



September 11, 2018

Gloria Tibbets
Field Manager
Bureau of Land Management
Colorado River Valley Field Office
2300 River Frontage Road
Silt, Colorado 81652

VIA ELECTRONIC SUBMISSION ONLY

Re: Gunnison County Comments and Request for Selection of “No Action” Alternative in Response to Preliminary Environmental Assessment for the December 2018 Competitive Oil & Gas Lease Sale Uncompahgre Field Office

Dear Ms. Tibbets,

On behalf of the Board of County Commissioners of the County of Gunnison, Colorado (“BOCC”), and pursuant to the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* (“NEPA”), we submit the following comments to the Bureau of Land Management’s (“BLM’s”) August 27, 2018 Preliminary Environmental Assessment for the December 2018 oil and gas lease sale within the management of the Uncompahgre Field Office (“UFO”) in the State of Colorado (“EA”). In short, and for the reasons set forth below, the BOCC urges the BLM to select the “no action” alternative at least as to parcels 8135, 8320, 8351 and 8140 and any other lands within Gunnison County,¹ deferring any such lease sale until economic conditions for the production and sale of coalbed methane natural gas (“CBM”) improve and the BLM finishes the process of and adopts an appropriate resource management plan (“RMP”) for the lands covered by the proposed sale.² The BOCC also reiterates its request that, notwithstanding the inaccurate statements in the Preliminary EA to the contrary, BLM lease stipulations can, and indeed should, include requirements for compliance with Gunnison County land use and environmental regulations.

As the BOCC has made clear in previous comments submitted to the BLM, the BOCC recognizes that natural gas development is an important part of Colorado’s economy and affords economic development opportunities within Gunnison County. Natural gas is a valuable resource

¹ As before, the BOCC acknowledges its partnership and cooperation with Delta County, Colorado and other members of the North Fork Coal Mine Methane Working Group, respecting that Delta County and other members of the group are important stakeholders in this process who may have additional or different comments regarding the proposed lease sale, particularly with regard to those portions of the proposed lease sale that do not implicate Gunnison County or its citizens. Accordingly, the BOCC takes no position as to whether those parcels not wholly or partially within Gunnison County should be a part of the “no action” alternative suggested by the BOCC.

² Should the BLM decline to accept the BOCC’s recommendations set forth in this letter, the BOCC reserves the right to object or to otherwise legally challenge the BLM’s decision, and, further, to fully apply its own Land Use Resolution regulations to oil and gas operations on the proposed parcels, as well as coordinate proper regulation and oversight of such operations through the Colorado Oil and Gas Conservation Commission.

that should be extracted in a manner that both permits economic opportunities for the County's citizens and also protects public health, safety, wildlife, tourism and recreation, scenic resources, light and noise pollution, agricultural uses, water quality, and the environment. Notwithstanding the foregoing, the draft EA, and the process the BLM has undertaken to implement it, are fundamentally flawed. Moreover, the Preliminary EA makes statements suggesting that the BLM disregards Gunnison County's regulatory authority, stake in this process, and input on how the BLM should best proceed with responsible oil and gas development within the County. This, in turn, implies that the BLM views local input as irrelevant with regard to public lands within the UFO. If this is indeed the case, it is contrary to the Secretary of the Interior's commitment to work "with state and local governments, communities, Indian tribes, and other stakeholders as true partners to determine the best ways to accomplish [decisions made in land use plans and environmental reviews], now and into the future." See Bureau of Land Management Press Release, "BLM Requests Input for Future Planning Efforts and Environmental Reviews" (July 3, 2017) at 1. It also causes the BOCC great concern about its ongoing and future relationship with the BLM with regard to public lands within Gunnison County.

