



May 7, 2012

Submitted via email: [BLM UT Comments 2@blm.gov](mailto:BLM_UT_Comments_2@blm.gov)

Brent Northrup  
Project Manager  
Utah Bureau of Land Management  
Canyon Country District Office  
82 East Dogwood  
Moab, UT 84532

**Re: Notice of Intent To Prepare a Master Leasing Plan, Amendments to the Resource Management Plans for the Moab and Monticello Field Offices, and an Associated Environmental Impact Statement**

Dear Mr. Northrup:

Western Energy Alliance submits the following scoping comments to the Utah Bureau of Land Management (BLM) in response to the Bureau's Notice of Intent (NOI) to prepare a Master Leasing Plan (MLP), amendments to the Resource Management Plans (RMP) for the Moab and Monticello Field Offices, and an associated Environmental Impact Statement (EIS). Western Energy Alliance represents 400 companies engaged in all aspects of environmentally responsible exploration and production of natural gas and oil in Utah and across the West.

Western Energy Alliance does not believe the Master Leasing Plan is a valid or necessary use of planning resources. Utah BLM spent 5 ½ years and millions of dollars developing the Moab and Monticello RMPs, with Records of Decision published in 2008. There is no valid reason for reworking that extensive planning efforts with RMP amendments so soon after the RODs were signed. Western Energy Alliance is concerned that the MLP process will include new lease stipulations that are more restrictive than necessary and will close certain areas to oil and natural gas leasing.

**BLM Should Take a Hard Look at its Legal Authority to Establish a Master Leasing Plan Prior to Moving Forward**

Western Energy Alliance urges BLM to reconsider whether proceeding with this MLP is prudent. The time and costs associated with the development of the Plan will be significant for all interested parties. If the Plan is determined to be unlawful under federal law, then all of the effort put into this project will have been wasted.

On May 17, 2010, BLM issued Instruction Memorandum (IM) 2010-117, *Oil and Gas Leasing Reform and Lease Parcel Reviews*. Section II of this IM addresses MLPs and

provides for additional planning and analysis beyond what is included in the applicable RMP to address changing circumstances, updated policies and new information. Although at a less site-specific level than a project-specific EIS, MLPs will also address likely development scenarios and varying mitigation levels.

According to the IM, MLPs will ordinarily be initiated as a land use plan amendment and will reconsider RMP decisions pertaining to leasing. New resource protection measures identified through the MLP process may result in a plan amendment that includes new lease stipulations and closing certain areas for leasing. These new stipulations and decisions will be applied as conditions of approval to existing leases if consistent with valid existing lease rights.

Under the MLP policy, BLM will prepare a MLP when the following four criteria are met:

1. A substantial portion of the area to be analyzed in the MLP is not currently leased;
2. There is a majority Federal mineral interest;
3. The oil and gas industry has expressed a specific interest in leasing, and there is a moderate or high potential for oil and gas confirmed by the discovery of oil and gas in the general area; and
4. Additional analysis or information is needed to address likely resource or cumulative impacts if oil and gas development were to occur where there are: multiple-use or natural/cultural resource conflicts; impacts to air quality; impacts on the resources or values of any unit of the National Park System, national wildlife refuge, or National Forest wilderness area, as determined after consultation or coordination with the NPS, the FWS, or the FS; or impacts on other specially designated areas.

IM 2010-117 at 4. This IM also states that “[a]n MLP may also be completed under other circumstances at the discretion of the Field Manager, District Manager, or State Director.” *Id.*

Western Energy Alliance is concerned about the apparent headlong rush by BLM to develop and implement MLPs despite an apparent lack of legal authority. The IM did not undergo proper rulemaking procedures including public notice and comment. Western Energy Alliance won a recent lawsuit against the corresponding IM 2010-118 on categorical exclusions, released along with 2010-117, because BLM had failed to follow proper rulemaking procedures. Under the Federal Land Policy and Management Act (FLPMA), federal land management decisions are to be made pursuant to RMPs developed under FLPMA, and federal regulations already establish a clear and precise process for amending those RMPs. *See generally* 43 U.S.C. § 1712(a), 43 C.F.R. § 1610. Failing to follow a full rule-making process to change these unambiguous regulations is unwarranted.

