November 5, 2018

Submitted via email: blm_nm_cfo_rmp@blm.gov

Carlsbad RMP Team Lead
620 East Greene Street
Carlsbad, NM 88220

Re: Draft Carlsbad Resource Management Plan and Environmental Impact Statement

Dear Sir/Madam:

Western Energy Alliance appreciates the opportunity to submit comments on the Bureau of Land Management’s (BLM) draft Resource Management Plan (RMP) for the Carlsbad Field Office. We encourage BLM to finalize the RMP expeditiously, with the changes discussed below.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in New Mexico and across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

The Alliance believes the alternatives presented in the draft RMP provide a comprehensive range of outcomes. We support selecting specific provisions from Alternatives C and D that align with our comments, resulting in a final RMP that properly updates the management prescriptions for the planning area and that achieves the required balance between mineral development, conservation, and other needs pursuant to the Federal Policy and Land Management Act (FLPMA). Below, we outline the concerns that should be addressed in the final RMP and identify specific provisions that should not be included.

Statutory and Regulatory Framework

When FLPMA was enacted in 1976, Congress declared that “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals.”¹ It is therefore the “continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in...the orderly and economic development of domestic mineral resources.”²

FLPMA dedicated public lands to multiple use and sustained yield and identified mineral exploration and development as one of the principle uses.³ Congress also directed the

¹ 43 U.S.C. §1701(a)(12)
² 30 U.S.C. §21a
³ 43 U.S.C. §1702(c),(l)
president to encourage federal agencies to “facilitate availability and development of domestic resources to meet critical material needs.”

Domestic oil and natural gas resource development is a legitimate use of public lands which can and is being done in an environmentally responsible manner. Throughout the development of this RMP and associated environmental impact statement (EIS), BLM must follow the requirements of the Energy Policy Conservation Act of 2000 and the Energy Policy Act of 2005 (EPAct) to reduce rather than increase impediments to federal oil and gas leasing.

Through the Carlsbad RMP process, BLM must also ensure that its selected alternative is consistent with the Administration’s policies and guidance for managing public lands. On March 28, 2017 President Donald Trump issued Executive Order 13783, titled “Promoting Energy Independence and Economic Growth,” which provides guidance to federal agencies to avoid taking actions that will unnecessarily burden domestic energy production.

Executive Order 13783 also requires federal agencies to review actions that potentially burden the development or use of domestically produced energy resources, including National Environmental Policy Act (NEPA) implementation. The Executive Order defines “burden” as “to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.”

In line with Executive Order 13783, Secretary of the Interior Zinke issued Secretarial Order 3349, titled “American Energy Independence,” which calls on BLM and the agencies within the Department of the Interior to review existing and draft policies to ensure a proper balance between conservation and job creation. The Department of the Interior (DOI) and BLM have recently taken numerous concrete steps to address NEPA and oil and natural gas leasing via Secretarial Orders (SO) and instructional memoranda (IM), including the following:

- **SO 3354** – Supporting and Improving the Federal Onshore Oil and Gas Leasing Program and Federal Solid Mineral Leasing Program
- **SO 3358** - Executive Committee for Expedited Permitting
- **WO PIM 2018-010** - NEPA Compliance for Oil and Gas Reinstatement Petitions

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4 30 U.S.C. § 1602(7)
The final RMP should accurately reflect these policies. As detailed below, numerous overly burdensome restrictions on development will limit the streamlining of NEPA analysis and permitting of oil and natural gas projects.

Furthermore, BLM’s Manual on Land Use Planning specifically states that “[w]hen applying leasing restrictions, the least restrictive constraint to meet the resource protection objective should be used.”5 We urge BLM to observe this statutory mandate and regulatory guidance as it considers any stipulations for oil and natural gas leases, especially with regard to timing limitations, No Surface Occupancy (NSO) stipulations, and controlled surface use (CSU) restrictions. As NSO is the most restrictive stipulation, it should be used only sparingly.

Finally, we note that the State of New Mexico and other federal agencies have primary authority to regulate numerous aspects of oil and natural gas development, including air quality, groundwater, and species protections. The final RMP should only address issues over which BLM has jurisdiction.

