IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-001887-REB

WILLSOURCE ENTERPRISE, LLC,

Plaintiff,
v.

INTERIOR BOARD OF LAND APPEALS,
RYAN ZINKE, in his official capacity as the
Secretary of the Interior, and UNITED STATES
DEPARTMENT OF THE INTERIOR,

Defendants,

WILDERNESS WORKSHOP,

Applicant for Intervention.

WILLSOURCE ENTERPRISE, LLC'S OPENING BRIEF

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INTRODUCTION

WillSource Enterprise, LLC (“WillSource”) seeks review of two U.S. Interior Bureau of Land Appeals (“IBLA”) decisions relating to its federal oil and gas leases located in the White River National Forest (“WRNF”). Despite WillSource’s diligent attempts to develop its leases and its earnest attempts to work with the agencies and impacted stakeholders, WillSource has been prevented from developing its leases by circumstances outside of its control. In fact, the very obstacles that prevented WillSource from developing its leases were often explicit requests by the agencies that manage WillSource’s leases—the U.S. Forest Service (“USFS”), the surface managing agency, and the U.S. Bureau of Land Management (“BLM”), which includes the Colorado River Valley Field Office (“Field Office”) and the Colorado State Office (“CSO”) (collectively “Agencies”). Unfortunately, instead of working together to promote development of public minerals as intended, the Agencies often contradicted one another and gave WillSource conflicting information.

WillSource is a small, locally-owned company, with few assets other than its oil and gas leases in the WRNF. While WillSource has acted in good faith, the same cannot be said for the Agencies. The Agencies worked together to delay and deceive WillSource and, in the end, the Agencies have told WillSource it can only blame itself for the expiration of three of its leases. However, such dishonest behavior should not be condoned. Since WillSource can demonstrate that the challenged decisions are arbitrary, capricious, an abuse of discretion, and not in accordance with law, this Court should hold unlawful and set aside the decisions of the IBLA.

STATEMENT OF FACTS

I. WILLSOURCE'S LEASES AND THE WILLOW CREEK UNIT.

In 1995, Infinity Oil and Gas purchased the following federal oil and gas leases from the BLM within the WRNF: COC 58838, COC 58836, COC 58837, COC 58838, COC 58839, COC 58840, and COC 58841 (collectively "Leases").[1] In September 1996, WillSource purchased the Leases. Given the terrain, their limited access, and other local concerns, the operating season for the Leases is limited to approximately July 1–November 30, annually. *See*, *e.g.*, BLM000142–43; BLM000203.[2]

On July 30, 2003, the BLM approved the Willow Creek Unit Agreement ("WCUA"), BLM000141, creating the Willow Creek Unit ("WCU") and requiring an obligation well to be drilled within the unit by January 30, 2004. *See* BLM000049–65. Once the initial well was drilled, the WCUA provides that the unit operator must continue drilling one well at a time and not allow more than 6 months between completion of one well and commencement of drilling operations for the next well. *See* WCUA § 9; BLM000053–54. After drilling a well, the unit operator submits a paying well determination ("PWD"), where the BLM evaluates the well's production to determine if it is producing in reasonably paying quantities. BLM000260. After receiving a PWD, the unit operator submits a schedule of lands to the BLM to be approved as the initial

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[1] The BLM and the IBLA both contend that leases COC 58835, COC 58840, and COC 58841 have expired. These three leases will be collectively referred to as the "Challenged Leases."

[2] All "BLM00###" citations refer to the bates numbered pages in the Administrative Record as provided by Defendants.

participating area ("PA") for the unit. WCUA § 11; BLM000054. All lands not included in the WCU's initial PA were to be automatically eliminated from the WCU on the fifth anniversary of the WCU's effective date. WCUA § (2)(e); BLM000051. The WCUA provides that its obligations will be suspended if, despite the operator's due care and diligence, the operator is prevented from complying with the terms of the WCUA due:

> [I]n whole or in part, by strikes, acts of God, Federal, State, or municipal law or agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials or equipment in the open market, or other matters beyond the reasonable control of the Unit Operator whether similar to matters herein enumerated or not.

WCUA § 25, BLM000059–60.

From the establishment of the WCU until June 2008, Delta Petroleum Corporation ("Delta") was the unit operator for WillSource. Delta sought and was granted an extension and timely completed the obligation well for the WCU on November 11, 2004. BLM000151; BLM000173. This well is the Little Beaver #1-20 well and is located on lease COC 58836. After completing #1-20, Delta sought to diligently drill a second well, but was prevented from doing so by circumstances out of its control. BLM000181 (BLM granting extension through September 1, 2006 because "of conditions which are preventing the drilling rig from accessing the proposed well location."); BLM000190 (BLM granting extension through September 1, 2007 because of unavailability of rig).

During this time, the BLM segregated acreage in lease COC58838, and in two of the Challenged Leases, COC 58840 and COC 58841, out of the WCU. *See* BLM000178–79; BLM000184–87; BLM001126 ¶ 13. The segregated portions were

leased as odd-shaped and/or fragmented parcels. BLM001125 ¶ 11. The BLM notified Delta of the segregations by sending a separate Decision for each lease. BLM000178–79; BLM000184–87. The Decisions expressly notified Delta that lands outside the WCU were segregated and would receive a new lease serial numbers. BLM000178; BLM000184; BLM000186. The decisions further extended the expiration of the segregated leases, giving Delta and WillSource an opportunity to hold the segregated portions by production. BLM000179; BLM000185; BLM000187. WillSource and Delta strategically allowed the segregated portions of these leases to expire because neither entity intended to develop those portions. BLM001126 ¶ 14. Based on this experience, WillSource had a reasonable belief that it would be notified by decision if the BLM believed the status of any of its Leases changed.

Thereafter, WillSource sought and was granted two extensions, pursuant to WCUA § 25, to drill a second well on CO 58837. BLM000203–204 (WillSource requesting extension due to unavoidable delays caused by agencies, third-party pipeline construction, and road/well pad work); BLM000211 (BLM granting extension through November 30, 2008 due to “Unavoidable Delay”); BLM000216–217 (WillSource requesting extension due availability of pipeline, industry-wide delays in equipment, and permitting delays from the State of Colorado and the BLM); BLM000221 (BLM granting extension through November 30, 2009).

