



October 28, 2014

Sally Jewell, Secretary  
U.S. Department of the Interior  
1849 C Street N.W.  
Washington, DC 20240

Tom Vilsack, Secretary  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, DC 20250

Re: Oil and gas leases in Badger-Two Medicine region of Lewis & Clark National Forest

Dear Secretary Jewell and Secretary Vilsack:

I am writing on behalf of American Rivers, American Whitewater, Blackfeet Headwaters Alliance, Glacier-Two Medicine Alliance, Montana Environmental Information Center, Montana Wilderness Association, National Parks Conservation Association, National Wildlife Federation, Sierra Club, Sustainable Obtainable Solutions, The Wilderness Society, and the Upper Missouri Breaks Audubon Society regarding the U.S. Forest Service and Bureau of Land Management's ("BLM") administration of oil and gas leases within the Badger-Two Medicine region of the Lewis and Clark National Forest in northwest Montana. Your agencies are now addressing a proposal to conduct an exploratory oil and gas drilling operation on federal oil and gas Lease M-53323, which is located in the northwest portion of the Badger-Two Medicine region near Glacier National Park. Lease M-53323 is one of 18 federal oil and gas leases in the Badger-Two Medicine region, each of which dates from leasing actions undertaken in 1981 and 1982 and all of which have been subject to suspensions of operations and production for nearly 30 years.

Recently, you received a request from the Blackfeet Nation's Tribal Business Council, supported by declarations from the Montana & Wyoming Tribal Leaders Council and the Blackfoot Confederacy, to cancel these leases to prevent harm to the tribe's longstanding cultural and spiritual interest in the Badger-Two Medicine region, which adjoins the western boundary of the Blackfeet Reservation. This letter supports and supplements the Blackfeet Nation's request by specifying the legal justification and necessity for cancellation of the Badger-Two Medicine leases. As set forth below, each of the Badger-Two Medicine leases was unlawfully issued in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* Further, the original illegitimacy of these leases can be rectified only through cancellation of these leases to restore the pre-leasing status quo. See Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292 (D. Mont. 1992). The Interior Department has ample regulatory authority to accomplish the necessary lease

cancellations where, as here, leases were “improperly issued.” 43 C.F.R. § 3108.3(d). For the reasons stated in this letter, I request that you utilize this authority to cancel the remaining federal oil and gas leases in the Badger-Two Medicine region to ensure compliance with federal environmental law and to protect the extraordinary resources of this important region.

## **I. The Extraordinary Value of the Badger-Two Medicine Region**

Situated in the Crown of the Continent ecosystem of the Northern Rockies region between Glacier National Park and the Great Bear and Bob Marshall wilderness areas, the 129,520-acre Badger-Two Medicine region is an almost entirely unroaded expanse of mountains, ridges, river valleys, and wetlands along Montana’s Rocky Mountain Front, where the Rocky Mountains meet the Great Plains. The Badger-Two Medicine region provides extraordinary habitat for rare, sensitive, and federally protected wildlife species. The region supports a high density of grizzly bears and contains a large expanse of crucial spring habitat for this species. See Dr. John L. Weaver, Conservation Value of Roadless Areas for Vulnerable Fish and Wildlife Species in the Crown of the Continent Ecosystem, Montana 75 (2011) (Attachment 1). It also contains large, well-connected blocks of wolverine and mountain goat habitat, id., and provides winter range and migration habitat for large elk herds, id. at 76. Further, the Badger-Two Medicine region constitutes the best remaining stronghold for genetically pure westslope cutthroat trout along Montana’s Rocky Mountain Front. Id. at 75. Reflecting these attributes, a 2011 study conducted by the Wildlife Conservation Society to assess the conservation value of remaining roadless areas in Montana’s portion of the Crown of the Continent ecosystem recommended that 97 percent of the Badger-Two Medicine region be added to the Bob Marshall Wilderness Area. See id. at 79.