As BLM moves forward in updating the Carlsbad RMP, it must ensure that the final RMP is consistent with Executive Order 13783, Secretarial Order 3349, and any further guidance provided by the Administration. BLM should not unnecessarily burden energy development through the Carlsbad RMP.

**Disturbance and Multiple Use**

BLM has a congressionally mandated multiple-use mission, which must be honored and not compromised by the single-use land management objectives promoted by certain interest groups. The Alliance supports BLM’s multiple-use mandate, and where energy production exists public lands are also available for other uses such as recreation, ranching, farming and hunting. By its nature, multiple-use engenders coexistence, not
competition. We can develop the energy on public lands that all Americans own while protecting the land, wildlife, air, water, cultural and other resources.

Each year, improvements in technology reduce the footprint of oil and natural gas development, and reclamation techniques continue to improve so that the impact to the land is small and temporary. Over the last decade, oil and gas development has shifted from vertical wells with dense well-pad spacing to directional and horizontal wells with significantly less disturbance and fragmentation per section of land developed. One horizontal well now takes the place of 8 to 16 vertical wells, leading to reductions in well pad disturbances, linear disturbances, and disturbances due to human activity. In 2012, the disturbance reduction resulting from this dramatic shift in drilling technology may have approached approximately 70 percent in Wyoming alone.

After a well is drilled and completed, which usually takes just a few weeks to months, depending on how many wells are clustered on a pad, interim reclamation occurs and the surrounding land remains available for recreational and agricultural purposes. Once wells are plugged and abandoned and final reclamation occurs, the disturbance to the land is barely discernable, if at all.

Ultimately, the impacts of developing vital energy resources are temporary, and oil and natural gas development can and does coexist with other multiple uses. BLM should recognize these facts and not preclude the use of excessive or unreasonable amount of land from oil and natural gas leasing.

Valid Existing Lease Rights

It is well settled under law that any RMP update process must respect valid existing lease rights. This fundamental principle is found within the applicable statutes, regulations, and BLM policy guidance.

Pursuant to FLPMA, all BLM actions, including authorization of RMPs, are “subject to valid existing rights.” Thus, pursuant to federal statute, the BLM cannot terminate, modify, or alter any valid or existing property rights through a land use plan update process.

For example, once BLM has issued a federal oil and gas lease that does not contain a CSU or NSO stipulation, BLM cannot thereafter completely deny development on the leasehold due to an updated RMP. As explained by the Interior Board of Land Appeals (IBLA), only

6 Oil & Gas Impacts on Wyoming’s Sage-Grouse: Summarizing the Past & Predicting the Foreseeable Future, 8 Human-Wildlife Interactions, David H. Applegate & Nicholas L. Owens, Fall 2014, 288.
7 Id. at 289.
8 43 U.S.C. § 1701 note (h); see also 43 C.F.R. § 1610.5-3(b) (BLM is required to recognize valid existing lease rights).
9 Id.
Congress has the right to completely prohibit development once a federal lease has been issued.\textsuperscript{11}

Under 43 C.F.R. § 3101.1-2, when a lease contains a stipulation regarding a particular wildlife or environmental resource, after site-specific NEPA analysis, BLM may be permitted to “make modifications to the siting and timing of surface-disturbing activities,”\textsuperscript{12} subject to the requirement that any modification must be reasonable, and only after site-specific NEPA analysis would support such a modification.\textsuperscript{13}

When FLPMA was enacted, Congress made it clear that nothing within the statute, or in the land use plans developed under FLPMA, was intended to terminate, modify, or alter any valid or existing property rights.\textsuperscript{14} Thus, an RMP update prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights.\textsuperscript{15}

Similarly, federal courts have interpreted the phrase “valid existing rights” to mean that federal agencies cannot impose stipulations or conditions of approval (COA) that make development on existing leases either uneconomic or unprofitable.\textsuperscript{16}

Therefore, through the Carlsbad RMP process, BLM cannot revise or restrict valid existing lease rights through imposition of COAs for drilling permits or through imposition of lease stipulation provisions from adjacent leases.\textsuperscript{17} BLM must make clear in the final RMP that timing limitations, CSU and NSO stipulations, and any other management prescriptions across the planning area are not applied retroactively to existing leases.