In September 2009, despite its diligent efforts to drill, WillSource was notified that the existing Ragged Mountain Pipeline would be unable to accept gas from its Leases. BLM000223. WillSource was also notified of a new pipeline that would pass directly by

its leases—the Bull Mountain Pipeline. BLM000224. Although WillSource was hopeful the Bull Mountain Pipeline would be able to accept gas for the Leases, an independent gas-marketing consultant noted, given "the uncertainties relative to Bull Mountain operating pressures, it is not feasible to design and permit the compression and production facilities that would be needed." *Id.* Once again, WillSource was forced to delay drilling by circumstances entirely out of its control. Despite the optimistic report that WillSource might be able to connect to the Bull Mountain Pipeline by summer 2010, the owners of the Bull Mountain Pipeline later became involved in their own legal disputes, which forced the pipeline to remain out of operation until 2014. *See Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, No. 12-cv-01618-RPM, 2015 WL 5655519, at *3 (D. Colo. Sept. 15, 2015); *see also* BLM000786 (letter from Gunnison Energy Corporation President confirming that the Bull Mountain Pipeline remained shut in as of August 31, 2012).

On September 25, 2009, WillSource met with BLM staff to discuss the challenges that were delaying its plans to drill a second well. *See* BLM000226–27. Reed Williams, President of WillSource, attended that meeting and left it feeling the BLM understood the challenges WillSource faced. BLM001128 ¶ 20 ("I left this meeting ... and felt there was no reason that the extension would be denied."); *see also* BLM000230–243. Shortly thereafter, WillSource submitted a formal extension request. BLM000226–227.

II. WILLSOURCE'S PAYING WELL DETERMINATION AND PARTICIPATING AREA APPLICATION.

While WillSource was waiting for a response to its extension request for the second well, WillSource submitted a request for a PWD and designation of a PA based

on the Little Beaver # 1-20 well. BLM000260–273. Two weeks after the expiration of WillSource's existing extension, by letter dated December 14, 2009, the BLM denied WillSource's extension request and said that it would provide an update on the status of the Leases after the PWD/PA applications had been processed. BLM000276. The BLM's denial letter provides, "[y]ou will be notified when we have finished processing the PWD and PA applications as to the status of the Willow Creek Unit and leases within the Unit." *Id.*; *see also* BLM000257–58 (November 18, 2011 email from BLM employee Hank Szymanski documenting next steps to take vis-à-vis the Willow Creek Unit, including "inform[ing] Willsource about the resulting unit status...."). The denial letter provided no appeal information and directed WillSource to contact Rick Ryan at the BLM with questions. BLM000276. Mr. Williams did so and was advised by Mr. Ryan to await the BLM's decision on its PWD/PA applications. BLM001129 ¶¶ 23–24.

The BLM's response to WillSource's PWD/PA applications was delayed for many months. To ensure WillSource's Leases were protected, Mr. Williams continued to follow up with BLM CSO staff. BLM0001129 ¶ 24. Ten months later, by letter dated September 21, 2010 ("September 2010 Letter"), the BLM granted WillSource's PWD and PA applications. BLM000300–301.[3] The letter provides that the PA has been approved with an effective date of November 11, 2004, BLM000300, but lacks the

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[3] Surprisingly, a BLM clearance sheet accompanying the September 21, 2010 letter contains a handwritten note providing "Can we send contraction letter at same time?" BLM000299. The note appears to be written by BLM geologist Ken McMurrough. *Id.* Thus, either the BLM knew its September 2010 letter had the effect of contracting the Willow Creek Unit and actively concealed that fact from WillSource, or other BLM staff disagreed that the September 2010 letter had the effect of contracting the Willow Creek Unit.

report as to the status of WillSource's Leases that had been promised in the December 14, 2009 letter. BLM0000276.

Again, Mr. Williams and other WillSource staff followed up with the BLM to inquire about the status of its Leases since it had not received any update, as promised. BLM001130 ¶ 26; BLM000276. The BLM staff advised WillSource that the BLM's only way of checking the status of leases was by referencing the BLM's LR 2000 data storage system and no changes had been reported there. *Id.* Based on experience, Mr. Williams also knew that if the BLM issued decisions affecting any of WillSource's Leases, it would see changes in the LR 2000 system or in its annual invoices. BLM001130 ¶ 27.

Unbeknownst to WillSource, on June 24, 2011, BLM employee Hank Syzmanski internally emailed Jason Gross, BLM/USFS Field Office employee, and stated the WCU "should have contracted on 11/11/2009." BLM000329.[4] A contraction occurs when leases are removed from a unit. Upon contraction, federal leases are extended on an individual basis for an additional two years. 43 C.F.R. § 3107.4 ("Any lease eliminated from any approved ... unit plan ... shall continue in effect ... for 2 years after its elimination from the plan or agreement ..., and for so long thereafter as oil or gas is produced in paying quantities."); 30 U.S.C. § 226(m) ("Any lease which shall be eliminated from any such approved ... plan ... shall continue in effect ... for *not less than* two years, and so long thereafter as oil or gas is produced in paying quantities."

[4] The use of past tense demonstrates that Mr. Hall knew the BLM had failed to notify WillSource that the Willow Creek Unit contracted.

(emphasis added)). If the BLM believed in June 2011 that the Challenged Leases contracted from the WCU in November 2009, it had a duty to immediately notify WillSource, because WillSource's two-year period to hold the Challenged Leases by individual production would have begun to toll. In fact, a purposeful delay in telling WillSource about the status of the Challenged Leases is arbitrary and capricious. *See Iceland S.S. Co. v. U.S. Dep't of the Army*, 201 F.3d 451, 461 (D.C. Cir. 2000) (agency action motivated by subjective bad faith is arbitrary and capricious).

On October 14, 2011, WillSource submitted an application for permit to drill ("APD") a new well on lease COC58835. BLM001199–1200; BLM001130–31 ¶¶ 29–30. In light of WillSource's APD, the Field Office contacted the CSO on October 21, 2011, to inquire about the status of the Willow Creek Unit. CSO employee Judy Armstrong responded on October 25, 2011, stating that the lease information "has been entered in LR2000 ...." BLM000334 (demonstrating that the information was not previously entered in as it should have been). Ms. Armstrong further stated, "I feel at this time the unit would have contracted in 2009 and will request from WillSource the contraction." *Id*. Clearly, the status of the Challenged Leases remained undetermined by the BLM during this time.

