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**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS**

)	
)	IBLA No. 2017-37
TERRY TEMPEST WILLIAMS and)	
BROOKE WILLIAMS,)	RE: Appeal of October 18, 2016
dba TEMPEST EXPLORATION,)	decision by BLM Utah State Director
)	denying noncompetitive lease offers for
Appellants,)	UTU91481 and UTU91574
)	
v.)	
)	
BUREAU OF LAND MANAGEMENT,)	
)	
Respondent)	
)	

STATEMENT OF REASONS

I. Preliminary Statement

In deciding this appeal, the Board need only address the following two issues:

- The BLM's discretion to deny an oil and gas lease is sharply limited if the BLM's basis for denial is not grounded in rational, neutrally-applied principles. Here, the BLM denied the Williamses' properly-filed bids on the basis that the Williamses failed to prospectively show "diligence," even though the BLM's longstanding practice is to issue leases on all properly-filed bids without

regard to a “diligence” showing—an approach supported by statute and regulations. Did the BLM have discretion to deny the Williamses’ lease bids?

- A lessee shows “diligence” even if it is not developing oil and gas if it can demonstrate that development would currently be uneconomical. The Williamses demonstrated that, based on the social cost of carbon, development would currently be uneconomical on a societal scale. Even if the BLM acted within its discretion in prospectively testing the Williamses’ “diligence,” did the Williamses show “diligence”?

II. Standard of Review

“It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.” *Larry Brown & Assocs.*, 133 IBLA 202, 205 (1995). When a lease offeror appeals the BLM’s rejection of that offer to the IBLA, “the Board *is* the agency, empowered to render a final decision in the first instance ‘as fully and finally as might the Secretary.’” *Statoil Gulf of Mexico LLC Exxonmobil Corp.*, 178 IBLA 244, 256 n. 5 (2009) (citing 43 C.F.R. § 4.1). The Board’s review of the BLM’s decision is “not limited to the record before [the agency] on the date the Decision was issued.” *Id.* at 258. Instead, the Board conducts de novo review, and the appealing parties may supplement the record. *Id.* at 257–58 (quoting *Wyoming Outdoor Council*, 160 IBLA 389, 397–98 (2004)).¹

With regard to the BLM’s discretion to deny an oil and gas lease:

[T]he Secretary’s discretion . . . whether the lands are or are not to be leased is not unlimited. . . . [T]he Secretary may only refuse lease issuance for sufficient reason capable of withstanding review as neither “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” nor “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

W. Energy All. v. Salazar, 2011 WL 3737520, at *7 (D. Wyo. June 29, 2011) (quoting 5 U.S.C. § 706(2)(A), (C)).

¹ Appellants have supplemented the record by attaching eleven exhibits and a declaration to this Statement of Reasons.

III. Facts

Terry Tempest Williams' and Brooke Williams' Lease Offers

Terry Tempest Williams is a celebrated author and conservationist. *See* Excerpts of Record 30 [hereinafter ER].² Ms. Williams and her husband, Brooke S. Williams, formed Tempest Exploration Company, LLC (Tempest Exploration) in early 2016. On February 16 and 18, 2016, Tempest Exploration submitted noncompetitive lease offers for ten-year leases on two oil and gas parcels, UTU91574 and UTU91481. ER at 3-4, 11-12. The two leases together span approximately 1120 acres. ER at 3, 11. The Williamses paid processing fees and advanced the first year of rent for both parcels. ER at 1, 9.

On March 29, 2016, Ms. Williams published an essay in the Opinion Pages of the New York Times recounting the events leading up to the purchases and explaining her intentions. ER at 15-18. The essay was titled “Keeping My Fossil Fuel in the Ground.” ER at 15. Ms. Williams explained that she and Mr. Williams “have every intention of complying with the law, even as we challenge it”; that they had formed Tempest Exploration “to establish ourselves as a legitimate energy company”; that “[w]e will pay the annual rent for the duration of the 10-year lease”; and that they would keep the oil and gas resources in the ground “until science finds a way to use those fossil fuels in sustainable, nonpolluting ways.” ER at 17.

