



To: The Honorable Michael Bennet, United States Senator
The Honorable Mark Udall, United States Senator
From: Kyle Tisdell, Western Environmental Law Center
Jim Ramey, Citizens for a Healthy Community
Date: June 25, 2012
Subject: BLM's Legal Responsibility to Complete its Revision of the Uncompahgre Field Office Resource Management Plan Prior to Leasing Additional Public Lands in the North Fork Valley for Oil and Gas Development

According to the Bureau of Land Management's ("BLM") Uncompahgre Field Office ("UFO") Manager, Barb Sharrow, the agency plans to re-offer for lease some or all of the public lands previously nominated in the now deferred August 2012 Competitive Oil and Gas Lease Sale. These lands include 22 parcels and approximately 30,000 acres in the North Fork Valley, surrounding the communities of Paonia, Hotchkiss, Crawford, and Somerset, as well as the Paonia Reservoir.

The information presented below highlights the agency's legal obligations, pursuant to the National Environmental Policy Act ("NEPA") and Council on Environmental Quality ("CEQ") regulations, to refrain from leasing any additional public lands in the UFO pending revision of the UFO's Resource Management Plan ("RMP"), as well as the legal imperative under the Federal Land Policy and Management Act ("FLPMA") to manage public lands according to the agency's multiple use mandate.

Moreover, this seems a fitting time to briefly discuss the opportunity to permanently protect the vital agricultural lands of the North Fork Valley through a legislative withdrawal.

I. National Environmental Policy Act

It is our position that the BLM is required to issue a moratorium on all oil and gas leasing and development in the Uncompahgre area for as long as the revision to the UFO RMP remains uncompleted. The agency is currently revising the RMP and environmental impact statement ("EIS") – updating the out-of-date and inoperable 1989 UFO RMP. In such a situation, NEPA establishes a duty "to stop actions that adversely impact the environment, that limit the choice of alternatives for the EIS, or that constitute an 'irreversible and irretrievable commitment of resources.'" *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988). When an EIS is underway, as here, NEPA regulations established by the CEQ prohibit an agency from taking any actions that would significantly impact the environment. 40 C.F.R. § 1506.1(c) (1997). Pursuant to these CEQ regulations:

While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not

undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate EIS; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

40 C.F.R. § 1506.1(c)(1)-(3).

Reflecting a reasonable and common sense notion, proceeding with any major Federal action covered by the stale 1989 RMP – including the lease sale of public lands in the UFO – is impermissible due to the inherent prejudice that this action will cause to the pending revision of the UFO RMP and EIS. Revision of the 1989 RMP is fundamental to the public land use decision-making process in the UFO, creating a foundation upon which all multiple use and mineral resource management decisions are made. Unfortunately, the 1989 UFO RMP, in its current form, is woefully incapable of performing this function.

The 1989 RMP contains very little analysis of oil and gas drilling in the Uncompahgre area generally, much less any analysis of the impacts that could be caused by drilling in the North Fork Valley. *See* 1989 RMP at 28, 31. The 1989 RMP, accompanying EIS, and 1987 Technical Report for Oil and Gas, did not analyze the site-specific impacts of gas development relative to the scale and intensity of modern extraction techniques – specifically the use of hydraulic fracturing, or fracking – much less any analysis of the public lands in the North Fork Valley. Importantly, many of these modern extraction techniques have wildly outpaced science and policy, undermining our collective ability to constrain oil and gas development within responsible limits that are protective of public health, communities, and the environment.

BLM UFO itself recognizes these shortcomings and has provided that “[p]reparation of the Uncompahgre RMP is necessary in order to respond to changing resource conditions, new issues, and federal policies, as well as to prepare a comprehensive framework for managing public lands administered by the UFO.” *Uncompahgre RMP Newsletter* (December 2009). “Management is becoming more complex due to the emergence of new issues of national significance, as well as heightened controversy surrounding certain existing issues. Increased oil, gas, and uranium activity, recreation demands, impacts from a growing population and urban interface, and pressures on wildlife and land health are among the many challenges to be addressed.” *Analysis of the Management Situation: for the BLM Uncompahgre Planning Area* (June 2010).

The whole point of NEPA is to study the impact of an action on the environment before the action is taken. *See Conner*, 848 F.2d at 1452 (NEPA requires that agencies prepare an EIS before there is “any irreversible and irretrievable commitment of resources”). Where “[i]nterim action prejudices the ultimate decision on the program,” NEPA forbids it. 40 C.F.R. § 1506.1(c)(1)-(3). Action prejudices the outcome “when it tends to determine subsequent development or limit alternatives.” *Id.* In this case, once oil and gas lease rights are conveyed, lessees have a right to drill, and the impact on the environment from the exercise of those rights

cannot be undone, which is exactly the situation NEPA disallows – allowing new activity that limits alternatives in the future.