III. NOVEMBER 2011 CORRESPONDENCE.

By letter dated November 9, 2011 ("November 2011 Letter"), the BLM first notified WillSource of its position that the Willow Creek Unit had contracted on November 11, 2009. BLM000337. On its face, the November 2011 Letter merely notifies WillSource of the BLM's position that the size of the WCU has been reduced.

The letter does not mention the status of the Challenged Leases and in no way implicates that the Leases' status had changed. The letter further requests a description of all lands eliminated from the unit and still contains no description of the status of any of WillSource's Leases. *Id*.

Mr. Williams, unsure what the November 2011 Letter meant for WillSource's Leases, contacted the CSO immediately to schedule a meeting for November 16, 2011. BLM001132 ¶¶ 35–36; *see also* BLM000340.[5] At this meeting, Mr. Williams and CSO employees Judy Armstrong, Roger Hall, and Becky Backlund discussed how to proceed with development of the Leases. BLM001132 ¶ 36. None of the BLM staff in attendance indicated WillSource would be prevented from continuing to develop its Leases, that WillSource's Leases had expired (as the agency now argues), or that the November 2011 Letter was appealable. Instead, the BLM staff requested Mr. Williams draft a memo memorializing the meeting and documenting WillSource's plans for development. BLM001132–33 ¶¶ 36, 38.

On November 29, 2011, WillSource submitted two additional APDs along with their processing fees for leases COC 58840 and COC 58841. BLM001133 ¶ 37. WillSource would not have completed and submitted these APDs if it had any indication from the BLM that WillSource's Leases were in jeopardy. Then, on December 6, 2011, WillSource submitted the memorandum that was requested at the November 16, 2011

[5] Previously, when WillSource's leases had contracted the BLM sent specific notice to WillSource. *See* BLM000178–79; BLM000184–87.

meeting. BLM000340–342. The memorandum clearly documents the expectation that WillSource and the BLM would work together to continue development of the Leases.

After WillSource submitted the December 6, 2011, memorandum, the BLM was non-responsive for many months. Despite the BLM's silence, WillSource was waiting on: (1) a document with the status of the Leases; (2) a response to the APD filed on October 14, 2011; (3) a response to the APDs filed on November 29, 2011; and (4) a response to the December 6, 2011, memorandum. Although WillSource remained in contact with the various branches of the BLM, WillSource heard nothing for many months.

IV. JUNE 2012 CORRESPONDENCE AND STATE DIRECTOR REVIEW REQUESTS.

In June 2012, WillSource received two letters from the BLM on the same day. One was titled "Notice of Order(s) of the BLM Authorized Officer" and was sent via certified mail ("June 2012 Notice"). BLM000377–378. The other letter was titled "Decision" and was not sent via certified mail ("June 2012 Decision"). BLM000380–381. The June 2012 Notice requests a description of the lands eliminated from the Willow Creek Unit and copies of WillSource's annual plans of development and reviews of operations. BLM000377. The June 2012 Decision finally contains a description of the Lease status as promised to WillSource years earlier. BLM000380. The June 2012 Decision also retroactively purports to establish that leases COC 58835, COC 58840, and COC 58841 expired on November 11, 2011. *Id.* Mr. Williams was stunned to read of the purported expiration of WillSource's Leases after working so closely with the BLM

for years—especially given the demeanor and collaborative nature of CSO staff at the November 16, 2011 meeting.

Mr. Williams immediately contacted CSO staff in an attempt to understand the meaning of the two letters. BLM001134 ¶ 43. On July 20, 2012, Mr. Williams attended a meeting with CSO staff regarding the possibility of challenging the two letters and asked for recommendations from the CSO staff in attendance. *Id.* Based on the specific recommendations of CSO staff, Mr. Williams drafted a request for state director review ("SDR") and submitted it to CSO employee Jerome Strahan the same day. *Id.* ¶ 44. Shortly thereafter, CSO employee Hank Syzmanski notified Mr. Williams that Mr. Syzmanski and CSO employee Kathleen Toth believed WillSource should limit its SDR request to the June 2012 Order only. BLM001135 ¶ 45. In their stated opinion, the June 2012 Order was generated first and therefore any challenge to the June 2012 Order would stay any effect of the June 2012 Decision. *Id.* At their express direction, Mr. Williams amended WillSource's SDR request ("SDR I"). BLM001135 ¶ 46. On July 24, 2012, as part of its SDR request, WillSource submitted a request for stay of the June 2012 Decision. BLM000420. By decision dated August 23, 2012, the CSO granted the stay. BLM000462.

In September 2012, relying on advice from BLM employees, WillSource requested a suspension of operations and product ("SOP") for all of its Leases. BLM001936–47; BLM001136 ¶ 49. By letter dated December 17, 2012, the BLM denied WillSource's requests. BLM001951–58. On January 7, 2013, WillSource timely

sought SDR review of the BLM's December 2012 SOP Denials ("SDR II"). BLM001136 ¶ 51.

Throughout this time, the Field Office, the CSO, the former Mineral Management Service, and the Office of Natural Resources Revenue ("ONRR") systematically treated WillSource's Challenged Leases as existing and part of the WCU. For example, WillSource continued to receive annual notices for delay rental payments due for the Challenged Leases. *See* BLM001293–1363. WillSource made all delay rental payments for the Challenged Leases. *See id.*

On January 31, 2013, Mr. Williams gave an oral presentation to CSO employee Roger Hall in support of SDR I and SDR II at the CSO. BLM001136–37 ¶¶ 52–54. After giving the oral presentation, Mr. Williams remained in close contact with the CSO. For example, Mr. Hall emailed Mr. Williams a draft SDR I decision. BLM001960–73. Critically, the draft SDR I recognized the BLM's mistakes in: (1) denying WillSource's October 2009 drilling extension request; (2) failing to keep the operator informed of the status of the WCU; and (3) not timely approving WillSource's PWD/PA application. BLM001968. The draft SDR I decision concludes that "the five year period of time to develop the unit … without [WCU] agreement specific drilling obligations will be initiated on September 21, 2010, the CSO approval date of the initial participating area." *Id.* (underline in original). The draft SDR I decision concluded that "CSO administration of the Willow Creek unit was deficient and prevented WillSource full enjoyment of the agreement provisions." *Id.* Despite the conclusion in the draft SDR I decision, by final decision dated January 23, 2014, the CSO upheld the BLM's decision in the June 2012

letters. BLM002053–59. By decision dated April 10, 2014, the CSO upheld the BLM's denial of WillSource September 2012 SOP request in SDR II. BLM001484–89.