On April 15, 2016, Utah BLM’s Acting State Director, Jenna Whitlock, wrote to Ms. Williams “to ensure that you understand your obligations under the leases if issued, and to request that you clarify statements you made about your intentions with respect to these leases in your essay entitled ‘Keeping My Fossil Fuel in the Ground.’” ER at 19. Ms. Whitlock requested information on two points: first, whether Ms. Williams was aware of language contained in the standard lease form that Ms. Williams signed; and second, whether Tempest Exploration intended to join the Crescent Unit Agreement, of which one of Tempest Exploration’s leases would be a part. ER at 19-20.

² To facilitate reference to the administrative record (which is not Bates stamped), Appellants have compiled and Bates stamped an Excerpts of Record (ER) containing the record documents cited in this Statement of Reasons.

Section 4 of the standard oil and gas lease form that Ms. Williams signed reads: “Diligence, rate of development, unitization, and drainage—Lessee must exercise reasonable diligence in developing and producing, and must prevent unnecessary damage to, loss of, or waste of leased resources.” ER at 5, 13. Ms. Whitlock asked Ms. Williams to “please advise me in writing within 30 days of your receipt of this letter whether you would accept the duty to exercise reasonable diligence in developing and producing oil and gas from the two leases you have offered to purchase rather than keeping the resources ‘in the ground’ as stated in your essay.” ER at 20.

Regarding the Crescent Unit Agreement, Ms. Whitlock explained that Tempest Exploration must either join the unit or show BLM why joining the unit should not be required. ER at 20. Ms. Whitlock asked Ms. Williams to “[p]lease inform me in writing within 30 days of your receipt of this letter whether you have contacted the Unit operator to begin the process of joining the Unit or if not why joinder should not be required.” *Id.* Ms. Whitlock concluded: “If I do not receive a response to this letter within 30 days of your receipt of it that provides the necessary information discussed above and demonstrates your compliance with the requirements that must be a part of such leases, the BLM may reject your two noncompetitive lease offers.” *Id.*

On May 2, 2016, the Williamses responded to both issues raised in Ms. Whitlock’s letter. ER at 21-22. Regarding the diligence requirement, they expressed “the intent to hold onto [the leases] until science research allows a sustainable use of the hydrocarbons with a resulting increase in value.” ER at 23. The Williamses explained how their intent to develop at a later time is no different than the intent of many oil and gas lessees. *Id.* The Williamses observed that BLM routinely issues leases to speculators who intend to hold their leases without drilling while waiting for economic conditions to change. ER at 23-24. The Williamses asked Ms. Whitlock to clarify why Tempest Exploration’s bid was less legitimate than any other: “[I]f you have a means of distinguishing our retention of our leases from the other bidders at the February 16th auction, please let us know the distinction.” ER at 25.

In their May 2 letter, the Williamses also indicated their intention to join the Crescent Unit Agreement “once we have reviewed the existing unit agreement and the underlying operating agreement.”

ER at 24. On June 17, 2016, Tempest informed Ms. Whitlock of its decision not to join the Crescent Unit. ER at 26. The Williamses detailed their reasons: the Williamses had discovered that the operator of the Unit, Tidewater Oil & Gas Co. (Tidewater), was in Chapter 11 bankruptcy, which brought into question the company's ability to rehabilitate drill sites; the Tidewater well had been less than successful, in terms of amount of oil recovered; the Tidewater well had been plagued with problems and had been in and out of operation; and the Williamses were unable to verify the existence of a reclamation bond for the Tidewater well. ER at 26-27. Without such a bond, to join the unit would be to "incur an unknown, or unknowable liability, which you can appreciate from a business perspective is unacceptable." ER at 27.

Also in the June 17 letter, the Williamses again articulated their intentions for the lease: "Jenna, please know we are in this for the long term and choose to hold onto our leases until new technologies can be developed that will allow the oil and gas resources to be developed and burned without producing climate-warming gases that currently are negatively impacting the future of life on earth." ER at 27. Tempest consistently explained their calculus for deciding to drill in this way, both to the BLM and in public statements. For example, in a July 22, 2016, interview with Steve Curwood of Public Radio International's *Living on Earth*, Ms. Williams said, "We've been very public saying, 'We don't want to drill on these lands until science can [show] us that the fossil fuels are [worth] more above land than below given the costs of climate.'" ER at 39.