The region’s tremendous natural values make it a magnet for humans as well. As the Forest Service has concluded, the Badger-Two Medicine region “is a magnificent area to enjoy solitude, wildlife viewing, hiking, hunting, fishing, stock use, snowshoeing and cross-country skiing.” U.S. Forest Serv., Rocky Mountain Ranger Dist. Travel Mgmt. Plan, Record of Decision for Badger-Two Medicine 10 (2009) (Attachment 2). To protect the area’s value for non-motorized backcountry recreation, as well as its wildlife habitat, the Forest Service in 2009 issued a travel management decision that closed most of the region’s trails to wheeled motorized vehicles and prohibited snowmobiling. Id. at 5, 10.

As the foregoing demonstrates, few lands within the public domain offer the natural and recreational values of the Badger-Two Medicine region. Even fewer augment those values with extraordinary cultural and spiritual values, as the Badger-Two Medicine region does. As discussed above, the national forest lands of the Badger-Two Medicine region neighbor the Blackfeet Indian Reservation. Members of the reservation community and the larger Blackfoot Confederacy revere the Badger-Two Medicine region as a land of special cultural and spiritual import. As described in a 2004 proclamation by the Blackfoot Confederacy, the Badger-Two Medicine region is critical to the “oral history, creation stories, and ceremonies of the Blackfoot people, as well as an important plant gathering, hunting, fishing and timbering site which continues to be vital to the religious, cultural and subsistence survival of the Blackfoot people.” Proclamation of the Blackfoot Confederacy, Badger-Two Medicine (Nov. 16, 2004) (“Blackfoot Confederacy Proclamation”). For this reason, the Keeper of the National Register in January

2002 declared 89,376 acres of the Badger-Two Medicine region eligible for listing in the National Register of Historic Places as a Traditional Cultural District (“TCD”), meaning that the area has an “association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.” U.S. Dep’t of the Interior, National Register Bulletin, Guidelines for Evaluating and Documenting Traditional Cultural Properties 1 (1998). In response to urgings by the Blackfeet Tribe, the Forest Service arranged for further ethnographic study to determine whether additional lands should be included within the TCD. In 2013, the Forest Service, Montana State Historic Preservation Office, and Blackfeet Tribal Historic Preservation Office concurred with the findings of the boundary expansion study, and recommended expanding the TCD to encompass 165,588 acres. As one of the studies underlying that recommendation reported, the lands within the TCD represent “the repository of all power that remains in the contemporary Blackfeet world.” Maria Nieves Zedeno, Principal Investigator, Badger-Two Medicine Traditional Cultural District, Montana: Boundary Adjustment Study, Final Report 89 (Mar. 10, 2006). The Keeper of the National Register concurred in the TCD boundary expansion recommendation on May 5, 2014.

## **II. Oil and Gas Leasing in the Badger-Two Medicine Region**

Despite its documented outstanding natural, recreational, cultural, and spiritual values, the Badger-Two Medicine region has been the site of leasing for oil and gas development by the federal government. In February 1981, the Forest Service issued an Environmental Assessment (“EA”) and Finding of No Significant Impact recommending that oil and gas leases be issued across much of the Lewis and Clark National Forest, including the Badger-Two Medicine region. See generally U.S. Forest Serv., EA, Oil & Gas Leasing, Nonwilderness Lands 61 (1981) (“Badger-Two Medicine leasing EA”) (Attachment 3). Accordingly, the BLM issued oil and gas leases encompassing much of the area in 1981 and 1982.