The BOCC's specific comments with regard to the Preliminary EA are as follows:

1. The BLM Did Not Provide Gunnison County and Its Citizens a Reasonable Opportunity to Comment on the EA.

At the outset, the BOCC takes issue with the BLM's failure to notify Gunnison County of the publication of the draft EA, and then provide only 15 days³ for the BOCC, the citizens of Gunnison County, and other interested parties to comment on a 157-page document. As the BLM is aware, on July 17, 2018 the BOCC provided written comments during the scoping period for the proposed lease sale that is the subject of the EA.⁴ In those comments, the BOCC expressly indicated its interest in participating in the leasing process, which plainly includes any process under NEPA. Despite this, County records do not indicate that the BLM transmitted its draft EA to the BOCC, or alerted the BOCC to its publication on August 27. On top of this, the BLM allowed a mere 15 days, or until today, to comment on the draft EA. This is plainly unreasonable and indicates that the BLM is disinterested in the input of the BOCC and other stakeholders. The BLM, like all federal agencies, is required under NEPA to provide "appropriate" time limits for comments to EAs. See 40 CFR § 1501.8; see also *Brodsky v. United States NRC*, 704 F.3d 113, 122 n. 4 (2d Cir. 2013) (finding that the court "cannot confidently conclude" that citizens were afforded "substantial opportunity to comment on agency's EA and FONSI). Further, the BLM must consider, when setting an appropriate time limit, the "[d]egree to which the action is controversial." See *id.* § 1501.8(b)(vii). Finally, the BLM must "involve the public in the EA process "to the extent practicable[.]" See *Theodore Roosevelt Conservation P'ship v. Salazar*, 392 U.S. App. D.C. 316, 337, 616 F.3d 497, 518 (2010), quoting 40 C.F.R. § 1501.4(b).

³ Indeed, the Labor Day holiday fell over the 15-day comment period, suggesting that the BLM was attempting to further limit the amount of time interested parties would have to comment. Moreover, this office made multiple phone calls to obtain a copy of the Preliminary EA but these calls were not returned in a timely manner, requiring this office to obtain a copy of the Preliminary EA from another source.

⁴ Those comments included a request for an extension of the scoping period to provide Gunnison County citizens and other stakeholders additional time to comment. The BLM did not respond to this request. Also, please note that the BOCC incorporates by reference those comments as if fully set forth herein, except to the extent they expressly contradict any comments contained in this letter.

Here, the BLM's own FONSI, published contemporaneously with the EA, admitted that the proposed lease sale is controversial. *See* FONSI at 2. ("The majority of the public opinions expressed in the North Fork area have expressed opposition to the proposed new leasing and to existing oil and gas operations in the project vicinity."). Accordingly, the BLM should have ensured that all interested parties, including the BOCC, received notice of the draft EA, and also should have afforded those parties reasonable time to submit comments. The BLM did neither. The BLM should therefore reconsider its decision to forego providing appropriate notice to interested parties and severely curtailing the time such parties can comment on the Preliminary EA.

2. The EA's Statement that "Federal lands and minerals" are not Subject to Gunnison County Regulation is Plainly Inaccurate.

In its July 2018 comments, the BOCC reminded the BLM of the fact that Gunnison County has the authority to protect and promote the health, welfare and safety of the people of Gunnison County, and the authority to regulate land use planning and quality and protection of the environment in the County. To this end, Gunnison County has adopted regulations to exercise such authorities including the review, approval or denial of proposed activities and uses of land and natural resources. The BOCC, therefore, suggested to the BLM that to the extent the BLM proceeds with the proposed lease sale, it is critical for the BLM to include compliance with all Gunnison County regulations regarding oil and gas exploration, development, operation, and upstream activities as a mandatory lease term in any lease of parcels within the proposed lease area. In addition, the BOCC suggested the BLM should include a requirement that any lessee comply with any other land use or environmental regulation imposed by Gunnison County that in any way relates to operations on the leasehold, including but not limited to water quality, public roads, emergency response, wildlife concerns, agricultural uses and recreation uses.

