver Creek was a reference stream he sampled—one without adjacent oil and gas development. In contrast to Dry Piney Creek, South Beaver Creek “had consistently good water quality, intact macro-invertebrate communities, more riparian vegetation, more pool and riffle habitat and higher proportions of gravel.” *Id.*

The Forest Service and the Wyoming Game and Fish Department are already faced with a challenging management situation in the South Cottonwood Creek area. True Oil, LLC has filed applications to drill two exploratory wells in an area on which it has four wells in production. In our comments on this exploratory well proposal, the Wyoming Outdoor Council raised concerns that typical mitigation measures could fall short of protecting habitat because of the sensitive and important resources at risk. The Wyoming Game and Fish Department also raised concerns about the serious threats oil and gas development poses to the sensitive aquatic habitats in this part of the Wyoming Range:

Increased sediment loads will have negative impacts to the hydrologic, geomorphic and ecological processes that directly affect streams, stream processes, and fish, macro-invertebrates and amphibian habitats. Oil and gas developments further increase the

² The EIS notes that more than 50 percent of historical boreal toad breeding site observations on the Bridger-Teton are also found within the contested lease area. EIS at 415.

³ Girard, Carlin E., *The Effects of Oil and Natural Gas Development on Water Quality, Aquatic Habitat, and Native Fish in Streams along the Wyoming Range*. M.S., Department of Zoology and Physiology, May 2015.

potential to introduce pollutants through discharges, chemical spills and surface runoff.

Wyoming Game and Fish Department comments on True Oil, LLC Lander Peak Exploratory Proposal in Sublette County, Nov. 25, 2015 at 4. Given the values of the area, the Department said that it “should be given high priority and protection....” *Id.*

A portion of the contested oil and gas leases (in and around North and South Cottonwood Creeks) surround the leases held by True Oil, LLC. In making a no leasing decision on these contested leases—and on all of the contested leases in the range—the Forest Service would avoid future management challenges of attempting to mitigate harm that would accompany drilling proposals in what is arguably the last, best stronghold for Colorado River cutthroat trout.

vi. Conclusion of terrestrial and aquatic wildlife comments

In the Wyoming Range, there are numerous high quality habitat types supporting myriad terrestrial and aquatic wildlife species.⁴ Too often, in response to applications for permit to drill, attempts to mitigate impacts from oil and gas development fail. That is because, simply put, development removes habitat and causes wildlife to avoid disturbed areas. As the Wyoming Game and Fish Department accurately describes:

If species are displaced from suitable habitats, they will most likely be displaced into marginal or unsuitable habitats. It is contrary to basic principles of wildlife ecology to assume that species can just move to other suitable habitats because unoccupied, suitable habitat does not exist. If species are displaced, it is most likely that they will be ‘forced into marginal habitats’ or will have to compete in already occupied habitats, which leads to lower survival and reproduction.

Id. at 207 (citing WGFD 2004). The Wyoming Game and Fish Department recommends a hierarchy of management approaches when it comes to oil and gas development. This hierarchy rests on the general premise that: “If effective habitat conditions are to be maintained for wildlife on public lands, it is imperative to accomplish energy production with the smallest possible footprint of disturbance.” *Recommendations for Oil and Gas Resources within Important Wildlife Habitats*. WGFD, Version 6.0, April 2010 at 1. As such,

The approach recommended to protect and maintain important wildlife resources...sets forth the following priority of actions: 1) avoid the impact; 2) minimize the impact through appropriate planning and management actions; 3) mitigate the impact by providing replacement or substitute resources; and 4) provide financial compensation only when no reasonable alternative is available to avoid, minimize or mitigate the impact.

⁴ Although we only highlighted five species and their habitats in our comments, the EIS discusses numerous other species, all of which would benefit from a no leasing decision.

Id. at 4. It is often not possible once public land has been leased to completely avoid the impacts of a proposed development, especially if adequate stipulations have not been included that limit allowable uses on the leasehold. That is why making a thoughtful and cautious decision today about whether leasing (and ultimately development) is advisable in this landscape is so crucial.

