



COLORADO  
OIL & GAS  
ASSOCIATION

May 5, 2017

*Submitted via e-mail to:* [ecrmp.comments@blm.gov](mailto:ecrmp.comments@blm.gov)

Mr. John Smeins  
Bureau of Land Management  
3028 East Main Street  
Cañon City, CO 81212

**Re: Preliminary Alternatives Report for the Eastern Colorado Resource Management Plan**

Dear Mr. Smeins:

Western Energy Alliance and the Colorado Oil & Gas Association (the Trades) appreciate the opportunity to comment on the Bureau of Land Management's (BLM) preliminary alternatives for the Eastern Colorado Resource Management Plan (RMP). We strongly support adoption of Alternative C: Emphasis on Responding to Demand for Resource Use, with some modifications.

Western Energy Alliance (the Alliance) represents over 450 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in Colorado and across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. Western Energy Alliance is committed to responsible oil and natural gas development that protects environmental resources, minimizes surface use impacts and contributes to the local and state economy.

Colorado Oil & Gas Association (COGA) is a member based trade association focused on oil and natural gas development in Colorado. Founded in 1984, COGA's purpose is to foster and promote the beneficial, efficient, responsible, and environmentally sound development, production, and use of Colorado's oil and natural gas resources. COGA provides a positive, proactive voice for the oil and gas industry in Colorado and aggressively promotes the expansion of Rocky Mountain natural gas markets, supply, and transportation infrastructure.

**I. BLM Must Adhere to the Statutory Framework**

When the Federal Land Policy and Management Act (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."<sup>1</sup> It is therefore the "continuing policy of the Federal Government in the national

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<sup>1</sup> 43 U.S.C. §1701(a)(12)

interest to foster and encourage private enterprise in...the orderly and economic development of domestic mineral resources.”<sup>2</sup>

FLPMA dedicated the public lands to multiple use and sustained yield, and identified mineral exploration and development as one of the principle uses.<sup>3</sup> Congress also directed the president to encourage federal agencies to “facilitate availability and development of domestic resources to meet critical material needs.”<sup>4</sup>

Furthermore, the State of Colorado and other federal agencies have primary authority to regulate numerous aspects of oil and natural gas development, including air quality, the hydraulic fracturing process, and groundwater. The RMP should only address issues over which BLM has primacy.

Taken together, this statutory framework should serve as clear guidance for BLM in evaluating which lands are available for oil and natural gas leasing and under what conditions. The RMP must reflect federal law and policy and the nation’s need for secure sources of domestic energy. The RMP should also acknowledge that oil and natural gas resources are developed in an environmentally responsible manner while providing the nation with an abundant source of affordable energy.

## **II. The RMP Should Reflect New Administration Policies for Land Management**

Through the Eastern Colorado RMP Update process, BLM must ensure that its selected alternative is consistent with the Trump Administration’s policies and guidance for managing public lands, including policies on mitigation, landscape scale planning, and climate change.

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. 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.”

Significantly, the Executive Order rescinded the November 3, 2015 Presidential Memorandum entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment” (Mitigation Memorandum). Reference to this now-rescinded Mitigation Memorandum in the Eastern Colorado RMP Preliminary Alternatives Report should be removed, and all mitigation policies within the Eastern Colorado RMP should be consistent with current Trump Administration policy.

Additionally, Executive Order 13783 rescinded Obama Administration orders, memoranda and reports on climate change, including the Council on Environmental Quality’s climate change guidance, titled “Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions

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<sup>2</sup> 30 U.S.C. §21a

<sup>3</sup> 43 U.S.C. §1702(c),(l)

<sup>4</sup> 30 U.S.C. § 1602(7)

and the Effects of Climate Change in National Environmental Policy Act [(NEPA)] Reviews.” This new guidance should be reflected in the Eastern Colorado RMP Update process.

In line with Executive Order 13783, on March 29, 2017, Secretary of the U.S. Department of the Interior Ryan 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 mitigation policies to ensure a proper balance between conservation and job creation. Secretarial Order 3349 specifically rescinds Secretarial Order 3330, titled “Improving Mitigation Policies and Practices of the Department of the Interior,” and calls on the agencies to review and recommend whether to reconsider, modify or rescind existing and draft actions that rely on Secretarial Order 3330 for mitigation guidance. Secretarial Order 3349 asks for similar review and potential rescission or modification of any actions relying on Obama Administration climate change guidance.

