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 REPLY BRIEF

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INTRODUCTION

Defendant's position is a wholesale embrace of *rex non potest peccare*—the king can do no wrong. Yet, "[s]ince the days of the Declaration of Independence, the keystone of America political thought has been responsible government, and the entire history of the American Revolution would seem to negate the applicability in this country of the English maxim that the king can do no wrong." George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 480 (1953). This Court should hold the Bureau of Land Management ("BLM") accountable for its actions and make a stand for the fundamental principle that no agency is above the law. *Cf. Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("a government of laws, and not of men").

Plaintiff WillSource Enterprise, LLC ("WillSource") is the lessee and operator of oil and gas leases in the White River National Forest, located just west of an area known as the Thompson Divide. WillSource worked closely with the Forest Service and BLM for years to develop six leases in the Willow Creek Unit ("WCU"). In addition to pipeline/access/equipment issues, WillSource held off drilling (and was granted extensions) for a variety of environmental reasons, including changing National Environmental Policy Act requirements, Elk calving, U.S. Forest Service ("USFS") road closures for snowmobile trail use, and cross-country skiing concerns. BLM001967; BLM000248-252. In short, WillSource was a good neighbor, conscious environmental steward, and an ideal business partner.

Despite WillSource's diligent and earnest work, the BLM claims that three of WillSource's leases, COC 58835, 58840, and 58841 ("Challenged Leases"), expired

under the terms of the Willow Creek Unit Agreement ("WCUA") on November 11, 2009. The BLM's bad faith commenced around the same time a coalition of environmental groups launched a concerted effort to keep BLM from granting WillSource an extension to drill a second well in the WCU. *See* BLM000244–245; BLM000246.

From December 2009-June 2012, the BLM refused to provide WillSource with the status of its Challenged Leases. During this period, the BLM and the Office of Natural Resources Revenue ("ONNR") treated WillSouce's leases as valid and gave WillSource no reason to doubt the statements made by BLM personnel. Moreover, the BLM's own records show that its administration of the WCU was "deficient and prevented WillSource from full enjoyment of the agreement provisions." BLM001969.

The record exposes an extraordinary case of affirmative misconduct and bad faith by the BLM. No private entity could conduct itself in the same manner as the Defendant and escape without repercussion. Accordingly, this Court should set aside the IBLA's decisions.

STANDARD OF REVIEW

"A court applying the arbitrary-and-capricious standard of review must ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Mkt. Synergy Grp., Inc. v. United States Dep't of Labor*, 885 F.3d 676, 683 (10th Cir. 2018) (quotations omitted). A court will set aside agency action if the agency "offered an explanation for its decision that runs counter to the evidence before the agency." *Zzyym v. Kerry*, 220 F. Supp. 3d

1106, 1110 (D. Colo. 2016) (quoting *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1574 (10th Cir. 1994)).

ARGUMENT

The IBLA decisions in *WillSource Enterprise, LLC*, IBLA 2014-104 (May 9, 2017) ("*WillSource I*") and *WillSource Enterprise,* LLC, IBLA 2014-172 (May 31, 2017) ("*WillSource II*") were arbitrary and capricious because they ignored critical aspects of the factual record and the BLM's own admission of its mistakes.[1] The IBLA's failure to consider all relevant factors resulted in a clear error of judgement. Moreover, "the government is always right" is not a rational basis. ECF No. 32. *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring) (deference to agencies undermines judicial "check" on political branches).

I. EQUITABLE ESTOPPEL CAN AND SHOULD APPLY AGAINST THE BLM

Defendant offers no practical or precedential justification for why it is immune from this Court's authority to order equitable relief. Equitable estoppel remains a powerful tool against government malfeasance, especially when the agency is a party to a contractual relationship.

The cases cited by Defendant each involve erroneous advice as they relate to the content of statutes and regulations,[2] making them fundamentally different than the situation in this case. In *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), the

[1] Due to the complicated history and record involved in this case, Plaintiff continues to believe oral argument is necessary.

