IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 13-993-RJL
	)	
S.M.R. JEWELL, Secretary	)	
U. S. Department of the Interior, *et al.*,	)	
	)	
Defendants.	)	

RESPONSE TO COURT ORDER

By Memorandum Order dated October 8, 2015, the Court ordered defendants to file "a memorandum that sets forth their decisions, and the factual and legal bases therefore, regarding: (1) whether to initiate the process for cancellation of the lease; (2) whether to continue the Section 106 process for lifting suspension of the lease; (3) if so, whether any additional NEPA compliance is necessary before lifting the suspension; and (4) a proposed accelerated schedule that sets forth the tasks remaining to be completed - either under the process for cancellation, or under NEPA before lifting the suspension- and the rationales for their necessity." The Court further ordered that after Plaintiff had an opportunity to respond, "[t]he Court shall either approve or reject the defendants' schedule or order such further adjustments as appropriate."

To comply with that Order, this memorandum sets forth defendants' decision to initiate the process for cancellation of Lease No. MTM53323 ("Lease"). The factual and legal bases for the decision, as well as a schedule for implementing the decision, follow.

I. Proposed Accelerated Schedule

The Department of the Interior ("DOI") is prepared to cancel the Lease as early as December 11, 2015, or as soon thereafter as the Court approves the proposed schedule.

II. Legal and Factual Basis for Initiating Cancellation

Because the Bureau of Land Management ("BLM") has not yet made a final cancellation decision, the specific bases for its expected decision are still being evaluated and finalized. Nevertheless, at this time we can explain the general authority of the BLM to cancel the Lease, or any similarly situated lease, and the initial findings that indicate cancellation is warranted. In addition, in our previous filing we indicated that cancellation would be accompanied by an environmental assessment ("EA") under the National Environmental Policy Act ("NEPA") that would take many months to complete. Upon further review, we believe an EA is not legally required so that a cancellation decision may be made as soon as December 11, 2015. Each of these issues is discussed below.

The Secretary of the Interior has inherent authority, under her general managerial power over public lands, to cancel leases issued in violation of a statute or regulation and that authority is not superseded by the Mineral Leasing Act ("MLA"). *Boesche v. Udall*, 373 U.S. 472 (1963) (MLA leaves unaffected Secretary's traditional administrative authority to cancel a lease on the basis of pre-lease factors). That authority is reflected in the implementing regulations. 43 C.F.R. § 3108.3(d) ("Leases shall be subject to cancellation if improperly issued."). Under this inherent and regulatory authority, the Department may cancel leases if they were issued in violation of NEPA,[1] the National Historic Preservation Act ("NHPA"),[2] or other laws. *See, e.g., Clayton W. Williams, Jr. (Williams)*, 103 IBLA 192, 95 I.D. 102 (1988) (lease voidable if NEPA requirements not fully met prior to lease issuance).

[1] 42 USC 4321, et seq.
[2] 54 USC 300101, et seq.

Improperly issued leases can be void or voidable. *Id.* A lease is void, and thus, a "legal nullity," when it pertains to lands that were not legally available for leasing at the time the lease was issued. *Id.* at 202-03. In contrast, a lease is "voidable" when it was issued in violation of a procedural requirement, such as NEPA, which does not compel any particular decision. *Id.* at 209-10. In other words, a void lease is one that suffers from a substantive defect that BLM cannot cure, such as leasing lands not open to leasing. A voidable lease is one that suffers from a procedural defect that BLM has the discretion to correct with further action on its part.

Although the BLM has not completed its decision making processes, it has tentatively concluded the Lease was issued without properly complying with NEPA and the NHPA. For example, in this case the agencies authorized and issued the Lease without the benefit of an Environmental Impact Statement ("EIS") to inform its decision making. The 1981 EA leading to approval of the lease provided that a NEPA analysis of the effects of surface-disturbing activities, including compliance with the requirements of other statutes such as the NHPA, would be undertaken when surface-disturbing activities were proposed on a case-by-case basis. The Lease allows surface occupancy subject to applicable lease stipulations.

The reliance by the USFS and the BLM on such an EA for a leasing decision violated statutory requirements and was inconsistent with two contemporaneous judicial decisions addressing oil and gas leasing in Montana which held that BLM must prepare an EIS prior to issuing an oil and gas lease, unless the lease being sold contains a stipulation preventing all surface disturbing activities. *Conner v. Burford ("Conner")*, 848 F.2d 1441 (9th Cir. 1988); *Bob Marshall Alliance v. Hodel (Bob Marshall Alliance)*, 852 F. 2d 1223 (9th Cir. 1988). In these cases, the courts were concerned about the BLM making an irreversible commitment of resources (i.e., issuing an oil and gas lease) such that subsequent environmental analysis would

be meaningless because BLM lacked sufficient regulatory authority to react to its findings by imposing additional restrictions after the lease was issued. The courts found that the only exception was when there was a stipulation of no surface disturbance. At the time the leases were issued, the Court of Appeals for the D.C. Circuit had reached the same conclusion. *Sierra Club v. Peterson,* 717 F.2d 1409, 1415 (D.C. Cir. 1983) (holding that "if the [Forest Service] chooses not to retain authority to preclude all surface disturbing activities," an EIS must be prepared "when the leases are issued.").

