

BLM, STOP DITHERING OVER FEDERAL OIL AND GAS LEASES: WHY THE LEASES MUST BE ISSUED WITHIN 60 DAYS

David B. Hatch*

Over the past decade, the traditional method for leasing federal lands for onshore oil and gas exploration seems to have hit a wall. It has become a matter of practice for wildlife and environmental groups to protest nearly every parcel of land the Bureau of Land Management (BLM) submits to a federal oil and gas lease sale. These protests require a lot of time and effort by the BLM and its staff to review each claim in order to determine which, if any, have any merit. Despite the BLM's practice to carefully review and select lands through its resource management plans and environmental studies, these protests often cause the BLM to attach further stipulations to lands, postpone leasing the lands, or eliminate the lands entirely from the lease sale. What is most troubling is the BLM's recent practice to hold the leases, even after they have been purchased, in order to continue its review of the environmental protests. During this time, the lease payments are held in a sort of limbo where neither the federal government nor the successful bidder has access to the funds. The end result is massive delay in the development of oil and gas, affecting the productivity of oil and gas companies, the revenue of state and federal governments, the jobs in local communities, and diminished access to resources that are vital for our fuel and transportation needs.

The problem is that the BLM does not have any authority to hold these leases after they have been purchased at a lease sale. Federal law is clear that the BLM must issue a lease within 60 days following the successful bidder's payment.¹ The BLM is overstepping its authority when it does not issue a lease within 60 days of payment. While the BLM has discretion to lease federal lands *before* a lease sale, and should use that discretion when the lands will be negatively impacted by oil and gas development, the BLM does not have discretion to withhold or delay the issuance of a lease *after* the lease sale takes place.

Despite the clear requirement to issue purchased leases, the BLM is continuing in its practice of withholding many leases beyond the 60-day period, causing great frustration within the oil and gas industry. The BLM is currently holding thousands of oil and gas leases that have been purchased at lease sales but yet to be issued. As of May 2010, in Wyoming alone the BLM had issued only 51 out of 1,200 oil and gas leases sold at its eleven lease auctions since June 2008.²

* © 2011 David B. Hatch, J.D. candidate at S.J. Quinney College of Law, University of Utah, May 2012; Junior Staff Member, *Utah Environmental Law Review*, 2010–2011. The author would like to thank his family, especially his wife Irene, for their unwavering support throughout law school.

¹ See 30 U.S.C. § 226(b)(1)(A) (2005).

² Mead Gruver, *Backlog of Protested Wyo. Leases Persists at BLM*, CASPER STAR-TRIB., May 11, 2010, http://trib.com/news/state-and-regional/article_1760614c-99c6-57b4-980b-08b94a7b5351.html.

Some of these unissued leases have been paid for, yet withheld by the BLM for over six years.³ Environmental groups defend the protests, doubting the protests cause any delays in oil and gas development.⁴ Meanwhile, industry advocates claim oil and gas companies are giving up on developing federal lands and focusing on private and state lands.⁵ No matter the side of the argument, the heart of the issue is the practice of the BLM to act contrary to the clear mandate of the statute. Congress established a defined procedure for leasing federal lands for oil and gas, yet the BLM is acting contrary to that procedure, significantly affecting the development of oil and gas on federal lands.

Over the past few years, the number of unissued leases has risen dramatically, pushing more industry advocates into the courtroom to challenge the BLM's actions. This Note will argue why the courts should find the BLM is overstepping its authority. Section I will provide background on the importance of leasing federal lands for oil and gas. Section II will discuss the relative statutes and regulations. Section III will interpret *Impact Energy Resources, LLC v. Salazar*, where a federal court recently decided the secretary of the interior does not have the authority to withdraw oil and gas leases after they have been purchased at a federal lease sale.⁶ Section IV will predict *Western Energy Alliance v. Salazar*, a recently-filed lawsuit regarding this identical issue.⁷ Finally, Section V will argue the BLM is acting contrary to the clear meaning of the statute and recommend that the BLM issue all unissued oil and gas leases, subject to the 60-day requirement.

I. OIL AND GAS: THE FOUNDATION OF OUR ENERGY HISTORY

Despite the recent cultural phenomenon to push for a dramatic reformation from fossil fuel energy to renewable energy, it is important to remember what carried us to this point: oil, natural gas, and other carbon-based fuel sources. While the idea of renewable and sustainable energy sources seems promising, and is certainly a goal worth pursuing, the economics and infrastructure are not yet in place to make a complete transition. During the short-term and to some extent, the long-term, the United States and the rest of the world will continue to rely on oil and natural gas for both their energy and transportation needs.

³ *Protested Leases Pending*, BLM, http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands_and_minerals/oil_and_gas/miscellaneous_oil0.Par.19901.File.dat/Protested%20Leases%20Pending%20Web.pdf (last visited Mar. 31, 2011).

⁴ Gruver, *supra* note 2 (“The oil industry has enough leases in its pocket now to drill for decades. So the idea that somehow a scarcity of oil and gas leases is holding up energy production is laughable,” claimed the executive director of one environmental group).

⁵ *Id.* (“No wonder companies are taking their money and investing in other states that have private land, where they don’t have to deal with this bureaucracy and politics,” said the president of an industry association).

⁶ *Impact Energy Res., LLC v. Salazar*, Nos. 2:09-CV-435 & 2:09-CV-440, 2010 WL 3489544 (D. Utah Sept. 1, 2010).

⁷ *W. Energy Alliance v. Salazar*, No. 2:10-CV-226 (D. Wyo. filed Oct. 15, 2010).

Oil and natural gas have been playing a vital role in the global economy for over a century and continue to do so today. The oil and gas industry is particularly important to the United States economy, supporting more than nine million American jobs.⁸ The industry's total value-added economic contribution in 2007 was more than \$1 trillion, or 7.5 percent of the U.S. gross domestic product.⁹ Leasing federal lands and waters is also the second largest revenue source for the United States, behind taxes.¹⁰ Oil and natural gas currently supply more than 60 percent of the United States' total energy demands and over 99 percent of the United States' demands of automobile transportation.¹¹ As the United States is certainly looking to a future that is less dependent on foreign supplies, it is a step in the wrong direction for the BLM to severely delay the development of oil and gas on federal lands. Understanding this concept, the U.S. Department of Energy continues to promote the development of oil and gas by assuring reliable access to these resources through public statements.¹² One must ask what is more reliable than developing these resources on American soil?