As BLM moves forward in updating the Eastern Colorado RMP, it must ensure that the alternatives reviewed, and the alternative ultimately selected, are consistent with Executive Order 13783, Secretarial Order 3349, and any further guidance provided by the Trump Administration on mitigation, landscape scale planning, and climate change. BLM should not unnecessarily burden energy development through the Eastern Colorado RMP.

### **III. BLM Should Recognize Technological Improvements and Their Impacts on Disturbance**

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 single interest groups. The Trades support 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 natural 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.<sup>5</sup> In 2012, the disturbance reduction resulting from this dramatic shift in drilling technology may have approached approximately 70 percent in Wyoming alone.<sup>6</sup>

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.

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<sup>5</sup> *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.

<sup>6</sup> *Id.* at 289.

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 unreasonably preclude lands from oil and natural gas leasing.

#### **IV. BLM Must Recognize its Limited Role in Regulating 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 the BLM. While BLM will necessarily analyze and disclose impacts to air and water through the NEPA process for the Eastern Colorado RMP Update, 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.<sup>7</sup> It does not mandate that a certain outcome be achieved or prohibit any impacts to environmental resources, such as air quality.<sup>8</sup>

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 manage the federal lands "in accordance with" the applicable land use plan.<sup>9</sup>

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.<sup>10</sup>

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 the BLM is not legally authorized to regulate air and water quality standards. It is the responsibility of the State of Colorado 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.

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<sup>7</sup> 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).

<sup>8</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>9</sup> 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).

<sup>10</sup> *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).

As BLM considers air and water quality measures proposed through the Eastern Colorado RMP Preliminary Alternatives Report, BLM must ensure that it is providing for conformance with the CAA and CWA and not attempting to usurp the State of Colorado's delegated authority.

**A. BLM Must Ensure its Alternatives Stay Within the Realm of its CAA Authority**

The Trades are concerned that the alternatives provided in the Eastern Colorado RMP Preliminary Alternative Report consider a number of restrictive measures within the Air Quality and Climate section that would exceed BLM's regulatory authority. These provisions, including those highlighted below, should be removed, or at minimum, revised to be consistent with BLM's limited authority to provide for compliance with the CAA.

First, Alternatives B, C, and D state that BLM should "[i]dentify, consider, and, as appropriate, require mitigation to address reasonably foreseeable impacts to resources from public land uses . . . ." <sup>11</sup> While such mitigation measures are currently undefined, we are concerned that BLM is here attempting to exceed its limited authority and unduly burden oil and gas development in direct conflict with Trump Administration policies.

Second, Alternative D proposes to regulate air quality in areas designated as nonattainment or maintenance by requiring "no net increase of [a] pollutant(s) or its precursors above baseline levels." <sup>12</sup> Such a requirement is unlawful and would exceed BLM's limited authority. Further, BLM here provides no source for a no net increase requirement. In areas designated as nonattainment within the Planning Area, air quality is regulated by a state implementation plan, known as a SIP, which outlines how the state will bring the area into attainment. BLM must follow the SIP within nonattainment areas and does not have authority to exceed air quality controls beyond the SIP.

Finally, Alternatives B, C, and D propose to require minimizing greenhouse gas emissions, and where that is infeasible, propose offset emissions or climate change adaptation. <sup>13</sup> While the oil and gas industry has taken great strides to reduce greenhouse gas emissions, moving toward an emissions offset program would establish new precedent far exceeding the climate change policy of the Trump Administration—and even climate change policy under the Obama Administration.

BLM must ensure that the proposed air quality provisions stay within the realm of BLM's actual authority under the CAA.

**B. BLM Must Ensure its Alternatives Stay Within the Realm of its CWA Authority**

The Trades appreciate the Eastern Colorado RMP Preliminary Alternatives Report's stated objective to maintain water quality standards consistent with the State of Colorado standards and ask that BLM not attempt to regulate water quality to higher standards. BLM must ensure that its alternatives analyze conservation measures consistent with its actual authority.

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<sup>11</sup> Eastern Colorado RMP Preliminary Alternatives Report Table 4 at 31.

