



November 30, 2017

*Submitted via email to [blm\\_ut\\_vernal\\_comments@blm.gov](mailto:blm_ut_vernal_comments@blm.gov)*

Ester McCullough  
Vernal Field Manager  
Bureau of Land Management  
170 South 500 East  
Vernal, UT 84078

**Re: Area of Critical Environmental Concern Evaluation for the Pariette Cactus**

Dear Ms. McCullough:

Western Energy Alliance does not support expansion of the Area of Critical Environmental Concern (ACEC) for the Pariette cactus in Duchesne and Uintah Counties, or the designation of a new, separate ACEC for the species. Furthermore, we believe the current ACEC was not developed pursuant to applicable federal law. The Bureau of Land Management (BLM) should not move forward with an expansion of the ACEC, or designate a new ACEC for the species, and it should reconsider the previous designation. The Alliance also opposes the establishment of any temporary management prescriptions in these areas until the next Vernal Resource Management Plan (RMP) amendment, a consideration contemplated in the May 2017 settlement agreement wherein BLM committed to this evaluation.<sup>1</sup>

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Utah and across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. Alliance members lease, develop, produce, and transport oil and natural gas on federal, private, and state lands within Duchesne and Uintah Counties and the 'Pariette Cactus Potential Habitat' area conveyed on the map provided by BLM in its notice, and therefore have a direct interest in BLM's course of action in this matter.

The Pariette cactus habitat lacks national significance, which is necessary in order to make an ACEC designation. BLM has a duty to recognize valid existing rights for oil and natural gas leases in the potential habitat area, and expansion of the ACEC threatens that duty. Finally, the ACEC may be used as a de facto critical habitat designation in circumvention of the Endangered Species Act. For these reasons, we oppose expansion of the ACEC designation.

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<sup>1</sup> Settlement Agreement in *Southern Utah Wilderness Alliance, et al. v. U.S. Department of the Interior, et al.* U.S. District Court (D. Utah) Consolidated Case No 2:12-cv-257 DAK; U.S. Court of Appeals for the Tenth Circuit Nos. 15-4151, 15-4152, 15-4153, 15-4155, 15-4158.

BLM is charged with managing federal lands for multiple use and sustained yield, and it must consider the associated economic impacts of an ACEC designation. The Uinta Basin is a premier oil and natural gas field that provides substantial socioeconomic benefits in the area. Restrictions that result in diminished oil and natural gas production in the Uinta Basin will have significant, negative consequences for the federal government, the State of Utah, and Duchesne and Uintah Counties, and BLM must evaluate a potential ACEC designation with these consequences in mind.

### Legal Framework

The Federal Land Policy and Management Act (FLPMA) defines an ACEC as an “area within the public lands where special management attention is required...to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish or wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.”<sup>2</sup>

In order to qualify for an ACEC designation, the resource contemplated for protection “requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern.”<sup>3</sup> The Pariette cactus does not have qualities that rise to national significance, nor is it threatened by irreparable damage, so the original ACEC designation was made in violation of BLM’s regulations and FLPMA’s statutory authority. Expansion of the existing ACEC, or the designation of an additional ACEC for the species, would double down on the previous error, rather than undoing it.

BLM’s prior administrative records do not provide any evidence of national significance for the Pariette cactus. In fact, the Pariette wetlands are manmade and in an area where oil and natural gas development has coexisted for decades. Furthermore, current population numbers exceed the Fish and Wildlife Service’s (FWS) recovery goal of 30,000. The 2014 Greater Monument Butte Draft Environmental Impact Statement estimated there were more than 50,000 cacti in the area, and previous surveys have estimated more than 100,000 species. A sustained population that far exceeds FWS’s recovery goals while coexisting with oil and natural gas development proves that the species is not threatened by irreparable damage and is not qualified for an ACEC designation, but rather qualifies the species for delisting from the ESA and removal as a BLM special-status species.

Expansion of the ACEC is also not warranted because BLM cannot make ACEC designations based on potential, rather than existing, habitat. Relying on potential habitat to make a designation is tantamount to making a critical habitat designation under the Endangered Species Act (ESA). Designating an ACEC based centrally on *potential* habitat is not only irresponsible, it goes beyond BLM’s regulatory jurisdiction for species management. FWS is the only agency that may designate critical habitat, and BLM cannot use the ACEC

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<sup>2</sup> 43 U.S.C. § 1702(a).

<sup>3</sup> 43 C.F.R. § 1610.7-2(a)(2); BLM Manual 1613, § .1.

designation process as an end-around process in violation of the ESA and the Administrative Procedures Act.