In addition to the Wyoming Game and Fish Department's recommendations about avoidance of impacts whenever possible, a November 3, 2015 Presidential Memorandum, *Mitigating Impacts on Natural Resources from Development and Encouraging Private Investment*, directs agencies like the Forest Service and the BLM "to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities." *Id.* at Sec. 1. The Forest Service and BLM must adhere to their respective mitigation policies in order to:

[E]stablish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are *important, scarce, or sensitive*, or wherever doing so is consistent with agency mission and established natural resource objectives. When a resource's value is determined to be *irreplaceable*, the preferred means of achieving either of these goals is through avoidance, consistent with applicable legal authorities.

Id. at Sec. 3(b)(emphasis added).

The fish and wildlife values alone in these contested 39,490 acres contain myriad natural resources that are "important, scarce, or sensitive" and thus require an outcome of "net conservation benefit," which is a higher standard than "no net loss." In addition, many of these resources—like Colorado River cutthroat trout habitat for example—are "irreplaceable." With respect to these resources, the executive order states that impacts should be "avoided."

Like the Upper Hoback Basin, where the wildlife values are also high and mitigation of PXP's 136-well drilling proposal would have been difficult or impossible to implement with any success, these contested 39,490 acres should remain intact. The Forest Service has the opportunity at the conclusion of this EIS process to opt for avoidance of impacts. A no leasing decision will ensure that the adverse impacts of industrial development on some of the highest quality wildlife habitat on our public lands today would be avoided entirely.

b. Air quality

As we have noted in prior comments, correspondence, protests, appeals and in meetings over the past eleven years, much has changed in western Wyoming since large-scale oil and gas development in the Upper Green River Valley began in the late 1990s. Along with increased development have come substantial adverse impacts, particularly to the region's air quality, human health, visibility and lake chemistry.

For many years, families in Sublette County lived with health risks associated with elevated winter ozone levels. The Upper Green River Valley was designated in "nonattainment" after three consecutive years where on certain days, the national ambient air quality standard for ozone (75 ppb) was exceeded. There were days in Sublette County when ozone levels were higher than the worst days in major cities like Houston or Los Angeles. All people, but especially children, people with compromised respiratory systems, and elderly people were at risk. This threat has not been as pronounced in recent years, thankfully, due to a downturn in oil and gas production combined with various proactive measures industry has taken. Although the proposal to lease contemplates a reasonably foreseeable development scenario of only 24 wells, the Forest Service is "mandated to insure that Federal projects on Federal lands conform to the Clean Air Act provisions in nonattainment areas. Therefore, the expectations are to reduce ozone precursors from all sources." EIS at 462.

Even with with the most severe threats from ground-level ozone temporarily abated, there are still frequent days of haze, which hangs over the valley and mars the once pristine and far-reaching mountain views. Impairment of visibility in the Bridger Wilderness has been documented. EIS at 457. The EIS correctly states that the Forest Service has an affirmative responsibility to protect air quality related values, including visibility over the lands within Class I areas, like the Bridger Wilderness. *Id.* at 462.

In addition to ozone precursor emissions and impaired visibility, the Forest Service has (since 1986) documented pollutants found in sensitive, high elevation lakes in the Wind River Range. *Id.* at 458-59. Nitrogen deposition greater than 1.5 kilograms per hectare per year is the level at which changes to lake community structure was documented in Rocky Mountain National Park. *Id.* Samples taken from high lakes in the Wind River Range show deposition levels "much higher" than 1.5 kg/ha/yr. *Id.* The EIS notes, "Some of the highest measured deposition has occurred in recent years since natural gas development began in the Pinedale area." *Id.*

Based on a reasonably foreseeable development scenario of 24 wells from the 39,490 acres, the EIS concludes that "it is not likely that emissions from this project alone would cause exceedances of National Ambient Air Quality Standards or have a noticeable impact on air quality related values (including visibility greater than 1 deciview) in nearby sensitive Class I and Class II wilderness areas and

national parks.” DEIS at 469. However, when these wells are coupled with “other emissions in the basin, they would likely contribute some to the cumulative effects that have been shown to occur in modeling for nearby projects.” *Id.* at 470.