In order to develop oil and gas resources in the United States, drilling on federal lands becomes an important part of the equation. In 2009, about one-half of the petroleum consumed by the United States was produced from domestic resources.¹³ Of the domestic production, only 11 percent of the United States' natural gas supply and only 5 percent of the oil supply was produced from federal lands and mineral estates.¹⁴ These numbers become more significant when one considers the size of the federal government's share of lands that could potentially produce oil or natural gas. Numerous oil and gas fields have been found in western

⁸ PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE U.S. ECONOMY: EMPLOYMENT, LABOR INCOME AND VALUE ADDED 1 (2009), available at http://www.api.org/Newsroom/upload/Industry_Economic_Contributions_Report.pdf.

⁹ *Id.* at 2.

¹⁰ DIANNE AUSTIN ET AL., DEP'T. OF THE INTERIOR, MINERALS MGMT. SERV., INTERIM REPORT ON THE HISTORY OF THE OFFSHORE OIL AND GAS INDUSTRY IN SOUTHERN LOUISIANA 30 (2004), available at <http://www.gomr.boemre.gov/homepg/regulate/enviro/studies/2004/2004-049.pdf>; see also DEP'T. OF THE INTERIOR, OFFICE OF THE INSPECTOR GEN., REPORT NO. CR-EV-BLM-0002-2009, EVALUATION OF THE BUREAU OF LAND MANAGEMENT'S OIL AND GAS LEASE AUCTION PROCESS (2009), available at <http://www.doi.gov/images/stories/reports/pdf/2009-I-0021.pdf> (finding the BLM received nearly \$1.2 billion in bonus bid revenue alone from the sale of over 14,000 onshore leases from 2004 to 2008, not including leases in Alaska).

¹¹ See PRICEWATERHOUSECOOPERS, *supra* note 8, at 1; see also *Oil*, DEPT OF ENERGY, <http://www.energy.gov/energysources/oil.htm> (last visited Mar. 31, 2011).

¹² *Oil and Gas Have 'Vital' Future Role: US Minister*, GOOGLE NEWS, <http://www.google.com/hostednews/afp/article/ALeqM5ikALqpVkoEtFvevpO2y0CGTsbhXw> (last visited Mar. 31, 2011).

¹³ *Frequently Asked Questions – Crude Oil*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/ask/crudeoil_faqs.asp (last visited Mar. 31, 2011).

¹⁴ *Oil and Gas*, BLM, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas.html (last updated Mar. 31, 2011).

states, many of which are owned in large portions by the federal government. The largest reserves of oil exist in Alaska, a state owned 62 percent by the federal government.¹⁵ Combining the federal government's ownership in all of the United States, the BLM manages approximately 700 million acres of mineral estate; however, only 2 percent of these lands are currently leased for oil and gas and much smaller percentage is producing oil or gas.¹⁶ Meanwhile, it is estimated that about 50 percent of the 700 million acres contain some amount of oil or natural gas.¹⁷

Despite the ever-growing needs of our community and growth in oil and gas development on private and state lands, the development on federal lands has begun to move backward. Over the past two decades, there has been a significant decline in leasing activity on federal lands. The total number of leases on federal lands in 1992 was 71,162, while in 2009 there were only 53,432 leases.¹⁸ Similarly, the BLM issued 3,990 new leases during 1992, while only issuing 2,072 new leases during 2009.¹⁹ During the same period of time, leasing and production on private and state lands have increased.²⁰ Two strong arguments for the decline in leasing on federal lands are: (i) the oil and gas industry is less motivated to pursue development on federal lands and thus nominates fewer lands to be leased and (ii) the BLM withdraws or defers many of the lease parcels that are properly noticed prior to being sold at a lease sale due to protests, even after the BLM selects these lands in accordance with its environmental studies and land use plans.²¹

¹⁵ *Alaska Crude Oil Provided Reserves, Reserves Changes, and Production*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/dnav/pet/pet_crd_pres_dcu_SAK_a.htm (last released on Dec. 30, 2010) (estimating Alaska oil reserves to be 3.5 billion barrels); BLM, PUBLIC LAND STATISTICS TBL. 1-3 (2000), available at http://www.blm.gov/public_land_statistics/pls00/pdf/part1-3.pdf (finding the percentage of ownership by the federal government additionally in the following oil-producing states: Nevada – 83%, Utah – 64%, Wyoming – 50%, California – 44%, Colorado – 37%, New Mexico – 34%).

¹⁶ *Facts about Federal Energy Leasing and Development*, BLM, http://www.blm.gov/wo/st/en/info/newsroom/Energy_Facts_07.html (last updated Feb. 2, 2011). The 700 million acres managed by the BLM are comprised of 245 million acres of federal lands and 455 million acres of non-federal lands where the surface and minerals were severed and the mineral interests were reserved by the federal government. *Id.*

¹⁷ *Leasing of Onshore Federal Oil and Gas Resources*, BLM, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/leasing_of_onshore.html (last updated Oct. 20, 2009).

¹⁸ *Facts about Federal Energy Leasing and Development*, *supra* note 16.

¹⁹ *Id.*

²⁰ *U.S. Crude Oil Supply and Disposition*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/dnav/pet/pet_sum_crdsnd_k_m.htm (last released on Mar. 30, 2011).

²¹ See, e.g., Letter from Larry Claypool, Deputy State Dir., Wyoming Bureau of Land Management, to Biodiversity Conservation Alliance et al., (Dec. 14, 2010) (reporting the BLM deferred 62 parcels out of 156 parcels offered for lease at the November 2, 2010 oil and gas lease sale in Wyoming).

The oil and gas industry has been known for its ups and downs. Similar to times in the past, Americans are living in a period of political instability where access to energy resources is becoming ever more insecure. While the United States looks to move towards renewable and sustainable energy resources, it must first, however, secure access to oil and gas—the resources that have been the foundation for our energy and economic needs for more than a century. In order to accomplish this task, the United States needs to increase its domestic production of oil and gas resources on federal lands.

Similarly, if the federal government is going to fulfill its goal of creating reliable access to oil and gas resources, it must consider reevaluating the method for leasing oil and gas on federal lands. The BLM should take a hard look at the relevant statutes and regulations and follow the procedure directed by Congress. In doing so, the BLM will see that it lacks the authority to hold an oil and gas lease, for any reason, longer than 60 days after payment by the successful bidder. The BLM must change its practice and issue the currently pending leases and all future leases, subject to federal laws and regulations.