V. IBLA APPEALS.

A. *WillSource I*.

WillSource timely appealed the SDR I decision to the IBLA. BLM000900–15. On July 10, 2014, WillSource requested an evidentiary hearing. BLM002203–09. But on October 26, 2015, the IBLA denied the motion for evidentiary hearing. BLM002444–47. WillSource's appeal was fully briefed by July 31, 2014, yet the IBLA did not issue its decision until May 9, 2017. *WillSource Enterprise, LLC*, IBLA 2014-104 (May 9, 2017) ("*WillSource I*"). For almost three years, WillSource waited on a determination as to the status of the Challenged Leases.

The IBLA decision, BLM002451–60, inexplicably ignores the BLM's actions and its treatment of WillSource and the Challenged Leases. *See* BLM002457. In fact, the IBLA provided that the "BLM approved WillSource's request for a paying well determination and established an initial participating area for the WCU that was effective when that well was completed on November 11, 2004." *Id.* The IBLA curiously omitted the critical fact that WillSource did not apply for the PA until November 30, 2009 and that BLM did not approve the PA until September 21, 2010. The IBLA ignored the crux of WillSource's argument, namely that the BLM may not retroactively contract the WCU and allow the Challenged Leases to expire with no notice to WillSource. The IBLA then provided that "[n]onparticipating leases were automatically eliminated from the WCU on November 11, 2009, which required WillSource to describe the area so

eliminated ... by February 10, 2010." *Id.* (internal quotation omitted). Again, the IBLA ignored that such a timeline was impossible because the BLM did not approve the PA until September 21, 2010, and, therefore, WillSource is entitled to equitable relief.

B. *WillSource II.*

WillSource timely appealed the SDR II decision to the IBLA. BLM001466–82. This appeal was fully briefed by August 11, 2014, yet the IBLA did not issue its decision until May 31, 2017. BLM002478.

The IBLA decision, *WillSource Enterprise,* LLC, IBLA 2014-172 (May 31, 2017) ("*WillSource II*"), BLM002461–69, relied largely on *WillSource I*, insofar as the IBLA held that the Challenged Leases expired November 11, 2011. BLM002463; BLM002467 ("We ... ruled in *WillSource* [*I*] that there was no estoppel preventing [the Challenged Leases] from being eliminated from the WCU on November 11, 2009. We think a similar result is also warranted in this case." (footnote omitted)). Once again, the IBLA ignored the facts in the record and rubber-stamped the BLM's actions in denying WillSource's September 2012 SOP request on two grounds. First, the IBLA ruled that the "stay" granted by the CSO while it considered SDR did not "stay" the effect of the June 2012 Order. BLM002465–66. Second, the IBLA ruled that the BLM was not estopped from denying WillSource's 2012 SOP, despite the concerted actions taken by BLM personnel to convince WillSource the Challenged Leases had not expired. BLM002466–68. For example, even in 2014, the Field Office was continuing to treat the Challenged Leases as valid existing leases by mailing WillSource a letter informing it of BLM actions that would affect the Challenged Leases. BLM002468.

WillSource timely sought review of the IBLA decisions in this Court on August 3, 2017. Doc. 1.

ARGUMENT

I. THE IBLA'S *WILLSOURCE I* DECISION IS ARBITRARY AND CAPRICIOUS.

The BLM should be estopped from retroactively contracting the WCU, which caused the Challenged Leases to expire with no notice to WillSource. *WillSource I* is unsupported by substantial evidence and unwarranted by the facts in the record. 5 U.S.C. § 706. The IBLA's failure to properly consider "all relevant factors," resulted in "a clear error in judgment." *See IMC Kalium Carlsbad v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1012 (10th Cir. 2000).

A. The Administrative Procedure Act and Standard of Review

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06, provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within in the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. IBLA decisions are considered final agency actions of the U.S. Department of the Interior and thus are subject to judicial review under the APA, 5 U.S.C. § 704. *See Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1156 n.5 (10th Cir. 2004).

Reviewing courts must "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The court must further "hold unlawful and set aside agency action, findings, and conclusions" that are:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence ...; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id. § 706(2).

B. The BLM Should Be Estopped From Retroactively Contracting The WCU And Allowing WillSource's Leases To Expire Without Notice.

The doctrine of equitable estoppel prevents a party from taking advantage of its own wrong. *See R.H. Stearns Co. of Boston, Mass. v. U.S.*, 291 U.S. 54, 61–62 (1934). A party invoking the defense of equitable estoppel must establish that: (1) the party to be estopped knows the facts; (2) the party to be estopped intended its conduct to be acted on or acted in a manner such that the party asserting estoppel has a right to believe it was so intended; (3) the party asserting estoppel must be ignorant to the facts; and (4) he must rely on the party to be estopped's conduct to his injury. *See Kowalczyk v. INS*, 245 F.3d 1143, 1149 (10th Cir. 2001). Additionally, when a party "has a duty to speak," silence "will work an estoppel ...." *See United States v. Georgia-Pacific Co.*, 421 F.2d 92, 97 (9th Cir. 1970) (footnote omitted).

Just like a private party, "when a government agent acts within his authority, the government can be estopped by [its] actions." *See Molton, Allen & Williams, Inc. v. Harris*, 613 F.2d 1176, 1179 (D.C. Cir. 1980); *see also Kizas v. Webster*, 492 F. Supp.

1135, 1145 (D.D.C. 1980) (There is no "doubt that the Government, like any private person or institution, can in certain circumstances be bound through principles of estoppel ...."), *aff'd* 707 F.2d 524 (D.C. Cir. 1983); *Best v. Stetson*, 691 F.2d 42, 44 (1st Cir. 1982) ("[C]ourts undeniably have the power to estop the government." (citing *United States v. Rexach*, 558 F.2d 37, 43 (1st Cir. 1977)). Case law clearly establishes that the government cannot be allowed to benefit from its own failures.