On August 16, 2016, the Williamses again wrote to Ms. Whitlock asking when the BLM would make a decision on their lease offers. ER at 41-45. Noting that six months had passed since their offer, the Williamses told Ms. Whitlock that they felt they had adequately addressed the BLM's concerns. ER at 42.

The Williamses' August 16 letter again raised questions about the "diligence" language found in Section 4 of the lease form. ER at 43. Parallel language appears in Section 187 of the Mineral Leasing Act. *Id.* The Williamses read this language to require only that, if or when a lessee does develop its lease, it must carry out its operations in a way that is careful and prevents damage and waste. *Id.* The Williamses also noted the language at Section 6 of the lease form: "Lessee must conduct operations in a manner that minimize[s] adverse impacts to the land, air, and water, to cultural, biological, visual, and

other resources, and to other land uses or users.” *Id.* The Williamses interpreted the language of Section 6 to require lessees to take into consideration the adverse impacts of drilling on future generations. *Id.*

The Williamses included social cost of carbon research in their correspondence with BLM to demonstrate that they planned to use an economic calculus that included social costs when determining when to develop their leases. ER at 43-45. The Williamses believed that the use of such a calculus was consistent with—and, indeed, required by—Sections 4 and 6 of the lease form and with Section 187 of the Mineral Leasing Act. ER at 43.

Leading economic models on the cost of greenhouse gas emissions to society suggest that the production and burning of fossil fuels causes substantial economic harm. A 700-page report prepared for the government of the United Kingdom calls climate change “the greatest example of market failure we have ever seen.”³ This market failure occurs when the costs to society of producing and burning fossil fuels are not incorporated into market decisions to develop those fuels. According to the latest estimates by a United States working group of eleven federal agencies, one ton of carbon dioxide released into the atmosphere costs society between \$12 to \$123, depending on the “discount rate” used to translate these future costs into present dollars.⁴ Other studies show much higher costs. For example, a study by Stanford scientists estimates a per-ton social cost of carbon of \$220.⁵ The higher figure accounts for projected slowing of economic growth rates as a result of climate damage.⁶ Other studies suggest additional ways in which the U.S. working group estimates understate the full costs of carbon.⁷

³ Nicholas Stern, *Stern Review on the Economics of Climate Change* (2006) (attached as Exhibit 2).

⁴ See Interagency Working Group on the Social Cost of Carbon, United States Government, *Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*, at 2 (2015 revision) (attached as Exhibit 3).

⁵ Frances C. Moore & Delavane B. Diaz, *Temperature Impacts on Economic Growth Warrant Stringent Mitigation Policy*, 5 *Nature Climate Change* 127 (2015) (attached as Exhibit 4).

⁶ *Id.*

⁷ See, e.g., Chris Hope & Kevin Schaefer, *Economic Impacts of Carbon Dioxide and Methane Released from Thawing Permafrost*, 6 *Nature Climate Change* 56, 56 (2016) (concluding that emissions from melting permafrost in the Arctic could increase the economic impact of climate change by about 13 percent from the Interagency Working Group estimates) (attached as Exhibit 7); Yongyang Cai, Timothy M. Lenton, and Thomas S. Lontzek, *Risk of Multiple Interacting Tipping Points Should Encourage Rapid CO₂ Emission Reduction*, 6 *Nature Climate Change* 520, 524 (2016) (concluding that the effect of five interacting tipping points could increase the social cost of carbon eightfold) (attached as Exhibit 8).

Regardless of the calculation used, numerous federal agencies (including the eleven agencies that are part of the working group on the social cost of carbon: the Council of Economic Advisors, the Council on Environmental Quality, the Department of Agriculture, the Department of Commerce, the Department of Energy, the Department of Transportation, the Environmental Protection Agency, the National Economic Council, the Office of Management and Budget, the Office of Science and Technology Policy, and the Department of the Treasury), as well as numerous economists and scientists,⁸ have determined that the social cost of carbon is greater than \$0—in most cases, much greater.