II. RELEVANT STATUTES, PROCEDURE AND REGULATIONS FOR ONSHORE FEDERAL OIL AND GAS LEASING

The law governing the leasing of federal lands for oil and gas is found in two statutes: the Mineral Leasing Act of 1920 and the Federal Onshore Oil and Gas Leasing Reform Act of 1987, which amends the Mineral Leasing Act (collectively the MLA).²² These two statutes authorize the BLM to lease oil and gas underlying BLM, national forest, and other federal lands, as well as on private lands where the surface and minerals have been severed and the federal government has reserved the mineral rights.²³

Through the MLA, Congress directs the BLM that “[a]ll lands to be leased . . . shall be leased as provided in this paragraph to the highest responsible qualified bidder by competitive bidding”²⁴

The Secretary [of the Interior] shall accept the highest bid from a responsible qualified bidder, *without evaluation* of the lands proposed for lease. Leases *shall be issued within 60 days* following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year.²⁵

The statute does not provide any exception by which the BLM is not directed to issue a lease after it has been purchased, so long as the leasing and bidding

²² Mineral Leasing Act of 1920, 30 U.S.C. § 181, *et seq.* (2006); Federal Onshore Oil and Gas Leasing Reform Act of 1987, 30 U.S.C. § 195, *et seq.* (2006).

²³ *Id.*

²⁴ *Id.*

²⁵ 30 U.S.C. §226(b)(1)(A) (2006) (emphasis added).

complied with the statutory requirements. Rather, the statute expressly states that the purchased leases should be issued without evaluation. Therefore, the MLA imposes a non-discretionary duty on the BLM to issue oil and gas leases within 60 days of final payment by the successful bidder, regardless of any pending environmental protest. In addition to the MLA, there are other laws and BLM rules which outline the procedure by which the BLM selects federal lands to be leased for oil and gas and how the BLM lease sale is to be operated.²⁶

A. Selecting Lands To Be Leased for Oil and Gas

Before a federal lease sale, the BLM is responsible for determining which federal lands are available for oil and gas leasing and selecting specific parcels from these lands to be sold through the land use planning system set forth under the Federal Land Policy Management Act (FLPMA).²⁷ FLPMA requires the BLM to manage BLM lands and other federal lands under the principles of multiple use and sustained yield, in accordance with their applicable land use plans.²⁸ In order to meet this mandate, the BLM conducts research and environmental studies to determine which resources are available, how those resources affect public use, and how development affects land, wildlife, and other resources. The BLM must weigh competing interests such as recreation, conservation, grazing, and other resource development like coal to meet its goal of multiple use and sustained yield. “Mineral exploration and production,” including oil and gas development, is expressly determined by FLPMA as one of the “principle or major uses” of federal lands.²⁹ As a major use, FLPMA further requires the U.S. Secretary of the Interior (the Secretary) to develop and maintain land use plans to govern these interests, including oil and gas, and their potential development on federal lands.³⁰ The BLM, under the direction of the secretary, in turn creates these land use plans commonly referred to as resource management plans (RMPs) to establish guidance, direction, objectives, policies, and management actions for federal lands administered within particular areas.³¹ Each state BLM office is typically responsible for managing its own field offices, which in turn are responsible for creating their own RMPs for their respective areas. This localized management plan allows the BLM to make these important evaluations about public, competing use, and environmental concerns “on the ground.”

The scope of an RMP is “to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public,

²⁶ See generally 43 U.S.C. §1701 (2006).

²⁷ *Id.*

²⁸ 43 U.S.C. §§ 1701(a)(7), (8), (12); see also 43 U.S.C. §§ 1610.5-3, 1732(a), (b) (2006).

²⁹ 43 U.S.C. §1702(1) (2006).

³⁰ 43 U.S.C. §1712(a) (2006).

³¹ *Id.*; *New Planning Initiatives*, BLM, <http://www.blm.gov/ut/st/en/prog/planning.html> (last updated July 14, 2010).

state, and local governments.”³² After an RMP is approved, the BLM uses the RMP in making all future management decisions, including whether to lease a parcel of land.³³ Creating an RMP is an important process in the procedure for leasing oil and gas for various parties: the BLM has the opportunity to review potential impacts on the land or wildlife; the public has the opportunity to participate in the management of the lands through public comment; and the oil and gas industry can rely on a steady set of procedures that allows federal lands to be potentially leased for oil and gas development.

Additionally, creating an RMP is a significant step in the procedure for oil and gas leasing on federal lands because, when approved, it constitutes a major federal action, significantly affecting the quality of the human environment.³⁴ This requires the BLM to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA)³⁵ because RMPs, and their accompanying EIS, are considered a major federal action. They provide the means by which a party can challenge the BLM’s actions.³⁶ NEPA provides an opportunity for an advocacy group of a competing use, such as an environmental group, to be involved in both the planning process and to challenge an EIS prepared under the statute.³⁷ This provides an ideal opportunity to determine whether lands will be negatively impacted by oil and gas development and address any environmental concerns before a parcel is noticed to be leased at an oil and gas lease sale. At this stage of the planning and review process, if the BLM finds an environmental challenge with merit, it still has discretion not to close the lands to leasing, or implement mitigation measures, as outlined below.

When studying lands for potential oil and gas development, the BLM studies a particular area taking environmental concerns and other factors into consideration. The RMP designates which federal lands are open to oil and gas leasing and which are closed. Depending on the environmental concerns and the nature of the lands, the BLM can create in an RMP stipulations or mitigation measures to reduce or even eliminate the concerns. These measures may either attach to potential leases before a lease sale, postpone a lease for further review, or be attached later as conditions of approval for subsequent exploration or development projects—such as when a lessee files for an application to drill. Similarly to the scope of RMPs, the primary purpose for implementing stipulations and mitigation measures is to maintain various other resources that may be found

³² Objective, 43 C.F.R. § 1601.0-2 (2011).

³³ 43 U.S.C. § 1712(a) (2006).

³⁴ *NEPA Frequently Asked Questions*, BLM, http://www.blm.gov/nm/st/en/prog/planning/nepa_faqs.html (last updated Jan. 13, 2011) [hereinafter *NEPA Frequently Asked Questions*].

³⁵ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

³⁶ *NEPA Frequently Asked Questions*, *supra* note 33.

³⁷ *Id.*

on the federal lands such as wildlife, cultural resources, or special environmental features.³⁸

The final step of the land use planning system under FLPMA is for the BLM to determine which federal lands are available for oil and gas leasing.³⁹ Through its RMPs, the BLM separates federal lands into one of four leasing categories: (1) open with standard stipulations, (2) open with special terms or conditions, (3) open but no surface occupancy allowed, or (4) closed to leasing.⁴⁰ Through this phase in the leasing process, the BLM has merely categorized federal lands and designated some as open for leasing. Because this is only a categorization, the BLM maintains its discretion to revise or amend its RMP in order to change the status of federal lands from open for leasing to closed for leasing and vice versa.

