



March 29th, 2013

Submitted via email to: roanplateau@blm.gov

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

RE: Roan Plateau Supplemental Environmental Impact Statement Scoping Comments

Dear Mr. Bennett:

Western Energy Alliance submits the following comments to the Bureau of Land Management (BLM) regarding the Roan Plateau Supplemental Environmental Impact Statement (SEIS). We strongly believe that BLM should ensure the supplemental effort remains focused on just those three aspects, i.e., cumulative air quality impacts, ozone impacts, and the Community Alternative, found deficient and remanded back to BLM by the Colorado District Court. BLM should not engage in a full rewrite of the Roan Plateau Resource Management Plan (RMP), but rather, keep the scope narrowly focused on those areas. As we describe below, these deficiencies can be quickly and efficiently corrected so that oil and natural gas can finally be developed, now sixteen years after Congress mandated development.

Western Energy Alliance represents over 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Colorado and across the West. Our members have a vested interest in decisions made by BLM for the Roan Plateau planning area that affect access to valid existing oil and gas lease rights, as well as future leasing, exploration, and development activities.

Background

In November of 1997, Congress, through the Transfer Act, transferred the 56,238 acres of the Naval Oil Shale Reserves (NOSR) 1 and 3 from the Department of Energy to the Department of the Interior for the express purpose of developing the oil and natural gas resources contained therein. As the Act states, "Beginning on the date of the enactment of this section, or as soon as practicable, the Secretary of Interior *shall* (emphasis added) enter into leases with one or more private entities for the purpose of exploration for, and the development and production of, petroleum...located on public domain lands in the Oil Shale Reserves Numbered 1 and 3..."¹

¹ 10 U.S.C. § 7439

In compliance with this statutory mandate, in November of 2000 BLM initiated a planning process for these 56,238 acres in addition to 17,364 acres already under BLM's management, together referred to as the Roan Plateau Planning Area. Over the next eight years, BLM accepted public comment, held numerous public meetings, consulted with cooperating agencies, and reviewed and analyzed a wide range of alternatives. After resolving protests and granting an extended period for the State of Colorado to further study and comment on the plan, a final Record of Decision (ROD) was issued in March of 2008. The resultant plan included stringent environmental restrictions and stipulations such as extensive No Surface Occupancy (NSO) acreage and a phased development approach. Only a small percentage of the leased acreage within the planning area may be under development at any given time, and must be reclaimed on a continuous basis to remain within a strict threshold of disturbed acreage.

According to BLM's own estimates, the estimated recoverable natural gas resource within the planning area is 8.9 trillion cubic feet (TCF), and could generate over the course of twenty years well over \$1 billion in lease sale and royalty payments, to be split with the State of Colorado. The August, 2008 sale of NOSR 1 and 3 leases generated \$113.9 million, which were issued that following September.

The development plan and resultant lease sale were litigated, and in June 2012, Judge Marcia Krieger issued an order partially remanding the decision back to BLM for further consideration of: 1) the self-styled "Community Alternative" as a NEPA document alternative; 2) the cumulative air quality impacts of its decision coupled with anticipated oil and gas development outside the planning area; and 3) potential ozone impacts.

Limited Scope of Remand

Western Energy Alliance wishes to emphasize the point that, when remanding the decision back to BLM, Justice Krieger noted *only three discrete points from the entire decision in which she found BLM to be in violation of the Administrative Procedures Act*. The scope of any supplemental analysis ought to remain confined to the three issues detailed in the preceding paragraph. It is apparent that BLM's intent is to reopen the entire RMP to possible amendment, which we strongly object to as entirely unnecessary and wasteful. BLM along with the state, counties and other stakeholders spent nearly eight years and extensive resources developing a plan with unprecedented environmental protections and a very restrictive staged development approach. BLM should not spend an inordinate amount of time redoing the RMP. BLM must simply analyze and present for the administrative record its findings on those three areas identified by Judge Krieger. In point of fact, Justice Krieger explicitly notes that, "...upon reconsideration of the issues addressed herein, the BLM may nevertheless reach the same decision (albeit upon a more complete record or more specific RMP/EIS)."²

² *Colorado Environmental Coalition, et al v. Salazar, et al.*, 1:08-cv-01460-MSK-KLM (Colorado 2012)

1. Cumulative Air Quality Impacts

The first point on which Justice Krieger remanded the decision back to BLM was the contention that BLM did not adequately consider the cumulative impacts of oil and gas development within the planning area when coupled with development scenario predictions outside of the planning area, particularly private lands. The court pointed to a Garfield County Planning Office document that cites a development scenario prediction of 10,000-20,000 new wells in the area over a window of twenty years. BLM rightly contended that the document did not contain sufficient specifics to facilitate any analysis of value for planning purposes. Western Energy Alliance would like to underscore the fact that the document in question was categorized by Garfield County as nothing more than a preliminary analysis and rough estimate.