<sup>12</sup> *Id.* at 32.

<sup>13</sup> *Id.*

The Trades are concerned that Alternative B appears to propose requirements that go beyond BLM's authority. For example, while Alternative B and portions of Alternative D call for groundwater monitoring consistent with Colorado Oil and Gas Conservation Commission (COGCC) rules, these alternatives propose to require maintaining groundwater quality at baseline conditions, which exceeds existing state standards. Further, Alternative B and portions of Alternative D propose to either fully prohibit any surface discharge of produced water on BLM-administered surface (Alternative B) or propose additional restrictions for the State of Colorado's surface discharge permitting process.<sup>14</sup>

We also believe that BLM should ensure consistency with State of Colorado water quality standards and permits. While we recognize that the purpose of NEPA is to analyze a range of alternatives, these alternatives must be reasonable and feasible. BLM's water quality alternatives discussion should analyze conservation measures that are within BLM's actual authority to regulate.

#### **V. BLM Must Recognize Valid Existing Rights Through the RMP Update Process**

It is well settled under law that any RMP update process, such as the Eastern Colorado RMP Update, 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."<sup>15</sup> 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.<sup>16</sup>

For example, once the BLM has issued a federal oil and gas lease that does not contain a no surface occupancy (NSO) stipulation, the BLM cannot thereafter completely deny development on the leasehold due to an updated RMP.<sup>17</sup> As explained by the Interior Board of Land Appeals (IBLA), only Congress has the right to completely prohibit development once a federal lease has been issued.<sup>18</sup>

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,"<sup>19</sup> subject to the requirement that any modification must be reasonable, and only after site-specific NEPA analysis would support such a modification.<sup>20</sup>

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

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<sup>14</sup> Eastern Colorado RMP Preliminary Alternatives Report Table 6 at 43.

<sup>15</sup> 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).

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g., National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999).

<sup>18</sup> *Western Colorado Congress*, 130 IBLA 244, 248 (1994).

<sup>19</sup> *Wyoming Outdoor*, 284 F. Supp. 2d at 92.

<sup>20</sup> *Yates Petrol. Co.*, 176 IBLA 144, 155 (2008).

rights.<sup>21</sup> Thus, an RMP update prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights.<sup>22</sup>

Similarly, 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.<sup>23</sup>

Therefore, through the Eastern Colorado RMP Update 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.<sup>24</sup>

BLM must make clear in the Draft Eastern Colorado RMP, which is the next step in this planning process, that it will recognize and respect valid existing lease rights.

#### **VI. BLM Must Recognize its Limited Authority to Regulate Non-Federal Surface Within the Patchwork of Federal and Non-Federal Surface and Minerals**

The Trades appreciate BLM’s recognition that many lands in the Planning Area, especially the Eastern Plains, comprise a patchwork of federal and non-federal lands and that BLM has limited authority to manage the surface of non-federal lands, especially in non-split estate situations. The Trades ask that BLM remain consistent with this recognition throughout the planning process and not attempt to exceed its statutory or regulatory authority on private surface.

With increased use of directional drilling technologies and the ability to access federal minerals from non-federal surface/non-federal mineral estate locations, BLM issued guidance in 2009 to assist field office staff in determining whether certain cultural and species restrictions apply in certain non-federal situations.<sup>25</sup> IM 2009-78 explicitly recognizes that where an operator proposes to drill a well from non-federal surface/non-federal minerals, and access both non-federal and federal minerals, the well is a federal action requiring BLM approval, but the well pad and other infrastructure is not a federal action providing BLM regulatory authority.

Throughout the Eastern Colorado RMP Update process BLM must ensure that it continues to recognize its limitations with respect to managing surface resources on non-federal surface.

#### **VII. BLM Should Ensure Wildlife Measures are Not Overly Burdensome**

We recognize that BLM must provide conservation measures for special status species within the Eastern Colorado RMP Update. However, we ask that that these conservation measures are fully analyzed to ensure that they are not overbroad, duplicative, or create a series of restrictions that are difficult for operators to comply with or impact an operator’s ability to develop its valid existing rights.

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<sup>21</sup> See 43 U.S.C. § 1701.

<sup>22</sup> See *Colorado Environmental Coal, et al.*, 165 IBLA 221, 228 (2005).