Oil and gas leases confer “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.” 40 C.F.R. § 3101.1-2; *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (requiring agencies to perform hard look NEPA analysis “before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values”). In fact, the 1989 RMP does not contain a general “no surface occupancy” stipulation that can be applied by BLM to prevent surface occupancy, which reinforces the notion that an irretrievable commitment of resources will occur at the lease sale stage. While BLM typically claims that it will conduct further analysis at the drilling stage – i.e., when an “application for permit to drill” is submitted by the lessee – this is little more than a shell game because the lessee has obtained the right to drill and that right cannot be denied. Put differently, once a lease is executed, the horse is out of the barn.

As provided, while CEQ regulations require a moratorium on any further leasing until the revised RMP and EIS are completed, such a decision is also well within the discretion of the UFO. As provided in BLM Instruction Memorandum No. 2010-117 (May 17, 2010):

As outlined in the Land Use Planning Handbook (H-1601-1), the Resource Management Plan (RMP) underlies fluid minerals leasing decisions. Through RMP effectiveness monitoring and periodic RMP evaluations, state and field offices will examine resource management decisions to determine whether the RMPs adequately protect important resource values in light of changing circumstances, updated policies, and new information (H-1601-1, section V, A, B). The results of such reviews and evaluations *may require field office resource information updates* and land use plan maintenance, amendment, or revision. In some cases state and field office staff *may determine that the public interest would be better served by further analysis and planning prior to making any decision whether or not to lease.*

(emphasis added). There can be no better example than the present situation of where the public interest would be better served by completing the RMP and EIS before deciding whether it is appropriate to lease the public lands in the North Fork Valley. According to BLM oil and gas statistics, there are over 6,500 oil and gas drilling permits on BLM land that industry is not using, as well as tens of millions of acres of federal lands under lease to the oil and gas industry that are not in use. *See* BLM, Oil and Gas Statistics, 1988 – 2011. Given these vast quantities, as well as the current historic low price of natural gas, it seems both ill advised and unnecessary to hastily proceed with leasing public lands in the UFO. BLM should not proceed with any leasing commitments pending completion of the RMP and EIS.

Further, BLM’s 1987 Technical Report provides little analysis of impacts, and no analysis of the cumulative impacts of oil and gas development. The report failed to analyze impacts from oil and gas development on climate change and greenhouse gases, or the potential for surface and groundwater contamination from fracking. The single paragraph that obliquely refers to fracking

does not describe the process industry employs today, including the well-documented controversy and uncertainties involved in fracking, nor does it analyze the impacts to the environment that result from this process. *See*, 1987 Technical Report, at 9 (referring generally to “formation stimulation that usually involves fluid fracture”).

The apparent reason for such little analysis of the environmental impacts from oil and gas development in this report is because production was anticipated to be minimal throughout the life of the RMP. For instance, the 1987 Technical Report provides that:

The reasonable foreseeable level of operations for the planning area during the *next ten to fifteen years* is anticipated to be three to ten APDs per year. These operations would result in a maximum of 30 acres of surface disturbance and three seismic lines annually. No production facilities would be developed. The probability for production or pipeline facilities is considered low given the past and present trends within the planning area for oil and gas and geothermal exploration and development. The analysis of this production level will not include spacing requirements or other detailed analysis specified in Information Bulletin WO-84-261 *as the probability of oil and gas production is so minimal*.

1987 Technical Report, at 10-11 (emphasis added). This projection is severely outdated. For example, the BLM UFO is currently considering SG Interests’ Bull Mountain Master Development Plan, which proposes 146 natural gas wells, 4 waste water disposal wells, two compressor stations, and other associated infrastructure. *See* Environmental Assessment No. CO-150-2009-0005 EA (2009).

Additionally, the 1987 Technical Report unambiguously suggests that any analysis contained therein is inherently limited in its temporal scope – providing that its evaluation of projected development is limited to “the next ten to fifteen years.” *Id.* However, it has now been 25 years since the report’s release, well beyond the period where its findings were deemed by BLM to be of any utility. Put simply, BLM’s analysis is stale, outdated, and too general and conclusory to justify any lease sale of lands in the UFO until after revision of the RMP and EIS is complete.

II. Federal Lands Policy and Management Act

Leasing any additional public lands in the UFO prior to the completion of the RMP revision would be contrary to the BLM’s basic charter under the Federal Lands Policy and Management Act (“FLPMA”). Under FLPMA, BLM is required to manage land under a multiple use mandate, which means “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment.” 43 U.S.C. § 1702. Leasing any additional public lands under the defunct 1989 RMP could easily lead to the “permanent impairment” of the land and environment because, as mentioned above, the 1989 RMP does not contain a general “no surface occupancy” stipulation.