Assuming development would follow if the leases were authorized under alternatives 2, 3, or 4, the no leasing alternative is the only alternative that would not contribute to the cumulative problem of emissions of ozone precursors (NO_x and VOCs), degraded regional air quality, impaired visibility in the Bridger Wilderness and alteration of lake chemistry in sensitive, high elevation lakes. We urge the Forest Service to make the no leasing alternative its final decision.

c. Groundwater resources

The EIS outlines scenarios in which groundwater could become contaminated from oil and gas drilling or production operations. EIS at 382-83. Pipeline and well casing failure, the processes of well drilling and improper construction, and management of open fluid pits and production facilities all pose risks to groundwater resources. *Id.* at 382. This is especially concerning in the Wyoming Range due to documented “high aquifer sensitivity” where many of the contested lease parcels are located. *Id.* at 373, 375. It is also of concern because, as the EIS states, “based on reports from other national forests with active oil and gas production, minor spills and leaks of gas are a common occurrence.” EIS at 147. The no leasing alternative is the only one that ensures groundwater resources will not be contaminated from new oil and gas drilling and production in the Wyoming Range.

d. Recreation

Recreation in many forms—hiking, fishing, camping, hunting, mountain biking, ATV riding, skiing, snowmobiling, wildlife watching, horse packing, backpacking—is available in the Wyoming Range. The EIS is correct to highlight a unique niche that the Wyoming Range in the Bridger-Teton National Forest occupies within the larger National Forest System. Namely, unlike many other forests where one must choose between extremes, e.g. designated wilderness settings or roaded, developed settings, the Wyoming Range’s dispersed recreation opportunities, specifically its abundance of roadless backcountry, is truly special. EIS at 127. Moreover, there are quite a few opportunities for dispersed camping free of charge where folks can “get off by themselves” outside formal campgrounds, but with easy access for individuals and families with tents and camping vehicles. *Id.* There is something for everyone in the Wyoming Range.

Social surveys conducted in surrounding counties are informative and give a snapshot of the values people attribute to the Bridger-Teton National Forest. EIS at 124-25. The contested oil and gas leases are entirely within Sublette County, and since the county is a cooperating agency in this process, it is of particular interest to review the results from Sublette County. When asked to assign a monetary value to various attributes, Sublette County respondents gave the highest value (83 out of a possible 100) to “recreation.” *Id.* at 124, Table 40. This is second only to Teton

County (89 out of 100) and higher than Fremont, Lincoln and Park (74, 76, 71 out of 100 respectively). *Id.* The attribute that received the lowest value from Sublette County residents was “economic” (36 out of a possible 100).⁵ *Id.* It was also the lowest value among all of the counties surveyed. *Id.* Fremont, Lincoln, Park and Teton attributed higher values to economic: 59, 43, 51 and 44 out of 100 respectively). *Id.* After recreation, the other two categories that received the highest numerical values in Sublette County were “aesthetic” (75) and biological diversity (75). *Id.*

When asked specifically about preferences about oil and gas leasing on the Bridger-Teton National Forest, 51 percent of respondents from Sublette County said they would prefer “not to have any leases” on the forest. *Id.* at 125, Table 41. This is significantly higher than respondents from Fremont, Lincoln, Park and Teton, of whom 23 percent, 28 percent, 19 percent and 35 percent (respectively) preferred no oil and gas leases on the forest. *Id.* When asked whether oil and gas leasing should be expanded on the forest, only 5 percent of Sublette County respondents agreed. *Id.* In contrast, 19 percent of Fremont, 20 percent of Lincoln, 23 percent of Park and 9 percent of Teton respondents favored expansion of leasing on the Bridger-Teton. *Id.* It is evident that recreation is of the highest importance to the people who enjoy the Wyoming Range—especially to the people who live in Sublette County. A no leasing decision ensures that an incompatible use (oil and gas development) does not adversely affect a use (recreation) that is valued above all others.

i. The southern-most leases have high scenic and recreational values.

Some elected officials have posited that it might be reasonable to allow leasing on the southern-most contested oil and gas parcels. Looking solely at a map and seeing the relative proximity of these leases to the Riley Ridge field, this is understandable; however, the values on the ground tell a different story. It would be a mistake to lease these parcels.

