United States Department of the Interior
OFFICE OF THE SECRETARY
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DECISION

Carl Mach
120 Aurora St.
Lancaster, New York 14086

August 14, 2008 Competitive Oil & Gas Lease Sale Protest Of Parcels COC73064 through COC73094 Is Dismissed

NOTE: Due to the high volume of protests, the official BLM protest response is posted on the BLM Colorado website, co.blm.gov. This paper copy is provided to you as a courtesy.
Your letter was received in our office on June 30, 2008, protesting the above named parcels offered in the August 14, 2008, Competitive Oil & Gas Lease Sale.

Protest Point 1: BLM has failed to abide by the recommendations of its own staff, the State of Colorado, and other cooperating agencies [and] overwhelming support from outdoorsmen, recreationists, businesses, and representatives of Colorado to not drill the area [on top of the Roan Plateau].
Response:
The BLM involved local communities, Garfield County, and the State of Colorado extensively as cooperating agencies throughout the process leading to the final decision. Given varying perspectives, consensus among all parties was not achieved, but all concerns were addressed and incorporated to the extent practicable within the range of alternatives considered and analyzed, as required by the National Environmental Policy Act (NEPA). Indeed, the concept of phased and clustered ridgetop development atop the plateau, with a maximum of 350 acres (1 percent of the area) allowed to be in a disturbed condition at any one time—which is the cornerstone of the Resource Management Plan Amendment and final Environmental Impact Statement (PRMPA/FEIS)—was based heavily on specific input by the Colorado Department of Natural Resources (CDNR). Although the BLM acknowledges a large amount of support for protecting the top of the Roan Plateau from natural gas drilling, it is also important to note that a significant portion of the local community and other stakeholders expressed a desire to see as much

production of natural gas from BLM lands in the planning area as practicable.

The Draft EIS considered a wide spectrum of alternatives based on input from concerned citizens, local communities and cooperating agencies. In the Draft EIS (DEIS), the BLM addressed an alternative (Alternative I) that would not allow oil and gas development on top of the plateau. Alternative II of the DEIS included protection of wilderness characteristics and natural values through the use of No Ground Disturbance/No Surface Occupancy (NGD/NSO) stipulations, as well as the designation of four large Areas of Critical Environmental Concern (ACECs) proposed to address visual, fish, wildlife, and plant values. Alternative III of the DEIS deferred drilling on the Upper Plateau and included mandatory protections for lands below the cliffs.

While this topic is not properly the subject of a protest to a lease sale, BLM is willing to reiterate its approach to ACEC designation in the plan amendment process. The BLM considered a full range of alternatives regarding designation and sizes of ACECs. The agency examined the relevant and important values and special management attention to protect these values during the analysis in the DEIS, considered comments received by the public and cooperating agencies, and proposed the four ACECs included in proposed RMPA/FEIS. The BLM followed a process regarding designation of ACECs that allowed for further public review and comment to comply with 43 CFR 1610.7-2. The BLM's considerations included the determination that the proposed ACECs provide an adequate level of protection for the values present, including rare plants, sensitive wildlife, the Colorado River cutthroat trout, and visual resources, among others. These considerations are consistent with Federal Land Policy and Management Act (FLPMA) and BLM guidance (BLM Handbooks H-1601-1 and H-1613) and the requirement to analyze a range of alternatives (40 C.F.R. § 1502.14). Although smaller in area than proposed by the Colorado Department of Natural Resources and various local communities, the final RMPA represents an increase in the acreage of ACECs as compared to the Preferred Alternative of the DEIS.

One or more NSO/NGD stipulations which protect a variety of sensitive resource values will be applied to leases issued within the proposed ACECs. Table 2.2 of the PRMPA/FEIS describes the proposed management prescriptions for ACECs and outlines such stipulations. For example, relevant and important criteria used to define the ACEC boundaries, and which would be protected by NSO/NGD stipulations, include high- and moderate-risk habitat for the Colorado River cutthroat trout for the Trapper/Northwater and East Fork Parachute Creek ACECs, wildlife security areas below the rim as mapped by Colorado Division of Wildlife (CDOW) for the Magpie Gulch and Anvil Points ACECs, and old-growth Douglas-fir forest for Magpie Gulch. For public land and resource values atop the plateau that lie outside the boundaries of the ACECs, BLM has provided a variety of other conservation/protection safeguards, including a controlled surface use (CSU) stipulation for the entire Parachute Creek Watershed Management Area, which includes all of the upper plateau.

Protest Point 2: BLM has failed to consider alternatives that would provide meaningful protection for the RPPA's wilderness-quality lands.
Response:
The BLM did consider an alternative that would protect and maintain areas found to have wilderness character (Alternative II in the PRMPA/FEIS). It is important to note that management for protection and maintenance of wilderness character and related values is discretionary for the BLM, under FLPMA § 202. Though the final RMPA does not specifically

manage areas to protect wilderness character, it does include prescriptions protecting other resources; these prescriptions protect some wilderness characteristics in portions of the planning area. Wilderness character and related values (characteristics) are addressed in Section 4.5.8 of the FEIS. Traditional uses associated with wilderness values are also included in discussions relating to recreation, tourism, hunting, and wildlife in Chapter 4 of the final EIS.