In addition to the BLM, the secretary also has the authority to modify the status of the lands or revoke lands from potential lease in order to further consider whether or not the lands should be open to leasing.⁴¹ The secretary may withdraw lands previously designated as open for leasing, although he must hold a public hearing to discuss the withdrawal and publish a notice in the Federal Register describing the withdrawal and the extent of the lands that are being segregated.⁴² If there is an emergency, the secretary may forego the Federal Register publication requirement, but the withdrawal must be in an extraordinary situation where the lands must be withdrawn otherwise their values would be lost.⁴³ In the event of an emergency withdrawal, the secretary must immediately file notice of the emergency withdrawal with the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.⁴⁴

B. The Federal Oil and Gas Lease Sale

In anticipation of a federal lease sale, the BLM selects parcels of lands from those categorized as open for leasing. Oil and gas companies typically review the

³⁸ There are many common stipulations attached to lease, such as specific seasonal time-frames for drilling operations or prohibiting the occupancy of the surface altogether. The lessee must adhere to these stipulations, such as by only conducting drilling operations during a specific time of the year or directionally drilling from adjacent lands, respectively, for the examples above.

³⁹ 43 U.S.C. § 1712(a) (2006).

⁴⁰ *Utah Oil and Gas Leasing Qs and As*, BLM, http://www.blm.gov/ut/st/en/prog/energy/oil_and_gas/oil_and_gas_lease/oil_and_gas_faqs.html (last updated Mar. 21, 2011).

⁴¹ 43 U.S.C. § 1714(a) (2006) (“the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section”).

⁴² 43 U.S.C. § 1714(b)(1), (f) (2006). Special considerations and procedures apply if the lands to be withdrawn are over 5,000 acres; *see generally id.* at (c).

⁴³ 43 U.S.C. § 1715(e) (2006).

⁴⁴ *Id.*

lands that are open for leasing and nominate specific parcels they desire to lease.⁴⁵ All parcels receiving nominations must be included in the lease sale unless the lands are withdrawn by the BLM.⁴⁶

The MLA directs the BLM to hold oil and gas lease sales in “each state where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary.”⁴⁷ The BLM must post a notice of competitive lease sale at least forty-five days prior to the sale, detailing the time, place, and location of the sale.⁴⁸ This sale notice must identify all parcels to be offered by the BLM at the lease sale and include any lease stipulations and notices that may apply to any lease parcel.⁴⁹

The BLM’s leasing regulations provide that prior to holding a lease sale, the authorized BLM office may “suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.”⁵⁰ However, if a parcel is not suspended by the authorized officer, BLM regulations provide that the parcel “*shall* be offered by oral bidding” and that a “winning bid shall be the highest oral bid by a qualified bidder, equal to or exceeding the national minimum acceptable bid.”⁵¹ This is the final opportunity for the BLM to withdraw a parcel of land. Once the lands have been noticed for competitive lease sale, and they have not been withdrawn by the BLM, they are deemed “to be leased” at the lease sale and the BLM no longer has any discretion whether or not to issue a lease. Thereafter, the statute does not provide any other exception by which either the BLM or the secretary may revoke a lease parcel. Therefore, the secretary’s discretion to withdraw lands from oil and gas leasing ends when notice is given that the parcels are to be offered at a competitive lease sale. Similarly, the BLM’s discretion to revoke a lease parcel ends if the parcel has been noticed, the BLM has not taken action to withdraw the parcel prior to the lease sale, and the lands are deemed “to be leased.”⁵²

⁴⁵ 43 C.F.R. § 3120.3-1 (2010) (nominations must be completed by application, include information about the nominator, be filed in the appropriate BLM office, and be accompanied by a remittance equal to the minimal acceptable bid, the first year’s rental per acre, and the appropriate administrative fee for each parcel nominated); *see also id.* at § 3120.3-4 (nominations may only be withdrawn by the BLM, in which case all payments are refunded to the nominator); *id.* at § 3120.3-7 (if the nominator is not the successful bidder at the lease sale, the minimum bid, first year’s rental, and administrative fees are returned).

⁴⁶ 43 U.S.C. § 1714(e) (2006).

⁴⁷ 30 U.S.C. § 226(b)(1)(A) (2006); *see generally* 43 C.F.R. § 3120.3-1 (2010) (FLPMA mandates that the BLM must hold all onshore oil and gas lease sales by oral competitive bidding). Lease sales are held both for single states as well as for multiple states depending on the number of the parcels to be sold and the resources of each BLM field office.

⁴⁸ 43 C.F.R. § 3120.4 (2010).

⁴⁹ *Id.*

⁵⁰ 43 C.F.R. § 3120.1-3 (2010).

⁵¹ 43 C.F.R. § 3120.5-1(a), (b) (2010); *see also* 43 C.F.R. § 3120.5-2 (2010) (the minimum acceptable bid is currently \$2.00 per acre).

⁵² *Id.*; 43 U.S.C. § 1714(a) (2006).

In order to bid on a lease parcel, a bidder must sign a bid form, agree to comply with the federal regulations and acknowledge that any bid made on a lease “constitutes a binding lease offer. . . .”⁵³ If a minimum bid is received on a lease parcel, the BLM will declare the highest bidder the successful bidder who must pay the BLM the minimum bonus bid of \$2.00 per acre, the first year’s lease rentals, and processing and administrative fees on the day of the sale.⁵⁴ The successful bidder then has ten working days from the day of the sale to pay the remaining lease bonus payment to the BLM.⁵⁵ By applying for the right to bid and bidding the highest amount for a lease parcel, the successful bidder is contractually obligated to his bid.⁵⁶ Similar to the obligation of the successful bidder to pay for the lease, the BLM should be bound to issue the lease subject to requirements of the statute. The MLA clearly directs the BLM to issue a lease within 60 days following receipt of the remaining bonus payment by the successful bidder.⁵⁷

C. *The BLM’s Practice of Non-Compliance*

The BLM has on several occasions addressed the 60-day requirement under the MLA. On each occasion, the BLM has recognized it has an obligation under the statute, but has ignored its duty to act within the law. First, the BLM has acknowledged through a statement on BLM rules and regulations dating as far back as 1988. When asked if the BLM wanted to include the requirement in its internal rules and regulations, the secretary replied:

Several comments on § 3120.5-3(b) of the proposed rulemaking pointed out that the Reform Act requires that competitive leases be issued within 60 days from the date of the sale. The comments requested that this requirement be specified in the final rulemaking. The recommendation is not adopted. *The [BLM] is committed to adhere to the time frame*

⁵³ 43 C.F.R. at § 3120.5-3 (2010). For the current BLM Enhanced Bidder Registration Form, see *Enhanced Bidder Registration Form*, BLM, http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2010.Par.54.317.File.dat/IM2010-099_att2.pdf (last visited Apr. 12, 2011).