We ask the Forest Service to factor in the above social survey results when making its decision whether to lease. There is no demonstration of local support for leasing the southern parcels. In fact, it is clear that the vast majority (95 percent) of Sublette County residents surveyed have no interest in expanding leasing anywhere in the Wyoming Range. *Id.* at 125. Although people in Pinedale and Daniel may frequent the middle and northern blocks of contested leases more than they do the southern area where three contested leases are located—and thus talk to their representatives about the places they know the best—this should not be interpreted as support for leasing in the southern block.

Indeed, people from Sweetwater County, northern Utah and the southern parts of Sublette County (e.g. Big Piney) frequent the southern and middle areas of

⁵ We note that compartmentalizing “recreation” from “economics” is problematic. Outdoor recreation is a huge driver of the local and state economy and to separate them creates a false dichotomy. For purposes of the survey, it is not clear whether economics was defined in terms of only extractable products, e.g. timber, livestock forage, oil and gas, but that is how we interpreted it.

contested leases more than the northern block. It is unfortunate that the social survey did not include Sweetwater County and that Sweetwater County is not a government cooperator in this EIS process. Surely the Sweetwater County commissioners would be hearing from their constituents about the importance of the southern and middle blocks for hunting, camping, fishing and other recreational uses.

Since 2005, Sweetwater County residents from the communities of Green River and Rock Springs have been some of the most dedicated and passionate advocates of “no leasing” in the Wyoming Range. Former Bridger-Teton supervisor Kniffy Hamilton often commented on the importance of hearing from these constituents, many of them hunters and anglers, which helped inform her decision to identify no leasing as the preferred alternative in a prior iteration of this EIS. We trust the Forest Service will take into account comments from all user groups and all communities in making its final decision.

As the EIS describes, the southern parcels in Synder Basin have tremendous values.⁶ A 5-mile segment of Big Fall Creek (2/3 mile of which is located with one of the contested leases) is eligible for a “scenic” designation under the Wild and Scenic Rivers Act. EIS at 173. The EIS describes the area:

The outstanding resource values include the scenic quality, hydrologic and geologic features. This creek is characterized by multiple waterfalls over spring-deposited limestone formations. The creek flows in the bottom of a scenic drainage with grass and forb covered slopes at the lower elevations and patches of a conifer forest toward the top of the ridge. Except in the forest cover . . . due to the open nature of this small valley, any alterations would be visible and impact scenic quality.

Id. The Bridger-Teton publishes a *Visitor Guide: Wildlands, Wildlife and Wide Vistas*, which highlights twelve “points of interest” on the forest.⁷ One of the twelve points of interest (on this 3.4 million acre forest) is within a southern contested lease parcel: Big Fall Creek. As the guide describes: “Travertine falls, spring-fed water and wildflowers can be enjoyed along this short two-track road.” See footnote 8 at p. 9.

The historic Lander Cutoff Trail of the California National historic trail passes through contested lease parcel WYW-173279. EIS at 176. This southern parcel also includes access to the southern part of the Wyoming Range National Recreation Trail. *Id.*

For the southern parcels in Management Area 26, the Forest Plan affords a high level of protection for scenic and visual quality: 84 percent of it is to be managed for retention (50 percent) or partial retention (34 percent). EIS at 171, Table 57. This is higher than the objectives in the management areas where the middle and northern contested leases are located. *Id.* at 170-71. Although the

⁶ Wildlife values—particularly elk and mule deer—in these southern-most parcels are also high and discussed in the wildlife section above on pages 11-12 of our comments.

⁷ See https://fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_062523.pdf.

analysis states that development could occur while meeting the “retention” objective (as only a portion of one of the leases falls within this area), new road construction associated with Alternative 2 “would make it difficult to meet the objective of partial retention” assigned to the foothills of Mt. Darby. *Id.* at 176.

The landscape in the southern portion of the contested leases is much like that of the middle and northern blocks in that its character is largely undeveloped, the scenery is outstanding and the wildlife and recreation values are high. Just as it would be a mistake to look at a map and assume the contested leases around True Oil, LLC’s field in South Cottonwood should be leased—because once a person visits the area the tremendous scenic, fish, wildlife and recreational values become apparent—these southern leases should also not be discounted.

ii. Conclusion to recreation

The EIS considers existing uses and the ways in which those uses could be impacted if another use—in this case oil and gas development—were to be authorized. To name only a few examples, recreational users would be displaced (e.g. higher spring, summer and fall traffic on access roads associated with oil and gas operations, and plowed roads in winter displacing snow machine recreation); wells and drilling operations would require miles of new roads impacting quiet, backcountry settings and wildlife habitat; and lights from operations would impose an industrial feeling at night in what is now a remote place with dark night skies.

