



September 2, 2016

*Submitted via e-mail to WRNFleases@blm.gov*

Greg Larson, Project Manager  
BLM Colorado River Valley Field Office  
Attn: WRNF Leases  
2300 River Frontage Road  
Silt, CO 81652

**Re: Joint Trade Association Comments on the Final Environmental Impact Statement on Previously Issued Oil and Gas Leases in the White River National Forest**

Dear Mr. Larson:

Western Energy Alliance and Western Slope Colorado Oil and Gas Association (the Trades) wish to reiterate their opposition to the Bureau of Land Management's (BLM) plan to modify or cancel previously issued leases in the White River National Forest (WRNF), as described in the Final Environmental Impact Statement (FEIS), Preferred Alternative, as a violation of our members' Mineral Leasing Act (MLA) contractual rights. In addition, based on new information that BLM itself has recognized by BLM as the "best available scientific information," that was not available when BLM published the Draft Environmental Impact Statement (DEIS), BLM must reconsider its decision, commence another round of public comments on a draft that adequately considers the new information, and delay issuance of the Record of Decision (ROD).

Western Slope Colorado Oil and Gas Association (WSCOGA) is a member-based organization focused on promoting the development of natural gas and oil resources in Northwest Colorado. Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Colorado and across the West. Members of the Trades are committed to developing the significant oil and natural gas resources within the WRNF in an environmentally responsible manner.

**BLM Has Failed to Adequately Analyze the "Best Available Scientific Information" in the FEIS**

On June 8, 2016, the U.S. Geological Survey (USGS) issued the "Assessment of Continuous (Unconventional) Oil and Gas Resources in the Late Cretaceous Mancos Shale of the Piceance Basin,

Uinta-Piceance Province, Colorado and Utah, 2016.”<sup>1</sup> The USGS explains, “[s]ince the last assessment, more than 2,000 wells have been drilled and completed in one or more intervals within the Mancos Shale of the Piceance Basin . . . [and] the USGS Energy Resources Program drilled a research core in the southern Piceance Basin that provided significant new geologic and geochemical data that were used to refine the 2003 assessment of undiscovered, technically recoverable oil and gas in the Mancos Shale.”<sup>2</sup> The USGS determined that the Mancos Shale holds an estimated 66 trillion cubic feet of undiscovered, technically recoverable shale gas. The Mancos is the 2nd-largest continuous/shale gas assessment, behind the Marcellus and ahead of the Barnett.<sup>3</sup> In addition, the USGS estimates the Mancos contains 45 mb of natural gas liquids and 74 mb of recoverable shale oil.<sup>4</sup> The Trades submitted a post-DEIS comment (as did a member company) highlighting this USGS report and urging BLM to supplement its DEIS and provide for public comment. BLM did not do so.

The BLM’s Information Quality Guidelines (BLM Guidelines) direct the use of the “best available” information in decision-making which requires “considering the data available weighed against needed resources and delay to collect new information and the value of newer information.”<sup>5</sup> The National Environmental Policy Act (NEPA) also directs that information in an EIS must “be of high quality” and allow for “[a]ccurate scientific analysis . . .”<sup>6</sup> Here the USGS report on the Mancos Shale has a high degree of usefulness for BLM’s decisions on lease cancellation/modification and possesses integrity and scientific objectivity. The announcement of this report from USGS constituted “significant new information” of value to the NEPA process that triggered a legal obligation for BLM to reopen and republish the DEIS alternatives.

Because the Colorado River Valley Field Office and WRNF host the now better-understood Mancos Shale, the agency’s NEPA analysis can and must reflect this significant fact. The public should have the opportunity to comment on the creation of new alternatives. Specifically, the USGS announcement upends the validity of alternatives in the FEIS, given that the increase in resource isn’t just a percent or two, as assumed in the FEIS, but represents a 40 fold increase in technically recoverable natural gas within the WRNF. BLM must not move forward with the ROD until its NEPA analysis reflects consideration and analysis of this significant new information.