<sup>23</sup> 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).

<sup>24</sup> *Colorado Environmental Coalition*, 165 IBLA at 228.

<sup>25</sup> See BLM Instructional Memorandum 2009-078, “Processing Oil and Gas Applications for Permit to Drill for Directional Drilling into Federal Mineral Estate from Multiple-Well Pads on Non-Federal Surface and Mineral Estate Locations” (IM 2009-78).

In addition to Executive Order 13783 and Secretarial Order 3349, the Energy Policy Act of 2005 provides that lease stipulations may only be “only as restrictive as necessary to protect the resource for which the stipulations are provided.”<sup>26</sup>

In the Eastern Colorado RMP Update, BLM must utilize the least restrictive management practices with respect to oil and gas development, including ensuring access to rights of way (ROW) for infrastructure, and document how it complied with these mandates and how the least-restrictive lease stipulation that would offer adequate protection of a resource was selected.<sup>27</sup>

#### **A. BLM Must Ensure Proposed Conservation Measures are Consistent with the ESA and FLPMA**

BLM must ensure that conservation measures for wildlife management are consistent with BLM’s authority under FLPMA and the Endangered Species Act (ESA). 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.

Under FLPMA, BLM is directed to prevent “unnecessary or undue degradation.”<sup>28</sup> This undue degradation standard has been interpreted as “undue or excessive” and “something more than the usual effects anticipated” from a given land use.<sup>29</sup> This standard assumes that some degradation, and thus some impact, may occur to the public lands.<sup>30</sup>

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.<sup>31</sup>

Further, the restrictions proposed by BLM as COAs through NSO, controlled surface use (CSU), and timing limitation (TL) stipulations in Table 11 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 be able to address such issues appropriately on a per-project basis. Further, BLM

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<sup>26</sup> 42 U.S.C. § 15922(b)(3)(C); *see also* BLM’s Manual 1601 on Land Use Planning, and Manual 1624 on Planning for Fluid Minerals at App. C. II. F. at 16.

<sup>27</sup> *See* BLM Handbook H-1601-1, App. C. II. F. at 16.

<sup>28</sup> 43 U.S.C. § 1732(b).

<sup>29</sup> *Mineral Policy Ctr. v. Norton*, 292 F. Supp.2d 30, 41 (D. D.C. 2003); *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008).

<sup>30</sup> *See, e.g., Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011) (“FLPMA prohibits only unnecessary or undue degradation, not *all* degradation.”).

<sup>31</sup> *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).

cannot apply such restrictions to existing oil and gas leases that do not contain lease stipulations to protect these BLM “sensitive species.”

To comply with FLPMA, NEPA, and the ESA, and to provide for informed decision-making, the Draft EIS needs to analyze the cumulative 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 considered in the Eastern Colorado RMP Update process are not overly burdensome and within its authority under FLPMA and the ESA.

### **B. Alternative B’s Wildlife Provisions are Overly Restrictive**

Alternative B calls for overly broad and restrictive management of all special status species, including BLM-designated and state-designated special status species, candidate species and designated threatened and endangered species, beyond the requirements of or authority provided by FLPMA and the ESA.

For example, Alternative B calls for conserving all special status species—especially those not designated as threatened or endangered under the ESA—by “maintaining, restoring, or improving occupied and suitable habitat . . . .”<sup>32</sup> This proposed management provision in essence gives non-listed species the benefit of critical habitat designation without going through the ESA listing or critical habitat designation process.<sup>33</sup>

Alternative B further proposes oil and gas buffers surrounding certain species without providing any scientific justification for such restrictions, including:

- Avoid all surface-disturbing activities within 0.25 mile of active swift fox dens;
- Prohibit surface occupancy and avoid surface-disturbing activity within 300 feet of active prairie dog colonies occupied by black-footed ferrets;
- Prohibit surface occupancy and avoid all surface-disturbing activities within a 656-foot buffer from the edge of habitat of federally listed and BLM-sensitive plant species;
- Prohibit surface occupancy within 0.5 to 1 mile of occupied and historic bald eagle nest sites;
- Prohibit surface occupancy within 0.25 mile of golden eagle occupied nest sites;
- Prohibit surface occupancy within 0.5 mile of occupied ferruginous hawk nest sites; and,

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<sup>32</sup> Eastern Colorado RMP Preliminary Alternatives Report Table 11 at 97 (emphasis added).