There is simply no doubt that oil and gas development on any of the contested leases in the Wyoming Range would dramatically and negatively change the current undeveloped character, the stunning scenery, feeling of remoteness, opportunities for solitude and the recreational enjoyment people appreciate about this place. Managing for multiple use is the Forest Service’s responsibility. Doing so requires thoughtful decisions about the highest and best uses for any given landscape. Not all of the conceivable uses can take place simultaneously on every acre. Some uses are simply incompatible with others. We urge the Forest Service in this case, to adopt the no leasing preferred alternative as its final decision.

e. Social and economics conditions

Significant baseline information about the social and economic conditions of Sublette County is included in the analysis. EIS at 77-115. Attention is also given to ecosystem services, which is a nice complement to the IMPLAN input-output model utilized in other sections of the EIS. Appendix F. Although we have no reason to question the actual numbers provided for various categories that appear in the EIS, (e.g. spending per well, total full and part time jobs by sector, average earnings per job, direct spending during oil and gas development under Alternative 2, tax revenues and mineral royalties generated, etc.), we believe that these figures don’t tell the full story—especially because revenue from recreation, tourism and wildlife-related sectors, in addition to economic benefits derived from amenities the Wyoming Range offers to residents’ quality of life, are largely not quantified at the county level nor adequately analyzed.

In the county-level analysis, “recreation” is lumped with “arts and entertainment,” and when recreation revenue is discussed in greater detail, it appears in a separate section of the EIS (in “recreation” rather than “socio-economic.”) We would like to better understand the methodology used to arrive at total earnings for recreation, arts and entertainment in 2013 (which apparently includes outfitters and guides) at just \$1.3 million. EIS at 90. This figure seems particularly low especially when other significant revenue sources are considered.

The Bridger-Teton National Forest saw \$57 million in outfitter/guide and other commercial recreation revenue in 2006. *Id.* at 128. Total economic activity in that same year was calculated at \$82.6 million. *Id.* at 131, Table 48. Although these are forest-wide figures, they only address commercial recreation.⁸ These figures don’t account for all other revenue derived from visitor experiences (local and tourist alike)—whether it’s wildlife viewing, driving for pleasure, hunting, fishing, camping and associated tourist expenditures such as eating in restaurants, staying in hotels and shopping in nearby communities. The EIS states that “commercial and non-commercial hunters . . . contribute significantly to local revenue,” but that doesn’t appear to be quantified, nor is it reflected in the county’s economic analysis. *Id.* at 131.

Moreover, although there are important economic data included in the recreation section regarding expenditures (e.g. Table 48 mentioned above), the EIS makes a correct observation that today, “the region’s economy is driven more by the attractiveness of communities as places to live than by tourist dollars.” EIS at 127. For this reason, attention solely to “recreational expenditures does not capture the entire economic impact of providing recreational opportunities and other amenities on public lands.” *Id.* There are significant positive economic effects (e.g. small business growth, job creation, population growth) for communities with access to public lands, scenery and open space because these amenities that public lands offer make communities attractive places to live. *Id.* This could be better addressed in the EIS.

The EIS also makes contradictory statements that should be clarified. For example, Alternative 2 is estimated to have “the greatest positive effect on jobs, income and population of the alternatives.” EIS at 101. It may be correct to say that Alternative 2 has the most potential to create jobs *in the oil and gas sector*, but referring to job creation in general, without accounting for the negative impacts oil and gas development would have on jobs in other sectors, is misleading.

The EIS does acknowledge that Alternative 2 has the “greatest potential to...impact outfitter and guide operations and jobs,” as oil and gas development could “deter[]” out of state visitors who prefer “a more undeveloped backcountry experience.” *Id.* at 99. Similarly, Alternative 2 has the potential for “the most substantial impacts to recreation.” *Id.* at 161. Yet, the EIS falls short of estimating the

⁸ In that same year (2006) \$4.5 million was generated from commercial recreation in the Pinedale and Big Piney ranger districts. Table 47, EIS at 128.

job losses should oil and gas development negatively affect recreation and jobs associated with and reliant on intact, backcountry settings.