Further, unlike the regulations governing the development and revision of RMPs, the IM deems that certain leasing recommendations, including those to withhold a lease parcel from offering, are not appealable or protestable decisions. IM 2010-117 at 5. This

unilateral restriction of due process and protest rights exceeds the discretionary authority of BLM to impose such a prohibition outside of the standard land use planning regulations.

BLM has, without following the public notice and comment requirements of the federal Administrative Procedures Act (APA), 5 U.S.C. § 553, promulgated and implemented resource management guidance establishing a mandatory process for amending existing RMPs. This unilateral, non-public rulemaking creates de facto BLM land use planning regulations, promulgated without required due process and notice and comment opportunities for the public.

The MLP program is duplicative of existing federal land use planning and resource management programs, is not authorized by federal law, and it appears to simply provide an opportunity for the agency to make an “end run” around the established resource planning processes required by FLPMA and its implementing regulations. Federal courts have regularly rejected efforts by federal agencies to implement programmatic changes via guidance that are obligatory, inconsistent with established law, and inconsistent with properly promulgated existing regulation. *See e.g. Natural Resources Defense Council v. EPA*, 643 F.3d 311, 320-21 (D.C. Cir. 2011).

Western Energy Alliance requests that BLM explain the legal basis for the MLP program established under IM 2010-117, including how the MLP policy is not an attempt to circumvent FLPMA or its regulations. The IM clearly was not developed in a manner consistent with APA rulemaking, and it is Western Energy Alliance’s concern that all parties’ efforts to develop a MLP will be in vain if the IM is ultimately deemed to violate the APA.

### **Withdrawal of Lands from Mineral Leasing Requires Congressional Approval**

In accordance with congressional mandate and FLPMA, BLM must analyze any withdrawal of land from mineral leasing, including impacts and costs. In order to withdrawal tracts of land greater than 5,000 acres from mineral leasing, BLM must provide Congress with a variety of information detailing the impacts, costs, and need so that Congress can properly decide whether to approve the withdrawal. A withdrawal also requires public notice and hearing, and consultation with state and local governments. 43 U.S.C. at § 1714(c)(1)-(12), (h); 43 C.F.R. Parts 2300, 2310.

Under FLPMA, a withdrawal is defined as “withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws . . . .” 43 U.S.C. § 1702(j).

Under a BLM Director Directive, the BLM cannot in effect close thousands of acres of public lands to oil and gas leasing without following FLPMA’s Section 204 withdrawal procedures:

Except for Congressional withdrawals, public lands shall remain open and available for mineral exploration and development unless

withdrawal or other administrative actions are clearly justified in the national interest in accordance with the Department of the Interior Land Withdrawal Manual 603 DM 1, and the BLM regulations at 43 C.F.R. 2310.

BLM Energy and Non-Energy Mineral Policy (April 21, 2006). This policy was adopted through IM 2006-197, BLM Energy and Non-Energy Mineral Policy. IM 2006-197 places conditions on the closure of lands available to mineral exploration and development, which follow FLPMA's withdrawal procedures.

Federal courts agree that BLM must follow FLPMA's withdrawal and reporting procedures before closing large tracts of land from mineral leasing. See *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383, 392-93 (D. Wyo. 1980) (The BLM could not decline to issue leases in RARE II areas without complying with §204 of FLPMA); *Mountain States Legal Foundation v. Hodel*, 668 F. Supp. 1466, 1474 (D. Wyo. 1987) (Forest Service violated FLPMA when it imposed an oil and gas leasing moratorium pending completion of its land use plan).

In line with FLPMA, BLM's MLP must fully analyze address the impacts of withdrawing lands from mineral leasing.

#### **BLM's Statutory Obligations Under FLPMA**

Any MLP or RMP amendment must necessarily be analyzed within the context of BLM's legal obligations under the Federal Land Policy and Management Act (FLPMA) and National Environmental Policy Act (NEPA).