[2] The IBLA has recognized this too. *See Georgia-Pac. Corp.*, 137 IBLA 248 (1997) ("a party is not ignorant of the 'true facts' when notice of segregation of land has been published in the Federal Register").

farmers were told by the government's agent that their entire wheat crop would be insured when, in fact, the clear language of the regulations prevented insurance of certain portions of their crop. *Id.* at 385. In *Montana v. Kennedy*, 366 U.S. 308 (1961), the plaintiff was the foreign-born child of an American mother and an alien father who contended that even if he was an alien under immigration law, the government should be estopped to assert his foreign birth because an American consular officer in Italy would not issue a passport to his pregnant mother to leave the country. *Id.* at 314. The Court did not grant relief because it was "uncontested" that the United States did not actually require a passport to return to the country at that time. *Id.*

Similarly, in *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam), whether a plaintiff was eligible for Social Security benefits was discernable and objective from the law itself. Defendant fails to point out that another case it cites, *Kowalczyk v. I.N.S.*, 245 F.3d 1143 (10th Cir. 2001), noted that the "high bar" for equitable estoppel cases applies specifically in *immigration* cases. *Id.* at 1150. Additionally, the Tenth Circuit ruled against the plaintiff because he could not show the administrative delay was deliberate or that it resulted in "identifiable prejudice" to the plaintiff's case. *Id.*

WillSource had no objective method of discerning whether the Challenged Leases had been contracted from the WCU other than consulting with the BLM and its LR2000 system. *See* BLM00130 ¶ 26. The BLM's representations about the status of Challenged Leases caused WillSource to not take action. Additionally, the vagueness of the November 2011 Letter and the BLM's subsequent erroneous advice to WillSource on how to proceed triggers the need for equitable estoppel. The identifiable prejudice to

WillSource is obvious. As a small, family-owned oil and gas company, WillSource stands to lose everything due to the BLM's actions.

A. The Contractual Nature of the Relationship Imposes Greater Equitable Liability on the Government

Defendant goes to great lengths to argue that this case is one simply involving contractual terms. *See* ECF No. 32 at 18–20, 26–30. This argument only underscores Defendant's increased liability under the traditional principles of equitable estoppel. *See Burnside-Ott Aviation Training Ctr., Inc. v. United State*s, 985 F.2d 1574, 1581 (Fed. Cir. 1993) (equitable estoppel available as a matter of law in contract claim against Navy).

Defendant touts the Department of Interior's statement that "a unit agreement is a contract between private parties." ECF No. 32 at 3-4 (citing *Black Res, Inc.*, 180 IBLA 259, 271 (2010)). Yet Defendant's own caselaw acknowledges that the United States is also a party to that contract. *Black Res, Inc.*, 180 IBLA at 272 ("an approved unit agreement has been described as a contract between the United States and the participating parties for joint development and operation of a targeted oil and gas field"). Moreover, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Expl. & Producing SE., Inc. v. United States*, 530 U.S. 604, 607 (2000). Under this rationale, equitable estoppel has been applied against the government's oral representations when they do not have the effect of "nullifying a statutory requirement." *See Manloading & Mgmt. Assocs., Inc. v. United States*, 461 F.2d 1299 (Ct. Cl. 1972) (applying equitable estoppel against government in contracts

case resulting in contractual amendment that renewed contract for next fiscal year based on agent's oral representations).

Clearly, under this understanding of the contractual relationship between WillSource and the BLM, this Court can and should hold the agency liable for its misrepresentations under the doctrine of equitable estoppel.

B. Estoppel Would Not Frustrate Congressional Purpose or Undermine Enforcement of the Law

This Court can effectuate the intent of Congress by estopping the BLM from cancelling WillSource's leases. Courts invoke estoppel against the government "when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of public laws." *F.D.I.C. v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994); *cf. Portmann v. United States*, 674 F.2d 1155, 1168–69 (7th Cir. 1982) (permitting estoppel against the Postal Service in the instant situation because it was not performing an inherently sovereign or peculiarly governmental function). At no point does Defendant contend that estopping the BLM in this case would interfere with or frustrate the enforcement of public laws. In fact, as argued by WillSource in its opening brief, *see* ECF No. 31 at 36-38, allowing WillSource to develop its leases would effectuate the purpose the Mineral Leasing Act ("MLA"). *See Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 392 (D. Wyo. 1980) (MLA "was intended to promote wise development of natural resources and to obtain for the public reasonable financial returns on assets belonging to the public.") (citing *California Co. v. Udall*, 296 F.2d 384 (D.C. Cir.1961)).