On October 18, 2016, Edwin Roberson, BLM Utah State Director, sent a letter to the Williamses rejecting their lease offers. ER at 46-50. Mr. Roberson explained BLM's rejection:

Viewed objectively and in their totality, your express statements to date show intent to not diligently explore for and produce the oil and gas resources underlying the two lease parcels for which you have submitted noncompetitive lease offers. Therefore, since you have stated publicly that you intend to keep the oil and gas resources in the ground and, therefore, not comply with the diligent development requirement plainly set forth in your noncompetitive lease offers (in Section 4 on page 3 of Form 3100-1), the lease offers are hereby rejected.

ER at 47. This was the only basis on which the Williamses' lease offers were rejected. *Id.*

Victoria Ramos' Lease

Meanwhile, at a May 17, 2016 oil and gas lease sale, Ms. Victoria Ramos bid on UTU91541, a 10-year competitive lease spanning 1,713 acres. *See* ER at 55 (bidders' list); ER at 54 (sale results summary); ER at 57 (lease bid receipt); ER at 60 (offer to lease).

In May 2016, Ms. Ramos lived in a homeless shelter in Salt Lake City. Decl. of H. Ehrbar, ¶ 6. She frequented the public library in downtown Salt Lake City in order to use the computers there. *Id.* On May 17, 2016, Ms. Ramos was outside the library, where climate activists had gathered to peacefully disrupt the BLM oil and gas auction being held inside the library. *Id.* ¶¶ 3, 4, 7. Although Ms. Ramos had not come to the library to participate in the protest, she fell into conversation with the activists before the

⁸ *See, e.g.,* National Research Council, *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use* 300-07 (2010) (discussing numerous social cost of carbon studies) (attached as Exhibit 5); William D. Nordhaus, *Projections and Uncertainties About Climate Change in an Era of Minimal Climate Policies* 31, Table 1 (2016) (showing a range of social cost of carbon figures) (attached as Exhibit 6).

auction began. *Id.* ¶ 7. Sharing the activists' enthusiasm for protecting public lands, Ms. Ramos decided to join the activists in disrupting the auction. *Id.* The activists thought that they would be better able to disrupt the auction if they were seated among the bidders. *Id.* ¶ 4. Therefore, some of the activists signed up as bidders, which allowed them to sit in the bidder section of the auction. *Id.* Ms. Ramos joined these activists in signing up as a bidder and sitting in the bidder section. *Id.* ¶ 8. The activists did not intend to bid on any oil and gas leases. *Id.* ¶ 4. They were aware of the prosecution of Tim DeChristopher for successfully bidding on 14 leases at a BLM oil and gas auction in Utah in December 2008 without intending to pay for the leases. *Id.* ¶ 5. DeChristopher served 21 months in prison for his act of civil disobedience. *Id.* Ms. Ramos, however, apparently did not understand that the activists' purpose in signing up as bidders was just to be in the bidding room—not to actually bid on leases. *Id.* ¶ 9. She bid on a lease. *Id.* ¶ 10.

One of the activists at the auction was Hans Ehrbar, a retired University of Utah economics professor. *Id.* ¶ 1. Mr. Ehrbar was concerned that Victoria Ramos would be prosecuted for successfully bidding on a lease with no intention to pay for it, as Tim DeChristopher was. *Id.* ¶ 11. Mr. Ehrbar did not want Ms. Ramos to get into legal trouble for the climate activists' actions. *Id.* Mr. Ehrbar also did not want Ms. Ramos' actions to reflect poorly on the activists. *Id.* Mr. Ehrbar offered to pay for Ms. Ramos' lease as a gift, and he did so. *Id.* ¶ 12. Based on Ms. Ramos' statements to Mr. Ehrbar, Ms. Ramos' intention was to keep the oil and gas on her lease in the ground. *Id.* ¶ 13. Mr. Ehrbar and Ms. Ramos discussed the idea that Ms. Ramos would work with the activists to publicize that even homeless people own our public lands, in order to connect the problem of homelessness with climate and public lands issues. *Id.* ¶ 13.