FLPMA is the organic statute for the BLM. Under FLPMA, BLM is required to manage public lands under the principles of multiple use and sustained yield, in accordance with applicable land use plans, to meet the needs of present and future generations. 43 U.S.C. § 1701(a)(7), (8) & (12); 43 U.S.C. § 1732(a) & (b); 43 C.F.R. § 1610.5-3.

Oil and Gas is a Major Use of Public Lands. FLPMA identifies mineral exploration and production as one of the "principle or major uses" of public lands. 43 U.S.C. § 1702(l). Further, FLPMA emphasizes the importance of public resources to the United States domestic energy supply and contains an express declaration of Congressional policy that BLM manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals, [and other commodities] from the public lands." 43 U.S.C. § 1701(a)(12) (emphasis added). FLPMA's definitions of multiple use and the major uses of public lands highlight the on-going utilization of natural resources on public lands for the benefit of the American people. 43 U.S.C. § 1702(c).

In Section 102 of FLPMA, Congress directed BLM to manage lands on a multiple-use basis, but also directed that it "mak[e] the most judicious use of the land for some or all of [the public land] resources" and, where appropriate, using "some land for less than all of the resources." 43 U.S.C. § 1702(c). In other words, as federal courts have recognized,

Congress made it clear in FLPMA that “BLM need not permit all resource uses on a given parcel of land.” *Rocky Mtn. Oil & Gas Ass’n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982) (emphasis added) (explaining contours of FLPMA and congressional directives to BLM regarding management of public lands).

Section 202 of FLPMA requires BLM to integrate “physical, biological, economic, and other sciences” in developing land-use plans. 43 U.S.C. § 1712. In developing an RMP, FLPMA requires that BLM “estimate and display the physical, biological, economic, and social effects of implementing each alternative considered in detail.” 43 C.F.R. § 1610.4-6.

The objective of resource management planning is “to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state, and local governments.” 43 C.F.R. § 1601.0-2 (emphasis added).

**The MLP Must Recognize Valid Existing Rights and Ensure that Management Prescriptions do not Restrict Access to, Amend, or Otherwise Restrict, Existing Oil and Gas Lease Rights**

The RMP and implementation of its management prescriptions cannot infringe upon or materially restrain valid and existing lease rights. This important legal principle must be reflected in the MLP.

**A. Legal Requirements**

Pursuant to FLPMA, all BLM actions, such as authorization of Resource Management Plans, are “subject to valid existing rights.” 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). Thus, pursuant to federal statute, the BLM cannot terminate, modify, or alter any valid or existing property rights. *Id.*

Federal courts have interpreted the phrase “valid existing rights” to mean that federal agencies cannot impose stipulations or conditions of approval that make development on existing leases either uneconomic or unprofitable. *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). BLM cannot prohibit a lessee from developing their leases. *National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *Western Colorado Congress*, 130 IBLA 244, 248 (1994).

Importantly, through the RMP, BLM cannot revise or restrict valid existing lease rights through imposition of Conditions of Approval for drilling permits or through imposition of lease stipulation provisions from adjacent leases. *Colorado Environmental Coalition*, 165 IBLA 221, 228 (2005).

## B. MLP Must Protect, and Not Infringe Upon, Valid Existing Rights

Based upon the legal requirements above, the MLP must ensure that valid existing lease rights are not restricted or unilaterally amended or modified. Nor can BLM approve management prescriptions that may impair, block access to, render uneconomic, existing leased federal oil and gas resources.

BLM's NEPA analysis in the MLP DEIS must be structured to inform the public within this context. In performing NEPA analysis, BLM must analyze potential impacts on oil and gas resources to ensure that valid existing leases are not imposed upon, and also ensure protection of the integrity of federal oil and gas resources to avoid waste of these important domestic energy sources.

### **Oil and Gas Leasing Should Continue During Any MLP or RMP Update Process**

Under the MLP and plan amendments to the Moab and Monticello RMPs that the BLM Canyon Country District is currently preparing, the BLM should not impose a de facto moratorium on oil and gas leasing.

#### A. Oil and Gas Leasing Decisions Continue Despite Ongoing Planning Process

Under the Mineral Leasing Act (MLA), the BLM must continue to make leasing decisions during the planning process, and it must recognize valid, existing rights.

