May 15, 2014

Submitted via email to: WRNFleases@blm.gov

Mr. Steve Bennett
Field Manager, Colorado River Valley Field Office
Bureau of Land Management
2300 River Frontage Road
Silt, CO 81652

RE: White River National Forest Leases Environmental Impact Statement Scoping Comments

Dear Mr. Bennett:

In response to the Scoping Notice for "Previously Issued Oil and Gas Leases in the White River National Forest", 79 Fed. Reg. 18,576, dated April 2, 2014, the undersigned organizations adamantly oppose any attempt to void or modify the terms of the existing 65 leases underlying White River National Forest (WRNF) lands, including imposing further mitigation measures for development proposals. These leases were purchased in good faith during multiple, publically noticed lease sales, and since their issuance, the U.S. Forest Service has continued to affirm the validity of its Forest Plan and National Environmental Policy Act (NEPA) analysis supporting its consent to lease, and BLM has recognized the validity of the challenged leases in project-level NEPA. A retroactive changing of the rules would not only violate valid existing lease rights, but would undermine the confidence in which private operators enter into contract

with the federal government in the future. BLM's actions in this instance will be scrutinized closely by industry not only within Colorado, but across the nation and the West as a barometer on whether a federal leaseholder can reasonably expect the regulatory certainty necessary to invest in federal resources in the future.

Our organizations represent many members across the nation and throughout the West who are involved in all aspects of environmentally responsible oil and natural gas development. They have a vested interest in the decision BLM will make regarding these 65 leases, and the ramifications that decision will have on energy development on federal public lands across the country.

Background

On May 13, 2004 the Bureau of Land Management (BLM) conducted an oil and gas lease sale which included parcels in the WRNF. The Forest Service consented to the sale as per the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA). Three of those parcels (COC—67538, COC – 67540, and COC – 67541) were subjected to protest, which BLM dismissed, defending the adequacy of the lease sale NEPA. This prompted an appeal to the Interior Board of Land Appeals (IBLA). The grounds for this appeal were the assertions that the Forest Service failed to comply with its 2001 Roadless Rule by consenting to the leases, that the Endangered Species Act (ESA) was not complied with regarding effects to the Canada Lynx, a species listed as "Threatened" under the ESA, and that BLM failed to comply with its obligation to conduct an Environmental Impact Statement (EIS) per NEPA.

In 2007, IBLA determined that the 2001 Roadless Rule, being an internal rule of the Department of Agriculture, did not fall under its purview, and so declined to make a ruling on that issue. Regarding the ESA, IBLA determined that it did not have at its disposal adequate record to make a determination of compliance, and so declined to make a ruling on that issue also. Lastly, IBLA determined that BLM, as it neither formally adopted the NPEA analysis conducted by the Forest Service nor prepared its own, failed to comply with NEPA.

Now, long after IBLA's ruling and multiple formal actions by BLM affirming the validity of the leases, BLM asserted that the NEPA analysis under which multiple lease sales in the WRNF took place is no longer adequate, and on April 2, 2014 published its intent to prepare an EIS on the 65 WRNF leases.

Lack of Need for a New Environmental Impact Statement

The IBLA decision is quite clear that to fulfill its NEPA obligations, BLM need only formally adopt the Forest Service NEPA, stating, "In complying with the National Environmental Policy Act, the Bureau of Land Management may adopt the environmental impact statements of other agencies as its own…"[1]

[1] *Board of Commissioners of Pitkin County and Wilderness Workshop, et al. (173 IBLA 173)*, Interior Board of Land Appeals, 2007.

BLM acknowledges as much in the Federal Register notice announcing BLM's intent to prepare a new EIS, stating, "the Interior Board of Land Appeals (IBLA) ruled that before including WRNF parcels in an oil and gas lease sale, the BLM must either formally adopt NEPA analysis completed by the WRNF or conduct a NEPA analysis of its own…"[2]