Ms. Ramos has no experience with oil and gas drilling or managing an oil and gas lease. *Id.* ¶ 15. Mr. Ehrbar met her a few times after May 17, 2016. *Id.* Other members of the climate activist group Mr. Ehrbar is a part of, Elders Rising, also tried to get to know her and keep contact with her. *Id.* Mr. Ehrbar's impression was that Ms. Ramos was struggling with personal issues and sometimes retreated into a fantasy world. *Id.* Ms. Ramos was apparently so unreliable that, after some time, Mr. Ehrbar and other

Elders Rising members decided no longer to reach out to her since she seemed unable to contribute to the group's work. *Id.* In Mr. Ehrbar's view, even if Ms. Ramos intends to develop her lease for oil and gas, she does not have the initiative, experience, and resources to do so successfully. *Id.* BLM was aware that Ms. Ramos lived in a homeless shelter, and that a climate activist who had participated in the disruption of the lease auction with the aim to keep fossil fuels in the ground had paid for her bid. *See* ER at 53.

On the afternoon of May 17, 2016, the Utah BLM staff noticed that Ms. Ramos had failed to sign her bidder form. ER at 52 (conversation record of K. Hoffman and V. Ramos); Decl. of H. Ehrbar, ¶ 14. The number that Ms. Ramos had provided was "not reachable," so Utah BLM's Kent Hoffman called Mr. Ehrbar. ER at 52; Decl. of H. Ehrbar, ¶ 14. Mr. Ehrbar in turn contacted Mr. Ramos at the homeless shelter, and, that evening, Ms. Ramos arrived to provide the missing signature. ER at 52; Decl. of H. Ehrbar, ¶ 14. Mr. Hoffman did not inquire about Ms. Ramos' intentions for the lease. ER at 52. Instead, Mr. Hoffman explained that Ms. Ramos' lease would be processed along with the other successful bidders' leases. *Id.* Ms. Ramos asked what rights the lease would grant if issued. *Id.* Mr. Hoffman used a map to explain the extent of the parcel. *Id.* Ms. Ramos "seemed astonished at the size when we described the dimensions in miles rather than acres—expressing amazement that it was 'so large.'" *Id.* Ms. Ramos asked what it would take to drill the lease. *Id.* Mr. Hoffman explained that it would cost several million dollars to permit and drill, but that a lessee could seek out an operating company to drill or could sell the lease to someone else outright. *Id.* Mr. Hoffman noted: "Ms. Ramos seemed amazed that she could obtain something of monetary value if the lease was to be issued to her." *Id.*

The BLM considered Victoria Ramos a "questionable bidder," and noted that "it appeared that she did not understand what she was doing when she bid on the lease parcel." *See* ER at 72 (BLM Alert: "Issuance of competitive lease to questionable bidder"). Nevertheless, the BLM issued the lease to Ms. Ramos approximately two months after the May 17 auction, on July 22, 2016, because "[a]lthough Ms. Ramos is apparently homeless and seems to lack financial resources, she is qualified to hold an oil and gas lease, and the amount she owed for her successful bid was timely paid." ER at 60, 72.

BLM's Routine Issuance of Noncompetitive Leases

The BLM's practice is to issue a noncompetitive lease to the first qualified applicant for the lease, without inquiring into a bidder's ability or intention to comply with lease terms. *See* ER at 69 (Email from L. Wilcken to K. Hoffman) ("They (individual or company rep) comes in. Fills out [a lease offer]. They pay the money. Accounts logs it into CBS and prints receipts. Accounts brings the non-comp offer to me. I wait until Thursday morning to check for multiple offers for the same lease. If there are multiple offers we then hold a drawing to see who wins the lease."). In fact, the Utah BLM has been unable to identify *any* other instance in which a Utah BLM office prospectively evaluated the ability of a bidder to exercise "diligence" in developing a lease as a basis for granting or rejecting a lease bid. *See* June 8, 2016 UT BLM Response under the Freedom of Information Act (attached as Exhibit 9); *see also* WY BLM FOIA Response (attached as Exhibit 10) (same, Wyoming BLM); ID BLM FOIA Response (attached as Exhibit 11) (same, Idaho BLM).