Despite the fact that BLM agrees that the USGS report is “the best available scientific information to inform BLM’s NEPA process”<sup>7</sup>, BLM decided to simply give “lip service” to its importance, but not let it interfere with the agency’s self-imposed schedule to issue the ROD this fall. Instead BLM inaccurately claims that it has adequately used the data to update its FEIS. BLM only did two things to address the

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<sup>1</sup> Hawkins, S.J., Charpentier, R.R., Schenk, C.J., Leathers-Miller, H.M., Klett, T.R., Brownfield, M.E., Finn, T.M., Gaswirth, S.B., Marra, K.R., Le, P.A., Mercier, T.J., Pitman, J.K., and Tennyson, M.E., Assessment of Continuous (Unconventional) Oil and Gas Resources in the Late Cretaceous Mancos Shale of the Piceance Basin, Uinta-Piceance Province, Colorado and Utah, 2016: U.S. Geological Survey Fact Sheet 2016-3030 (May 2016), 4 p., <http://dx.doi.org/10.3133/fs20163030>.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Nathaniel Gronewold, “Natural Gas: USGS finds huge reserves in Colo.’s Mancos Shale,” E&E News, EnergyWire (June 9, 2016) (“Western Colorado is home to the second-largest shale natural gas basin in the United States . . .”).

<sup>4</sup> *Id.* at 3.

<sup>5</sup> BLM Guidelines at § 2(c). *See also*, Information Quality Act, 44 USC §§ 3504(d)(1) and 3516 and White House, Office of Management and Budget (“OMB”), “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies,” 67 *Fed. Reg.* 8452 (February 22, 2002).

<sup>6</sup> 40 C.F.R. § 1500(1)(b).

<sup>7</sup> FEIS at E-3.

USGS report: 1) modified the text in the FEIS, Affected Environment, Geological Resources (Section 3.3) to simply note the numbers in the USGS report for this new “undiscovered resource”; and 2) provided 3 long responses to comments on the USGS report.<sup>8</sup>

These two actions do not constitute adequate compliance with either the BLM Guidelines or NEPA regulations. The Council on Environmental Quality (CEQ) NEPA Guidance directs that a response to a substantive comment should result in changes to the *text* of the NEPA document and not simply lengthy responses to comments in a separate comment response appendix.<sup>9</sup> Instead of incorporating what BLM admits is the “best available scientific information,” BLM in its several responses to comments, argues why nothing needs to change.<sup>10</sup>

The MLA, Federal Land Policy Management Act (FLPMA), and the Energy Policy Act of 2005 contain language that affirm that federal mineral resources are to be managed for sustained yield and the greatest benefit for the American taxpayer, as well as for the benefit of national energy independence and energy security. It is crucial that the FEIS accurately describe the federal mineral resources that would be affected by the proposed action, especially given the preponderance of evidence that suggests that the resources (and associated production and royalty revenues) are very significant. BLM is required to use the best available information and data in its NEPA analysis. Therefore, the Trades contend that the BLM must revise their evaluation of the leases, and the RFDS that supports it, to more accurately account for the latest information including the USGS report. The information BLM used in its DEIS and FEIS to support a Preferred Alternative of canceling 25 leases and adding new stipulations to other leases was derived from several often biased sources and sources that are now out-of-date, and rendered obsolete and inadequate by the USGS report.<sup>11</sup>

The public should have the opportunity to comment on the creation of new alternatives in light of this new geological information. If BLM were to take the time to thoroughly analyze this data, as NEPA encourages, it might reach a different decision than the Preferred Alternative of lease cancellation. Instead, BLM might decide that in light of this new, abundant federal resource, it is more compliant with the MLA to affirm the existing leases under either FEIS Alternatives 1 or 2. BLM’s failure to adequately analyze this new information leaves the FEIS and ROD legally flawed and subject to challenge.

### **The Preferred Alternative Violates Lease Rights and the FEIS Inadequately Addresses Our Comments**

The Trades fundamentally oppose any cancellation of existing lease rights based on retroactive analysis. The entire enterprise of private extraction of minerals on federal lands is founded on contracts entered into between the federal government and private entities. It is the strongly held opinion of the Trades that the lease contracts in question have always been and continue to be valid, as they were entered into in good faith by all parties, including BLM, the U.S. Forest Service, and the purchasers of the leases. The Forest Service has stated in writing numerous times that it views these leases as “valid existing

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<sup>8</sup> FEIS at E-136–138; E-170; E-187; E-205; E-213–215.

<sup>9</sup> CEQ, Question 29a, “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations,” 46 *Fed. Reg.* 18026 (March 23, 1981).

<sup>10</sup> *See, e.g.*, (“the RFDS [Reasonably Foreseeable Development Scenario] used for analysis in the EIS already included consideration of unconventional plays,” “the potential of this resource is still being sorted out”). FEIS at ES-136–138; ES-213 – 215.

<sup>11</sup> *See, e.g.*, geological information submitted by Pitkin County and Wilderness Workshop.

rights.”<sup>12</sup> These lease contracts represent valid existing rights, and are expressly protected under the FLPMA, which states that all BLM actions are “subject to existing rights.”