Mitigation

We are concerned that BLM may be considering requiring compensatory mitigation for leases issued under the RMP if they impact special status species. While we recognize there is a mitigation hierarchy within the Department of the Interior that calls for avoidance, minimization, and mitigation of impacts, recent guidance makes clear that compensatory mitigation cannot be required within the hierarchy – it is merely an option a project proponent may voluntarily consider.

BLM’s issuance of IM 2018-093: Compensatory Mitigation represents a significant and important step in resolving inconsistencies and promoting efficient and responsible exploration and development of federal mineral resources. It specified that BLM has a statutory obligation to ensure that actions on public lands do not result in unnecessary or undue degradation, which is a different standard than the “no net loss” concept included

\textsuperscript{11} Western Colorado Congress, 130 IBLA 244, 248 (1994).
\textsuperscript{12} Wyoming Outdoor, 284 F. Supp. 2d at 92.
\textsuperscript{14} See 43 U.S.C. § 1701.
\textsuperscript{15} See Colorado Environmental Coal, et al., 165 IBLA 221, 228 (2005).
\textsuperscript{16} See Utah v. Andrus, 486 F. Supp. 995, 1011 (D. Utah 1979); see also Conner v. Burford, 84 F.2d 1441, 1449-50 (9th Cir. 1988).
\textsuperscript{17} Colorado Environmental Coalition, 165 IBLA at 228.
in the draft RMP. Because “necessary” or “due” degradation can occur, it follows that some uncompensated impacts are allowed.

Statutes and regulations require agencies to mitigate adverse impacts through avoidance and minimization measures. FLPMA mandates that use of public lands may be subject to conditions to “minimize adverse impacts on...resources and values...” Pursuant to the Mineral Lease Act (MLA) implementing regulations, BLM may require reasonable measures “to minimize adverse impacts to other resource values...”

No statute or regulation requires more than avoidance or minimization. In fact, FLPMA and the MLA do not even mention the term “mitigation,” rather they only discuss avoidance and minimization of adverse impacts. As a result, compensatory mitigation cannot be a requirement, and IM 2018-093 reached that natural conclusion.

BLM must remove all references to compensatory mitigation in the final RMP.

**Wildlife Protections**

BLM must ensure that conservation measures for wildlife management are consistent with BLM’s authority under FLPMA, the Endangered Species Act (ESA), and the Migratory Bird Treaty Act (MBTA). BLM cannot manage non-listed, state- or BLM-designated special status species with the same protections afforded ESA-listed species. Further, with respect to managing special status species habitat, BLM must further ensure that its proposed conservation measures are within BLM’s authority.

Regarding habitat protection, BLM cannot manage all occupied, suitable, and unoccupied habitat for the benefit of a species, especially not species not listed as “threatened” or “endangered” under the ESA. Additionally, the ESA allows federal actions to have some impact to listed species or their critical habitat, as long as the impact does not jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

Further, the restrictions proposed by BLM as COAs through NSO, CSU, and timing limitation (TL) stipulations in Table 2-10 are, for the most part, unnecessary and must be supported by scientific evidence. The proposed stipulations protecting special status plant species habitat must recognize valid existing lease rights, and thereby afford sufficient flexibility through exception, waiver, and modification criteria to allow for activities needed for exploration and development of those valid lease rights. If the stipulations are too inflexible or regimented with respect to operational and technical issues, BLM will not

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20 See, e.g., Conservation Cong. v. U.S. Forest Serv., 720 F.3d 1048, 1057 (9th Cir. 2013) (“Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area.”); Wild Fish Conservancy v. Salazar, 628 F.3d 513, 523 (9th Cir. 2010) (observing that an action can impact the survival or recovery of listed species without jeopardizing the species’ continued existence).
be able to address such issues appropriately on a per-project basis. Further, BLM cannot apply such restrictions to existing oil and gas leases that do not contain lease stipulations to protect these BLM “sensitive species.”

While it may be appropriate for the BLM to impose prospective conservation measures for the conservation of special status species, including listed and non-listed species, these conservation measures must allow for site-specific flexibility. Additionally, in the case of non-listed species, BLM cannot entirely prohibit development within species habitat, nor can it impose broad, unjustified buffers around habitat.