The IBLA erroneously held that the BLM was not estopped from retroactively contracting the WCU, which caused the Challenged Leases to expire with no notice to WillSource. BLM002459–60. "Estoppel is a doctrine with '[m]orality and justice' as its foundation." *See Mabus v. General Dynamics C4 Systems, Inc.*, 633 F.3d 1356, 1368 (Fed. Cir. 2011) (Newman, J., dissenting) (quotations omitted). Indeed, "some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement." *Armstrong v. United States*, 516 F. Supp. 1252, 1255 (D. Colo. 1981).

WillSource properly demonstrated that the BLM: (1) knew the true facts; (2) intended WillSource to act on the BLM's conduct or otherwise the BLM acted in such a manner that WillSource has a right to believe it was so intended; (3) WillSource was ignorant of the facts; and (4) WillSource relied on the BLM's conduct to its detriment. BLM001080–85. WillSource's claims are not based on a single action. Instead, the BLM, for years, continually lead WillSource to believe the Challenged Leases were valid existing leases for years. WillSource had no reason to believe the BLM was being

deceptive or otherwise trying to trick WillSource into allowing any of its Leases to expire. BLM001122–23 ¶ 5; BLM001123 ¶ 7, BLM001140–41 ¶¶ 70–75.

First, the record clearly establishes that BLM staff knew the BLM's September 2010 approval of WillSource's PWD/PA application affected the Challenged Leases. BLM000299 (Clearance sheet with handwritten note asking if CSO could send WillSource contraction letter in Fall 2010); BLM000329 (internal email noting that the WCU "should have contracted on 11/11/2009."). Despite the internal BLM communications, the BLM failed to notify WillSource of any change in the status of its Leases until its June 2012 Decision—and by that time, it was too late for WillSource to utilize the two-year extension. BLM000384–85; BLM001132 ¶ 34 ("The BLM had either been purposely or unintentionally misleading WillSource by representing that no changes had occurred to the status of [the Challenged Leases]."). Even the November 2011 Letter, which the IBLA heavily relied upon to support its position that WillSource waited too long to challenge the expiration of the Challenged Leases, contains no description of the effect of the contraction on the Challenged Leases. BLM000337.

Second, the BLM clearly intended WillSource to act on its conduct. WillSource had worked closely with the BLM for years and always complied with agency requests, often at significant expense. For example, when the USFS asked WillSource to move its proposed wellpad sites to previously disturbed road beds, WillSource did so, at large expense to itself and absent any legal requirement to do so. BLM001123–24 ¶ 7. From the moment WillSource became operator of its Leases, its employees worked closely with BLM and followed BLM's advice in good faith each step of the way. Each time

WillSource received correspondence asking it to contact someone at BLM, WillSource did so and explicitly followed that BLM employee's advice. *E.g.*, BLM001130 ¶ 26; BLM001132 ¶ 35; BLM001133 ¶ 38; BLM001134 ¶ 43; BLM001135 ¶ 45. Given the number of years WillSource and the BLM worked together, the BLM not only intended its conduct to be acted upon, it knew WillSource would follow any advice it gave.

Third, WillSource was ignorant of the true facts due to the BLM's failure to disclose information to WillSource. WillSource had experienced portions of leases COC 58838, COC 58840, and COC 58841 expiring before and received explicit notification of the expiration from the BLM. BLM001146–51 (decisions notifying Delta that portions of leases within the WCU had segregated and notifying Delta when the segregated portions would expire). Thus, WillSource had the reasonable expectation that should the status of any of its Leases change, the BLM would properly notify it. BLM001130–31 ¶ 29 ("Under no circumstances did I or any other WillSource employee believe that the BLM had authority to change the status of a lease without first notifying the operator."). WillSource also continued to ask all levels of BLM employees about the status of the Challenged Leases and was always told that there had been no change to the status of its Leases despite the internal communications among BLM employees stating the opposite. BLM001130 ¶ 26; BLM001130–31 ¶ 29; BLM001132 ¶ 34. Absent BLM notification, WillSource had no ability to ascertain the true facts as to the status of the Challenged Leases.

Moreover, the BLM, including many CSO employees, treated the Challenged Leases as valid existing leases. On November 16, 2011, just a few days after

WillSource received the November 2011 Letter, Mr. Williams met with three CSO employees to discuss the November 2011 Letter. BLM001132–33 ¶ 36. No one at that meeting notified WillSource that the BLM believed the Challenged Leases had expired on November 11, 2011. Instead, the employees directed Mr. Williams to draft a memorandum memorializing the meeting and outlining proposals to keep all WillSource's Leases intact. BLM001133 ¶¶ 38–39. After the November 16, 2011 meeting, WillSource continued to work diligently and expend resources toward developing the WCU. BLM001133 ¶ 39. No prudent operator would have continued to expend resources on expired leases.

Again, after receiving the June 2012 Order and June 2012 Notice, WillSource once more sought advice from the CSO on how to proceed. BLM001134 ¶ 43. After submitting an SDR request, CSO employee Hank Syzmanski contacted Mr. Williams and directed Mr. Williams to request SDR for the June 2012 Order only. BLM001135 ¶ 45. Mr. Syzmanski explained that "the June 2012 Order was generated first and that any challenge to the June 2012 Order would effectively stay the June 2012 Decision until a ruling from the State Director was issued." BLM001135 ¶ 45. Essentially, the IBLA's decisions seeks to punish WillSource for following the advice and direction of the BLM.

Fourth, and finally, WillSource clearly relied on the express advice of the BLM to its detriment. WillSource has been injured by the BLM and IBLA's belated conclusion that WillSource should have appealed the November 2011 Letter. At the time, WillSource was simply directed to work with the CSO to ensure its Leases were

preserved. To suddenly say, "'[t]he joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *See Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

The plaintiff in *Brandt* submitted a non-competitive oil and gas lease offer to the BLM Los Angeles office. 427 F.2d at 54. The plaintiff made a mistake on its offer form and the BLM Los Angeles responded to the plaintiff with a decision directing the plaintiff to: (1) appeal the decision letter directly through the agency administrative appeal process; or (2) correct the error on the lease offer form and fill out a new form, which the BLM enclosed in the same envelope. *Id.* at 55. The plaintiff chose the second option and completed the new offer form. *Id.* After a third-party protested the issuance of the oil and gas lease to plaintiff, the Secretary of the Interior concluded that plaintiffs' amended offer was a new offer and was junior to another offer that was submitted before plaintiff submitted its amended offer. *Id.* The Ninth Circuit held that the BLM Los Angeles Office's decision failed to adequately inform plaintiff that it was adversely affected and contained ambiguity as to whether it was a final decision. *Id.* at 56–57. The Ninth Circuit acknowledged that the case would have been "much different" "if the booby trap unwittingly set for [plaintiff] had somehow hurt the government." *Id.* at 57.