In *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975), the IBLA denied a patent under the Color of Title Act, which authorizes claims of adverse possession against the United States under limited circumstances. The defendant claimed the government should be estopped from claiming title to the land based on misrepresentations made by officers of the BLM. *Id.* at 406. In accepting the estoppel argument, the court conducted a balancing test and found that the government's conduct would work a serious injustice to the defendant. *Id.* at 412. The court further found that the interest of the public would not be "unduly threatened or damaged" by granting defendant the opportunity to obtain the relevant tract of land because, in part, the government would benefit once the defendant gained title to the land and started paying taxes. *Id.* at 412–13; *see also California Co.*, 296 F.2d at 388 ("The public does not benefit from resources that remain undeveloped, and the Secretary must administer the [MLA] so as to provide some incentive for development."). Thus, allowing WillSource to develop its leases would carry out the purpose of the MLA.

II. THE TOTALITY OF THE CIRCUMSTANCES EXPOSES AFFIRMATIVE MISCONDUCT BY THE BLM

The IBLA showed complete disregard for crucial facts in the record and effectively rubber-stamped the actions of the BLM. By concealing and misrepresenting its view that WillSource's leases had contracted in November 2009—while simultaneously promising to provide WillSource with an update on the status of its leases and assuring WillSource that its leases were in jeopardy—the BLM repeatedly, systematically, and maliciously deceived WillSource. *Cf. Armstrong v. United States*,

516 F. Supp. 1252, 1255 (D. Colo. 1981) (alleging defendants repeatedly and systematically misled plaintiff was sufficient to sustain claim for equitable estoppel against government). The IBLA summarily dismissed many of WillSource's strongest arguments as untimely because it did not challenge the BLM's November 9, 2011 Letter informing WillSource the WCU had been contracted two years earlier ("November 2011 Letter"), yet completely failed to examine the adequacy of the Letter itself.

Affirmative misconduct is far from the insurmountable hurdle described by Defendant.[3] *See Bartlett v. U.S. Dep't of Agric.*, 716 F.3d 464, 476 (8th Cir. 2013) ("[A]ffirmative misconduct is something more than mere negligence")[4]; *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 97 (9th Cir. 1970) ("[I]t is clear that conduct far short of actual fraud will also suffice [to raise estoppel]."). Even the IBLA has recognized that "'[a]ffirmative misconduct' need not rise to the level of an effort on the part of Government employees to deliberately mislead an appellant." *Floyd Higgins*, 147 IBLA 343, 351 (1999) (holding BLM was estopped to cancel unpatented mining claims where

[3] Affirmative misconduct is not always required to assert equitable estoppel against the government. *See Azar v. U.S. Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) (affirmative misconduct not a requirement in the unique situation in which a party seeks to estop the Postal Service from relying on Express Mail insurance limits).

[4] Defendant's brief cites *Bartlett* for the false proposition that "negligence and bad faith are insufficient" to constitute affirmative misconduct. ECF No. 32 at 24. Rather, the *Bartlett* court concluded, "these allegedly misleading actions were at most the product of negligence, which is insufficient to establish affirmative misconduct." 716 U.S. at 476. The closest it came to addressing bad faith was in a citation. *See id.* (citing *Morgan v. C.I.R.*, 345 F.3d 563. 566–67 (8th Cir. 2003) (holding that "negligence and *possible* bad faith" in an IRS officer's representations about tax liability were "insufficient grounds for estoppel") (emphasis added)).

failure to timely file assessments was created by BLM administrative errors; BLM's action, while not malicious or ill intended, constituted concealment of material facts).

In *Schweiker*, the Supreme Court noted that the government employee's erroneous information on benefits eligibility was not "affirmative misconduct" because "at worst … [it] did not cause [the plaintiff] to take action or fail to take action that [plaintiff] could not correct at any time." 450 U.S. at 789 (citing, *infra*, *Merrill* and *Kennedy*); *see also Hanson v. Office of Pers. Mgmt.*, 833 F.2d 1568, 1569 (Fed. Cir. 1987) (no affirmative misconduct when government agency "acted in full good faith on the basis of the then accepted reading of the statute"). WillSource relied, to its detriment, on the written and oral representations of the BLM.