In light of this, BLM's original contention that the document was hypothetical in nature, and therefore did not present itself as an appropriate and reliable basis for planning purposes was correct, and BLM simply needs to expound on this further for the purposes of the court's remand. Prior precedent recognizes the validity of BLM's position that the expectation of speculative oil and natural gas development in impact analysis is unreasonable, and need not be incorporated into an EIS.³ The decision itself specifically states that, "Given the scope of Garfield County's projections of 10,000-20,000 additional wells over the life of the RMP/EIS – a figure several times larger than the scope of the few thousand wells anticipated within the Planning Area itself over the same time frame – the BLM's failure to either model the cumulative air quality effects *or to offer a more complete explanation as to why it was impractical to do so is not inconsequential*" (emphasis added).⁴

Western Energy Alliance would like to further emphasize the need for BLM to merely clarify the impracticality of relying on the Garfield County Planning Office's rough estimate referenced above for land use planning purposes. Giving a working document not yet in its final form and not yet reviewed and analyzed for technical accuracy the level of credence to influence and alter the composition of an EIS level document sets a dangerous precedent. BLM must merely explain why a rough estimate composed of arbitrary future development scenarios and growth estimates was considered but determined to be of inappropriate quality and reliability to affect its analysis. Courts have already ruled that unreasonable and speculative analyses need not be incorporated into the planning process.

Air quality is a dynamic resource that must be monitored in a continuous manner and managed adaptively. In order to do so, it is necessary to follow the sequential nature of the NEPA process and determine impacts only at the appropriate phase at which BLM can identify and quantify them in a meaningful way. At the RMP phase, and indeed even at

³ *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1229 (10th Circuit 2008)

⁴ *Colorado Environmental Coalition, et al v. Salazar, et al.*, 1:08-cv-01460-MSK-KLM (Colorado 2012)

the leasing stage, this degree of precision is not possible. An RMP document is meant to define appropriate uses for the land and set general parameters within which those uses may take place.

As individualized projects are proposed, BLM will then have the site-specific information necessary to accurately quantify impacts and determine the necessary mitigation measures to keep air quality within the levels set by National Ambient Air Quality Standards (NAAQS). Prior court precedent agrees with this sequential process of impact analysis and mitigation. "When BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken."⁵

The US Environmental Protection Agency (EPA) also concurred, stating in its comments on the Draft EIS that because an RMP is not a specific project but rather a generalized description of potential development, air quality impacts could not be assessed with precision, and the attempt should not be made to do so. BLM was therefore fully in compliance with its NEPA responsibilities when it determined that cumulative air impacts were not likely to violate NAAQS. BLM also correctly established a plan for continuous air monitoring with flexible, adaptive management and the application of mitigation measures when necessary.

There is no need for BLM to initiate an entirely new air quality data collection and analysis process. Analysis for the Roan Plateau airshed has already been conducted during the RMP revisions for the Colorado River Valley, White River, and Grand Junction Field Offices. BLM should reference this analysis in the SEIS to explain how it has met its obligations under NEPA and to address Judge Kreiger's concerns on air quality.

2. Potential Ozone Impacts

The second point on which the court remanded the decision back to BLM was ozone impacts. "By confining its ozone analysis to ascertaining whether ozone precursors reached certain levels in the past, the BLM did nothing to ascertain whether several thousand producing wells in the Planning Area would be likely to result in those precursor levels being reached in the future."⁶ However, it qualifies this statement by stating that, "The Court emphasizes that it is not necessarily directing that the BLM perform complete ozone modeling...It may be that, upon reconsideration, the BLM concludes that all that is necessary is a more detailed explanation for its conclusions..."⁷

⁵ *Park County Res. Council v. Department of Agriculture*, 817 F.2d 609, 624 (10th Circuit 1987), overruled on other grounds by *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Circuit 1992)

⁶ *Colorado Environmental Coalition, et al v. Salazar, et al.*, 1:08-cv-01460-MSK-KLM (Colorado 2012)

⁷ *Ibid.*

At the time of the Roan Plateau FEIS decision, BLM did not believe that historic ozone levels warranted further modeling, but noted that it could become an issue in the future, and that further study may be conducted. As noted in the section above, further relevant study of air impacts did in fact take place since the Record of Decision was issued, including ozone impact analysis. The Colorado River Valley RMP, White River RMPA, and Grand Junction RMP have all modeled the airsheds covering the Roan Plateau Planning Area and the regions adjacent to it. None determined that ozone NAAQS levels were likely to be exceeded, confirming BLM's initial contention that ozone impacts were not likely to be an issue.

Further, with phased development, the level of activity will be relatively low and ozone violations will be unlikely. More detailed NEPA analysis will take place when specific projects are proposed, and the site-specific analysis will identify measures to mitigate ozone. As detailed in the section above, the sequential approach to NEPA analysis ensures that the environmental impacts of oil and natural gas development are identified and mitigated.