Indeed, this was precisely what BLM attempted to argue it had already done. "BLM nonetheless contends on appeal that as a cooperating agency with respect to the 1993 FS EIS and a reviewing agency with respect to the 2001 FS EIS, it should now be deemed to have adopted those EISs…"[3] BLM, having helped write the Forest Service EISs, felt it was self-evident that it had evaluated and adopted them. IBLA disagreed, but the point remains that at the time of the lease sales, BLM believed that the Forest Service NEPA was sufficient; it had simply missed the procedural step of formally adopting it. BLM has repeatedly acted on this belief by conducting development-level NEPA on many of the 65 challenged leases. The attempt by BLM to change its position now is "arbitrary and capricious" and violates fundamental administrative law.[4]

Retroactive NEPA

BLM, however, has subsequently determined that "the WRNF NEPA analysis conducted is no longer adequate" and will "conduct its own NEPA analysis through this EIS regarding these previous decisions to lease WRNF lands for oil and gas development."[5] Despite the fact that NEPA is only required if there remains a major federal action, of which, post-sale, there does not, BLM identifies six preliminary issues which it wishes to address. We address each of these points in turn, which we feel will elaborate our concerns.[6] Each point contains text taken verbatim from the Federal Register Notice.

1. *"The level of oil and gas leasing, drilling, and production activity within the WRNF has increased dramatically since the 1993 Oil and Gas Leasing Final EIS decision…The increased level of oil and gas leasing, drilling, and production activity indicates a need to update the Reasonably Foreseeable Development scenario…"*

   Comment: We fully understand that circumstances change, and attempts to predict future scenarios are not always entirely accurate. However, Reasonably Foreseeable Development scenarios (RFD) are not intended to play the role of a crystal ball. They are simply an educated estimate based on the best available information, and intended to provide a baseline by which management proposals can be measured. Neither are they to be used to set a threshold for

[2] *Notice of Intent To Prepare an Environmental Impact Statement for the Previously Issued Oil and Gas Leases in the White River National Forest; Silt, Colorado*, 79 Federal Register 63, April 2, 2014, pg. 18576.
[3] *Board of Commissioners*, IBLA.
[4] 5 USC § 706 (2)(A)
[5] *Notice of Intent*, Federal Register.
[6] 42 USC § 4332 (C); see also *National Environmental Policy Handbook*, Bureau of Land Management, January 30, 2008, pg. 30.

development in the planning area. RFDs are not set in stone and are revised precisely because technology changes, as does the level of interest in an area. Likewise, land use plans like Resource Management Plans (RMP) and Land and Resource Management Plans (LRMP) undergo periodic amendment or revision to address changing circumstances.

Incidentally, both the Colorado River Valley Field Office and WRNF are doing just that. But until such time as an amendment or revision is completed, *the existing plan remains the authoritative management document*. This is not our contention; it is BLM's written policy. "Existing land use plans decisions remain in effect during an amendment or revision…if current land use plans have designated lands open for a particular use, they remain open for that use."[7] It therefore does not matter if BLM *now* thinks that the NEPA analysis and management regime were inadequate, *they were legally the guiding documents at the time the leasing decision was made*, *and must be given deference*. BLM simply cannot seek to apply current conditions and policies to a past decision to lease.

It is becoming apparent throughout the West, as BLM increasingly resorts to deferrals, that those opposing oil and natural gas development have effectively reversed this longstanding BLM policy to a default position which assumes existing land use plans are NOT in fact the authoritative management document. The recently issued Instruction Memorandum No. CO-2014-019 is a prime example of this, deferring nearly 3 million acres from leasing consideration while Master Leasing Plans (MLP) are considered, thought this is in direct contradiction to BLM's own written policy, which states that "[a] decision to temporarily defer an action could be made where a different land use or allocation is currently being considered in the preferred alternative of a draft or proposed RMP revision or amendment. These decisions would be specific to individual projects or activities and *must not lead to an area-wide moratorium on certain activities during the planning process* (emphasis added)."[8] The acceptance and implementation of this new, unwritten policy by the BLM ensures "victory through perpetual delay" for the opponents of oil and natural gas development.