Furthermore, under the MLA, BLM’s authority to cancel or add new terms to leases is limited. In the leasing process, once BLM accepts the bid and the lessee fully pays for the lease, a contract exists between the lessee and BLM based solely on those identified terms and conditions.<sup>13</sup> The unilateral addition of new terms by BLM is a breach of this contract and violates “the equal opportunity for all bidders to compete on a common basis for leases.”<sup>14</sup> The Interior Board of Land Appeals (IBLA) recognized that stipulations could not be added to an existing lease if the BLM could not provide an adequate justification.<sup>15</sup> Additionally, the FEIS represents a retroactive application of the 2015 Leasing EIS to leases issued between 1995 and 2012. BLM has not adequately addressed these legal arguments, but has simply asserted in the FEIS that it has regulatory and inherent authority to cancel leases issued “improperly.”<sup>16</sup> BLM has not looked at the particular facts of *these* leases and BLM’s actions since lease issuance when applying this legal justification for the Preferred Alternative.

BLM argues that it must address the NEPA deficiency identified by the IBLA in 2007. But BLM took no action after that date to address the “deficient” NEPA and instead continued to issue leases and approve several development plans based on that same NEPA. BLM and the Forest Service even successfully defended that “deficient” NEPA in federal district court.<sup>17</sup> Moreover, BLM, in the Preferred Alternative, will allow all producing and committed leases to continue to rely on the “deficient” NEPA. Based on these actions, it appears BLM believes it has some discretion when addressing a NEPA deficiency which does not always compel lease cancellation.

BLM’s rationale for not taking the available option identified by the IBLA in 2007 of adopting the existing Forest Service NEPA for *all* 65 leases is inadequate given BLM’s above-described prior actions and the Preferred Alternative. On the one hand, BLM is deciding to overlook a NEPA “deficiency” and leave producing/committed leases unchanged because BLM “recognizes the adverse economic impacts for the local governments and technical challenges for the BLM associated with any decision to cancel producing or committed leases.”<sup>18</sup> Yet, on the other hand, BLM is emphasizing the NEPA “deficiency” and changed circumstances to justify cancellation of 25 leases and modification of others.<sup>19</sup> But why doesn’t BLM *similarly* “recognize the adverse economic impacts to local governments” and the lessees and affirm the leases? BLM doesn’t address this obvious question. BLM illogically argues that while it has the authority to cancel leases for flaws at lease issuance and it would be unreasonable not to do so in the case of the so-called Thompson Divide leases, it would be a “technical challenge” for BLM to do so in

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<sup>12</sup> See Secretary Vilsack letter to Pitkin County Commissioners (Feb. 28, 2012) (“the Forest Service recognizes these leases as valid existing authorizations, issued in accordance with the legal requirements at the time the leases were issued. Leases are contracts . . .”); USFS WRNF Oil and Gas Plan Amendment ROD (2015) at 9.

<sup>13</sup> See, e.g., *Coastal States Energy Co.*, 80 IBLA 274, 279 (1984); BLM Manual MS-3120 – Competitive Leases, § 3120.64.A (Rel. 3-337, 2/18/13).

<sup>14</sup> See *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff’d* Civ. No. 82-1278C (D. N.Mex. 1983).

<sup>15</sup> *DeJour Energy Corp USA*, IBLA 2010-175, \*16 (April 21, 2011).

<sup>16</sup> See, e.g., FEIS E-84–85; E-99.

<sup>17</sup> *Natural Resources Defense Council v. Forest Service*, BLM et al., 2011 WL 3471011 at \*1 (D. Colo. August 5, 2011) (“Oxy USA holds an oil and gas lease entitling it to drill for natural gas on the land at issue.”).

<sup>18</sup> FEIS at 2-69.

<sup>19</sup> FEIS at E-99.

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the case of producing/committed leases.<sup>20</sup> BLM should do a more thorough analysis of its legal authority to cancel leases under *these* facts, before it cancels long-held, valid existing leases.

BLM's Preferred Alternative is flawed. BLM should identify a preferred alternative more consistent with the MLA and lease rights, by affirming *all* the leases based on adoption of the existing Forest Service NEPA at the time of lease issuance. Moreover, BLM must more adequately consider the "best available scientific information" in a re-opened NEPA process with public comment. Until BLM does so, it must not finalize the NEPA process and issue the ROD.

Sincerely,



Kathleen M. Sgamma  
Vice President of Government and Public Affairs  
Western Energy Alliance



David Ludlam  
Executive Director  
West Slope COGA

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<sup>20</sup> FEIS at 2-69.