⁵⁴ 43 C.F.R. §§ 3120.5-2, 3000.12 (providing a table of processing and administration fees applicable to a competitive lease sale); *but see* 43 C.F.R. § 3120.3-1 (2010) (the successful bidder may not be required to pay the minimum bonus bid, the first year’s lease rentals, and processing and administration fees if the bidder was also the nominator of the lease parcel).

⁵⁵ 43 C.F.R. § 3120.5-2 (2010).

⁵⁶ 43 C.F.R. § 3120.5-3 (2010) (“A bid shall not be withdrawn and shall constitute a legally binding commitment [by the successful bidder] to execute the lease bid form and accept a lease, including the obligation to pay the bonus bid, first year’s rental, and administrative fee”).

⁵⁷ *Id.*; 30 U.S.C. § 226(b)(1)(A) (2006).

*required by the Reform Act, and no purpose is served by repeating the requirement in the final rulemaking.*⁵⁸

Second, the BLM's procedural handbook, directs its employees and agents to act regardless of the clear language of the statute:

If a protest is received on the holding of a lease sale or the inclusion of a specific parcel in the sale, while the merits of the protest are being considered, the State Director may either elect to hold the sale or suspend the entire lease sale (or offering of the parcel) If a bid is received on any parcel involved in the protest, *the protest must be resolved before issuance of the involved lease.*⁵⁹

Third, the BLM has recently issued a notice of competitive lease sale with language showing its practice to act in contrast to the 60-day requirement:

If I am the high bidder at the sale for a protested parcel, when will BLM issue my lease?

We will make every effort to decide the protest within 60 days after the sale.

We will issue no lease for a protested parcel until the State Director makes a decision on the protest.

If the State Director denies the protest, we will issue your lease concurrently with that decision.⁶⁰

Fourth, the Secretary, through his recent reform of onshore oil and gas leasing, has acknowledged that the issuance of protested leases may be held up for pending environmental challenges.⁶¹

The BLM has repeatedly recognized its obligation under the MLA to issue all leases within 60 days following final payment by the successful bidder, yet the BLM continues to ignore the plain language of the statute and chooses to adopt a practice of withholding purchased leases while reviewing environmental

⁵⁸ General Oil and Gas Leasing, 53 Fed. Reg. 22814, 22831 (June 17, 1988) (emphasis added).

⁵⁹ BLM, BLM Handbook 3120-1 – COMPETITIVE LEASES 39 (emphasis added).

⁶⁰ BLM, WYO. STATE OFFICE, NOTICE OF COMPETITIVE OIL AND GAS LEASE SALE ON NOVEMBER 2, 2010, at ix (2010), available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/energy/og/leasing/2010.Par.82240.File.dat/11list.pdf>.

⁶¹ Instruction Memorandum from BLM, No. 2010-117 Oil and Gas Planning, and National Environmental Policy act (NEPA), Section III(I) (2010), available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-117.html.

challenges. The BLM's intention to act outside of the clearly-expressed federal statute has spurred two recent lawsuits: *Impact Energy Resources, LLC v. Salazar*⁶² and *Western Energy Alliance v. Salazar*.⁶³

III. THE STATUTES AND REGULATIONS AS APPLIED IN *IMPACT ENERGY RESOURCES, LLC v. SALAZAR*

A. *Factual Background*

On November 4, 2008, after having complied with the MLA and FLPMA to select federal lands to be leased for oil and gas development, the BLM issued a notice offering 241 parcels of federal lands to be leased at a competitive sale on December 19, 2008 in Salt Lake City, Utah.⁶⁴ The 241 lease parcels were selected by the BLM from lands nominated by members of the oil and gas industry.⁶⁵ Each of the lease parcels were designated as open to oil and gas, based upon determinations by the BLM's Moab, Vernal, and Price field offices within Utah.⁶⁶ In selecting these specific parcels for lease, each BLM office adhered to its corresponding RMP and determined each parcel had been adequately considered by an EIS in compliance with NEPA.⁶⁷

The lease sale notice, however, was the first time the National Park Service (the NPS) was notified that some of the parcels would be in a lease sale.⁶⁸ The NPS was concerned about the short time frame to review the prospective lease parcels

⁶² *Impact Energy Res., LLC v. Salazar*, Nos. 2:09-CV-435 & 2:09-CV-440, 2010 WL 3489544 (D. Utah Sept. 1, 2010).

⁶³ Complaint, *W. Energy Alliance v. Salazar*, No: 2:10-CV-226 (D. Wyo. Oct. 15, 2010).

⁶⁴ *Impact Energy Res.*, 2010 WL 3489544 at *1.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at *2. (explaining that it is customary for the BLM to consult with other federal agencies that manage federal lands, such as the National Park Service, in selecting lands to be leased for mineral development). This particular lease sale sparked a controversy that many of the lease parcels were located on, or at the footsteps of, national parks and national monuments. *See generally* U.S. DEP'T OF THE INTERIOR, REPORT NO. CR-EV-BLM-0002-2009, EVALUATION OF BUREAU OF LAND MANAGEMENT'S OIL AND GAS LEASE AUCTION PROCESS (2009), *available at* <http://www.doi.gov/images/stories/reports/pdf/2009-I-0021.pdf>. The circumstances of the lease sale sparked an evaluation by the U.S. Inspector General for the DOI to review the BLM's oil and gas lease auction process when the bidding process was disrupted by an individual without the intent to pay for any of the leases. The individual who won fourteen lease parcels totaling \$1.8 million in lease revenue was later found guilty in federal court in the District of Utah for violating the Federal Onshore Oil and Gas Leasing Reform Act of 1987 by knowingly interfering with the competitive bidding process. *See The DeChristopher Case from Auction to Conviction*, SALT LAKE TRIB., Mar. 3, 2011, <http://www.sltrib.com/sltrib/home/51359668-76/dechristopher-auction-2009-benson.html.csp>.

before the sale.⁶⁹ The lease sale notice also provided for a formal process for the public to protest the inclusion of specific parcels in the lease sale, which, in turn, resulted in a high volume of protests.⁷⁰ After consulting with the NPS and considering the number of protests, the BLM reduced the number of lease parcels for sale from 241 to 132.⁷¹ Many of the protestors were environmental advocacy groups including Southern Utah Wilderness Alliance (SUWA).