<sup>33</sup> See 16 U.S.C. § 1533(a)(1) (factors for listing); § 1533(b)(2) (factors for critical habitat designation).

- Institute noise abatement year round for new facility operations located within 1.25 miles of active lesser prairie chicken leks.<sup>34</sup>

While it may be appropriate for the BLM to impose 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.

Many of the measures that propose prohibiting surface occupancy or surface disturbing activity are carried over into Alternatives C and D, either in whole or providing for “avoidance” instead of fully “prohibiting” activity. BLM must ensure that these proposed provisions are consistent with FLPMA, the ESA, and Administration policies.

In the Draft EIS, BLM must provide scientific justification for its proposed conservation measures as provided in Alternative B and the other alternatives analyzed.

#### **VIII. BLM Must Ensure any Mitigation Strategy is Consistent with BLM Authority and Administration Policies**

BLM must ensure that any mitigation strategy developed during the Eastern Colorado RMP Update process is constrained by BLM’s existing authority and consistent with Executive Order 12783, Secretarial Order 3349, and Administration policy regarding mitigation.

Consistent with Executive Order 12783, the mitigation strategy as conceptually proposed in Appendix B of the Eastern Colorado RMP Preliminary Alternatives Report must remove reference to the November 3, 2015 Mitigation Memorandum and any additional proposed goals that would burden oil and gas development as explained by Executive Order 13783 and Secretarial Order 3349. Further, the Trades request that the mitigation strategy acknowledge that the oil and gas industry consistently utilizes avoidance and minimization measures in developing projects, and provides recognition of those avoidance and minimization measures in any future proposed mitigation strategy.

In developing a mitigation strategy, BLM cannot impose a “no net loss” or “net conservation gain” mitigation standard as contained in the Mitigation Memorandum. The standards of “no net loss” and “net conservation gain” are inconsistent with FLPMA’s undue degradation standard, which directs that the Secretary, in managing the public lands, “take any action necessary to prevent unnecessary or undue degradation,”<sup>35</sup> and is inconsistent with existing Administration policy.

As explained in Section VII.A. above, FLPMA allows for some impact to occur on public lands from oil and gas development.<sup>36</sup> BLM cannot impose a mitigation standard beyond its statutory authority.

Further, with respect to the concept of compensatory mitigation as provided in the conceptually proposed mitigation strategy, BLM must provide further parameters on how avoidance and

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<sup>34</sup> Eastern Colorado RMP Preliminary Alternatives Report Table 11 at 99-121.

<sup>35</sup> 43 U.S.C. § 1732(b).

<sup>36</sup> See, e.g., *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011) (“FLPMA prohibits only unnecessary or undue degradation, not *all* degradation.”).

minimization measures are accounted for and how residual impacts, if any, are calculated. BLM cannot create a regulatory regime enforcing compensatory mitigation where it neither has statutory or regulatory authority to do so, nor has provided actual scientific support for the requirement.

In light of Executive Order 13783 and Secretarial Order 3349, we recommend that BLM reconsider its proposed mitigation strategy and whether such strategy should be developed at all for the Eastern Colorado RMP Update.

#### **IX. BLM Must Ensure Cultural and Tribal Provisions do not Burden or Restrict Valid Existing Lease Rights**

The Trades recognize the benefits to knowing where culturally-significant resources are located, educating the public on culturally-significant resources, and preserving those resources for future generations. However, we are concerned with the expense of measures proposed across all alternatives in the Eastern Colorado RMP Preliminary Alternatives Report for identifying such cultural and Tribal resources, which exceed existing requirements and procedures.

For example, Tables 13 and 14, addressing cultural and Tribal resources, call for multiple measures, including:

- Providing multiple public education events annually;
- Performing a minimum of 75 acres of cultural resources inventory annually;
- Performing a minimum of two data recovery or research projects annually;
- Monitoring a minimum of 19 sites annually;
- Closing to oil and gas leasing any lands that underlie historic properties of regional significance;
- Prohibiting oil and gas occupancy or surface-disturbing use within 328 feet from locally significant cultural resources; and,
- Developing an inventory to annually seek and record a minimum of one ecological landscape and the culturally sensitive locations within it.<sup>37</sup>

The Trades are concerned that many of these new measures, such as conducting minimum acres of survey yearly or conducting a minimum number of research projects yearly, are not within BLM's existing budget and would therefore be required to be paid for by oil and gas operators requesting permits within the Planning Area.