### **Valid Existing Rights**

The existing ACEC for the Pariette cactus and the ‘potential habitat’ area, including those areas designated as “Pariette Cactus Points with 300 foot Buffer,” under evaluation by BLM contain numerous oil and natural gas leases that were obtained from BLM prior to the designation of the ACEC. These leases carry valid existing rights that BLM must recognize and cannot infringe upon through an ACEC designation. BLM’s regulations state:

A lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: Stipulations attached to the lease; restrictions deriving from specific non-discretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed.<sup>4</sup>

Furthermore, Section 201 of FLPMA states that ACEC designations by themselves do not change the allowed uses of the designated lands: “[t]he preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.”<sup>5</sup> ACECs are not intended to be areas where no oil and gas development should be allowed. Yet this preclusion of oil and gas is precisely what some may hope occurs through this evaluation. As such, we remind BLM that as explained in FLPMA’s legislative history, “unlike wilderness areas . . . [ACECs] are not necessarily areas in which no development can occur.”<sup>6</sup> In addition, any ACEC designation or expansion should not unreasonably prevent or hinder the ability of oil and gas operators to transport to market oil and natural gas resources that are currently producing on valid leases within the ‘potential habitat’ area or in surrounding areas.

Finally, 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>7</sup> The Interior Board of Land Appeals (IBLA) has also held that BLM may not apply no surface occupancy (NSO) restrictions on valid existing leases retroactively after a subsequent ACEC designation. In *Southern Utah Wilderness Alliances*, 122 IBLA 6, 110 (1991), BLM’s environmental assessment approving the issuance of applications for permits to drill (APDs) was

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<sup>4</sup> 43 C.F.R. § 3101.1-2

<sup>5</sup> 43 U.S.C. § 1711(a).

<sup>6</sup> Senate Report 94-585

<sup>7</sup> See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); see also *Connor v. Burford*, 848 F.2d 1441, 1449-50 (9th Cir. 1988).

challenged for a failure to analyze and attach NSO restrictions to the APDs due to the presence of a subsequently created ACEC. IBLA upheld BLM's decision to approve the APDs because the leases were issued without NSO restrictions in an area designated as open for oil and gas development prior to the ACEC's creation.

In the May 2017 settlement agreement that precipitated this evaluation, the parties agreed that "[if] the relevance and importance criteria are met, BLM will establish any necessary temporary management prescriptions to protect the relevant and important resource values, as required by Manual 1613." The Alliance opposes any such temporary prescriptions, particularly any NSO stipulations that could be applied to future oil and gas leases in the area. Should BLM move forward with any temporary management prescriptions pursuant to their evaluation, those prescriptions must be no more restrictive than what could be applied through an ACEC formally designated through an RMP amendment and must fully honor and protect valid existing lease rights.

Taken together, the statutory and judicial history of ACECs clearly establishes that BLM must recognize leaseholders' valid existing right to develop leases issued prior to an ACEC designation, and the leases are not subject to further restrictions such as NSO.

#### **Existing Conservation Measures**

An expansion of the Pariette cactus ACEC, or the designation of a new separate ACEC for the species, is unnecessary because current conservation measures are sufficient to protect the species. Pariette cacti are protected through numerous mitigation measures undertaken by an oil and natural gas leaseholder in the area, including: site-specific cactus surveys; biologist oversight of authorized construction; limits on surface disturbance; protection of soils through best management practices and surface stipulations; design requirements to minimize or avoid impacts; buffers; and Section 7 consultation with FWS for surface disturbing activity within 300 feet of populations and/or individual plants.

There is no evidence these measures are not sufficiently serving to protect the species. In the absence of such evidence, BLM has not provided an adequate basis for the existing ACEC designation or for expanding it.

#### **Conclusion**

Western Energy Alliance strongly opposes expansion of the Pariette cactus ACEC in Duchesne and Uintah Counties, and urges BLM to reconsider the current designation. BLM has not demonstrated the species has the qualities necessary to justify an ACEC designation, and current management practices are otherwise sufficient to protect the species. Should BLM choose to expand the ACEC, it must continue to recognize valid existing rights for oil and natural gas leases in the designated area and not impose restrictions that were not attached to the lease at its issuance. BLM must also consider how this action would impact of future oil and gas development in the Uinta Basin,

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including its associated socio-economic benefits to communities, as well as local, state, and federal coffers.

Thank you for the opportunity to comment on the proposed ACEC. Please do not hesitate to contact me with any further questions.

Sincerely,



Tripp Parks  
Manager of Government Affairs