WESTERN ENERGY ALLIANCE

August 22, 2015

Submitted via email: blm_wo_protest@blm.gov

BLM Director (210)
Attention: Protest Coordinator
P.O. Box 71383
Washington, DC 20024-1383

Re: Moab Master Leasing Plan and Proposed Resource Management Plan Amendments/Final Environmental Impact Statement for the Moab and Monticello Field Offices, UT

Dear Sir/Madam:

Western Energy Alliance submits this protest to the Bureau of Land Management's (BLM) Master Leasing Plan (MLP) and Proposed Resource Management Plan Amendments/Final Environmental Impact Statement (PRMPA/FEIS) for the Moab and Monticello Field Offices. We do not believe the MLP is a valid use of planning resources, and we are concerned that the MLP closes off extensive areas to oil and natural gas leasing and generally includes new lease stipulations that are more restrictive than necessary.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West, including member companies with interest in oil and natural gas development in the planning area. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

We protest four components of the MLP: (1) the legality of MLPs in general; (2) the purpose and need statement; (3) a lack of justification for excessive restrictions; and (4) violation of valid existing rights.

1. Legality of MLPs

Western Energy Alliance is generally concerned that BLM's MLP policy was established in violation of the Administrative Procedures Act (APA), and therefore any MLPs issued pursuant to that process are of questionable legality. The APA requires agencies to give the public notice of a proposed rulemaking in the Federal Register and grant interested parties an opportunity to participate in the planning process. Instruction Memorandum (IM) 2010-117, the document that established the MLP process, amended and altered BLM regulations by adding new standards and requirements, but the IM was developed in private with no opportunity for public comment.

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Presumably, BLM did not believe the IM required a rulemaking when it was issued. However, legal precedent has found that policy guidance on the level of the 2010 IM constitutes a rule requiring compliance with APA rulemaking procedures.[1] The IM may therefore be subject to invalidation under a legal challenge, and any MLP issued in the absence of a formal rulemaking on the MLP process is potentially unlawful.

2. Purpose and Need

The process for developing the MLP was also in violation of the National Environmental Protection Act (NEPA) requirement to include a purpose and need statement that defines the objectives of the action, which may not be so unreasonably narrow as to "become a foreordained formality."[2] In drafting the MLP, however, only one outcome was possible, as every action alternative imposed additional constraints on oil and natural gas development. The purpose and need statement specifically states that the MLP enables BLM to "consider a range of new constraints, including prohibiting surface occupancy or closing areas to leasing."

Limiting review to the amount of lands that will be subject to new restrictions or removed from availability for leasing altogether prejudges the outcome; the only question left is how the MLP will limit oil and natural gas development and to what extent. BLM should have analyzed an alternative that recognized the importance of facilitating our nation's energy resources, an important aspect of BLM's multiple use mandate, and allowed for increased oil and natural gas leasing, Instead, BLM chose to explicitly state that the purpose of the ML P was to further restrict leasing in the planning area. Because BLM crafted the MLP in such a narrow manner as to only allow for one outcome, the MLP was a "foreordained formality" in violation of NEPA.

BLM's narrow focus on imposing additional constraints is also at odds with BLM policy governing the development of MLPs. The stated purpose of the 2010 Instruction Memorandum (IM) which established the MLP process is to "ensur[e] orderly, effective, timely, and environmentally responsible leasing of oil and natural gas resources" and to "create more certainty and predictability, protect multiple use values … and provide for consideration of natural and cultural resources …."[3] The result of this MLP runs directly counter to the IM's stated purpose, as it will limit oil and natural gas leasing rather than ensuring leasing that meets the goal of the IM.

By identifying additional restrictions on oil and natural gas leasing as the only purpose of the proposed MLP, BLM has violated both NEPA and the intent of the 2010 IM.

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[1] *Natural Resources Defense Council v. EPA,* 643 F.3d 311, 320-21 (D.C. Cir. 2011)
[2] *Citizens Against Burlington, Inc.*, 938 F.2d at 196
[3] Instruction Memorandum 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews.

3. Stipulations and Withdrawals from Leasing

In accordance with the Federal Land Policy Management Act (FLPMA), BLM must analyze any withdrawal of land from mineral leasing, including impacts and cost. In order to withdraw 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.

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…" Furthermore, BLM policy forbids the closure of thousands of acres of public lands to oil and natural 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.

Under the MLP, 451,183 out of 785,000 acres (57%) in the MLP area would no longer be available for leasing or would be subject to No Surface Occupancy (NSO) leasing. More than 100,000 acres would also be set aside for potential potash development over an "MLP directed" ten-year period. This Potash Leasing Area (PLA) would not be available for oil and natural gas leasing. The MLP would further designate 22,293 acres as Areas of Critical Environmental Concern and impose NSO on those acres. Finally, 210,884 acres have been removed from standard leasing and development operations, leaving zero acres in the MLP area for leasing with standard terms and conditions. These restrictions to the acreage in the planning area constitute a withdrawal under FLPMA, and BLM therefore may not take the specified actions without Congressional approval.

4. Valid Existing Rights

Finally, FLPMA requires BLM to ensure that valid existing lease rights are unequivocally protected.[4] However, through the imposition of overly restrictive stipulations and Conditions of Approval (COA), the MLP impedes lessees from exercising their valid existing rights. Although the MLP broadly states that "The planning process will recognize the existence of valid existing rights," it also states that "BLM can subject development of existing leases to reasonable conditions, as necessary, through the application of Conditions of Approval at the time of permitting." While this is technically accurate, BLM

[4] 43 U.S.C. § 1701 note (h)

fails to recognize and disclose that its authority with respect to development of existing leases is significantly different, and lesser, than its authority at the leasing stage.

Lessees have a legal right to occupy the surface to explore for, produce, and develop their leases.[5] Although BLM can impose reasonable conditions on existing leases, it cannot impose NSO stipulations on existing leases where none existed before.[6] An oil and natural gas lessee "shall have the right to use so much of the leased lands as is necessary to explore for, drill for…remove and dispose of all the leased resource in a leasehold," subject only to: (1) lease stipulations; (2) restrictions from nondiscretionary statutes; and (3) "reasonable measures" imposed to minimize impacts provided they are "consistent with lease rights granted."[7] Examples of "reasonable measures" include measures that do not require "relocation of operations by more than 200 meters" or prohibit surface occupancy by more than 60 days per year.[8] The MLP imposes NSO stipulations that unlawfully preclude the development of oil and natural gas lease rights, and is therefore a violation of its authority under FLPMA.

In sum, Western Energy Alliance protests BLM's disregard of its statutory and regulatory authority in developing the MLP. Thank you for considering these points of protest, and please do not hesitate to contact me with any questions.

Sincerely,

Kathleen M. Sgamma

Vice President of Government & Public Affairs
Western Energy Alliance

[5] *Pennaco Energy v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004)
[6] *Sierra Club v. Peterson*, 717 F.2d 1409, 141 1 (D.C. Cir. 1983)
[7] 43 C.F.R. § 3101.1-2.
[8] *Id.*