Issuance and development of those leases has been controversial from the outset. The BLM approved the first drilling permit on one of the Badger-Two Medicine leases—specifically, Lease M-53323—in 1985. That decision touched off a series of appeals before the Interior Board of Land Appeals (“IBLA”), which three times remanded the drilling decision to the BLM until 1993, when a new drilling permit was approved. That approval precipitated a legal challenge by conservation organizations, including some of the signatories to this letter, in Montana’s federal district court. The lawsuit raised, among others, issues concerning the legal legitimacy of the Badger-Two Medicine leases. See Complaint, Nat’l Wildlife Fed’n v. Robertson, Civ. Action No. 93-44-GF (D. Mont. filed Apr. 14, 1993) (Attachment 4). However, before the lawsuit could be resolved, the BLM suspended all operations and production on the lease at issue to facilitate congressional consideration of legislative protection for the area. As a result, the lawsuit was administratively closed without prejudice to the plaintiffs’ right to reopen the proceedings if necessary. See Order, Nat’l Wildlife Fed’n v. Robertson, Civ. Action No. 93-44-GF (D. Mont. filed Mar. 10, 1997) (Attachment 5). Operations and production on other leases in the Badger-Two Medicine region likewise were suspended and all of the Badger-Two Medicine leases remain under suspensions to this day, with the leases now suspended to allow completion of procedures required by the National Historic Preservation Act, 16 U.S.C. § 470 et seq.

More recent actions concerning oil and gas development in the Badger-Two Medicine region have served only to underscore the error of the Forest Service and BLM’s original decision to authorize leasing in this area. In November 2004, the Blackfoot Confederacy issued a proclamation formally declaring that “it will not consent and will not approve any energy development within the Badger-Two Medicine and will vigorously oppose any proposals for such development.” Blackfoot Confederacy Proclamation. Thereafter, the Blackfeet Nation sent a letter to the holders of oil and gas leases in the Badger-Two Medicine region urging them to voluntarily and equitably terminate their leases, stating that “[t]he Front is our ‘backbone of the world’ and a vital part of our culture” and “[t]he Tribe feels there is no validity in regards to these leases.” Letter from William Talks About to Whom It May Concern at 1-2 (Dec. 8, 2004). In response to such sentiments and broad public outcry opposing oil and gas development on Montana’s Rocky Mountain Front, Congress in 2006 passed legislation that prohibited further oil and gas leasing on federal lands within a specified area of the Front, including the Badger-Two Medicine region, and provided tax incentives for leaseholders in the affected area who chose to voluntarily retire their leases. In January 2010, five holders of leases in the Badger-Two Medicine area—Occidental Petroleum Corporation, Williams Cos., Rosewood Resources, XTO Energy Inc., and BP—took Congress up on that offer and relinquished leases encompassing 28,730 acres.

That action left four entities holding 18 remaining oil and gas leases in the Badger-Two Medicine region. To date, each of these leaseholders has declined to voluntarily retire its leases. The remaining Badger-Two Medicine leaseholders, and the leases they hold, are as follows:

<b>Lease Number</b>	<b>Lessee</b>	<b>Issue Date</b>	<b>Suspension Date</b>
MTM 019181	Devon Ene Prod Co LP	8/24/1981	8/1/1988
MTM 019182	Devon Ene Prod Co LP	8/24/1981	8/1/1988
MTM 019183	Devon Ene Prod Co LP	8/24/1981	8/1/1988
MTM 019184	Devon Ene Prod Co LP	8/24/1981	5/1/1987
MTM 019185	Devon Ene Prod Co LP	2/22/1982	5/1/1987
MTM 025168	Devon Ene Prod Co LP	8/20/1981	9/1/1986
MTM 025169	Devon Ene Prod Co LP	8/20/1981	9/1/1986
MTM 025170	Devon Ene Prod Co LP	8/20/1981	9/1/1986
MTM 025172	Devon Ene Prod Co LP	9/10/1981	9/1/1986
MTM	Devon Ene Prod Co	9/10/1981	9/1/1986

025173	LP		
MTM 025174	Devon Ene Prod Co LP	8/20/1981	9/1/1986
MTM 025175	Devon Ene Prod Co LP	8/20/1981	9/1/1986
MTM 053317	Devon Ene Prod Co LP	5/11/1982	2/1/1987
MTM 053320	Moncrief W A Jr	5/14/1982	5/1/1988
MTM 053323	Solenex LLC	5/24/1982	10/1/1985
MTM 055320	Kluthe J G Trust "A"	11/29/1982	3/1/1988
MTM 073543	Devon Ene Prod Co LP	9/1/1981*	8/1/1988
MTM 073544	Devon Ene Prod Co LP	9/1/1981*	8/1/1988
<i>*effective date for noncompetitive lease</i>			