A. The IBLA Ignored that the BLM Knew the Unit Had Contracted, Concealed the Truth, and Induced WillSource to Act

The IBLA erroneously failed to examine several critical parts of the factual record. The IBLA's mistakes were amplified by its failure to conduct an evidentiary hearing to probe the complex factual record at issue.

WillSource completed its first obligation well under the unit agreement in November 2004. BLM002454. WillSource (through Delta Petroleum) then opted to drill a second well test on challenged lease CO 58837 under Section 9 of the unit agreement. BLM000203–204. WillSource was granted extensions to complete its second well from 2005-2009 because it was facing obstacles out of its control. In September 2009, knowing its latest extension was going to expire on November 30, WillSource met with the BLM to discuss the challenges. No one at that meeting gave

WillSource any indication that its forthcoming extension request would be denied. BLM001128 ¶ 20. While its extension request was pending, WillSource submitted its request for paying well determination ("PWD") and participating area ("PA") designation based on its first well (Little Beaver I-20). BLM000260–273.

Coincidentally, in early-November 2009, a coalition of special-interest groups, Wilderness Workshop, the Wilderness Society, and the Thompson Divide Coalition, launched a concerted effort to keep BLM from granting WillSource an extension to drill the second well in the WCU. BLM000244–245 (Nov. 8, 2009 Letter from Wilderness Workshop/Wilderness Society to BLM); BLM000246 (Nov. 9, 2009 Letter from Thompson Divide Coalition to BLM).

The BLM subsequently denied WillSource's extension request. BLM000276. In the December 14, 2009 letter denying WillSource's extension request, the BLM erroneously stated that WillSource had been told in the September 2009 meeting that an extension would be inappropriate. BLM000276. *But see* BLM001128 ¶ 20 (Declaration of Reed Williams) ("I left this meeting ... and felt there was no reason that the extension would be denied.").

The denial letter also explicitly promised WillSource, "[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*. The denial letter provided no appeal information and directed WillSource to contact Rick Ryan at the BLM with questions. BLM000276. Mr. Williams did exactly that and was advised to await the BLM's decision on its pending PWD/PA applications. BLM001129 ¶¶ 23–24. Mr. Williams continued to

follow up with BLM staff, but heard nothing. BLM0001129 ¶ 24. On January 8, 2010, the BLM sent a letter to Wilderness Workshop, informing it that BLM had denied the extension request and that it was processing the PA application. BLM000250.

Ten months later, by letter dated September 21, 2010 ("September 2010 Letter"), the BLM granted WillSource's PWD/PA applications. BLM000300–301. The letter provides that the PA had been approved with an effective date of November 11, 2004 but lacked the report as to the status of WillSource's leases that had been promised in the December 14, 2009 letter. BLM0000276. WillSource was left in the dark. BLM staff affirmatively acknowledged that this delay was an error. BLM000251.

Once again, WillSource followed up with the BLM as to the status of its leases. BLM001130 ¶ 26; BLM000276. 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. *Id*. The BLM told WillSource that no change in status had been entered for the Challenged Leases, and no changes had been reported to the status of the WCU. *Id.*

The evidence, however, definitively shows the BLM knew a contraction had occurred and utterly failed to alert WillSource. An internal BLM clearance sheet that had accompanied the September 2010 Letter contains a handwritten note providing, "Can we send contraction letter at same time?" BLM000299. Moreover, a timeline summary of the WCU file, prepared by BLM employees Ken McMurrough and Roger Hall notes in the September 21, 2010 entry: "Approved … Participating Area … This would hold [unchallenged leases]. If no further drilling then unit would contract on 11/11/09 and leases COC-58835, 58840, 58841 would drop out or expire. **The BLM**

did not notify them of the status of the WCU and the leases in the unit as we indicated by the letter dated 12/14/09." BLM000251 (bold in original).

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. The use of the past modal demonstrates that Mr. Syzmanski knew the BLM had failed to notify WillSource that the WCU had contracted.