2. *"Oil and gas exploration and production technology have improved since 1993."*

Comment: Industry prides itself on the technological advances made in the drilling and completion processes. Advancements in multi-well pads, directional and horizontal drilling and in completion techniques have not only unlocked vast but previously inaccessible resources and completely changed the conversation about American energy security, but have decreased the footprint of production on the land and improved the protection of other resources. But too often these technological advancements are seen as a silver bullet and their limits are ignored. Directional and horizontal drilling depends on the geology of the area. Depending on the

[7] *Land Use Planning Handbook*, Bureau of Land Management, March 11, 2005, pg. 47.
[8] *Ibid.*

topography of the well pad, multiple wells may not be the most environmentally preferable option. Further, the above comments regarding upholding previous management decisions apply to this point as well. Changes in technology are appropriately addressed in the established amendment and revision process, not arbitrary decisions to change the rules mid-game.

3. *"An increased level of oil and gas activity has created an increased level of public interest in oil and gas related activities on public lands."*

Comment: Industry is very aware of the increased interest of the public, and is keenly sensitive to the fact that misinformation about the development and completion processes is widely promulgated by opponents of our industry. We support public involvement in the land and resource planning process, but the public was offered ample opportunity, as required by law, to comment on and participate in the Forest Service plans and NEPA under which the lease sales took place. While opponents of responsible oil and natural gas development are often very vocal, there are many other segments of the public that rely on the resultant energy, jobs, and economic growth that are often not as strident. Leasing decisions are certainly informed by the public, but not at the whim of public opinion second-guessing deliberative, balanced decisions made years prior. The uncertainty from constantly reopening and re-evaluating past decisions could create a climate in which no capital intensive and long-term projects could thrive.

Furthermore, the wording used in the Federal Register notice seems to imply that the public is ubiquitously hostile to and suspicious of the industry. This could not be further from the truth. The industry employs many thousands of people in Western Colorado and the nation as a whole, and provides significant economic benefit to communities, the state, and the nation. A dramatic increase in oil and natural gas production has put America on the path toward energy security and away from dependence on unfriendly nations which don't follow the same strict environmental standards. Industry has a long history of philanthropy, contributing to the arts, community projects, education, and more. For these and many other reasons, the oil and natural gas industry is viewed favorably by a large proportion of the American public.

In short, heightened public interest in our industry is welcomed, and public involvement in land and resource management planning is essential, but the NEPA process is not a referendum, and public interest does not constitute a valid reason for BLM to discard prior management decisions and violate valid existing lease rights.

4. *"Since 1993, the BLM has new information related to air resources management…"*

Comment: This may be the case, but the argument made in point number 1 applies here as well. Management decisions made under legally effective land use plans cannot be unilaterally

revoked by BLM for any reason. Furthermore, it is unclear how a retroactive analysis of prior lease sales would even provide usable information for air quality analysis. The question of the utility of lease sale-level analysis for specific environmental impacts has arisen before, and its limits are legally recognized. Whether BLM now possesses new information on air resources management is therefore not a basis for initiating an EIS on past decisions to issue leases.

5. *"The BLM will address lands in the WRNF inventoried as Roadless areas…"*

   Comment: Regardless of the fact that it does not prohibit oil and natural gas development, the Forest Service Roadless Rule does not fall under the purview of BLM anyway, as IBLA has made very clear. It is a Forest Service land use designation. The *Pitkin County* appellants made violation of the 2001 Roadless Rule a discrete point in their appeal, to which IBLA responded by citing a prior case. "…objections raised with respect to the conformity of the Forest Service's actions either with its own internal operating procedures or with laws solely applicable to the Forest Service *are not properly considered either by BLM or this Board* (emphasis added)."[9] Furthermore, the Forest Service, which has jurisdiction for the Roadless Rule, concurred with the lease sales, as noted in the Federal Register notice. Roadless area considerations are and should only be considered *for future leasing* in the WRNF. They are neither chronologically applicable to the existing leases, nor do they fall under BLM's legal jurisdiction.

6. *"The EIS will address changes since 1993 to BLM sensitive species and to species listed as threatened or endangered under the Endangered Species Act of 1973"*

   Comment: Impacts to both BLM sensitive species and those listed as "Threatened" or "Endangered" (T&E) can and should take place when permitting applications are submitted for individual projects. An Environmental Assessment (EA) could determine if any impacts might result, and whether an EIS is warranted at that time. As BLM has this ability currently, it is entirely unnecessary to threaten to revoke or modify existing leases. Therefore, changes to BLM sensitive species and T&E species since 1993 seems a spurious argument to use to initiate this EIS. Regardless, BLM cannot impose new stipulations to existing leases based on post-decision protocols. As IBLA made no determination that the ESA was violated in *Pitkin County*, BLM cannot unilaterally make that determination subsequent to the original decisions to issue these leases and seek to revoke or modify valid existing rights.