On December 17, 2008, two days prior to the scheduled lease sale, SUWA filed a lawsuit against the BLM and several of its directors in federal court in the District of Columbia challenging the BLM's decision to offer leases on 77 of the 132 parcels.⁷² Notwithstanding the pending litigation, the BLM went forward with the lease sale on December 19, 2008. However, the BLM agreed to delay issuing the 77 disputed leases, if they were purchased, for up to 30 days following the lease sale. This allowed the BLM an appropriate time-frame to comply with its 60-day requirement to issue a lease following payment by the successful bidder as mandated under the MLA.⁷³ On December 19, 2010, the lease sale took place as planned, and 116 of the 132 available lease parcels received bids and the BLM named successful bidders for each of those 116 parcels, which included all of the 77 disputed leases.⁷⁴

The plaintiffs in the case were the successful bidders for nine of the 77 disputed leases.⁷⁵ The record showed that before and during the lease sale, the BLM complied with all applicable statutes, regulations, rules, procedures, guidelines, and its corresponding RMPs.⁷⁶ Similarly, each of the plaintiffs satisfied their statutory requirements by both bidding and completing final payment for each of the lease parcels as directed under the MLA.⁷⁷ As a result, the BLM accepted each of the plaintiffs as successful bidders for their respective lease parcels by: (1)

⁶⁹ *Impact Energy Res.*, 2010 WL 3489544 at *2.

⁷⁰ *Id.*; *Notice of Competitive Lease Sale Oil and Gas*, BUREAU OF LAND MGMT. (Nov. 4, 2008), http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands_and_minerals/oil_and_gas/december_2008.Par.23668.File.dat/Dec%202008%20Notice%20for%20Sale.rtf (directing the BLM not to issue a lease to the highest qualified bidder until the state director resolves the protests, but if the state director upholds a protest, the BLM must impose additional protective stipulations or withdraw the parcel from the lease sale); *see also generally* 43 C.F.R. § 3120.1-3 (directing the BLM not to issue a lease to the highest qualified bidder until the state director resolves the protests, but if the state director upholds a protest, the BLM must impose additional protective stipulations or withdraw the parcel from the lease sale).

⁷¹ *Impact Energy Res.*, 2010 WL 3489544, at *2.

⁷² *S. Utah Wilderness Alliance v. Allred*, No. 08-2187 (RMU), 2009 WL 765882, at *1 (D.D.C. Jan. 17, 2009).

⁷³ *Impact Energy Res.*, 2010 WL 3489544, at *2.

⁷⁴ *Id.*

⁷⁵ Plaintiff's Opening Brief at 7, *Impact Energy Res., v. Salazar*, 2010 WL 3489544 (D. Utah Sept. 1, 2010) (Nos. 2:09-CV-435 and 2:09-CV-440) [hereinafter *Plaintiff's Brief*].

⁷⁶ *Id.*; *see also Impact Energy Res.*, 2010 WL 3489544, at *2.

⁷⁷ *Plaintiff's Brief*, *supra* note 75, at 8.

accepting payment from the plaintiffs for all bonuses, advanced rentals, and administrative fees; (2) naming the plaintiffs as successful bidders on the BLM website; (3) cashing all of the plaintiffs' payment checks for the nine disputed leases; and (4) mailing receipts to the plaintiffs acknowledging that all payments had been accepted and that their high bids were acceptable.⁷⁸

On December 22, 2008, three days after the lease sale, SUWA sought a temporary restraining order (TRO) and preliminary injunction in its pending case to prevent the BLM from issuing the 77 disputed leases.⁷⁹ The D.C. court subsequently issued the TRO, enjoining the BLM from issuing the disputed leases until further notice from the court.⁸⁰

The disputed leases remained unissued, well-past the 30-day period the BLM originally agreed to wait before issuing the leases. On February 4, 2009, the new Secretary of the Interior, Ken Salazar (appointed under the newly inaugurated Obama administration), announced that he had directed the BLM to not issue the 77 disputed lease parcels.⁸¹ The secretary stated his decision not to issue the leases was based on the TRO and the secretary's own view that the environmental review process for the lease sale was not adequate.⁸² Two days later, on February 6, 2009, the secretary formally withdrew the disputed leases by sending an intra-agency memorandum directing the Utah BLM State Director to withdraw the leases and refund the lease payments to the respective successful bidders.⁸³ On February 12, 2009, the Utah BLM State Director sent a letter to each of the successful bidders for the 77 disputed leases, including the plaintiffs, notifying them that the lease parcels they had purchased were being withdrawn and that they would receive a full refund of their lease payments.⁸⁴

⁷⁸ *Id.*

⁷⁹ *Impact Energy Res.*, 2010 WL 3489544, at *3; *see also* *S. Utah Wilderness Alliance v. Allred*, No. 08-2187, 2009 WL 765882, at *3 (D.D.C. Jan. 17, 2009).

⁸⁰ *Impact Energy Res.*, 2010 WL 3489544, at *3.

⁸¹ *Id.*

⁸² *Id.*; *S. Utah Wilderness Alliance*, 2009 WL 765882; Teleconference about Restoring Balance in Controversial Last-minute Oil and Gas Lease near Utah Nat'l Park (Feb. 4, 2009) (transcript available at http://www.doi.gov/news/podcasts/2009_02_04_podcast.cfm). The controversy regarding the concern that the BLM may have leased parcels on or at the footsteps of national parks and monuments continued well through this stage of the case. On December 29, 2009, the U.S. Inspector General for the DOI issued an investigative report that looked into the allegations that the BLM, under the direction of the Bush administration, rushed the December 19, 2008 Utah competitive lease sale prior to the upcoming change in white house administrations. However, the report concluded none of the BLM employees involved with the lease sale felt they were pressured in any form to rush the sale of the leases. In addition, the report found the NPS was unaware of the newly proposed lease parcels simply because of an error, not by the intensions of anyone to deceive the NPS. The report is available at: http://www.doi.ig.gov/images/stories/reports/pdf/BLM%20Lease%20Report_508.pdf (last visited Nov. 23, 2010).

⁸³ *Impact Energy Res.*, 2010 WL 3489544, at *3.

