

**BEFORE U.S. DEPARTMENT OF THE INTERIOR  
SECRETARY OF THE INTERIOR**

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In re: Rulemaking Petition to Revise	)	
Procedure for Responding to Protests	)	
of Oil and Gas Leases for Competitive	)	November 9, 2010
Sale	)	

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**PETITION FOR RULEMAKING**

Pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), and Department of Interior regulations, 43 C.F.R. § 14.2, WildEarth Guardians hereby petitions the Secretary of Interior to exercise the authority vested in him by Reorganization Plan No. 3 of 1950 § 2 as amended, 5 U.S.C. App., the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1740, and the Mineral Leasing Act (“MLA”), 30 U.S.C. § 189, to revise regulations related to the procedures for responding to protests of competitive oil and gas leases. WildEarth Guardians specifically petitions the Secretary of Interior to revise 43 C.F.R. § 3120.1-3 to require authorized officers of the U.S. Bureau of Land Management (“BLM”) to suspend the offering of a competitive oil and gas lease parcel or parcels that are under appeal or protest for inclusion in a Notice of Competitive Lease Sale.

This petition is about establishing greater certainty with regards to the practice of leasing oil and gas resources in the United States. The issuance of an oil and gas lease conveys a right to develop, including the right to “use so much of the lease lands as is necessary to explore for, drill for, mine, extract, remove and dispose of” the leased oil and gas (*see* 43 C.F.R. § 3101.1-2). Our request comes as oil and gas industry lawsuits has challenged the BLM’s practice of failing to respond to protests or appeals of the sale of competitive oil and gas lease parcels within 60 days. Under the statutory requirements of the Mineral Leasing Act, industry argues that the BLM must issue a competitive oil and gas lease to the successful bidder within 60 days after a lease sale. *See* 30 U.S.C. § 226(b)(1)(A). Thus, industry has argued that the BLM is required to issue competitive oil and gas leases within 60 days after receiving a successful bid, regardless of whether a protest or appeal has been resolved.

The arguments advanced by the oil and gas industry are without merit. Nevertheless, we believe that this controversy can be avoided altogether if BLM would take steps to retain its full discretion and refrain from issuing oil and gas leases prior to holding competitive lease sales.

In light of industry’s lawsuit, it is in the public’s best interest to establish a consistent and mandatory response on the part of the BLM to ensure that oil and gas lease parcels that are subject to appeal or protest are not sold before issues related to their legal viability can be resolved.

## PETITIONER

WildEarth Guardians is a Santa Fe, New Mexico-based conservation group with offices in Denver and Phoenix. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild rivers, and wild places of the American West. WildEarth Guardians has been active in ensuring BLM oil and gas leasing decisions in the Rocky Mountain West protect wildlife, wild places, air quality, the climate, and other natural values.

## AUTHORITY

WildEarth Guardians petitions the Secretary of Interior pursuant to the APA. 5 U.S.C. § 551, *et seq.* The APA specifically requires that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). This requirement is echoed in Department of Interior regulations. *See* 43 C.F.R. § 14.2.

The Secretary of Interior has broad authority to undertake the requested rulemaking. Indeed, the Secretary is broadly empowered to “make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.” Reorganization Plan No. 3 of 1950 § 2 as amended, 5 U.S.C. App. Both FLPMA and the MLA expound on this authority with regards to the practice of leasing oil and gas and with regards to the management of oil and gas leases by the BLM. FLPMA provides that with respect to public lands, “The Secretary...shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands[.]” 43 U.S.C. § 1740. The MLA also provides that “[t]he Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purpose of this chapter[.]” 30 U.S.C. § 189.

The APA requires the Secretary to conclude the matter raised in this petition within a reasonable time. 5 U.S.C. § 555(b). Interior regulations further require that rulemaking petitions “be given prompt consideration[.]” 43 C.F.R. § 14.3. Petitioner requests the Secretary of Interior expedite resolution of this matter, especially given that the BLM is proposing additional oil and gas lease sales and, to this date, continues to fail to respond to protests of the offering of oil and gas lease parcels within 60 days of their sale. In light of mounting industry lawsuits, uncertainty, and in light of the need to restore meaning to the protest and appeal process, we request the Secretary respond to this rulemaking petition within 30 days.

## PETITIONED RULE REVISION

WildEarth Guardians requests the BLM make one revision to 43 C.F.R. § 3120.1-3. Below is the requested revision, with ~~strikeout text~~ indicating the deleted provisions and underline text indicating the added provision:

Sec. 3120.1-3 Protests and appeals.

No action pursuant to the regulations in this subpart shall be suspended under Sec. 4.21(a) of this title due to an appeal from a decision by the authorized officer to hold a lease sale. The authorized officer ~~must~~ ~~may~~ suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.