Additionally, under FLPMA, the BLM has the authority to permanently withdraw lands from leasing availability. 43 U.S.C. § 1714. This authority is independent of BLM’s land use planning process, as provided through a RMP, and authorizes the Secretary to “make, modify, extend, or

revoke withdrawals.” *Id.* We have urged the BLM to consider an affirmative withdrawal of all unleased public lands in the North Fork Valley from present and future oil and gas development, in order to protect a myriad of resources (e.g. water quality, air quality, recreation, prime and unique farmlands, socio-economic, etc.). Furthermore, and to the degree that BLM thinks or finds that this alternative can only be considered at the RMP stage, rather than through 43 U.S.C. § 1714, this alternative underscores the need for BLM to refrain from leasing any additional public lands in the UFO pending revision of the UFO RMP/EIS.

Pursuant to FLPMA, BLM is required to develop and revise land use plans so as to “observe the principles of multiple use.” 43 U.S.C. § 1712(c)(1). “Multiple use” means “a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” *Id.* at § 1702(c).

FLPMA does not mandate that every use be accommodated on every piece of land; rather, delicate balancing is required. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). “‘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.” *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1290 (10th Cir. 1999) (citing 43 U.S.C. § 1702 (c)). As held by the Tenth Circuit, “[i]f all the competing demands reflected in FLPMA were focused on one particular piece of public land, in many instances only one set of demands could be satisfied. A parcel of land cannot both be preserved in its natural character and mined.” *Rocky Mtn. Oil & Gas Ass’n v. Watt*, 696 F.2d 734, 738 n. 4 (10th Cir.1982) (quoting *Utah v. Andrus*, 486 F.Supp. 995, 1003 (D.Utah 1979)); *see also* 43 U.S.C. § 1701(a)(8) (stating, as a goal of FLPMA, the necessity to “preserve and protect certain public lands in their natural condition”); *Pub. Lands Council*, 167 F.3d at 1299 (citing § 1701(a)(8)). As further provided by the Tenth Circuit:

BLM’s obligation to manage for multiple use does not mean that development *must* be allowed on [a particular piece of public land]. 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. Thus, an alternative that closes the [proposed public lands] to development does not necessarily violate the principle of multiple use, and the multiple use provision of FLPMA is not a sufficient reason to exclude more protective alternatives from consideration.

New Mexico ex rel. Richardson v. Bureau of Land Management, 565 F.3d 683, 710 (10th Cir. 2009). Accordingly, BLM has authority to both permanently withdraw these lands pursuant to 43 U.S.C. § 1714, as well as to refrain from offering these lands at any future lease sale pending revision of the UFO RMP/EIS and “preserve and protect [these] public lands in their natural condition” for the benefit of “future generations” under BLM’s multiple use mandate, 43 U.S.C. § 1701(a)(8). Pursuant to either option afforded to BLM under FLPMA, BLM UFO must consider the permanent withdrawal and preservation of lands in the North Fork Valley as a reasonable alternative.

III. Opportunity for Permanent Protection through Legislative Withdrawal

In addition to BLM's legal duty to refrain from offering public lands for competitive sale pending revision of the UFO RMP, the Senators have the opportunity to affirmatively act on behalf of the public interest to permanently protect the lands of the North Fork Valley through legislative withdrawal.

Such decisive action is not unprecedented, particularly given the vital resource values at stake in the North Fork Valley. For example, the Valle Vidal, a 102,000-acre haven in northern New Mexico, was permanently protected from industry's push to open the area to oil and gas development. *See Valle Vidal Protection Act of 2005*, Pub. L No. 109-385 (2006). The Valle Vidal legislation was introduced in 2005 by Representative Tom Udall (now the Democratic Senator from New Mexico), and eventually won the support of Senator Pete Dominici (R), which paved the way for the bill to unanimously pass through the Senate and be signed into law by President George W. Bush.

The precious resources of the North Fork Valley deserve a similarly bold champion. The North Fork Valley is one of the foremost agricultural regions of Colorado, if not the interior west. It is home to farms and ranches, vineyards and orchards. The Valley has the largest concentration of organic, sustainable growers in the state, and has a thriving agro-tourism industry – all of which are fundamental to the local economy. Even a remote chance that these community resources could be negatively impacted from oil and gas development is too great a risk.

Furthermore, in the face of a warming planet and the demonstrated alteration of our ecosystems, the viability and success of North Fork Valley farmlands are among the most cherished and fundamental resources from a resiliency standpoint. We urge you to consider spearheading the enduring conservation of these vital resources by permanently removing these lands from the oil and gas industry's reach by taking legislative action.

Of course, we would be happy to meet with you at your convenience to answer any further questions you may have.

Sincerely,



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