As you are aware, the holder of Lease M-53323 recently sued the Forest Service and BLM in federal district court in Washington, D.C., asking the court to order the agencies to lift the ongoing suspension of operations and production on that lease so that oil and gas exploration can immediately commence pursuant to the disputed 1993 drilling permit. That drilling proposal presents an imminent threat of irreparable harm to the exceptional natural, recreational, cultural, and spiritual values of the Badger-Two Medicine region discussed above. While the Forest Service and BLM have undertaken to defend against the leaseholder's effort to force immediate drilling on Lease M-53323, neither agency appears to have undertaken a meaningful assessment of the predicate question whether Lease M-53323 or any of the other remaining Badger-Two Medicine leases conveyed valid development rights to the leaseholder in the first instance. For the reasons that follow, they did not and should be canceled.

### **III. Issuance of the Badger-Two Medicine Leases Violated NEPA**

Issuance of the oil and gas leases that persist in the Badger-Two Medicine region violated the National Environmental Policy Act under well-established and directly applicable federal case law. Indeed, much of this case law arose from legal challenges to leases issued by the Forest Service and BLM on other national forest lands in the Northern Rockies region based on environmental assessments that were similar to, and generally contemporaneous with, the leasing EA for the Badger-Two Medicine region. These cases established that the approach to environmental analysis undertaken by the agencies in connection with this Northern Rockies leasing campaign fundamentally defied NEPA. Issuance of the Badger-Two Medicine leases reflected this same unlawful approach.

First, issuance of the Badger-Two Medicine leases violated NEPA because the Forest Service and BLM failed to consider the impacts of oil and gas development activity in the

Badger-Two Medicine region in an environmental impact statement (“EIS”) prior to lease issuance. It is well settled that issuance of a federal onshore oil and gas lease authorizing surface occupancy of the leasehold is a “major Federal action[] significantly affecting the quality of the human environment” requiring an EIS prior to lease issuance. 42 U.S.C. § 4332(2)(C); see Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988); Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988); Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983). Accordingly, as the cited cases illustrate, federal courts have held Forest Service and BLM leasing decisions to violate NEPA where the agencies prepared only a more cursory environmental assessment, rather than a full EIS, before issuing leases that authorized surface occupancy of the leasehold.

In the most pertinent example, the Montana district court and Ninth Circuit Court of Appeals in the Bob Marshall Alliance case held that the agencies violated NEPA when they issued leases in the Deep Creek area south of the Badger-Two Medicine region on Montana’s Rocky Mountain Front based only on a 1980 EA that was similar in all pertinent respects to the EA that the same agencies prepared to analyze the Badger-Two Medicine leasing decision. See Bob Marshall Alliance v. Watt, 685 F. Supp. 1514, 1517-21 (D. Mont. 1986); Bob Marshall Alliance, 852 F.2d at 1227-28. As the Ninth Circuit stated, “sale of the Deep Creek leases required preparation of an EIS unless the lease absolutely prohibits surface disturbance in the absence of specific government approval”—i.e., unless the lease includes a “no surface occupancy,” or “NSO,” lease stipulation. Bob Marshall Alliance, 852 F.2d at 1227 (quotations and citations omitted). However, “[n]o EIS was prepared on any of the leases” and therefore “the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases.” Id. Precisely the same legal analysis and conclusion applies to the Badger-Two Medicine leases, and for this reason alone issuance of those leases violated NEPA.