Then, on October 14, 2011, WillSource submitted an application for permit to drill ("APD") a new well on challenged lease COC58835. BLM001199–1200; BLM001130–31 ¶¶ 29–30. This APD was submitted 26 days before the purported termination of all of the Challenged Leases on November 9, 2011. 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 WCU. CSO employee Judy Armstrong responded on October 25, 2011, stating that the lease information "has been entered in LR2000 ...." BLM000334 (showing 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*.

It was in the subsequent November 9, 2011 Letter ("November 2011 Letter") that the BLM *first* notified WillSource of the BLM's position that the WCU had contracted on November 11, 2009. The BLM, however, still gave WillSource no information on *which* leases were affected. BLM000337. The Letter does not mention the status of the Challenged Leases and in no way implicates that the Leases' status had changed. Yet somehow the BLM expected a description of all lands eliminated from the WCU. *Id*.

The IBLA heavily relied upon this letter to support its position that WillSource waited too long to challenge the expiration of the Challenged Leases.[5] *See* BLM002458.

In the subsequent November 16, 2011 meeting where CSO employees Judy Armstrong, Roger Hall, and Becky Backlund discussed with Mr. Williams how to proceed with development of the Challenged Leases, no one indicated that the Challenged Leases had expired 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. After WillSource submitted the December 6, 2011, memorandum, the BLM was non-responsive until the summer of 2012. *Cf.* 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....").

Then, on June 8, 2012, Wilderness Workshop, the Wilderness Society, the Natural Resources Defense Council, Earthjustice, and Western Resource Advocates pressured the BLM to cancel WillSource's leases. BLM000359–370. Curiously, on June 22, 2012, WillSource then received the "Notice of Order(s) of the BLM Authorized Officer," which requested a description of the lands eliminated from the Willow Creek Unit and copies of WillSource's annual plans of development and reviews of operations.

[5] Defendant erroneously claims Plaintiff waived the argument regarding factual impossibility that the Challenged Leases contracted in November 2009 when the BLM did not approve the PA until September 21, 2010. ECF No. 32 at 32. In its Statement of Appeal, WillSource clearly made this argument to the IBLA. *See* BLM001678 ("Importantly, the purported November 11, 2009 contraction date is nearly a year *prior* to the BLM's September 2010 letter approving WillSource's P.A. Thus, by the CSO's own account three . . . leases were contracted from the [WCU] for failure to be included within the P.A., *before* the PA even existed.") (emphasis in original).

BLM000377. WillSource also received the June 2012 Decision, which finally contained a description of the lease status as promised to WillSource years earlier. BLM000380. The June 2012 Decision retroactively purports to establish that leases COC 58835, COC 58840, and COC 58841 expired on November 11, 2011. *Id*.

The BLM's knowledge and actions regarding the expiration of WillSource's leases are inexcusable. BLM employee Roger Hall's Draft SDR I Decision concludes that "CSO administration of the Willow Creek unit was deficient and prevented WillSource full enjoyment of the agreement provisions." BLM001968.

The record definitively proves that BLM employees knew the unit had contracted and completely failed to alert WillSource. Knowledge may be imputed amongst varying agencies all within the United States Department of the Interior. *See Griffin & Griffin Expl., LLC v. United States*, 116 Fed. Cl. 163, 175 (2014) (holding in breach of contract claim that alleged "mutual mistake" about availability of the land for lease was not actually mutual because employees of MMS under control of Department of Interior had knowledge that prior lease had not terminated when BLM executed new lease agreements) (citing J.*A. Jones Constr. Co. v. United States*, 182 Ct.Cl. 615, 623, 390 F.2d 886 (1968) (imputing knowledge of one agency to another where there was an interagency relationship between the two agencies)); *see also USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987) (in action to recoup overpayments made on a contract for the purchase of petroleum, the court found that the government's failure to inform defendant of problems with measurement of oil delivered for six months was "inequitable" and "egregious" and the court applied the doctrine of estoppel based

on the government's inaction); *Georgia-Pacific Corp.*, 137 IBLA 248, 248 (1996) ("BLM may be deemed to know the facts contained in its records.").

B. The IBLA Ignored Key Facts Surrounding November 2011 Letter and Erroneously Dismissed the Bulk of WillSource's Arguments

The IBLA irrationally concluded that WillSource could not challenge the BLM's misconduct in its appeal of the June 2012 Decision and June 2012 Order because WillSource failed to timely raise those issues. BLM002458. Because of this erroneous conclusion, the IBLA failed to address many of WillSource's arguments, including, *inter alia*, the most troubling aspects of the BLM's conduct. *See* BLM002458–2460; BLM002464–2468.