In the instant action, the BLM's actions toward WillSource's Leases carried on for years, making them even more egregious than the BLM Los Angeles Office's single mistake in *Brandt*. 427 F.2d at 55; *see also United States v. Eaton Shale Co.*, 433 F.Supp. 1256, 1274–75 (D. Colo. 1977) (estopping the government from declaring a patent void after it issued the patent and consistently treated it as valid for 21 years).

Here, the BLM failed to adequately inform WillSource that it had been adversely affected by the September 2010 Letter, approving WillSource's PWD/PA application, or the November 2011 Letter. The September 2010 Letter and November 2011 Letter contained no indication that they were final, binding decisions. *See Brandt*, 427 F.2d at 56–57. At least in *Brandt*, the BLM Los Angeles Office "issued a decision." *Id.* at 54. In the instant action, none of the correspondence that the IBLA faults WillSource for failing to appeal were labeled "decision." The BLM cannot be allowed to direct WillSource on how it should act each step of the way and then disclaim any responsibility for the consequences of its guidance. *Id.* at 57 ("Bad advice cannot ordinarily justify giving away to individuals valuable government assets. This is no such case.").

This Court has similarly had occasion to hold that "there are instances where it would be unconscionable to allow the government to reverse an earlier position." *See Armstrong*, 516 F. Supp. at 1254 (citing *United States v. Lucienne D'Hotelle*, 558 F.2d 37 (1st Cir. 1977)). In fact, "some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision-making process that the government may be estopped from disavowing the misstatement." *Id.* at 1255 (citing *United States v. Wharton*, 514 F.2d 406, 412 n.6 (9th Cir. 1975)). The IBLA believes that the terms of the unit agreement trump all other considerations; however, courts have repeatedly refused to condone such deceitful agency action. *See Molton, Allen & Williams, Inc.*, 613 F.2d at 1181 ("There is no reason ... why the government should be allowed such an unfair and dishonest manner of doing business."); *Portmann v. United States*, 674 F.2d 1155, 1160 (7th Cir. 1982) ("More modern decisions ... have noted that a concern

for administrative efficiency should not permit the government to deal unfairly or capriciously with its citizens." (citing *Georgia-Pacific Co.*, 421 F.2d at 100); *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973); and *Massaglia v. Comm'r of Internal Revenue*, 286 F.2d 258, 260 (10th Cir. 1960)).

In sum, the BLM treated the Challenged Leases as valid existing leases through June 2012. Even after receiving the June 2012 Order and June 2012 Decision, WillSource continued to pay annual delay rental payments on its leases and those payments have been accepted by the ONRR. The June 2012 Order and June 2012 Decision were the first time that the BLM treated the Challenged Leases as expired. Based on its own experience with the BLM, WillSource reasonably believed that the BLM could not change the status of leases without first notifying the operator. Thus, the IBLA's decision finding "no affirmative misconduct of the" BLM, BLM002459, is arbitrary and capricious, unsupported by the facts in the record, and must be set aside.

C. *WillSource I* Is Arbitrary And Capricious Because The IBLA Failed To Consider All Relevant Factors And Made A Clear Error in Judgment

In an apparent attempt to bless the BLM's deceptive actions, the IBLA failed to consider the relevant factors as presented in the record. *See IMC Kalium Carlsbad*, 206 F.3d at 1012. The administrative record clearly demonstrates the BLM misled WillSource into believing the Challenged Leases were valid, existing leases up until June 2012, when the BLM suddenly changed course. Ignoring the BLM's role in the current situation, the IBLA blamed WillSource alone for following the BLM's advice and direction for years.

The "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard in 5 U.S.C. § 706(2)(A), which is commonly referred to as the "arbitrary and capricious" standard, serves as a "catchall" that "pick[s] up administrative misconduct not covered by the other more specific" standards. *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984). An agency decision is arbitrary and capricious when the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

Thus, an agency action that is within the agency's delegated authority may still be held unlawful as arbitrary and capricious. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In addition, the arbitrary and capricious standard applies to both the factual basis for an agency's action, *Overton Park*, 401 U.S. at 416, and the reasoning employed by the agency. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974).

Review under the arbitrary and capricious standard requires courts to determine "whether the agency considered all relevant factors and whether there has been a clear error of judgment." *IMC Kalium Carlsbad*, 206 F.3d at 1012 (quotation omitted). Agency action is arbitrary and capricious unless it is supported by substantial evidence

in the administrative record. *Pennaco Energy*, 377 F.3d at 1156. "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003)).

On November 30, 2009, WillSource submitted its PWD/PA application. BLM000260–273. The BLM delayed responding for nearly ten months. Then, by letter dated September 21, 2010, the BLM approved WillSource's PWD/PA application. BLM000300–01. It cannot be understated that as of November 11, 2009, no one, not the BLM and certainly not WillSource, knew that any lands would be contracted from the WCU based on the PA. The BLM's delay in responding to WillSource's PA request should not now be used as an excuse to extinguish WillSource's valuable lease rights.

Despite the clear timeline of events before the IBLA, the IBLA held that the Challenged Leases "were automatically eliminated from the WCU on November 11, 2009 ...." BLM002457. This finding is arbitrary, capricious, factually impossible, and the result of a clear error in judgment. Based on the IBLA's erroneous conclusion that the Challenged Leases contracted from the WCU on November 11, 2009, the IBLA further found that WillSource was required to submit a description of the lands eliminated from the WCU by February 10, 2010. *Id.* Again, the BLM did not approve the PA until September 21, 2010, over seven months *after* February 10, 2010, and over ten months after the purported contraction of the WCU. The crux of the IBLA's ruling relies on the factual impossibility that the Challenged Leases contracted from the WCU on November 11, 2009. Therefore, the IBLA failed to consider an important aspect of the problem and its decision is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

