



**Federal Lessees Get Burned, Then Rights Extinguished;
Recent Leasing Decision has Potential Broad
Ramifications for Valid Existing Rights**

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A recent decision by the U.S. Forest Service regarding sold and issued federal oil and gas leases in Wyoming has potentially broad ramifications on the fate of valid existing federal lease rights across the west. This controversial decision opens the door to future lease cancellations, and raises the significant legal issue as to whether federal agencies have the authority to extinguish property rights and void leases based upon supplemental environmental analysis performed under court or administrative remand, or at the discretion of the agency.

On January 25, 2011, after three years of supplemental environmental review under the National Environmental Policy Act (NEPA), the U.S. Forest Service reversed its own 2005 decision allowing federal oil and gas leasing in the Bridger-Teton National Forest. This decision effectively cancels 44,720 acres of oil and gas leases that were fairly and lawfully offered for competitive bid, sold, paid for, and in some cases even issued, in 2005 and 2006. The Forest Service performed this supplemental NEPA analysis after the Interior Board of Land Appeals found that environmental plaintiff organizations were likely to succeed on the merits in an order granting their request to stay the leasing decisions pending merits briefing for the administrative appeal.

The Forest Service's recent decision reflects what an all-too-familiar choreography is now in federal oil and gas leasing. Leases are offered for sale, bids are received, leases are paid for, and legal protests are filed. Next, in response to legal challenges, the Bureau of Land Management (BLM) suspends leases or does not issue the leases so that it can re-analyze environmental issues. The result is years of delay, stranded investment capital, and business and regulatory uncertainties that inhibit business planning and capital budget allocation. And lately, the troubling outcome has been the rescission and cancellation of lessee's valid property interests.

The potential ramifications from this leasing decision extend much farther than the confines of the Bridger-Teton National Forest. By reversing its prior leasing decisions, the Forest Service's action raises the legal issue of whether the federal government can cancel issued leases and extinguish property rights, after a court or administrative remand based upon procedural violations of NEPA and performance of supplemental NEPA analysis.

The NEPA analysis for leasing decisions informs BLM's decision on how to lease these lands (*i.e.*, environmental protections through lease stipulations). NEPA is a procedural statute. As explained by the U.S. Supreme Court, NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). When those challenging leasing decisions complain only of procedural violations of statutes, the remedies for procedural statutes and NEPA violations "are limited to procedural remedies." *Willow Creek Ecology v. U.S. Forest Service*, 225 F. Supp. 2d 1312, 1316 (D. Utah 2002) (citation omitted).

Except in rare situations where the agency failed to analyze a "no leasing" alternative, when federal courts find procedural NEPA violations associated with leasing decisions, upon remand, the disputed leases are suspended, thus prohibiting any surface-disturbing operations, until the agency has completed additional NEPA analysis. *See, e.g., The Wilderness Society, et al. v. Wisely*, 524 F. Supp. 2d 1285, 1312 n.12 (D. Colo. 2007) ("The Court will not simply void the September 2005 decision to resume leasing—and all of the BLM's subsequent acts implementing that decision—as doing so might adversely affect property interests obtained by lessees as a result of the lease sale."). When performing additional NEPA analysis upon court remand, the federal agencies' review and analyses should be limited to determining what, if any, additional lease stipulations should be applied to address resource specific issues that relate to the NEPA violations found by the court.

Moreover, lease cancellation is contrary to the well established tiered environmental review and decision-making process for oil and gas leasing and subsequent exploration and development. Even after the extensive environmental analyses at the land use planning and leasing stages, at the site-specific project stage, BLM or the Forest Service undertakes additional and detailed environmental review to ensure that any authorized exploration or development activity takes into account and mitigates resource issues of concern. In a lessee's APD, BLM may impose conditions of approval to address and mitigate potential environmental concerns. Similarly, Forest Service may impose site-specific conditions of approval through a Surface Use Plan of Operations.

Thus, although a federal oil and gas lease is a valid property interest that gives the lessee the exclusive right to fully develop any oil and gas on the leasehold, it is clear these rights come with strings attached. BLM has discretion to control the rate and scope of development, before, during, and after development to ensure environmental protection. This authority does not, however, enable the federal government to retroactively void a lessee's valid existing rights.

The Forest Service's latest decision on the Bridger-Teton leases represents a new and extraordinary step because it cancels leases, rescinds bids and extinguishes valid existing lease rights, based upon supplemental environmental analysis performed several years after the leases were sold. It is arguable that the Forest Service's decision exceeds the procedural boundaries of NEPA and long established legal precedent that protects lessees' property rights, even the event of an adverse court decision and remand for performance of additional environmental analysis.

As to the Bridger-Teton decision, the stage is set for administrative appeal, and subsequent federal court litigation. The result of this litigation could have a profound impact on the legal status of existing leases when a court or administrative body remands a leasing decision for performance of supplemental environmental analysis.

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