⁸⁴ *Id.*

The plaintiffs still desired the leases to be issued on the nine parcels and they looked for any possible means to have the BLM reinstate and issue the leases. In an attempt to exhaust administrative remedies, the plaintiffs, among others, appealed the BLM's decision to withdraw the leases to the Interior Board of Land Appeals (the IBLA).⁸⁵ But on April 9, 2010, the IBLA dismissed the appeal for lack of authority to hear the appeal because the secretary's February 6, 2009 Memorandum was an approval of actions taken by the BLM.⁸⁶

On May 13, 2009, the plaintiffs filed this action in federal court in the District of Utah against the secretary, the Utah BLM State Director, and the BLM seeking to protect their interest in the nine leases for which they were named the successful bidders.⁸⁷ That same day, the court ordered that SUWA was entitled to intervene as a defendant.⁸⁸ Following on July 20, 2009, the court consolidated this action with pending litigation by Uintah County, Carbon County, and Duchesne County against the same defendants in an action which the plaintiffs were claiming a lost economic interest on the lands within their respective borders because of the BLM's withdrawal of the disputed leases.⁸⁹

B. Case Discussion

The court first looked at § 226(a) of the MLA, which states “[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary.”⁹⁰ The court found “it becomes clear that the permissive ‘may’ language of § 226(a) is limited, and refers only to pre-sale decisions about whether or not to offer a parcel of land in a lease sale.”⁹¹ Both parties conceded to this finding—namely that prior to a lease sale the Secretary has discretion to decide which lands will be offered for lease. Therefore, the underlying issue of the case was whether or not the secretary or the BLM has discretion to issue a lease after it has been purchased at a competitive lease sale.

The defendants relied heavily on several cases interpreting the MLA where the courts found the secretary had discretion in issuing a lease.⁹² However, the court dismissed each of these cases because they dealt with noncompetitive lease sales in contrast to competitive lease sales, which reinforced a strict distinction between the procedures of the two.⁹³ Notably, BLM regulations expressly permit noncompetitive offers to be withdrawn any time prior to issuance of the lease.⁹⁴

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at *1.

⁹⁰ *Id.* at *5 (quoting 30 U.S.C. § 226(a) (2010) (emphasis added)).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at *6 (finding a noncompetitive offer to lease is a suggestion that a particular parcel might be leased, rather than a competitive lease sale where the agency has already formally decided that a parcel will be leased. The court compares competitive leasing to a

The defendants also argued that the “shall” language of § 266(b)(1)(A) under the MLA should be interpreted broadly and that it “refers solely to who must get a lease *if* the secretary ultimately decides to issue a lease.”⁹⁵ The defendants argued the court should defer to the BLM’s interpretation under the *Chevron* doctrine.⁹⁶ But the court found “[i]n this case there is no reason to defer to the [BLM’s] interpretation of § 226 because the statutory language is unambiguous. ‘It is a basic canon of statutory construction that use of the word ‘shall’ indicates a mandatory intent.’”⁹⁷ “Shall means shall. The Supreme Court and [the Tenth Circuit] have made clear that when a statute uses the word ‘shall,’ Congress has imposed a mandatory duty upon the subject of the command.”⁹⁸

The court held the language was clear, that shall means mandatory, and, therefore, the secretary *must* issue the lease upon payment for lands purchased at a lease sale.⁹⁹ The court held that the defendants failed to overcome the plain language of § 226 of the MLA and, therefore, the secretary did not have authority to withdraw any leases after the BLM had named successful bidders.¹⁰⁰ Notwithstanding the court’s conclusion regarding the interpretation of the statute, the court ultimately held in favor of the defendants on a technicality.¹⁰¹ The court

homeowner who lists their home for sale and then agreeing to sell it to the highest bidder at an auction, so long as that bid is above the minimum reserve price. On the other hand, noncompetitive leasing is similar to a random individual stumbling upon a for sale sign in the seller’s front yard and then making an offer on the home. Under the competitive leasing example, the homeowner has far less discretion to withdraw his home from the sale. The MLA now requires that all federal onshore oil and gas leases must be by competitive lease sale).

⁹⁴ 43 C.F.R. § 3110.6 (2010); compare 43 C.F.R. § 3120.5-3 (2010).

⁹⁵ *Impact Energy Res.*, 2010 WL 3489544, at *6 (recognizing the IBLA adopted this position in *Richard D. Sawyer*, 162 IBLA 339 (2004), but distinguishing the interpretation from the facts of this case).

⁹⁶ *Id.* See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842–43 (1984) (establishing a fundamental guideline for reviewing an agency’s interpretation of a statute); see generally *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir. 1995) (holding “[w]hen reviewing an agency’s interpretation of a statute it administers, we first determine whether the statute is unambiguous. If the intent of Congress is clear then we must give effect to that intent. ‘The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.’ If, however, the statute is ambiguous or silent on the issue in questions, we must determine whether the agency’s determination is based on a permissible construction of the statute. If so, we will defer to the agency’s interpretation.”).

⁹⁷ *Impact Energy Res.*, 2010 WL 3489544, at *7 (quoting *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997)).

⁹⁸ *Id.* (quoting *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *10.

found the plaintiffs' claims were time-barred, based upon a ninety-day statute of limitation requirement imposed by the MLA.¹⁰²

Notwithstanding the holding of this case, the issue underlying this discussion is distinguished: "the secretary [and the BLM] did not have authority to withdraw any leases after the [BLM] had named the high bidders."¹⁰³ The BLM must issue purchased leases within 60 days of final payment by the successful bidder.

Even after this decision, the BLM has continued its practice of holding leases after they have been purchased fueling more litigation on the issue. In an attempt to directly address the issue of the BLM withholding leases past the 60-day requirement, the following action was recently filed by the Western Energy Alliance.

IV. WESTERN ENERGY ALLIANCE V. SALAZAR

Several oil and gas companies have recently filed a lawsuit against the U.S. Department of the Interior and the BLM for failing to comply with their non-discretionary obligation to issue oil and gas leases within the 60-day requirement as mandated under the MLA. On October 18, 2010, a complaint was filed in the U.S. District Court for the District of Wyoming.¹⁰⁴ The plaintiffs alleged they are the successful bidders of federal oil and gas leases in Wyoming for a combined total of \$4,523,251 for 118 leases since 2005; none of which have yet been issued by the BLM.¹⁰⁵ In addition, plaintiff Western Energy Alliance, which represents many oil and gas companies, alleged that the BLM is holding over \$100 million of lease payments by its members for unissued leases in Wyoming alone.¹⁰⁶

The plaintiffs set out arguments nearly identical to those presented in *Impact Energy Resources, LLC v. Salazar*; namely, that the MLA provides the secretary with discretion to determine which lands are available for oil and gas leasing, but that discretion ends when the lands are designated as "to be leased."¹⁰⁷ They argued the MLA directs that leases must be issued within 60 days following payment by a successful bidder.¹⁰⁸ The plaintiffs further argued the defendants are well-aware of their obligation to issue leases subject to the 60-day requirement, but continue a practice that is contrary to clear congressional intent.¹⁰⁹

¹⁰² *Id.* See 30 U.S.C. § 226-2 (2005) ("[n]o action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter"); see also 43 C.F.R. § 3000.5 (2010). Following this decision, the plaintiffs filed a Motion to Alter or Amend Judgment, arguing the action should not be time-barred. The court denied the motion on January 20, 2011. See *Plaintiff's Brief*, *supra* note 75.