IV. Argument

The Board should reverse the BLM's decision to deny the Williamses' lease bids for two reasons. First, while the BLM has discretion to deny noncompetitive lease bids, it may only do so on a basis that is not arbitrary and capricious. It is arbitrary and capricious for the BLM to treat like cases differently; the BLM may not issue leases on all properly-filed bids, even where evidence suggests "diligence" may be lacking, while denying the Williamses' properly-filed bids on the basis that the Williamses failed to prospectively show "diligence."

Second, even if the BLM has discretion to single out the Williamses by inquiring prospectively into their "diligence," the Williamses' showing that they plan to develop their leases when circumstances become favorable, based on a their chosen economic calculus—one including the social costs, in addition to the personal costs, of development—demonstrates "diligence." More broadly, such a showing satisfies and honors BLM's animating goals to be accountable to the public, not to private industry.

A. The BLM Acted Arbitrarily and Capriciously When It Treated Like Cases Unlike.

The BLM's decision to single out the Williamses for differential treatment violates the "fundamental norm of administrative procedure" that "requires an agency to treat like cases alike." *Westar Energy, Inc. v. Federal Energy Regulatory Commission*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *Colorado Interstate Gas Co. v. Federal Energy Regulatory Commission*, 850 F.2d 769, 774 (D.C. Cir. 1988) ("dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice"). The BLM's decision also violates the Williamses' constitutional right to equal protection of the laws. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing that a "class of one" equal protection claim exists "where plaintiff . . . has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment").

The BLM's practice is to issue noncompetitive leases on a first in time, first in right basis, assuming the applicant is qualified. *See* ER at 69 (Email from L. Wilcken to K. Hoffman) (describing ministerial process for issuing noncompetitive leases); *see also* ER at 67 (Email from J. Spencer to J. McQuilliams) ("Anytime someone signs the lease form, they are self-certifying that they are qualified under [43 C.F.R. §] 3102 (US citizen and over the age of 18, etc) to hold a lease."). This practice is supported by the plain language of the relevant statute: "[T]he person first making application for [a noncompetitive] lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding, upon payment of a non-refundable application fee of at least \$75." 30 U.S.C. § 226.

The Williamses are qualified to hold a lease. 43 C.F.R. § 3102.1 (stating leaseholders are required to be citizens of the United States); *id.* § 3102.5-1(c) (stating leaseholders are required to be adults). The Williamses also paid the bid fee for each of the leases, along with the first years' rentals. ER at 9; 43 C.F.R. § 3110.4(a) (requiring "payment of the first year's rental and the processing fee for noncompetitive lease applications"). Having met the regulatory criteria for a proper bid, the Williamses must be afforded an equal opportunity with other bidders to contract. *Schraier v. Hickel*,

419 F.2d 663, 667 (D.C. Cir. 1969) (“Of course an applicant for a lease under the Mineral Leasing Act is entitled to certain legal protections. He has a legal right that the cognizant officials may not disregard his application on a basis other than that permitted by law. The same may be said of anyone desiring to contract with the United States—he has no right to a contract, but he has a right to an equal opportunity to contract that is not [negated] by resort to illegal procedures or standards.”)

The BLM’s longstanding practice is to issue leases on all properly-filed bids without inquiring into a bidder’s ability to “diligently” develop the lease. *See* Exhibits 9-11 (FOIA responses showing that in no other instance has a Utah, Wyoming, or Idaho BLM office ever prospectively investigated a bidder’s ability to exercise diligence in developing a lease as a basis for granting or denying a lease). This longstanding practice is supported by law. Nothing in Section 4 of BLM’s Lease Form 3100-11—the standard lease that the Williamses signed—nor the Mineral Leasing Act requires a demonstration of an ability or intent to develop as a condition of lease issuance. Section 4 provides: “Diligence, rate of development, unitization, and drainage—Lessee must exercise reasonable diligence in developing and producing, and must prevent unnecessary damage to, loss of, or waste of leased resources.” Parallel “diligence” language is contained in the Mineral Leasing Act at 30 U.S.C. § 187: “Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property”

The provisions provide only that “diligence” be a requirement of the lease. Nowhere in the plain language of these provisions is there a requirement that the lessee prospectively demonstrate as a condition of lease issuance that it will exercise diligence. This is in contrast to coal leasing, which by law includes a rigorous prospective inquiry before issuance of a lease. *See Nat. Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. 925, 930 (D.D.C. 1978) (describing evolution of coal leasing process, including regulations that introduced requirements for a technical examination prior to the issuance of a permit or a lease as well as approval of a mining plan prior to actual mining operations). In the oil and gas context,

the situation is much more analogous to the state of coal leasing before 1969, when “[prospecting] permits were issued routinely upon request where consistent with law.” *Id.* at 929.

