AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

Agenda Item: Protest Letter; BLM Re: Oil & Gas Lease Sale

Action Requested: Discussion

Parties to the Agreement:

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:

For ratification and possible discussion please find Gunnison County's letter protesting the BLM's December 2018 Oil & Gas Lease Sale which was submitted November 2, 2018.

Fiscal Impact:

Submitted by: Office of the County Attorney **Submitter's Email Address:** rmagruder@gunnisoncounty.org

Finance Review: ○ Required ◉ Not Required

Comments:

Reviewed by: Discharge Date:

County Attorney Review: ○ Required ◉ Not Required

Comments:

Reveiwed by: Discharge Date: Certificate of Insurance Required Yes ○ No ○

County Manager Review:

Comments:

Reveiwed by: GUNCOUNTY1\mbirnie Discharge Date: 11/2/2018

○ Consent Agenda ◉ Regular Agenda ○ Worksession Time Allotted: 5

Agenda Date: 11/6/2018

Revised April 2015

Gunnison County
COLORADO

Office of the Gunnison County Attorney

David Baumgarten • County Attorney
Matthew R. Hoyt • Deputy County Attorney

November 2, 2018

Gregory Shoop
Acting Director
Bureau of Land Management
Colorado State Office
2850 Youngsfield Street
Lakewood, Colorado 80215

VIA FACSIMILE (303) 239-3799
& FEDEX OVERNIGHT

Re: Gunnison County Protest of the December 2018 Oil & Gas Lease Sale by the Uncompahgre Field Office of the BLM, COC # 79293, 79294, 79295, 79296 and 79297

Dear Mr. Shoop,

The office of the Gunnison County Attorney represents the Board of County Commissioners of the County of Gunnison, Colorado ("BOCC"). On behalf of the BOCC, and pursuant to 43 C.F.R. § 3120.1-3, we submit the following protest of the Bureau of Land Management's ("BLM's") decision to offer lands in Gunnison County as part of its December 2018 lease sale, specifically those lands bearing the serial numbers COC 79293, 79294, 79295, 79296 and 79297 ("Gunnison County Parcels").

I. INTEREST OF THE PROTESTING PARTY

Gunnison County is the fifth-largest county by land area in Colorado. The County retains, and exercises, authority to regulate land use planning and environmental quality and protection, including oil and gas activities on federal lands managed by either the BLM or the United States Forest Service ("USFS") within the County. *See, e.g.*, Colo. Rev. Stat.§§ 29-20-101, 30-28-101, *et seq.*; *Bd. of Cty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773, 785 (Colo. App. 2006). In particular, by duly adopted Resolution of the BOCC, the County has promulgated Regulations for Oil and Gas Operations, to provide a framework for the responsible exploration and production of oil and gas resources in Gunnison County in a manner that a) conserves other natural resources; b) helps ensure compatibility with surrounding land uses; and c) mitigates adverse impacts to and protects the public health, safety, welfare and the environment of Gunnison County and its residents and visitors. *See* Resolution Nos. 2003-50, 2004-27, 2010-43 and 2012-25, Regulations and attachments, *www.gunnisoncounty.org/346/Regulations-Guidelines*. These Regulations prohibit any oil and gas operations within Gunnison County, including those on land managed by the BLM or USFS, without first obtaining a permit from the County and otherwise complying with the Regulations. *See, e.g.*, Gunnison County Oil and Gas Reg. § 1-110(A) at 4-48.

The BOCC submitted comments with regard to the proposed lease sale in July 2018, and, pursuant to the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA"), in September 2018 with regard to the BLM's Environmental Assessment ("EA") for the December

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2018 oil and gas lease sale within the management of the Uncompahgre Field Office ("UFO") in the State of Colorado. These comments were either ignored, disputed or disregarded by the BLM. Accordingly, for the reasons stated below, the BOCC protests the December 2018 lease sale with regard to the Gunnison County Parcels.

II. BASIS FOR PROTEST

A. The BLM Failed to Require Compliance with Gunnison County Regulations As part of its Lease Stipulations for the Gunnison County Parcels

BLM's October 26, 2018 Notice of Competitive Lease Sale for the December 2018 lease sale ("Notice") includes the Gunnison County Parcels, and includes some lease stipulations with regard to these Parcels. *See* Notice at 19-26. But these stipulations are insufficient and improper because the BLM failed to include the following additional stipulation, or something to its effect: "All lands within Gunnison County are subject to Gunnison County's land use regulations, including but not limited to the County's Regulations for Oil and Gas Operations and corresponding permitting requirements."