BLM has thus tentatively concluded that the Lease, which was issued without the completion of an EIS, was issued in violation of NEPA. Rather than undertaking a full environmental analysis before issuing the leases, the agencies attempted to defer their analysis of impacts until after the leases had been issued and an irretrievable and irreversible commitment of resources had taken place. As explained above, the 1981 EA took the position that such analysis could occur after lease issuance. The *Conner* and *Bob Marshall Alliance* decisions, however, make explicitly clear that such a deferral is a violation of NEPA. The BLM is examining whether additional NEPA defects also occurred in issuing the Lease.

In addition, BLM has determined that U.S. Forest Service ("USFS") and BLM failed to fully consider the effects of oil and gas development on cultural resources, including religious values and activities, within the Badger-Two Medicine area prior to lease issuance. Although the NEPA analysis for the leasing action included some tribal consultation to comply with the American Indian Religious Freedom Act ("AIRFA"), because the leasing action did not immediately authorize surface disturbance, the agencies mistakenly delayed full compliance with NHPA and AIRFA. The USFS recognized that "[s]urface disturbing operations associated with oil and gas activities may have an impact on cultural resources," but determined that compliance

with the acts "will be required at the time soil disturbing activities are proposed." EA at 54. Prior to issuing leases the USFS failed to inventory the Lease parcel to locate and record cultural resources and guarantee access and preservation of religious sites. An agency's failure to engage in a reasonable and good faith effort to identify historic properties of religious and cultural significance is a violation of the NHPA. *See Pueblo of Sandia v. U.S.*, 50 F.3d 856 (10th Cir. 1995) (USFS' evaluation of the Las Huertas Canyon for inclusion in the National Register was not reasonable or in good faith).

Given the violations of law at the time of Lease issuance, the BLM has tentatively concluded that the Lease is voidable. Documented deficiencies in NEPA and NHPA compliance show that the Lease was issued prematurely. In this instance, the NHPA procedural defect has now been corrected by completing the consultation process. But that process led to the recommendation from the Advisory Council on Historic Preservation to revoke the Application for Permit to Drill, cancel the Lease, and ensure that future mineral development does not occur. The USFS concurred in that recommendation. In addition, since the time of lease issuance, Congress has permanently prohibited the issuance of new oil and gas leases in the Badger-Two Medicine area. Tax Relief and Health Care Act of 2006, P.L. 109-432, § 403. Considering these factors, among others, the BLM has concluded that proceeding with administrative lease cancellation under its inherent authority to manage public lands is the most appropriate course of action.[3]

[3] As noted throughout this discussion, no final decision has yet been made. Any challenge to the Department's authority or rationale for cancelling must await the issuance of the final agency action. *See, e.g., Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) ("District Court's authority to review the conduct of an administrative agency is limited to cases challenging 'final agency action.'"). Moreover, by making its decision, albeit not the one sought by Plaintiff, the Defendants will have fulfilled the Court's Order in this case to provide a "resolution of the decision whether to lift the suspension of plaintiff's lease." Order of July 27, 2015, at 5; *see Norton v. SUWA*, 542 U.S. 55, 64 (2004) (clarifying that Section 706(1) "empowers a court only to compel

III. Neither an EIS nor EA is required to be prepared for lease cancellation under the unique facts of this case.

In the schedule earlier proposed to this Court, the BLM anticipated preparing an EA as part of its decision-making process for lease cancellation. While the preparation of a NEPA analysis is often a valuable aid to decision-making, even when it is not required (as contemplated by CEQ regulations – 40 CFR 1501.3(b)), the BLM has determined that NEPA is not triggered by lease cancellation under the facts of this case, nor is it a necessary aid to decision-making here.

The Lease being cancelled has never been developed. The cancellation thus does not alter the environmental status quo and, in fact, would preserve what is currently an undeveloped and relatively remote place. There is a long line of case law holding that in circumstances such as this, where the agency action maintains the environmental status quo, NEPA's procedures simply do not apply. *See, e.g.*, *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979) (no EIS required when government leased pre-existing parking facility to management firm because there was no change in the status quo); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002) ("NEPA's procedures do not apply to agency actions that maintain the environmental status quo"); *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 680 (5th Cir. 1992) (FWS acquisition of conservation easement did not trigger NEPA because environmental status quo unchanged); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1344 (9th Cir. 1995) (FMHA transfer of title to a ranch did not trigger NEPA because no change in the environmental status quo); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-17

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an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act.") (internal quotation marks omitted).

(9th Cir. 1981) (NEPA does not apply when an agency financed the purchase of an airport already built).

Given this longstanding judicial interpretation of NEPA and the circumstances associated with the Lease, the BLM has determined that cancellation of the Lease does not trigger NEPA, and the schedule proposed above does not require any time for preparation of a NEPA analysis.

Dated: November 23, 2015

Respectfully submitted,
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