The IBLA's belated conclusion that WillSource should have appealed the November 2011 Letter informing it that the WCU had contracted on November 11, 2009 is not supported by the facts in the record. BLM002458. The Letter was vague and gave no indication that it was a final decision. It directed WillSource to contact the BLM with questions. When WillSource contacted the BLM, no one indicated that the letter was appealable or that the vague information therein required an appeal. Instead, BLM staff mislead WillSource into believing its leases were not in jeopardy. The IBLA failed to examine the adequacy of the November 2011 Letter or consider the factual record.

First, nothing in the letter indicated that it was a final decision. *See* BLM000337. It is not entitled "Order" or "Decision" and contains no appeal information. *Id.* The letter merely notified WillSource of the BLM's position that the size of the WCU had been reduced and gave no type of definitive information that would have led WillSource to

conclude it was final. *Id.* As any reasonable person would do, Mr. Williams contacted the BLM to understand the meaning of the letter. On November 16, 2011, Mr. Williams met with three CSO employees to discuss the 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.[6] BLM001133 ¶¶ 38–39.

Notwithstanding Defendant's argument that the BLM had no duty to notify WillSource of its appeal rights in the Letter, when WillSource contacted the CSO, as the letter advised, it had a duty to not mislead or otherwise continue to conceal the effect of the Letter. *See United States v. Wharton*, 514 F.2d 406, 412 (9th Cir. 1975) (estopping the BLM from denying a patent application because "[t]he BLM had every reason to believe [plaintiffs] would act on its advice.").

The BLM now claims the November 2011 Letter was binding, but that is not how its agents represented it at the time. If the BLM felt unequipped to meet with WillSource and explain the situation, it makes no sense that the BLM would schedule a meeting for November 16, 2011 to discuss the meaning of the Letter. Moreover, it makes even less sense why BLM employees at that meeting would discuss working with WillSource

[6] In a footnote, Defendant asserts that Plaintiff's brief and arguments "suggest that it repeatedly attempted to improperly extract advice from non-lawyers at the BLM rather than seeking its own legal counsel." ECF No. 32 at 26 n.14. This assertion shows the absurd Catch-22 Defendant's position creates for WillSource. Any reasonable observer can see that, had WillSource not diligently worked with BLM throughout this entire process, Defendant would be arguing that WillSource only had itself to blame for not adequately communicating with BLM and following its advice.

to keep the Challenged Leases from expiring if they had already expired *and* the November 2011 Letter was a final decision that needed to be appealed. It may not be the duty of the BLM to provide legal or business advice, but the agency should not be sending official correspondence that its own employees do not understand.

On its own, the BLM's conduct would be enough to warrant estoppel and undermine the conclusions reached by the IBLA in *WillSource I* and *II*. When combined with the close working relationship WillSource had with the BLM, there is no question that WillSource justifiably relied on the representations made by the BLM.

Previously, when WillSource's leases had contracted, the BLM sent specific notice to WillSource. *See* BLM000178–79; BLM000184–87. This had been the practice of the BLM throughout its relationship with WillSource regarding lease COC 58838. After completing the obligation well (Little Beaver # 1-20), WillSource (through its partner at the time, Delta Petroleum), sought diligently to drill a second well. 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 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. This only adds to WillSource's justifiable reliance on the BLM's representations.

REMEDY

Federal courts possess broad discretion to fashion an equitable remedy. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1289-90 (11th Cir. 2015) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329) (1944)) (remand without vacatur is permitted under APA). When the court's equitable authority is invoked on APA review, it has the power to order Plaintiff's requested relief. *See Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241 (D. Colo. 2011) (courts retain traditional equitable jurisdiction because there is no jurisdictional limit in the APA).

CONCLUSION

For all these reasons, this Court should set aside the IBLA's decisions and order equitable relief that allows WillSource to exercise its rights and fulfill the intent of Congress in the MLA.

DATED this 26th day of June 2018.

Respectfully submitted,

/s/ Christian B. Corrigan

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June 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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/s/ Christian B. Corrigan
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