Finally, BLM must ensure the final RMP complies with recent guidance from DOI and the U.S. Fish and Wildlife Service (FWS) regarding migratory birds. The draft RMP’s stipulations regarding migratory birds are inconsistent with FWS’s MBTA guidance in conjunction with an M-Opinion which provided clarity on the limits of MBTA liability. Opinion M-37050 determined that the MBTA does not provide criminal liability for incidental take of migratory birds or nests, and FWS issued additional guidance on June 14, 2018 clarifying that the MBTA does not prohibit the destruction of inactive nests and even provides guidance on the destruction of active nests.

Based on this guidance, BLM’s imposition of blanket stipulations to protect migratory birds, nests, and trees from incidental take is superfluous and unjustifiable. The draft RMP establishes buffers near both active and inactive nests and prohibits destruction of inactive nests despite clear FWS guidance on nest destruction, thus creating overly burdensome requirements contrary to DOI policy. If the MBTA does not prohibit incidental take, BLM should not impose onerous restrictions on oil and gas lessees to prevent incidental take, and the final RMP should reflect this conclusion.

To comply with FLPMA, NEPA, the ESA, and the MBTA, and to provide for informed decision-making, BLM needs to appropriately analyze the impacts of management prescriptions, stipulations, and access restrictions upon minerals management and development, including both the economic and environmental impacts from these narrow operational windows. BLM must ensure that the conservation measures for special status species and migratory birds considered in the final RMP are not overly burdensome and within its authority under the appropriate laws.

Air and Water Quality

The Clean Air Act (CAA) and Clean Water Act (CWA) generally delegate primary authority for regulating air and water emissions to the states and not to BLM. While BLM will necessarily analyze and disclose impacts to air and water through the NEPA process for the Carlsbad RMP, BLM is not the regulating agency that ensures that oil and gas operations comply with the CAA and CWA.
As BLM recognizes, NEPA is purely a procedural statute that requires the identification and analysis of a proposed action’s impact to environmental resources.\(^{21}\) It does not mandate that a certain outcome be achieved or prohibit any impacts to environmental resources, such as air quality.\(^{22}\)

Further, BLM’s authority to develop land use plans and otherwise manage federal land under FLPMA does not usurp the air quality or water quality authority granted to the states under the CAA and CWA. Similar to NEPA, FLPMA requires that BLM only “provide for” the compliance with federal air and water quality standards when developing federal land use plans, and that it manages the federal lands “in accordance with” the applicable land use plan.\(^ {23}\)

To “provide for” compliance with the CAA in an RMP, BLM simply has to provide lease stipulations or notices that ensure that Applications for Permits to Drill (APDs) and other site-specific project authorizations include a measure or condition of approval that a lessee must obtain all applicable air and water permits from the appropriate jurisdictional authority.\(^ {24}\)

Records of Decision for NEPA documents do not themselves authorize any activity capable of emitting air and water pollutants. Companies must obtain a permit and authorization from the appropriate air and water quality authorities before initiating any operations analyzed in a NEPA document and must comply with applicable air and water regulations once operations commence. APDs are issued with conditions of approval (COAs) that require operators to comply with all applicable laws, but BLM is not legally authorized to regulate air and water quality standards. It is the responsibility of the State of New Mexico to issue air and water permits for oil and gas operations and to ensure that operators comply with those permits and the CAA and CWA.

As BLM considers air and water quality measures proposed through the RMP, BLM must ensure that it is providing for conformance with the CAA and CWA and not attempting to usurp the State of New Mexico’s delegated authority.

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\(^{21}\) See, e.g., 42 U.S.C. § 4332(2)(C) (agency is required to prepare a detailed statement on, inter alia, “any adverse environmental effects which cannot be avoided should the proposal be implemented”); 40 C.F.R. § 1502.16 (same); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 551 (1978).


\(^{23}\) See 43 U.S.C. § 1712(c)(8) (“[i]n the development of and revision of land use plans, [BLM] shall . . . provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards . . .”); 43 U.S.C. § 1732(a).