Protest Point 3: BLM has failed to fully consider the impacts of its action on wildlife and sensitive species. NEPA and FLPMA rules are clear that non-binding mitigation measures, by definition, do not constitute sufficient mitigation.
Response:
Section 4.3.4 of the PRMPA/FEIS (p.4-67) discusses at considerable length the various special status wildlife, fish, and plant species known or expected to occur in the Roan Plateau planning area, as well as the no surface occupancy, controlled surface use, and timing limitation stipulations to be applied to leases for their protection. Appendix I in the PRMPA/FEIS provides further information on best management practices, reclamation practices, and other mitigation measures to be applied as conditions of approval at the permitting stage for oil and gas developments. Among the protective measures are NSO stipulations for streams supporting Colorado River cutthroat trout, as well as associated moderate- and high-value watershed processes, wildlife security areas below the rim, raptor nest sites and the peregrine falcon cliff-nesting complex, caves that support Townsend's big-eared bats, and occupied habitat for threatened, endangered, proposed, or candidate plant species. Additional measures include controlled surface use and timing limitation stipulations for wildlife.

Moreover, the entire approach of phased and clustered ridgetop development, with a maximum of 350 acres of disturbance at any one time and with a minimum of 0.5 mile between well pads was specifically developed in concert with the State of Colorado. The phased and clustered ridge-by-ridge development was designed to reduce habitat fragmentation, and to reduce effective habitat loss due to disturbance.

In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the Supreme Court clarified that "there is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." The court noted that "it would be inconsistent with NEPA's reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. Cf. *Baltimore Gas & Electric Co.*, 462 U.S., at 100 ("NEPA does not require agencies to adopt any particular internal decisionmaking structure"). 490 U.S. at 352. Accordingly the court concluded that the Court of Appeals erred, first, in assuming that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions,'" and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action."

Regarding BLM's ability to grant waivers, modifications, or exceptions to lease stipulations, these are described in Appendix C of the FEIS and would be allowed only under strictly defined circumstances, and in consideration of the need to protect resources. As stated in 43 C.F.R. § 3101.1-4, "a stipulation included in an oil and gas lease shall be subject to modification or waiver

only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts."

Further, as required by 43 C.F.R. § 3101.1-4, public notification and at least a 30-day public comment period is required before granting of any waiver or modification that is substantial. An exception, which is a one-time exception from a stipulation for a specific period, location, or activity, does not require public notice or comment. As with waivers and modifications, BLM grants exceptions to protective stipulations only if it is demonstrated that adverse impacts would not result to the resource being protected or that any adverse impacts would be adequately mitigated. Decisions to grant waiver, modification or exception affecting wildlife typically involve consultation with the Colorado Division of Wildlife.

The best management practices (BMPs) and other mitigation measures incorporated into the RMPA represent a range of methods that are proven to be effective in specific situations. At the implementation stage—e.g., preparation of master development plans for ridge-by-ridge development atop the plateau—BLM resource specialists will select the BMPs and other mitigation measures best suited to location-specific, resource-specific, and project-specific factors. Monitoring and adaptive management practices will be employed where appropriate.

Protest Point 4: BLM has misinterpreted the legislation transferring the Roan plateau to its management, incorrectly asserting that all lands must be leased for oil and gas drilling.
Response:
You contend that the BLM improperly interpreted Public Law Number 105-85 ("the Transfer Act) that pertains to the Roan Plateau's Naval Oil Shale Reserves 1 and 3. We disagree. The Transfer Act states that BLM "shall" lease those areas and your protest has not proven otherwise. The BLM considered both leasing and not leasing the un-leased portions of the transferred lands (under the Transfer Act), as well as partially leasing these lands. Alternative I of the DEIS proposed no new leasing on transferred lands. Under Alternative II, BLM considered partial leasing by limiting to approximately 21,000 acres the area available to leasing. Alternatives III, IV, and V would have made all lands available for leasing. The BLM, therefore, provided a full range of alternatives for consideration and environmental review.

Regarding the Transfer Act, the DEIS and FEIS explained that BLM has interpreted the Transfer Act as directing that the transferred lands in Naval Oil Shale Reserves No. 1 and 3 be made available for oil and gas lease, consistent with the Federal Land Policy and Management Act. For this reason, the BLM concluded that Alternative F did not comply with the Transfer Act. Elements of Alternative F and the other "preliminary alternatives" were therefore reworked into the five alternatives analyzed through the planning process. For example, in various alternatives, the DEIS and FEIS analyzed the following: no new leasing on top of the plateau (44,267 acres); management of 21,382 acres for the protection of wilderness characteristics in three areas totaling 36,184 acres; protection of 7,883 acres within eligible wild and scenic river corridors; and strict management of motor vehicle travel.

Accordingly, on behalf of the Department of the Interior, I dismiss your protest. If you have any questions about this response, contact Duane Spencer, Chief, Branch of Fluid Minerals at 303.239.3753.

C. Stephen Allred
Assistant Secretary
Land and Mineral Management

cc:
State Director, Colorado State Office
DSD, COSO Division of Energy, Lands and Minerals
Field Office Manager, Glenwood Springs