Second, issuance of the Badger-Two Medicine leases violated NEPA because the Forest Service and BLM failed to meaningfully consider a “no-action” alternative—i.e., the alternative of not issuing any leases in the Badger-Two Medicine region. NEPA requires federal agencies to study a reasonable range of alternative actions “in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E); see also id. § 4332(2)(C)(iii) (requiring EIS to provide a “detailed statement” on “alternatives to the proposed action”). The required NEPA study of alternatives mandates that “agency decisionmakers have before them and take into proper account all possible approaches to a particular project (including total abandonment of the project).” Bob Marshall Alliance, 852 F.2d at 1228 (quotations and alterations omitted, emphasis in original). In the oil and gas leasing context, such a “no-action” alternative means “the option of not issuing any oil and gas leases.” Id. (emphasis added). The “no-action” alternative must be given “meaningful consideration,” id. at 1230; “the mere listing of the no-leasing alternative without any meaningful consideration ... will not suffice to satisfy the mandate of NEPA.” Bob Marshall Alliance v. Watt, 685 F. Supp. at 1521. Further, consideration of the “no-action” alternative must occur “at a time when that alternative is still viable, a time which is limited to the pre-leasing stage.” Id. This is because, “by definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate becomes ineffective.” Bob Marshall Alliance, 852 F.2d at 1229 n.4.

The EA prepared by the Forest Service to assess the Badger-Two Medicine leases violated this requirement. Once again, the Bob Marshall Alliance case is controlling. In Bob Marshall Alliance, the Forest Service prepared an EA for the Deep Creek leasing decision that rejected the “the no-leasing alternative” on the basis that then-“current policy” did not allow for withholding lease issuance absent identification of specific “unacceptable and unavoidable conflicts with surface uses and resources.” 685 F. Supp. at 1520 (quotations and citation omitted); see U.S. Forest Serv., EA, Oil & Gas Leasing: Deep Creek & Reservoir North RARE II Further Planning Areas 46-47 (1980) (“Deep Creek leasing EA”) (dismissing non-leasing alternatives as “unviable” under agency policy) (Attachment 6). The Montana district court rejected this position, holding that “the agencies erred by failing to prepare an EIS which developed alternatives,” including “the no-leasing alternative.” Bob Marshall Alliance, 685 F. Supp. at 1521.

The Badger-Two Medicine leasing EA commits the same legal error as the Deep Creek leasing EA. Like the Deep Creek leasing EA, the Badger-Two Medicine leasing EA rejected meaningful consideration of the “no-action” alternative on the asserted basis that it “is contrary to present Forest Service Policy.” Badger-Two Medicine leasing EA 61; see also id. at 31 (stating that alternative of “No Action on Lease Applications at this Time” “is in conflict with National and Regional Forest Service policy”). Accordingly, as with the Deep Creek leasing EA, the Forest Service’s dismissal of the “no-action” alternative in the Badger-Two Medicine leasing EA violated NEPA pursuant to Bob Marshall Alliance.

However, the Badger-Two Medicine leasing EA went even farther than the Deep Creek leasing EA in corrupting legitimate consideration of a “no-action” alternative. The Deep Creek leasing EA invalidated in Bob Marshall Alliance at least included the alternative of not leasing the Deep Creek area (although, as discussed, it improperly dismissed that alternative without meaningful consideration). See Deep Creek leasing EA at 47. By contrast, the Badger-Two Medicine leasing EA failed to include a legitimate “no-action” alternative at all. The so-called “no-action” alternative in the Badger-Two Medicine leasing EA did not consider “the option of not issuing any oil and gas leases,” as required by NEPA. Bob Marshall Alliance, 852 F.2d at 1228. Rather, this alternative merely “would delay recommendations on leasing until completion of the Forest Plan.” Badger-Two Medicine leasing EA at 31. As the EA explained, “this alternative would be a delay prior to implementation” of action alternatives that called for leasing and development of the Badger-Two Medicine area. Id. at 45. Accordingly, the EA projected that “[t]he long-term effect for this [no-action] alternative would probably be the same as [for two leasing alternatives]” and stated that the “no-action” alternative’s long-term satisfaction of criteria for evaluating environmental impacts “is assumed to be the same as for [the two leasing alternatives].” Id. at 58. Indeed, based on this reasoning, the Badger-Two Medicine leasing EA asserted that its so-called “no-action” alternative would match or even exceed leasing alternatives in its detrimental impact on such resources as “[p]ristine or undeveloped areas,” threatened and endangered species and their habitat, and “[r]ecreation and visual quality.” Id. at 59 (Table 5).