In the Preliminary EA, the BLM perfunctorily rejected these suggestions, stating that "the courts have ruled that federal lands and minerals are not subject to local control." *See* Preliminary EA at 5. This statement is demonstrably false.⁵ Both the federal courts, and courts here in Colorado, have made clear that that "neither the federal statutory scheme nor the case law relied upon by [oil and gas producers] supports the conclusion that Congress intended to preempt all local regulation in the area of oil and gas operations." *See Bd. of Cty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773, 785 (Colo. App. 2006), *citing Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303 (10th Cir. 1969); *see also, e.g., Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1205 n.6 (10th Cir. 2012) (explaining that federal law regarding mineral leasing does not "provide a pervasive regulatory scheme intended to occupy the entire field of federal mineral lands regulation.") (internal citations and quotation marks omitted); *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1124 (10th Cir. 1982) ("Congress has prescribed limited, but not exclusive, controls over the leasing of federal lands for oil and gas production."). The BLM's claim that Gunnison County has no regulatory oversight over oil and gas operations within its borders is nothing short of specious.

⁵ This statement is also at odds with statements contained in other parts of the Preliminary EA. *See, e.g., id.* at 18 ("Under FLPMA and the CAA, the BLM cannot conduct or authorize any activity that does not conform to all applicable local, State, Tribal, or Federal air quality statutes, regulations, standards, guidelines, or implementation plans.").

Moreover, the BOCC takes issue with the Preliminary EA's statement that Gunnison County's regulatory oversight was "outside the scope of the EA." See Preliminary EA at 5. As the BLM is aware, NEPA requires it to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. See 42 U.S.C. § 4331(b). NEPA further requires the BLM to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." See *id.* § 4332(2)(E). To that end, the BLM must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action in comparative form, so as to provide a "clear basis for choice among the options" open to the agency. See 40 C.F.R. § 1502.14. This alternatives analysis is the "heart" of the agency's NEPA analysis. See *id.*

Because, as was explained in BOCC's July comments, Gunnison County's regulations protect and promote, among other things, the environment and responsible natural resource development and operations, the application of those regulations *is*, contrary to the statement in the Preliminary EA, within the scope of NEPA's requirements. BLM's offhand rejection of Gunnison County regulations further demonstrates that the proposed lease sale alternative selected by the BLM is, at best, problematic, and, at worst, abusive, arbitrary and capricious decisionmaking. See, e.g., *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999) (agency action improper when it is "arbitrary, capricious or an abuse of discretion."). In any case, the Preliminary EA should recognize Gunnison County's authority and stake in this matter. Further, with regard to this and any future proposed lease sale, the BLM should incorporate Gunnison County's regulatory provisions as lease stipulations.

3. The Preliminary EA Improperly Declines to Consider the Lack of an Economic Need for Additional CBM Drilling in the North Fork Basin.

In its July 2018 preliminary comments, the BOCC indicated that natural gas prices were at historic lows, and, therefore, questioned whether a present oil and gas lease sale in the North Fork made economic sense. In response, the Preliminary EA claimed that "evaluation of economic needs is not a factor considered by the BLM in offering nominated parcels for sale" and "outside the scope of the EA". See Preliminary EA at 5. These statements are also inaccurate. The Federal Lands Policy Management Act, 43 U.S.C. § 1701 *et seq.* expressly provides that one of the BLM's management goals is "sustained yield," which "requires BLM to control depleting uses over time, *so as to ensure a high level of valuable uses* in the future." See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58, 124 S. Ct. 2373, 2376 (2004), *citing* 43 U.S.C. § 1702(h) (emphasis added); see also *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) ("It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses. . . . Development is a *possible* use, which BLM must weigh against other possible uses--including conservation to protect environmental values, which are best assessed through the NEPA process.") (emphasis in original); *Babbitt*, 167 F.3d at 1290 ("Multiple use' requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes without the infliction of permanent damage."). It is axiomatic that increased natural gas supply reduces the value of produced natural gas, as opposed to unproduced gas that is not produced prices increase. See, e.g., U.S. Energy Information Administration, "Factors Affecting Natural Gas Prices" (Aug. 23, 2017) *available at* www.eia.gov.