~~Only the Assistant Secretary for Land and Minerals Management may suspend a lease sale for good and just cause after reviewing the reason(s) for an appeal.~~

We would also be willing to agree to the addition of a deadline by which BLM would be required to respond to a protest or appeal. However, because we are unable to ascertain at this time a reasonable deadline, we feel it is more appropriate to simply require that the offering of protested or appealed lease parcels be suspended until a protest or appeal has been officially resolved.

## **REASONS FOR PETITIONED RULE REVISION**

There are a number of reasons for the petitioned revision to 43 C.F.R. § 3120.1-3, including:

### **I. The Revision Would Resolve Potential Conflict with Statute**

Industry has argued that BLM's delayed resolution of protests is at odds with the MLA. To the contrary, BLM's decision to decision to "think first, lease later" is consistent with both the MLA and NEPA.

However, regardless of what the MLA actually requires, questions have been raised about whether the BLM is obligated to issue oil and gas leases to successful bidders within 60 days of a lease sale. To resolve all questions regarding conflict with the MLA, the BLM should refrain from offering a lease parcel or parcels for sale unless and until protests have been resolved. Such an act is entirely consistent with the MLA. As the MLA states, BLM is only obligated to hold lease sales quarterly where there are "eligible lands" available. *See* 30 U.S.C. § 226(b)(1)(A). In the case of the requested rule revision, a parcel would not be eligible unless and until any protest regarding its proposed offering in a lease sale has been resolved.

### **II. The Revision Would Restore Certainty for Industry and Citizens**

The requested rule revision would provide certainty for the oil and gas industry and for citizens. BLM's current practice is to withhold the issuance of oil and gas leases to successful bidders until a protest has been resolved. This often means that successful bidders are not issued their oil and gas leases within 60 days following a lease sale. While this delay in resolving protests and issuing leases is allowed by the MLA, by resolving appeals prior to the sale of lease parcels, BLM will ensure that it can issue leases to successful bidders within 60 days.

### **III. The Revision Would Reinforce BLM's Recent Instruction Memorandum**

The requested rule revision would also reinforce BLM's recently issued Instruction Memorandum ("IM") on oil and gas leasing reform. *See* Instruction Memorandum No. 2010-117 (May 17, 2010). This IM set in place a requirement that lease protest periods begin 30 days prior to the date the lease sale notice is posted. According to the IM, this was to ensure that state and field offices were provided "at least 60 days to review protests before the oil and gas lease sale." IM 2010-117, Section III.H.

In other words, IM 2010-117 intended to ensure that BLM was provided sufficient time to resolve protests regarding the inclusion of a lease parcel or parcels in a competitive lease sale. Unfortunately, the IM does not require that protests or appeals be resolved by any date certain and the IM continues to condone the BLM's practice of offering for sale protested lease parcels. Indeed, Section III.H of IM 2010-117 states only that, "[w]hen possible, state offices should attempt to resolve protests before the sale of the protested parcels," and that, "Protests that are not resolved do not prevent bidding on protested parcels at the auction."

The requested rule revision will reinforce the language and intent of IM 2010-117 by providing regulatory incentive for BLM state offices to resolve protests of oil and gas lease parcels *prior* to a lease sale. However, the requested rule revision will also ensure that actions undertaken in furtherance of the goals of IM 2010-117 do not inappropriately undermine BLM authority. Overall, the requested rule revision will serve to meet the purpose of IM 2010-117, which is to ensure "orderly, effective, timely, and environmentally responsible leasing of oil and gas resources on Federal lands." IM 2010-117.

### **IV. The Revision may Benefit from the Addition of a Deadline**

Although WildEarth Guardians is cognizant of the fact that adding a firm deadline to 43 C.F.R. § 3120.1-3 could be beneficial, we believe that BLM should be given as much time as necessary to resolve protests. The critical need, first and foremost, is to ensure that irreversible commitments of resources, including irretrievable waivers of discretion, do not occur as protests are being resolved. However, if the Secretary believes that a deadline for the response to protests would be appropriate, WildEarth Guardians would not oppose the imposition of such a deadline.

### **V. Other Agencies Have Similar Stay Procedures**

We would finally note that other stay mechanisms exist in other agencies' appeal regulations. In particular, the U.S. Forest Service's appeal regulations provide for an automatic stay of a decision while an appeal is resolved, stating that implementation of a decision "may occur on, but not before, the 15<sup>th</sup> business day following the date of appeal disposition[.]" 36 C.F.R. § 215.9(b). Thus, the concept embodied by the requested rule revision is neither novel nor unreasonable.

## CONCLUSION

The requested rulemaking is a simple, straightforward, and equitable avenue for resolving any potential future conflict. By ensuring that oil and gas lease parcels are not sold unless and until any protests of such parcels, if adequately filed, are resolved, BLM will provide itself, as well as all other interested parties, including industry and citizens, with the certainty necessary to provide for the orderly, effective, timely, and environmentally responsible leasing of oil and gas resources.

Dated this 9<sup>th</sup> day of November 2010.

Respectfully submitted,

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