In a striking display of differing treatment of similarly situated bidders, in the summer of 2016, the Utah BLM issued a lease to Ms. Victoria Ramos. ER at 60. Despite the fact that the BLM was aware that Ms. Ramos is a homeless woman, with no experience developing oil and gas, whose bid was made as part of a climate protest and paid for by a climate activist, the BLM did not condition the issuance of Ms. Ramos’ lease on a showing that Ms. Ramos would drill. ER at 52, 53, 72.

The BLM has not provided a rational basis for rejecting the Williamses’ lease offers while granting Ms. Ramos’ lease. Like the Williamses, Ms. Ramos has no previous experience in the oil and gas business and participated in the leasing process as a climate activist. The manner in which the BLM issued Ms. Ramos’ lease—as a matter of course, without any testing of her intent or ability to develop her lease—is the norm, and is in line with the BLM’s custom of issuing leases on all properly-filed bids.

The BLM has also not provided a rational basis for rejecting the Williamses’ bids while accepting the bids of other lessees who, like the Williamses, intend to hold their leases without drilling while waiting for economic conditions to become favorable for drilling. Notably, only 47% of the 27 million acres of federal land under lease are in production.⁹ Oil and gas companies frequently seek—and are frequently granted—suspensions of their leases under 43 C.F.R. § 3103.4-4.¹⁰ Such suspensions allow companies to extend their ability to hold their leases with no development of them, rent-free. 43 C.F.R. § 3103.4-4(d). There are nearly a million acres of such suspended leases in Utah.¹¹ The BLM applies the “diligence” requirement differently to these lease holders than to the Williamses. The Williamses flagged this issue with the BLM during the lease

⁹ See BLM, *Oil and Gas Statistics*, Tables 3 and 6, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics> (last visited June 29, 2017).

¹⁰ See The Wilderness Society, *How Stockpiling Leases Is Costing Taxpayers* (attached as Exhibit 1).

¹¹ *Id.*

process. ER at 23-24. The BLM never explained why the diligence requirement applied differently to them. ER at 46.

If the BLM wants to change the required showing for a lease bid, it should do so by amending its regulations, not through mercurial treatment of individual bidders.

B. Even If the BLM Acted Within Its Discretion in Prospectively Testing the Williamses' Diligence, the Williamses Showed "Diligence."

Even assuming that it is within the BLM's discretion to require a bidder to demonstrate, as a condition of lease issuance, that it will "exercise reasonable diligence in developing and producing" the oil and gas beneath a lease, the Williamses did make such a showing. In the oil and gas context, "reasonable diligence" means doing "that which an experienced operator of ordinary care and prudence would do in the same or similar circumstances . . . having due regard for the rights, interests, and advantages of both lessor and lessee." *Newell v. Phillips Petroleum Co.*, 144 F.2d 338, 339 (10th Cir. 1944); *accord Brimmer v. Union Oil Co. of California*, 81 F.2d 437, 440 (10th Cir. 1936). Whether an operator is acting with "diligence" is evaluated contextually, taking into consideration economic factors. *See Eggleston v. McCasland*, 98 F. Supp. 693, 695 (E.D. Okla. 1951) (stating that the factors to be considered by the court in determining if a lessee has acted with diligence include "the availability of a market, means of transportation, the availability of pipe lines, and the cost involved in transporting the product to the nearest available market"). A lessee may show "diligence" even if it is not developing oil and gas if development would be uneconomical. *See, e.g., id.* (lessee demonstrated diligence even though lessee did not market gas where marketing gas was uneconomical due to lack of transmission line); *see also Risinger v. Arkansas-Louisiana Gas Co.*, 198 La. 101, 111-12 (1941) (explaining that lessees demonstrated diligence even though they did not market gas where cost of removing naturally-present salt water from gas would render operation of the well uneconomical).