We believe that BLM has sufficient data available from the three RMP documents in the surrounding field offices to demonstrate that its original position on ozone for the Roan Plateau was accurate. For purposes of the Roan SEIS, BLM need only reference that analysis to demonstrate that the air quality impacts have been adequately analyzed and addressed. The remand is perfectly clear that simply explaining these points in further detail is sufficient to meet its requirements.

3. Community Alternative

The final issue on which the ROD was remanded back to BLM was the consideration of the so-called "Community Alternative." "It appears to the Court that the BLM's current argument – that it was not required to analyze the Community Alternative because that alternative was infeasible – is the type of *post-hoc* justification for an action that is offered in litigation, rather than a justification given by the agency at the time of the decision. Thus, it is insufficient to discharge the agency's action under NEPA."⁸ It clarified this finding by stating that, "This is not to say that the BLM's current contention that the Community Alternative was infeasible is necessarily inconsistent with the record...because there is conflicting evidence in the record on the question of feasibility of the Community Alternative, the matter must be remanded to the BLM to weigh that competing evidence."⁹

Western Energy Alliance believes that the BLM did in fact analyze the Community Alternative, correctly found it deficient, and did not disregard it out of hand as the court's

⁸ *Colorado Environmental Coalition, et al v. Salazar, et al.*, 1:08-cv-01460-MSK-KLM (Colorado 2012)

⁹ *Ibid.*

view seems to indicate. Therefore, to fulfill the requirements of the remand, BLM need only elucidate this position.

First, the dictates of the Transfer Act are clear that the acreage of NOSRs 1 and 3 be leased for the express purpose of leasing and the exploration and development of petroleum resources. BLM determined that placing any significant portions of these reserves off limits would contradict the Transfer Act, and Justice Krieger, in her decision, concurred. Therefore, any alternative that would do so was not a viable alternative.

The so-called Community Alternative suggested that directional drilling from the base could access the majority of the resource located beneath the top. However, the geology of the Roan Plateau contains lenticular deposits of hydrocarbons, not the continuous, horizontal stratigraphy that lends itself to extensive directional drilling. This is sufficient to render the Community Alternative infeasible. Furthermore, though industry analysis indicated that directional drilling of more than 2,000 feet was extremely difficult, BLM in consultation with the Colorado Oil and Gas Conservation Commission (COGCC) utilized a potential 2,500 foot reach to dictate its well spacing requirements. The Community Alternative would require a reach well in excess of this number, and as such is speculative in nature. Prior precedent upholds BLM's discretion to discount alternatives that are "too remote, speculative, impractical, or ineffective".¹⁰

Second, BLM did incorporate many of the protective measures suggested by the Community Alternative into the proposed plan. While the technically infeasible aspects of the alternative were discarded, many aspects that are feasible were included.

Because the court directed BLM to weigh the competing evidence on the feasibility of the Community Alternative, to comply with the remand, BLM need only detail the technological deficiencies and explain its decision adequately. BLM has the evidence in the administrative record to clearly demonstrate how the Community Alternative violates the Transfer Act. BLM should be able to take that analysis and clearly explain its position in a short amount of time. Further extended consideration of the Community or other alternatives is not necessary.

Conclusion

Western Energy Alliance emphasizes that the integrity and valuation of the current existing leases within the Roan Plateau Planning Area be protected. In any business venture, it is not unreasonable to expect a stable and predictable regulatory environment in which to operate. Capricious management practices and regulatory uncertainty undermine a leaseholder's ability to economically develop and produce their mineral rights. A primary

¹⁰ *Biodiversity Conservation Alliance v. BLM*, 608 F.3d 709, 715 (10th Circuit 2010)

guiding statute for the BLM, 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 Roan Plateau Planning Area constitute a binding contractual obligation by BLM to allow development to move forward within the parameters of the lease, and they cannot be unilaterally modified or devalued by any subsequent actions. Any retroactive stipulations or conditions not originally in place at the time of the sale would constitute a breach of contract and cannot therefore be enacted.¹²

BLM may also not lawfully analyze any alternative in which valid existing leases would be cancelled. The Interior Board of Land Appeals 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."¹³

Western Energy Alliance firmly maintains that BLM has at its disposal all the requisite information to address the issues laid forth in the court's remand. To fulfill the requirements of the court's decision, BLM need only elaborate its explanation for coming to its final decision. Further, this remand is very limited in its scope, and does not warrant a reopening of the entire RMP to further review and revision. Any measures taken by BLM which would alter the terms and conditions of the leases currently held would be deemed a breach of contract.

We appreciate the opportunity to provide scoping comments for the Roan Plateau SEIS and request that you give our comments and suggestions serious consideration. If you have questions, please contact me.

Sincerely,



Brian J. Meinhart
Policy Analyst

¹¹ 43 USC § 1701 note (h)

¹² *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000)

¹³ *Western Colorado Congress*, 130 IBLA 244 (1994)