¹⁰³ *Impact Energy Res.*, 2010 WL 3489544, at *7.

¹⁰⁴ Complaint, *W. Energy Alliance v. Salazar*, No: 2:10cv226 (D. Wyo. 2010).

¹⁰⁵ *Id.* at 12–13.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8.

In relief for the damages caused by the defendants, the plaintiffs requested that the court:

- (A) Order Defendants to issue the leases with no further delay;
- (B) Declare the Defendants' policy of not issuing mineral leases within 60 days is illegal and contrary to Congress' clear intent and direction in the Mineral Leasing Act;
- (C) Declare that when the Secretary has exercised its discretion to include a protested parcel in a competitive oil and gas lease sale, that the State Director is obligated to issue a lease for that parcel to the highest qualifying bidder within 60 days from the date that bidder paid its bonus bid amount and first year lease rental payment and that any DOI policy and practice to the contract is prohibited;
- (D) Order Defendants to issue all leases in the future within 60 days of receiving payment as required under the Mineral Leasing Act; and
- (E) Grant such other and further relief as justice may require.¹¹⁰

Since the filing of this lawsuit, a coalition of conservation groups has sought to intervene to oppose the issuance of the leases.¹¹¹ The groups defend the BLM's decision not to issue the leases because prospective development would threaten hundreds of thousands of acres of wilderness land and archaeological sites.¹¹²

Notwithstanding the claims made by the conservation groups, the court will likely hold in favor of the plaintiffs based upon the statutory language of the MLA and *Impact Energy Resources, LLC v. Salazar*. Similarly to the arguments presented in this Note, the issue of where the lands are located, and if development would negatively affect the lands, should have been dealt with during the planning process. Once the lands are noticed for complete lease sale, they are deemed "to be leased" at the lease sale and the BLM no longer has any discretion whether or not to issue a lease. The secretary's and the BLM's discretion to withdraw lands from oil and gas leasing ends if the parcel is noticed, the BLM takes no action to withdraw the parcel prior to the lease sale, and the lands are deemed "to be leased."¹¹³

In this case, the planning process had been completed and the lease sale had already taken place. In deciding this case, the court should look to determine if all the statutory requirements and regulations were properly complied with such as developing RMPs, conducting EISs, and categorizing the lands as open for leasing. If the court finds the BLM complied with the relevant statutes and regulations, the court will hold the BLM is overstepping its authority and that it must issue the leases subject to the 60-day requirement.

¹¹⁰ *Id.* at 17–18.

¹¹¹ Brandon Loomis, *Green Groups Seek to Stop Utah Drilling*, SALT LAKE TRIB., Jan. 26, 2011, <http://www.sltrib.com/sltrib/home/51130745-76/groups-leases-utah-drilling.html.csp>.

¹¹² *Id.*

¹¹³ *Id.*; see also 43 U.S.C. § 1714(a) (2006).

V. WHY THE LEASES SHOULD BE ISSUED

The issues with the BLM's practices are becoming more and more apparent. Of the oil and gas lease sales from 2007 to 2009 in four western states, 74 percent of competitively sold lease parcels were protested.¹¹⁴ During this same period, more than 91 percent of the time in Utah and up to almost 100 percent of the time in Wyoming, the BLM failed to issue purchased leases within the 60-day mandatory period.¹¹⁵ Each year the delays become longer and longer while the BLM continues to promise an answer of how to deal with the back-logged leases. As of May 2010, the BLM was holding more than \$84 million in industry payments for unissued leases in Wyoming alone.¹¹⁶ This capital has been suspended, without interest, rather than being invested in developing projects that might otherwise provide vital resources for our communities' energy and transportation needs.

As found in *Impact Energy Resources, LLC v. Salazar*, the BLM's policy and practice to not issue oil and gas leases, even while pending environmental protests exist, is contrary to Congress' clear intent and direction under the MLA. The current land use planning system provides ample opportunity for these lands to be evaluated for environmental concerns before they are offered as lease sales. If the development of oil and gas will truly have a negative impact on these lands, the BLM should withdraw the lands *before* any lease sale. Any delay in issuing a lease after a lease sale is contrary to the statute.

This process provides a uniform procedure by which the oil and gas industry can rely on investing in and developing federal lands for oil and gas development. In order for these companies to invest in researching federal lands, bidding on federal leases, and pursuing an exploration plan on those lands, they must be able to anticipate that a purchased lease will be issued as defined by federal statute. On the other hand, if the BLM continues to hold leases after they have been purchased, the industry will continue to drift away from developing oil and gas on federal lands. These delays diminish the industry's productivity and increase its costs of developing federal lands. More importantly, this scenario will negatively affect our nation as a whole and our individual communities by lost jobs, limited oil and gas for fuel and transportation, and greater reliance on foreign resources.

VI. CONCLUSION

The statutory language of § 226 of the MLA is clear: "All lands to be leased . . . shall be leased as provided in this paragraph to the highest responsible qualified bidder by competitive bidding . . ." and the "[l]eases *shall be issued*

¹¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-670 ONSHORE OIL AND GAS, BLM'S MANAGEMENT OF PUBLIC PROTESTS TO ITS LEASE SALES NEEDS IMPROVEMENT 9 (2010), available at <http://www.gao.gov/new.items/d10670.pdf>.

¹¹⁵ *Id.* at 19.

¹¹⁶ *Id.* at 21.

within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year.”¹¹⁷ While the BLM and the secretary have discretion in deciding which lands are to be leased before a competitive lease sale, that discretion ends when the lands are deemed “to be leased” and purchased by a successful bidder.

The BLM recognizes its obligation to comply with the 60-day requirement, yet it continues a practice contrary to the clear language of the statute. By withholding leases longer than 60 days after final payment by the successful bidder, the BLM is overstepping its authority. As the court in *Impact Energy Resources, LLC v. Salazar* found and as the court in *Western Energy Alliance v. Salazar* will likely find, the BLM must comply with the MLA by immediately issuing all pending leases and changing its practice to issue all future leases subject to the 60-day requirement.

¹¹⁷ 30 U.S.C. § 226 (1920) (emphasis added).