In other words, by authorizing the development of natural gas now, the BLM is devaluing natural gas in the North Fork in arguable violation of FLPMA.

In addition, the BLM's claim that "evaluation of economic needs" is outside the scope of a NEPA process is inaccurate. While it's true that NEPA prohibits the elevation of economic considerations over environmental ones, NEPA recognizes that its purpose is to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." *See* 42 U.S.C. § 4331(a). Thus, economic considerations, particularly when they can result in additional protection of natural resource values and the environment, should be a part of the "hard look" NEPA requires the BLM to perform as part of any proposed lease sale, including this one. *See* 40 C.F.R. § 1508.14 ("When an environmental impact statement is prepared and *economic . . . effects* are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.") (Emphasis added). In short, while economic considerations "occupy a lesser tier of importance in an EIS than do purely environmental or ecological concerns[,] . . . NEPA requires a narrowly focused, indirect review of the economic assumptions underlying a federal project described in an impact statement." *See, e.g., City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1009 (S.D. Tex. 2004) (internal citations and quotations omitted).

Undoubtedly, the Preliminary EA avoids the question of whether natural gas development is economically sensible at present because the data clearly indicates that it is not. As the BOCC explained in its July 2018 comments, natural gas prices remain historically low and are predicted to remain so until 2019, thus raising the question of whether it makes sense to develop additional natural gas resources at present. *See* United States Energy Information Administration, "EIA expects 2018 and 2019 natural gas prices to remain relatively flat", *available at* www.eia.gov/todayinenergy/detail.php?id=34672. Indeed, even the BLM's pending draft RMP, while painting a rosier picture of natural gas prices, asserts that "the price of natural gas is projected to increase at an annual rate of [only] 1.2 percent." *See* United States Department of the Interior, Bureau of Land Management, *Uncompahgre Field Office Draft Resource Management Plan and Environmental Impact Statement* (May 2016) ("Draft RMP") at 3-121. Moreover, the Preliminary EA itself recognizes that despite its approval of numerous wells in the North Fork basin, producers have drilled only a tiny few, strongly evidencing the low price and lack of demand for CBM at present. *See* Preliminary EA at 13-14. This only makes sense; as of September 5, 2018, the commodity price for natural gas (at the Henry Hub) was \$2.83 per mcf, a 64% decrease from its high in 2008 of almost \$ 14.⁶ *See* Natural Gas (Henry Hub) Price, *available at* <https://markets.businessinsider.com/commodities/natural-gas-price>. Simply put, it is irrefutable that the current price of natural gas does not support the proposed lease sale, and the EA's failure to consider this economic reality is inconsistent with the BLM's obligations under FLPMA and NEPA.

⁶ To the extent the BLM is considering, as they should, the economics of oil and gas leasing, it is relying upon erroneous assumptions. The 2012 Reasonable Foreseeable Development Scenario for Oil and Gas used by the BLM to prepare the current draft RMP recognizes the fall of natural gas prices, but nonetheless predicts a natural gas price of around \$5.00 by 2018, or almost double the present actual price. *See* Stilwell, Dean P. *et al.*, "Reasonable Foreseeable Development Scenario for Oil and Gas for the Uncompahgre Field Office, Colorado" Final Report" (Feb. 16, 2012) at 58-59, Fig. 20. Obviously, the BLM's forecast was off the mark, and to the extent the BLM is continuing to rely on such estimates, it should cease doing so.

4. The EA Implicitly Recognizes But Nonetheless Rejects the Need to Adopt a Proper RMP Before Proceeding with the Proposed Lease Sale.