In short, the Badger-Two Medicine leasing EA did not even purport to consider the alternative of “total abandonment of the project.” Bob Marshall Alliance, 852 F.2d at 1228 (quotations, citation, and emphasis omitted). For this reason, the so-called “no-action”

alternative in the Badger-Two Medicine leasing EA provided decision makers and the public with no point for comparison of the impacts of proceeding with leasing versus taking no action. To the contrary, it allowed only for comparison of the impacts of leasing now versus leasing later. This was not a legitimate “no-action” alternative and for this reason too the Badger-Two Medicine leasing EA violated NEPA.

#### **IV. Issuance of the Badger-Two Medicine Leases Violated the ESA**

In addition to violating NEPA, issuance of the remaining Badger-Two Medicine leases violated the Endangered Species Act. Pursuant to ESA section 7(a)(2), all agencies must ensure that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of such species’ critical habitat. 16 U.S.C. § 1536(a)(2). To effectuate this mandate, the ESA and its implementing regulations require agencies whose action “may affect” an ESA-listed terrestrial species to consult with the U.S. Fish and Wildlife Service (“FWS”), which must prepare a biological opinion regarding the impacts of the proposed action. See 16 U.S.C. § 1536(a)(2), (b); 50 C.F.R. § 402.14(a), (g), (h). In the context of oil and gas leasing, the ESA requires, prior to lease issuance, “preparation of a comprehensive biological opinion as to the effects of the leases and of all post-leasing activities on threatened and endangered species.” Bob Marshall Alliance, 852 F.2d at 1228 (emphasis in original); see also Conner, 848 F.2d at 1453-54. In preparing such a biological opinion, FWS must “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

Issuance of the Badger-Two Medicine leases violated this ESA requirement. In an attempt to comply with the ESA, the Forest Service obtained a biological opinion from FWS regarding the impact that issuance of the Badger-Two Medicine leases would have on ESA-listed species, including the grizzly bear, but that biological opinion did not comprehensively evaluate the impact of post-leasing activities on threatened and endangered species. Rather, the biological opinion stated that “there is insufficient information to provide a comprehensive biological opinion on the entire agency action, i.e., the lease sale and all subsequent activities.” FWS, Biological Opinion from Wally Steucke, Area Manager, to Tom Coston, Regional Forester 3 (1981) (Attachment 7). Accordingly, the biological opinion was “restricted to the interim activity (lease sale),” which involved “no on-the-ground disturbance” and therefore could not possibly jeopardize imperiled wildlife. Id.

This limited approach to ESA consultation is identical to that rejected by the Ninth Circuit in Bob Marshall Alliance and its predecessor, Conner v. Burford. As the Ninth Circuit stated:

In light of the ESA requirement that the agencies use the best scientific and commercial data available to insure that protected species are not jeopardized, 16 U.S.C. § 1536(a)(2), the FWS cannot ignore available biological information or fail to develop projections of oil and gas activities which may indicate potential conflicts between development and the preservation of protected species. We hold that the FWS violated the ESA by failing to use



the best information available to prepare comprehensive biological opinions considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2).

Conner, 848 F.2d at 1454; accord Bob Marshall Alliance, 852 F.2d at 1228. Because the Forest Service, BLM, and FWS likewise failed to use the best information available to prepare a comprehensive biological opinion considering all stages of the agency action prior to issuance of the Badger-Two Medicine leases, issuance of those leases equally violated the ESA.

## **V. The Remaining Badger-Two Medicine Leases Should Be Canceled**

To remedy the violations of NEPA and the ESA discussed above, your agencies should move expeditiously to cancel the remaining Badger-Two Medicine leases. Such action is warranted, and necessary, for four reasons.