\(^{24}\) Cf. WildEarth Guardians v. Salazar, 880 F. Supp. 2d 77, 93 (D.D.C. 2012), aff’d, 738 F.3d 298 (D.C. Cir. 2013) (stating that “neither the FLPMA nor the implementing regulations required BLM to analyze whether and to what degree the leasing of the . . . tracts would comply with national ozone, PM10, and NO2 standards”);WildEarth Guardians v. BLM, 8 F. Supp. 3d 17, 38 (D.D.C. 2014) (finding the same and concluding that BLM satisfied FLPMA by including clauses in the leases requiring compliance with air and water quality standards).
Wilderness

Under all Action Alternatives, BLM would designate significant amounts of Lands with Wilderness Characteristics (LWC) and maintain protections for Wilderness Study Areas (WSA). Designation of these areas would result in burdensome restrictions on development of substantial portions of the planning area, including NSO, CSU, and TL stipulations.

Under Section 102 of FLPMA, Congress directed BLM to manage lands on a multiple-use basis to “…best meet the present and future needs of the American people” in a “combination of balanced and diverse resource uses,” including minerals development. Importantly, in Section 103(c) of FLPMA, Congress listed resources that BLM should take into account in allocating management, and “wilderness characteristics” is not included as such a resource. On the other hand, mineral development is a “principal or major use” of public lands under FLPMA. Congress further emphasized the importance of minerals development by, as noted above, declaring that public lands be managed “in a manner which recognizes the Nation’s need for domestic sources of minerals.” 43 U.S.C. § 1701(a)(12).

In addition, designation of LWCs and WSAs conflicts with a Congressional prohibition. Through the appropriations process, Congress has repeatedly denied funding for the implementation of Secretarial Order 3310 concerning the designation of “Wild Lands” since its release in 2010.25 LWCs and WSAs are “Wild Lands” in all but name. It is therefore a violation of both existing law and the multiple-use mandate for BLM to designate LWCs and WSAs in any planning document, and they should be removed from the final RMP.

Visual and Cultural Resource Management

The Visual and Cultural Resource Management stipulations specified throughout the RMP are overbroad and unreasonable because they propose to inhibit or preclude oil and natural gas development activity. Stipulations in Table 2-8 fail to recognize the relatively short-term surface disturbance resulting from oil and natural gas operations.

Multiple uses of federal lands provide economic and cultural values to society, and the broad application of stipulations does not demonstrate BLM compliance with NEPA’s provision of consideration of reasonable alternatives. Should BLM proceed with including the stipulations considering in the draft RMP, it should adopt Alternative D’s least restrictive prescriptions prospectively, while maintaining current visual and cultural management prescriptions for valid existing leases.

25 See, e.g. Public Law 115-31 at 131 STAT. 460, “None of the funds made available in this Act or any other Act may be used to implement, administer, or enforce Secretarial Order No. 3310 issued by the Secretary of the Interior on December 22, 2010.”
Socioeconomics

New Mexico’s oil and natural gas industry contributes tremendously to the local, state, and national economy, providing billions of dollars each year in royalties, bonuses, and severance taxes, besides the added benefits of direct capital investment to local economies and thousands of high paying jobs. Continued access to oil and natural gas resources on New Mexico’s public lands is critical to ensuring economic growth and job creation in New Mexico.

According to calculations from the Alliance’s economist, JDA & Associates, the total economic output from oil and natural gas in Lea and Eddy Counties alone totaled $899 million and $603 million, respectively, based on data available in 2016. Notably, these large totals occurred prior to the booming development of the Permian Basin over the past two years and are now undoubtedly significantly higher. For instance, the recent record-breaking Carlsbad Field Office third quarter 2018 lease sale resulted in bonus payments of nearly $1 billion, of which almost $500 million is directed to the State of New Mexico.

Environmentally responsible development of oil and natural gas in the planning area will continue to provide significant benefits to local communities, the state, and the nation. BLM can achieve that goal by eliminating the overly restrictive management prescriptions in the draft RMP.

Conclusion

As identified above, the draft Carlsbad RMP contains numerous provisions that exceed BLM’s authority and do not follow recent guidance issued by the Administration. We urge BLM to withdraw these provisions from the final RMP, which should nevertheless be completed expeditiously. Thank you for the opportunity to provide these comments, and please do not hesitate to contact me with any questions.

Sincerely,

Tripp Parks
Manager of Government Affairs

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26 Western Oil and Natural Gas Employs America data, available online at https://www.westernenergyalliance.org/employsamerica