Further, the Forest Service should consider that Alternative 2 (with a RFD scenario of 24 wells) projects only 9.9 full time oil and gas sector jobs, and none are long-term jobs. *Id.* at 99. Of those jobs, 5.8 would be created in the development phase and 4.1 would be created in the production phase. *Id.* Unlike jobs in outfitting, guiding, tourism or recreation, oil and gas jobs are temporary. After drilling is completed, most of these jobs would no longer exist.

The nature of the oil and gas industry—an industry that follows “boom and bust” cycles—means that jobs fluctuate significantly. Even during the height of a boom, oil and gas jobs are not ones that account for stable population growth in a region. Specialized workers tend to follow the next big play and do not often put down roots in new locations. Oil and gas workers are often “on” for two weeks and then “off” for two weeks—returning to their homes in Texas, Oklahoma or other places during the off weeks. Indeed, between 2006-2010 the EIS acknowledges that 31.2 percent of people working in Sublette County commuted from outside the county for work.” *Id.* at 86-7. A temporary, non-resident oil and gas workforce often takes more of a toll on a local region’s economy and social services than it contributes. Crime rates rise, traffic increases, housing costs rise and there is not enough capacity to respond to medical or educational needs. *Id.* at 98-101.

In contrast, stable and meaningful population growth in communities in the Greater Yellowstone region stems from people seeking “environmental quality, access to outdoor recreation, scenery, wildlife and open space.” *Id.* at 127. These are the attributes that draw people to settle in communities like Pinedale. “People moving to the region are largely responsible for the growth in small businesses and job creation and therefore contribute much to the economy.” *Id.*

There is no question that revenue generated from the energy sector benefits Sublette County and the State of Wyoming. It is a crucial aspect of our economy and will continue to be until we are able to better diversify. What is also true is that recreation and tourism based on opportunities to enjoy intact public lands, open space and wildlife is what brings millions of visitors (and billions of dollars) to Wyoming every year. The amenities that the Wyoming Range offers in abundance are also the very attributes that contribute to the quality of life we residents of Wyoming value.

Wyoming is fortunate to have both world-class energy resources and world-class public lands and wildlife. Today, there are thousands of oil and gas wells in production and additional thousands pending approval in Sublette County alone. The 24 wells envisioned in the Wyoming Range under Alternative 2, would have little significance in terms of energy production in Sublette County or in Wyoming. These wells would generate short-term, non-renewable revenue, but would put at risk future long-term, sustainable revenue generated from safeguarding intact habitat and recreational opportunities. In a part of the Bridger-Teton renowned for its backcountry character, its wildlife habitat and a thriving recreation-based

economy, it is entirely reasonable—and responsible—for the Forest Service to make a no leasing decision.

III. The Forest Service has the discretion not to consent to lease.

The Forest Service’s decision whether to give its consent to lease national forest lands for oil and gas development is wholly discretionary. As the DEIS accurately reflects, it is the combination of many relevant factors—scenery, air, water, wildlife, fisheries, recreation, tourism, hunting and fishing, sense of place, socio-economics and others—that legitimately informs and supports the agency’s identification of the no leasing alternative as its preferred course of action. These resources are well documented and considered in the DEIS. Based on the thorough and careful analysis, these factors provide a rational and defensible basis on which to support a no leasing final decision.

In comments on the last draft EIS from 2010, one high bidding company asserted that if the Forest Service withdrew its consent to lease (leading BLM to cancel contested leases) it would violate its multiple use objective and would be contrary to the direction set forth in the Bridger-Teton National Forest’s 1990 forest plan. This is wrong. Although oil and gas development is a recognized use of national forest lands, there is no mandate that lands legally available for lease in a forest plan actually be leased. Although some final decisions are made in forest plans, suitability and availability determinations do not authorize or mandate any action on the part of the agency. *See Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) (holding that a challenge to a timber suitability determination in forest plan was not ripe for review). Lands that are administratively available for oil and gas leasing on the Bridger-Teton have the potential to be leased, but are not required to be leased. Leasing decisions are completely within the discretion of the agency.