Additionally, after November 11, 2009, the BLM continually treated the Challenged Leases as valid existing leases, which undercuts the IBLA's conclusion that the Challenged Leases contracted from the WCU on November 11, 2009 and then expired on November 11, 2011. The record clearly demonstrates that the BLM and WillSource both believed the Challenged Leases were valid existing leases until at least June 2012. For example, on October 21, 2011, a BLM Field Office employee emailed the CSO to inquire about the status of the WCU. BLM000333 (The BLM Field Office was requesting "guidance on what the [CSO] believes is the unit status."). Thus, as of October 2011, the BLM Field Office had no inkling that the WCU contracted in November 2009. Judy Armstrong, one of the CSO employees closely involved with WillSource throughout the years, responded, "I feel at this time the [WCU] would have contracted in 2009 and will request from WillSource the contraction." BLM000334. This email demonstrates that as of October 2011, neither the BLM Field Office, nor the CSO were aware of the purported contraction of the WCU. And, although the BLM employees discuss contraction, none discuss expiration of the Challenged Leases. The BLM Field Office employee simply replied on October 25, 2011, that if the CSO "decides that contraction of the unit is in order I need to know as soon as possible." BLM000335. Thus, as of October 25, 2011, the Challenged Leases had not contracted from the WCU. *But see* BLM000662–63; BLM000672–75 (BLM's own records dated November 12, 2013, which still display the Challenged Leases as valid existing leases).

Moreover, if the BLM suddenly knew as of October 25, 2011, that the Challenged Leases contracted from the WCU in November 2009, it had a duty to notify WillSource

immediately, not wait until June 2012 *after* the BLM alleges the Challenged Leases expired. Had WillSource been notified on October 25, 2011 that the BLM believed the Challenged Leases would expire November 11, 2011, it could have immediately requested an SOP or otherwise taken action to preserve the Challenged Leases.[6] Based on the foregoing, the IBLA failed to consider all relevant factors and made a clear error of judgment in ruling that the Challenged Leases expired in November 2011.

The record further demonstrates that even after WillSource requested SDR of the June 2012 Orders, CSO employees continued to give WillSource reason to believe the Challenged Leases would remain intact. After giving the oral presentation on January 31, 2013, Mr. Williams remained in contact with CSO employees and was continually told that WillSource would receive a final decision soon. BLM001137 ¶ 55. The BLM's own regulations require a SDR decision to be issued within 10 business days of an oral presentation. 43 C.F.R. § 3165.3(d). In August 2013, CSO employee Roger Hall emailed Mr. Williams the draft SDR decision. BLM001137 ¶ 57; BLM001960–73. The IBLA decision is devoid of any mention of the draft SDR decision. This draft SDR decision recognizes the inequities that WillSource was forced to endure. BLM001966 ("WillSource believed the company was working with the Forester Service, BLM Colorado River Valley Field Office and BLM Colorado State Office as one entity."); BLM001967 ("The changing [] requirements by the Forest Service along with the Divide

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[6] It would have been possible for WillSource to take action to suspend or otherwise preserve the Challenged Leases, because any lease contracted from a unit "shall continue in effect ... for not less than two years, and so long thereafter as oil or gas is produced in paying quantities." 30 U.S.C. § 226(m).

Creek gas treatment facility and pipeline access/legal issues of the Bull Mountain pipeline have in the past prevented WillSource from meeting the [WCU] Agreement timelines."); BLM001968 (The approval date of WillSource's PWD/PA application "**is almost ten months after the five year expiration date of that PA under Section 2(e) of the unit agreement.**") (bold in original); *id.* (The CSO "was remiss in not approving the 6th extension request for drilling a second unit well; and in keeping the operator informed of the unit status."); *id.* ("CSO was not timely in the approval of the PWD/PA application."). Thus, at one point, the BLM itself admitted some culpability.

Moreover, the IBLA arbitrarily denied WillSource's motion for evidentiary hearing. BLM002203–09. WillSource requested an evidentiary hearing: "(1) to satisfy due process; and (2) to resolve issues of material fact as they relate to WillSource's defense of equitable estoppel." BLM002204 ¶ 5.

First, rights conferred on lessees through federal oil and gas leases are protected property interests. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 609 (2000) (oil and gas lease under the Outer Continental Shelf Lands Act constitute a contract); *Griffin & Griffin Exploration, LLC v. United States*, No. 10-638L, 2014 WL 2199269, at *6 (Ct. Cl. 2014) (a federal oil and gas lease is a contract); and *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." (citations omitted)). As such, the federal government may not grant a property right protected by the Fifth Amendment and then

deprive the grantee of the property right without notice and opportunity for hearing. *See Mennonite Bd. of Mission v. Adams*, 462 U.S. 791, 798 (1983) (a statutorily created lien may not be extinguished without providing the lien holder with due process); *cf. Bass Enterprises Production Co. v. United States*, 133 F.3d 893 (Fed. Cir. 1998) (federal oil and gas lease protected by the Fifth Amendment). The IBLA summarily dismissed this point by providing that WillSource's presentation during the SDR and its briefs to the IBLA satisfied due process. It is hard to imagine how an informal presentation by WillSource at the CSO, to the very same people who have systematically been deceiving WillSource, satisfies due process.

Second, there were plenty of facts in dispute before the IBLA and WillSource was entitled to an evidentiary hearing regarding those disputed facts. *See* BLM002205–06 ¶ 10 (listing 10 disputed facts that necessitated an evidentiary hearing). For example, in its answer brief, the BLM characterized its correspondence with WillSource as "not ambiguous." BLM002090–91. Yet, the evidence in the administrative record overwhelmingly demonstrates that the BLM's correspondence and actions all indicated that the Challenged Leases were valid existing leases, at least until June 2012. If the BLM's correspondence and actions were "not ambiguous," as characterized by the BLM, then the BLM would have told WillSource beginning in September 2010 that the Challenged Leases had contracted from the WCU and had entered their two-year extension. *See* 30 U.S.C. § 226(m). Instead, the BLM systematically led WillSource to believe the status of the Challenged Leases was unchanged for years and then, in June 2012, suddenly switched course and told WillSource the Challenged Leases had

expired six months earlier. The record includes ample disputed facts to warrant an evidentiary hearing, and the IBLA's denial of WillSource's motion for evidentiary hearing was arbitrary and capricious.

Because the IBLA ignored the majority of the facts in the record regarding the timeline of events and the actions of the BLM, *WillSource I* was arbitrary and capricious.