Executive Order 13783 and Secretarial Order 3349 call on federal agencies to reduce the regulatory burden on oil and gas development on federal lands. BLM must ensure that these wholly new proposed protective measures—which span Alternatives B, C, and D—comply with the terms and spirit of

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<sup>37</sup> Eastern Colorado RMP Preliminary Alternatives Report Table 13 at 135-40; Table 14 at 143-45.

Executive Order 13783 and Secretarial Order 3349 and do not unreasonably increase operators' costs for development nor limit operators' access to public lands for operations or through ROWs for infrastructure.

#### **X. BLM Must Promote Flexibility of Management with Respect to Visual Resources**

As with all resources, BLM must promote flexibility of management with respect to visual resources. We support Alternative C and the Eastern Plains Landscape alternative's goal of prioritizing flexibility for development projects over protection of visual resources, and hope this goal will result in flexibility within the final, approved Eastern Colorado RMP Update.

The Trades recognize that BLM must manage visual resources, which includes, in certain circumstances, providing restrictions on visual impacts. Consistent with the goal of Alternative C, BLM should provide flexibility to allow for site-specific conditions.

We are concerned with the provision within Table 16 allowing for required mitigation for foreseeable impacts as raised by members of the public.<sup>38</sup> The oil and gas industry routinely incorporates minimization measures in its project planning to reduce visual impacts of its development and operations. However, some impacts are unavoidable. BLM must recognize these limitations, as well as the best practices utilized by operators, when attempting to address public concerns.

In the Draft EIS BLM must provide further parameters around and analyze the concept of allowing for required mitigation of impacts raised by the public so that the Trades and our members can better respond to this proposed provision.

#### **XI. BLM Cannot Follow Planning 2.0 Guidelines in Developing the RMP**

Preparation of preliminary alternatives and allowing for public comment on them prior to a draft RMP is a new approach for BLM. We appreciate this additional opportunity to comment, and believe it is a useful step prior to the release of a draft RMP. The opportunity to comment on preliminary alternatives was one of many new steps in the RMP process contemplated in BLM's Resource Management Planning rule, issued on December 12, 2016, which was commonly referred to as Planning 2.0. The new rule would also have redefined the concept of multiple use, allowed for landscape-scale planning led at the national level, rather than the State or Field Office level, and unlawfully limited the special role played by state and local governments in the planning process.

On March 27, 2017, President Trump signed House Joint Resolution 44, which overturned the Planning 2.0 rule and prevented BLM from issuing a rule that was substantially the same in the future. Although release of the preliminary alternatives is within BLM's discretion under current rules, other changes to the RMP process that were briefly enacted under Planning 2.0 are now beyond BLM's authority. As such, we want to especially emphasize the important role state and local governments have in developing the RMP, and highlight once again BLM's multiple use mandate.

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<sup>38</sup> Eastern Colorado RMP Preliminary Alternatives Report Table 16 at 158.

We are not concerned that issuing the preliminary alternatives in any way violates proper BLM procedure; we merely want to caution BLM going forward that it cannot rely upon Planning 2.0's interpretation of the relevant statutes as it relates the issues discussed above.

## **XII. Conclusion**

Environmentally responsible development of oil and natural gas in the Eastern Colorado RMP planning area provides significant benefits to local communities, the state, and the nation. BLM should continue to support development and strongly consider the economic benefits for every stakeholder involved, including lease payments and royalties to the federal, state, and local governments, in preparing the RMP.

Today's oil and natural gas technology is better, safer and more efficient than ever before in minimizing surface usage. To successfully develop an RMP for the area, BLM must establish multiple-use alternatives that will balance reasonable protections for wildlife, cultural, and recreational interests with responsible oil and natural gas development. We appreciate this opportunity to provide comments during this process. Please do not hesitate to contact us should you have any questions.

Sincerely,

Tripp Parks



Manager of Government Affairs  
Western Energy Alliance

Andrew Casper



Director of Legal & Regulatory Affairs  
Colorado Oil & Gas Association