First, you have well-established authority to cancel federal oil and gas leases where, as here, the leases were issued in violation of NEPA and the ESA. Leases issued contrary to law are voidable at the Secretary of the Interior's discretion. See Boesche v. Udall, 373 U.S. 472, 481-83 (1963); Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980); see also Grynberg v. Kempthorne, 2008 WL 2445564 (D. Colo. June 16, 2008) (affirming BLM's cancellation of an oil and gas lease issued in violation of regulation); High Plains Petroleum Corp., 125 IBLA 24, 26 (1992) ("It is well settled that the Secretary has the authority to cancel any oil and gas lease issued contrary to law or regulation because of the inadvertence of his subordinates."). In the specific context of a lease issued in violation of NEPA, the IBLA has held that such a legal error renders the lease voidable. St. James Village, Inc., 154 IBLA 150, 158 (2001) (vacating BLM's decision to issue a geothermal lease for NEPA violation); Clayton W. Williams, Jr., 103 IBLA 192, 210 (1988) (lease issued in violation of NEPA is voidable). Indeed, Interior Department regulations explicitly state that "[l]eases shall be subject to cancellation if improperly issued," 43 C.F.R. § 3108.3(d), and that "[t]he United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit," id. § 1810.3(b). Although 43 C.F.R. § 3108.3(d) was promulgated in 1983—after issuance of the remaining Badger-Two Medicine leases—it merely codified "the Department of the Interior's existing practice in considering specific situations" involving improperly issued leases. Revision of the Regulations Covering Oil and Gas Leasing on Federal Lands, 48 Fed. Reg. 33,648, 33,655 (1983). The Interior Department has exercised this lease cancellation authority in similar circumstances. For example, the BLM in August 2009 canceled leases for three parcels within the White River National Forest in Colorado where issuance of the leases violated NEPA. See Letter from Karen Zurek, Chief, Fluid Minerals Adjudication, to Encana Oil & Gas (USA) Inc. (Aug. 12, 2009) (stating that "the leases are declared invalid ab initio, retroactively withdrawn from the date of issuance, August 30, 2004, and are hereby canceled") (Attachment 8).

Second, lease cancellation is not only authorized but essential to remedy the violations of federal environmental law in this case. In this regard, while the Ninth Circuit in Conner v.

Burford indicated that prohibiting surface-disturbing activity on oil and gas leases pending legal compliance might alone be sufficient to remedy NEPA and ESA violations in some circumstances, 848 F.2d at 1461, Bob Marshall Alliance established that a “more comprehensive remedy” is necessary where, as here, the NEPA violation included failure to meaningfully consider the “no-action” alternative, 804 F. Supp. at 1297 n.8. In Bob Marshall Alliance, the Ninth Circuit affirmed the district court’s finding of NEPA and ESA violations in all pertinent respects but, rather than imposing the same surface-disturbance prohibition that was ordered in Conner, the appellate court recognized that “[h]ere we face an additional factor not present in Conner, namely the agencies’ failure to consider the no action alternative.” 852 F.2d at 1230. Accordingly, the Ninth Circuit remanded the case to the Montana district court to clarify the appropriate remedy. On remand, the district court expressly rejected application of the Conner v. Burford remedy and held that only cancellation of the challenged leases could rectify the legal violations in that case:

Cancellation of the leases is, in this court’s opinion, the only remedy which will effectively foster NEPA’s mandate requiring informed and meaningful consideration of alternatives to leasing the Deep Creek area, including the no-leasing option. Cancellation of the leases is the only remedy which will effectively ensure the goal envisioned by NEPA, particularly 42 U.S.C. § 4332(2)(E) (1982), by guaranteeing, to the fullest extent possible, that the defendant agencies have studied, developed and described alternatives, including the no-action alternative. ... Consideration of alternatives is critical to the goals of NEPA. The court is of the opinion that full and meaningful consideration of the no-action alternative can be achieved only if all alternatives available with respect to utilization of the Deep Creek Further Planning Area are developed and studied on a clean slate. In this manner, the mandate of NEPA will remain effective.

Bob Marshall Alliance, 804 F. Supp. at 1297-98. Because the Badger-Two Medicine leases also were issued without meaningful consideration of the “no-action” alternative, lease cancellation is equally required here.