D. The BLM Exceeded Its Authority Under The Mineral Leasing Act.

An administrative agency "literally has no power to act ... unless and until Congress confers power upon it." *See La. Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 374 (1986); *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) ("Administrative agencies do no possess the discretion to avoid discharging the duties that Congress intended them to perform." (citations omitted)). The Mineral Leasing Act ("MLA"), 30 U.S.C. § 181 *et seq*., directs the BLM to "administer the [MLA] so as to provide some incentive for, and to promote the development of oil and gas deposits in all publicly-owned lands of the United States through private enterprise." *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 382, 392 (D. Wyo. 1980) (citing *Harvey v. Udall*, 384 F.2d 883 (10th Cir. 1967)). To underscore the importance of the MLA, in 1970 Congress passed the Mining and Minerals Policy Act ("MMPA"), in order to promote development of the nation's oil and natural gas. 30 U.S.C. § 21a. Thus, it is the duty of the BLM to carry out Congress's intent in enacting the MLA and MMPA.

Because the purpose of the MLA is "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise," *Harvey*, 384 F.2d at 885 (quotation omitted), the MLA vests the Secretary of

the Interior, acting through the BLM, *Mountain States Legal Found. v. Hodel*, 668 F. Supp. 1466, 1469 (D. Wyo. 1987), with authority to issue leases covering oil and gas deposits "and lands containing such deposits owned by the United States, including those national forests ...." 30 U.S.C. § 181. The MLA authorizes the Secretary to approve unit agreements for the purposes of "properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof ...." 30 U.S.C. § 226(m).

To protect a lessee's or operator's valuable interest in a federal oil and gas lease, the MLA provides that if a lease is eliminated from a unit, it "shall continue in effect ... for not less than two years, and so long thereafter as oil or gas is produced in paying quantities." 30 U.S.C. § 226(m). The MLA seeks to encourage continued, beneficial production, even on eliminated leases. Further, "no lease shall be deemed to expire during any suspension," 43 C.F.R. § 3103.4-4(b), and rental and minimum royalty payments are to be suspended during a period of suspension of operations and production ("SOP"). *Id.* § 3103.4-4(d).

Instead of promoting development of the nation's oil and natural gas, the BLM has engaged in a concerted effort to thwart development by mismanaging WillSource's Leases and concealing material facts about the WCU for years. As of 2014, WillSource had invested over $8 million into the minerals underlying the WCU, BLM001141 ¶ 72, just as Congress intended. WillSource's large investment further demonstrated its commitment to developing the WCU, especially given that WillSource is a small, independent company with few assets. Despite the fact that WillSource had worked closely with the Agencies for years, and despite the fact that WillSource was delayed

from drilling a second well by circumstances entirely out of its control, the BLM underhandedly turned the tables and blamed WillSource for the unavoidable delays. *See* BLM002083 (Blaming WillSource for waiting five years to file its PA application, while ignoring the BLM's delay in responding to the application). Clearly the BLM and IBLA's actions are not what Congress intended in passing the MLA and the MMPA, and thus, the IBLA's decision is arbitrary and capricious, and abuse of discretion, and otherwise not in accordance with law.

II. THE IBLA'S *WILLSOURCE II* DECISION IS ARBITRARY AND CAPRICIOUS.

WillSource II is a challenge to the BLM's denial of WillSource's SOP request for the challenged leases and the IBLA's affirmance of that decision. BLM002461–69.

Prior to requesting an SOP for the Challenged Leases, WillSource requested a stay of the June 2012 Order.[7] By letter dated August 23, 2012, the CSO granted WillSource's request for stay. BLM000462–66. The CSO specifically wrote that WillSource's "request for a stay is granted pending final issuance of the SDR." BLM000462. There is no ambiguity about whether the stay should have been in effect until the CSO decided the pending SDR. The decision further provides that "[t]he stay is granted due to the time needed to submit the supporting documentation and the scheduling of the oral presentation once the supporting documentation is received." *Id.* This description of the reason for granting the stay, however, does not change the fact

[7] Based directly on CSO employees' advice, WillSource believed its SDR request of the June 2012 Order covered both the June 2010 Order and the June 2012 Decision. BLM001134 – 35 ¶¶ 43–46.

that the stay was to be in place "pending final issuance of the SDR." *Id.* The IBLA's ruling that the stay merely affected "the timeframe within which WillSource had been required to provide the documents [in support of its SDR request]" cannot be squared with the plain language of the decision. *See* BLM002465.

The holding in *WillSource II* also relies entirely on the incorrect holding in *WillSource I*. Thus, if *WillSource I* is set aside, *WillSource II* must also be set aside. In *WillSource II*, the IBLA expressly ruled that the Challenged Leases expired on November 11, 2011 and therefore, the BLM could not grant WillSource's September 2012 SOP request. BLM002466. As previously demonstrated, the IBLA severely erred in ruling in *WillSource I* that the BLM was not estopped from allowing the Challenged Leases to expire with no notice to WillSource. Therefore, the IBLA's reliance on *WillSource I* renders its decision in *WillSource II* in arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

REMEDY

This Court should set aside *WillSource I* and *WillSource II* and rule that WillSource is entitled to the statutory two-year extension that it lost when the BLM concealed that the status of the Challenged Leases changed. *See* 30 U.S.C. § 226(m). To protect the substantial investment of lessees on federal land, Congress specifically protected leases that contracted from units "for *not less than* two years from the date of such [contraction] and so long thereafter as oil and gas is produced in paying quantities." *Id.* (emphasis added). Notably, Congress chose to write this provision as a

floor for the minimum amount of time a lease must stay in effect for, not as a ceiling that would force a lease to expire regardless of any bad actions by the agency.

In the alternative, WillSource is entitled to a 13-month drilling extension for each of the Challenged Leases. This represents the time between when WillSource received the September 2010 letter and November 11, 2011, when the BLM purports that the Challenged Leases expired.

CONCLUSION

WillSource has worked tirelessly, and in good faith, to develop its Leases. The BLM's concerted efforts to stymie WillSource's production and conceal the status of the Challenged Leases was arbitrary, capricious, an abuse of discretion, and not in accordance with law. For the foregoing reasons, WillSource respectfully requests that this Court hold unlawful and set aside *WillSource I* and *WillSource II* and give the IBLA specific instructions on the errors to be addressed on remand.

DATED this 13th day of April 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April 2018, I electronically filed the foregoing with the Clerk of Court using this Court's CM/ECF system, which will cause the following counsel of record to be notified:

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