Here, the Williamses demonstrated that, given the the social cost of carbon, development would currently be uneconomical on a societal scale, ER at 43-45, and they intended to forgo drilling until technologies could be developed that would make fossil fuel development economical on a societal scale.

ER at 23, 25, 45. Even if the BLM is correct that Section 4 of the lease form and the Mineral Leasing Act require the lessee to demonstrate an intent to develop, a plan to develop leases when circumstances become favorable, based on a lessee's chosen economic calculus—here, one including broader social costs, not just market factors that affect the lessee's own pocketbook—meets that standard.

Indeed, an economic calculus based on the social cost of carbon fulfills the BLM's Congressional mandates and comports with other provisions of Lease Form 3100-1 better than one that is keyed only to private costs and benefits. This is because “land management is not a private business; [the BLM's] ultimate accountability is to the public.” Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 304 (1980). Specifically, the BLM's management of the lands in trust for the public is governed by the Federal Land Policy and Management Act (FLPMA). 43 U.S.C. §§ 1701–1784. FLPMA requires BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). This protective mandate applies to BLM leasing decisions, *see* 43 C.F.R. § 3161.2 (requiring the BLM to ensure “that all operations be conducted in a manner which protects other natural resources and the environmental quality”), and should be considered in light of the BLM's overarching mandate to employ “principles of multiple use and sustained yield,” 43 U.S.C. § 1732(a).

Achieving “multiple use and sustained yield” means looking ahead to consider the needs of future generations. *See* 43 U.S.C. § 1702(c) (“multiple use” means “a combination of balanced and diverse resource uses *that takes into account the long-term needs of future generations*”) (emphasis added); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (maintaining sustained yield requires “control [of] depleting uses over time, so as to ensure a high level of valuable uses *in the future*”) (emphasis added). Section 6 of Lease Form 3100-1 echoes these protective mandates, stating that a “Lessee must conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users.”

The Williamses' use of a social cost of carbon calculus is consistent with the BLM's obligations to the public, including the future public. If lessees routinely inquired whether development would be uneconomical on a societal, rather than a personal, scale, they would not contravene but rather would help achieve the BLM's obligations as a steward of public lands. Issuing leases to lessees like the Williamses "take[s] into account the long-term needs of future generations," prevent[s] "undue and unnecessary degradation" of the lands, and "minimize[s] adverse impacts to the land [and] air, and to other land uses or users" by considering costs of carbon such as the spread of disease, decreased food production, property damage, and loss of ecosystem services—costs that are widely recognized to be in the double to triple digits in dollars per ton of carbon released. *See, e.g.*, Exhibit 3 at 3 (2013 U.S. Interagency Working Group report) (estimating a social cost of \$12 -\$123 per ton of carbon released); Exhibit 4 (study by Stanford scientists) (estimating a social cost of \$220 per ton of carbon released). The BLM, in its decision rejecting the Williams' lease bids, points to no authority to the contrary. ER 46.

BLM allows industry leaseholders to drill or not drill on the basis of personal economic calculus, but denied the Williamses the opportunity to drill or not drill on the basis of a broader social economic calculus—even though the latter calculus does not contravene BLM's obligation to serve the public. Such arbitrary decision-making is precisely the kind forbidden by law. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 505, 537 (2009) (federal agencies must make decisions "based on neutral and rational principles").

V. Conclusion

For the foregoing reasons, Appellants Terry Tempest Williams and Brooke Williams respectfully request that the IBLA reverse the October 18, 2016 decision of BLM's Utah State Director rejecting the Williamses' noncompetitive lease offers for U91481 and UTU91574, and grant those leases to the Williamses.

Respectfully submitted this 1st day of July, 2017.



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CERTIFICATE OF SERVICE

I certify that on July 1, 2017, I served this STATEMENT OF REASONS via email to, and on July 3, 2017, I will serve this STATEMENT OF REASONS via overnight mail to:

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