Notably, the BLM overlooked Bob Marshall Alliance’s important conclusion in commenting on the validity of the Badger-Two Medicine leases in the 1993 Record of Decision approving a drilling permit for Lease M-53323. In that document, the BLM admitted the close similarity of the leasing process undertaken for the Badger-Two Medicine region and the leasing process held unlawful in Conner v. Burford, but concluded that, even if Conner were applicable, “that holding would not invalidate the leases but would rather require full compliance with NEPA and ESA prior to any surface-disturbing activities.” BLM, Fina Oil and Chem. Co. Exploratory Oil/Gas Well Fed. S. Glacier No. 1-26, Record of Decision 18 (1993) (Attachment 9). In so stating, the BLM simply ignored Bob Marshall Alliance, which held that “Conner v. Burford is distinguishable” where the leasing agencies failed to consider the no-action alternative and that, in such circumstances, the “more comprehensive remedy” of lease cancellation is necessary. 804 F. Supp. at 1297 n.8. The Bob Marshall Alliance holding is dispositive here.

Third, cancellation of the Badger-Two Medicine leases is essential to conserve the acknowledged natural, recreational, cultural, and spiritual resources of the Badger-Two Medicine region. The pending dispute over drilling on Lease M-53323 vividly illustrates that the remnant Badger-Two Medicine leases constitute a persistent threat to the integrity of the extraordinary values that exist within this region—values that have driven decades of conservation measures aimed at protecting this region from the very types of environmentally harmful development activities that are threatened by the remaining leases. For example, the Forest Service recently closed the great bulk of the Badger-Two Medicine region to motorized access to conserve the region’s natural, recreational, and cultural resources, but the plan for exploratory drilling on Lease M-53323 would require 4.5 miles of new motorized road construction across public lands in this sensitive region. Similarly, the BLM in 2005 terminated work on an environmental analysis of oil and gas drilling in the Blackleaf area, located south of the Badger-Two Medicine region on Montana’s Rocky Mountain Front, in recognition of that area’s similar wildlife and recreational values, but now the development proposal for Lease M-53323 threatens to bring the impacts of oil and gas drilling to a landscape that combines equivalent wildlife and recreational values with cultural and spiritual resources of national significance. These recent agency conservation measures are representative of a much broader federal campaign to prioritize conservation of natural resources within the larger Crown of the Continent ecosystem. See Summary of Recent DOI Efforts to Conserve the Crown of the Continent Region (Attachment 10). Oil and gas development pursuant to the remaining Badger-Two Medicine leases is fundamentally inconsistent with this federal conservation campaign and, indeed, would undo a significant part of the conservation work that your agencies have accomplished to date in this region.

Fourth, and finally, there is no other apparent alternative for resolving the oil and gas development threat in the Badger-Two Medicine region. Even if the federal defendants prevail in the ongoing legal dispute over drilling on Lease M-53323, such a victory would not represent a permanent resolution of the oil and gas development threat, as the Badger-Two Medicine leases would remain in place and the holders of Lease M-53323 and others in the region could continue to assert development rights and advance development proposals. Such proposals would, in turn, necessitate expenditure of federal resources to analyze drilling plans that lack a legitimate legal basis. Given that the remaining Badger-Two Medicine leaseholders have steadfastly declined to voluntarily retire their leases, cancellation of the remaining leases represents the only opportunity to permanently resolve this development threat. Such cancellation is both warranted and equitable given that the process of issuing the Badger-Two Medicine leases suffered from obvious legal defects under well-established authority and the leaseholders have had notice of these legal defects for many years.

In conclusion, I urge your agencies to move expeditiously to conserve the irreplaceable natural resources of the Badger-Two Medicine region by canceling the remaining oil and gas leases in that area. Cancellation of these leases is appropriate to safeguard an area of immense natural, recreational, cultural, and spiritual value, as described above.

Please advise me of your decision regarding this matter as soon as possible so that I can determine what, if any, further actions may be required to ensure adequate protection for this national treasure.

Sincerely yours,

Timothy J. Preso