As the Preliminary EA recognizes, the BLM's present RMP for the UFO is almost 30 years old, and "would not be adequate to address potential resource impacts from leasing and the development of the proposed leases." *See* Preliminary EA at 7. The BLM asserts it has solved this problem by adopting some, but not all, of the provisions of the draft RMP as lease stipulations. But the Preliminary EA fails to analyze in detail why only some, but not all, of the provisions of the draft RMP should be incorporated as lease stipulations for any leases executed under the proposed lease sale. Such cursory analysis fails to satisfy the BLM's obligations under NEPA. As explained above, the BLM must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action in comparative form, so as to provide a "clear basis for choice among the options" open to the agency. *See* 40 C.F.R. § 1502.14. It does not appear to the BOCC that the BLM took a "hard look" at an alternative that would have adopted all of the provisions of the draft RMP as lease stipulations, or, as explained below, a deferral of the December 2018 lease sale until the draft RMP is adopted.

As the BLM acknowledges, the almost 30 year-old RMP "remains the land use plan in effect" for this proposed lease sale, and that the current draft of the RMP "differ[s] substantially" in that the current RMP contains only "three general" lease stipulations, while the draft RMP potentially contains many times that, depending on the alternative selected by the agency. *See* Preliminary EA at 5, 9. Despite this, the EA fails to explain with any detail how only partial application of the current draft RFP "ensure[s] adequate protection of resources and resource uses." *See id.* at 6. This is notwithstanding the fact that the EA acknowledges potential adverse effects to the environment that could potentially be mitigated by the draft RMP or future drafts of the RMP as that plan is revised and modified pursuant to the planning process. *See, e.g.* Preliminary EA at 41-42 (recognizing adverse effects to endangered fish). Nor, as explained further below, does the Preliminary EA explain with any detail why the BLM could not first complete the RMP process and adopt a new RMP before proceeding with the proposed lease sale, particularly in light of considerations outlined in these comments that the BLM has either disregarded or failed to properly analyze. Thus, the BOCC reiterates its comment that the BLM should wait for the adoption of a modern, appropriate RMP before proceeding with this proposed lease sale.

5. The BLM Did Not Rigorously Explore a No Action Alternative and Deferral of the Lease Sale Until Adoption of a Proper RMP.

Perhaps the most concerning shortcoming of the Preliminary EA is its failure to engage in any detailed examination of a "no action alternative[.]" by which the BLM would defer the December 2018 lease sale until adoption of the draft RMP. Rather than any rigorous analysis, the Preliminary EA devotes a mere three sentences to the no action alternative of lease deferral. *See* Preliminary EA.⁷ This is not the "hard look" that NEPA requires. *See* 40 CFR 1502.14 (requiring agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives[.]"); *Blue*

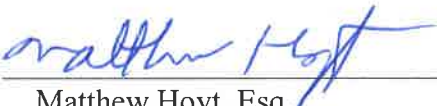
⁷ It therefore may be the case that the BLM should consider preparing an EIA rather than an EA, given the proposed Finding of No Significant Impact's ("FONSI's") identification of controversy surrounding the proposed lease sale.

Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (“In cases in which a federal agency prepares a FONSI, the reviewing court must insure that the agency took a ‘hard look’ at environmental consequences[.]”) (Internal citations and quotations omitted). In light of all of the concerns the BOCC has with the BLM’s analysis, we believe it is clear that the BLM should not give the “no action” alternative such short thrift and should instead revise the Preliminary EA to afford this alternative the detailed analysis it deserves.

6. Conclusion

In light of both the comments BOCC previously submitted in this process and the comments contained in this letter, the BOCC does not support the Preliminary EA as written and urges the BLM to adopt the “no action” alternative and defer the proposed December 2018 lease sale.

ON BEHALF OF THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF GUNNISON, COLORADO

By: 
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Gunnison County, Colorado

cc: Colorado State Director Gregory Shoop, United States Bureau of Land Management
The Honorable John Hickenlooper, Governor of the State of Colorado
The Honorable Michael Bennet, United States Senate
The Honorable Cory Gardner, United States Senate
The Honorable Scott Tipton, United States House of Representatives