Valid Existing Rights

The Mineral Leasing Act of 1920 does not grant BLM the authority to cancel or modify issued leases under the circumstances of the 65 WRNF leases. Cancellation eligibility is expressly limited to circumstances in which the lessee does not abide by the terms of the lease, provisions of the Act, and

[9] *Colorado Environmental Coalition 125 IBLA 210*, Interior Board of Land Appeals, 1993.

current regulations promulgated under the Act. IBLA has affirmed the rights of the lessee, stating, "once the Secretary has leased the land he may not deny or extinguish the rights of the Federal oil and gas lessee under the valid oil and gas lease. Clearly, the Secretary's power and authority to obliterate, diminish, and/or interfere with vested rights is not absolute."[10] Further practical limitations on the ability to cancel leases are in place for leases held under production, as is the case of several of the 65 leases in question.

Due to these statutory constraints, BLM has historically limited lease cancellations to instances where it did not have the inherent authority to issue the leases in the first place. For example, had the Forest Service not consented to the lease sale, such a situation might be the case, but the Forest Service did concur, and BLM had the authority to conduct the lease sales. The leases were therefore legitimately issued and are valid.

BLM's principle guiding statute, the Federal Land Policy and Management Act of 1976 (FLPMA) expressly states that all BLM actions are "subject to valid existing rights."[11] The current leases within the WRNF constitute a binding contractual obligation by BLM to allow development to move forward within the parameters of the lease, and they cannot be unilaterally "voided" or "modified" as BLM contends is within the realm of possible outcomes. IBLA has clearly ruled that an EIS alternative that would infringe on lease rights is invalid because "BLM…cannot deny the right to drill and develop the leasehold unless a non-discretionary statute, such as the Endangered Species Act, prohibits drilling. Absent a ban, authority to completely deny development activities can only be granted by Congress."[12] Applying retroactive stipulations or conditions not originally in place at the time of the sale or revoking a lease outright would constitute a breach of contract and also cannot be enacted.[13]

Any attempt by BLM to distinguish between any of these similarly situated leaseholders because some are producing and some are not, or because a lease is say in Pitkin County rather than Mesa County may violate long held principles of equal protection. To that point, the use of the term "Thompson Divide Area" or TDA to differentiate among the leases is not appropriate, as the TDA does not exist as a formal political designation. Labeling those leases as such acknowledges the politically motivated effort to segregate certain leases and subject them to more vigorous attempts to overturn them. Leases with the TDA are no less legitimate than those outside the area, and BLM cannot address them under different criteria.

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[10] *Penroc Oil Corp., et al.,* 84 IBLA 36, 1984.
[11] 43 USC § 1701 note (h).
[12] *Western Colorado Congress*, 130 IBLA 244, 1994.
[13] *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620, 2000.

Conclusion

Federal land and resource management must have consistency if it is to be vested with any amount of confidence. Private companies expend significant capital analyzing and leasing federal resources, completing permitting, complying with regulation, and developing the oil and natural gas. The federal process is expensive and requires long-range planning. If industry believes that the federal government will no longer reliably live up to its obligations, will arbitrarily change the rules of the game mid-process, will allow public and political pressure to unduly influence administrative processes, and will not honor legally protected private property rights, it will lose that confidence in the federal process.

Cancellation of the leases or retroactive changes to lease terms would run counter to the Mining and Mineral Policy Act of 1970 which states "it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries…"[14] Not only would the leaseholders be unjustly harmed, but the thousands who rely on them for jobs will be dramatically affected and communities that rely on the economic contributions and revenues will suffer. Denial of valid existing rights would place BLM in a legally tenuous situation. We therefore oppose any efforts to redefine the rules under which the current leaseholders are expected to operate, and urge BLM to simply formally adopt the existing NEPA originally conducted for the lease sales.

Sincerely,

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Western Energy Alliance

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[14] 30 USC § 21a (1)

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