The MLA requires that all public lands not specifically closed to leasing be open to lease for the exploration and development of oil and gas resources. BLM's Land Use Planning Handbook states that existing RMPs must be followed and are in full force during the RMP revision or amendment process. BLM Handbook H-1601-1, Section VII(E) at page 47. Specifically, BLM's Handbook states, "Existing land use plans decisions remain in effect during an amendment or revision until the amendment or revision is completed and approved. The decisions of existing land use plans do not change. For example, if current land use plans have designated lands open for a particular use, they remain open for that use." *Id.*

Federal courts have consistently held that BLM does not have to defer leasing pending an update to the underlying RMP. *See, e.g., ONRC Action v. Bureau of Land Management*, 150 F.3d 1132 (9th Cir. 1998) (holding that BLM is not required to halt actions, such as mineral development, pending amendment or revision to an existing land use plan). Neither FLPMA nor NEPA require that "BLM postpone or deny a proposed action pending completion of amendment or revision of an existing land use plan that currently supports that action." *Powder River Basin Resource Council*, 180 IBLA 32, (2010). BLM may not suspend the offering of lands for oil and gas leasing during an RMP revision. *See, e.g. Colorado Environmental Coalition*, 161 IBLA 386, 396 (2004).

BLM must recognize that despite an ongoing MLP planning process, oil and gas leasing decisions are to continue.

### **BLM Must Utilize Least Restrictive Lease Stipulations**

In developing the MLP or RMP amendment, BLM must utilize the least restrictive lease stipulation necessary to protect the applicable resource providing the basis for the stipulation.

#### **A. Legal Requirements**

Pursuant to Section 363 of the Energy Policy Act of 2005, BLM entered into a Memorandum of Understanding with the Forest Service that documented procedures to ensure consultation between agencies regarding oil and gas leasing on public lands. Section 363 provides that lease stipulations are “only as restrictive as necessary to protect the resource for which the stipulations are provided.” 42 USC § 15922(b)(3)(C).

With respect to oil and gas resources, BLM’s Manual 1601 on Land Use Planning, and Manual 1624 on Planning for Fluid Minerals, specifically direct BLM not only to identify which areas would be subject to different categories of restrictions as included in the MLP, but also to show that the least restrictive lease stipulation that would offer adequate protection of a resource has been selected. See BLM Handbook H-1601-1, App. C. II. F. at 16.

#### **Socio-economic Impact**

The oil and gas resource potential in the MLP planning area is significant. It is estimated that the planning area contains 145 Bcf of natural gas, 32,477,632 barrels of oil, and 4,410,384 barrels of Natural Gas Liquids (NGL).<sup>1</sup> In addition, technological advances that enable the development of oil and natural gas resources that were previously thought to be unrecoverable could increase the overall resource potential in the MLP area.

By closing areas at the pre-leasing stage through the MLP process, BLM would be closing access to significant domestic energy resources in the MLP area. These closures, along with restrictive lease stipulations that could ultimately be applied, will have a significant negative impact on capital investment in energy development in the MLP area, job creation and economic activity. Accordingly, BLM must provide a thorough analysis of the socio-economic impact of the closures and restrictions to oil and gas development in the MLP.

Utah’s oil and gas industry contributes significantly to the local, state, and national economy, providing millions of dollars each year in royalties, bonuses, and severance taxes, besides the added benefits of direct capital investment to local economies and over 79,000 high paying jobs.<sup>2</sup> Continued access to oil and gas resources on Utah’s public lands

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<sup>1</sup> *Master Leasing Plan Project Resource Assessment*, Sheldon Kye Energy LLC, prepared for Western Energy Alliance, May 2012.

<sup>2</sup> *Blueprint for Western Energy Prosperity*. ICF International, Prepared for Western Energy Alliance, 2011 Rocky Mountain Forecasts.

is critical to ensuring economic growth and job creation in eastern Utah's rural communities.

Thank you for your consideration of these scoping comments. If you have questions, please contact me at [skimball@westernenergyalliance.org](mailto:skimball@westernenergyalliance.org) or (303) 623-0987.

Sincerely,



Spencer Kimball  
Manager of Government Affairs