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

There is also nothing in the Multiple Use Sustained Yield Act (MUSYA) of 1960, 16 U.S.C. §§ 528-531, that mandates the Forest Service authorize a certain amount of leasing or any leasing at all.⁹ In response to challenges claiming the

⁹ MUSYA and its implementing regulations do not even specifically apply to questions regarding oil and gas leasing, since unlike outdoor recreation, timber, range, watershed and fish and wildlife resources, oil and gas development is not one of the statute’s enumerated renewable resources. 36 C.F.R. § 219.1; *see also Rocky Mountain Oil & Gas Ass’n v. U.S. Forest Service*, 157 F.Supp.2d 1142, 1145 (D. Mont. 2000) (stating that “NFMA and MUSYA do not apply to oil and gas leasing...”).

Forest Service violated its multiple use mandate, courts have routinely found the general concepts of multiple use as contained in MUSYA give the Forest Service wide latitude for its management decisions. In a challenge to the Bridger-Teton's 1990 forest plan, plaintiffs claimed it did not guarantee sufficient mineral and timber production. The court rejected the argument and held:

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

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

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

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

Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Service, 157, F.Supp.2d 1142, 1144-45 (D. Mont. 2000)(citations omitted). The situation here is similar in that this EIS is a

pre-leasing analysis that will inform the Forest Service's discretionary decision whether to lease 39,490 acres in the Wyoming Range.

There is one difference between the Wyoming Range and the Rocky Mountain Front, although as explained below, it doesn't alter the authority of the Forest Service in any way. With respect to the Wyoming Range, the pre-leasing decision to be made today is one that follows an unauthorized offering/issuance of oil and gas leases from 2005-06. As such, a no leasing decision would prompt the BLM to withdraw the offer regarding the pending leases and cancel the improperly issued leases. Companies would be refunded their payments and bids.

a. The BLM has the 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). 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. A violation of NEPA at the leasing stage is one example of improper lease issuance, causing the leases in question to be deemed voidable; *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.")

In 2004, in a situation similar to these contested leases, 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 instance where 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.

As courts and the IBLA have acknowledged, if a leasing decision is challenged, and it is found that the agencies erroneously justified the 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. As such, in 2006, in response to motions filed to the IBLA on these Wyoming Range leases, the IBLA was clear: “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.

i. There is no heightened standard the Forest Service must meet to “justify” a no leasing decision.

In response to the prior EIS, one high bidding company argued that the analysis lacked adequate justification for canceling the leases improperly issued. This misrepresents the nature of the decision to be made. Despite the unique fact that roughly half of the 39,490 acres of leases were issued to high bidders, these are not valid leases. Rather, because the leases were issued improperly and suspended as a result, they are voidable based upon further review. This is a pre-leasing analysis, and as such, the Forest Service has the discretion not to lease.

There is no heightened standard the Forest Service must meet in order to “justify” its discretionary decision. The Forest Service does not need to show impacts would be catastrophic to a species, or to a resource. Nor does it need to show that mitigation measures would be wholly ineffective in order to choose the no leasing alternative. It is well within the agency’s legitimate discretion to decide not to authorize even mitigated impacts associated with oil and gas development activities. It need only show that it conducted a thorough review and that its decision is well informed.

b. The BLM has the legal authority to reject high bids on pending leases.

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 39,490 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 the BLM 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 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.* The IBLA also noted that every BLM lease sale notice mentions the possibility that protest resolution can result in the withdrawal of parcels from leasing. *Id.* at 12 n. 7 (citing the BLM’s Notice of Competitive Oil & Gas Lease Sale, June 6, 2009 at viii.)

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 (at the time) 44,720 acres was already underway, and opted not to take further action until the conclusion of the analysis.

To conclude, the (now) 39,490 contested lease acres have a complicated procedural history; however, there is nothing about their disposition that prevents the Forest Service and the BLM from altering the prior unlawful decision to lease. Assuming the agencies’ reasoning is rational and supported by adequate analysis—as it is in this DEIS—the Forest Service has the discretion not to consent to leasing and the BLM has the authority to cancel improperly issued leases and reject high bids on pending leases.

IV. Conclusion

We are pleased that the Forest Service has identified no leasing as its preferred alternative. We urge the agency to adopt the no leasing alternative as its final decision. Thank you for considering our comments.

Sincerely,



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