As the BOCC has previously, and indeed repeatedly, explained to the BLM, the BLM must include compliance with all Gunnison County regulations regarding oil and gas exploration, development, operation, and upstream activities as a mandatory lease term in any lease of parcels within the proposed lease area. In addition, the BOCC has informed the BLM that it must include a requirement that any lessee comply with any other land use or environmental regulation imposed by Gunnison County that in any way relates to operations on the leasehold, including but not limited to water quality, public roads, emergency response, wildlife concerns, agricultural uses and recreation uses.

Undoubtedly, the BLM declined to include such a lease stipulation because of the specious claim contained in its Preliminary EA: "[T]he courts have ruled that federal lands and minerals are not subject to local control." *See* Preliminary EA at 5. Not only is this statement at odds with statements contained in other parts of the Preliminary EA, *see*, *e.g.*, *id.* at 18 ("Under FLPMA and the CAA, the BLM cannot conduct or authorize any activity that does not conform to all applicable local, State, Tribal, or Federal air quality statutes, regulations, standards, guidelines, or implementation plans."), it is also false. Both the federal courts, and courts here in Colorado, have made clear that that "neither the federal statutory scheme nor the case law relied upon by [oil and gas producers] supports the conclusion that Congress intended to preempt all local regulation in the area of oil and gas operations." *See BDS Int'l, LLC*, 159 P.3d at 785, *citing Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303 (10th Cir. 1969); *see also*, *e.g.*, *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1205 n.6 (10th Cir. 2012) (explaining that federal law regarding mineral leasing does not "provide a pervasive regulatory scheme intended to occupy the entire field of federal mineral lands regulation.") (internal citations and quotation marks omitted); *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1124 (10th Cir. 1982) ("Congress has prescribed limited, but not exclusive, controls over the leasing of federal lands for oil and gas production.").

Because the Gunnison County Regulations apply to oil and gas leasing activity on BLM-managed lands, BLM's refusal to include reference to them as part of the planned lease stipulations is contrary to law. BLM's own regulations provide that oil and gas lessees must "comply with applicable laws and regulations." *See* 43 C.F.R. § 3162.1(a) (2018); *see also* 43 C.F.R. § 3162.5-1(a) (2018) ("The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality. In that respect, the operator shall comply with the pertinent orders of the authorized officer and ***other standards and procedures as set forth in the applicable laws, regulations, lease terms and conditions***, and the approved drilling plan or subsequent operations plan.") (Emphasis added). Thus, it is nonsensical and, indeed, contrary to law for the BLM not to include stipulations that help ensure that lessees comply with the Gunnison County Regulations as part of their lease obligations. In failing to do so, the BLM has engaged in agency action which is arbitrary, capricious, an abuse of discretion, and not in accordance with the law. *See, e.g.*, 5 U.S.C. § 706; *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999).

BLM's failure to include the Gunnison County Regulations as lease stipulations also violates NEPA. NEPA required the agency to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. *See* 42 U.S.C. § 4331(b). NEPA further required the BLM to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *See id.* § 4332(2)(E). To that end, the BLM was required to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action in comparative form, so as to provide a "clear basis for choice among the options" open to the agency. *See* 40 C.F.R. § 1502.14. This alternatives analysis is the "heart" of the agency's NEPA analysis. *See id.*

Because Gunnison County's Regulations protect and promote, among other things, the environment and responsible natural resource development and operations, the application of those regulations ***is***, contrary to the statement in the Preliminary EA, within the scope of NEPA's requirements for BLM to have analyzed. It is also within the scope of NEPA's mandates for BLM, under NEPA, to have created and selected an alternative that included the Gunnison County Regulations as a lease stipulation. *See W. Org. of Res. Councils v. BLM*, 591 F. Supp. 2d 1206, 1236 (D. Wyo. 2008) (affirming agency's NEPA analysis where EIS recognized that "various county and local permitting and approval actions may be required" for coalbed methane ("CBM") development on BLM-managed lands); *Moapa Band of Paiutes v. United States BLM*, No. 2:10-CV-02021-KJD-LRL, 2011 U.S. Dist. LEXIS 116046, at *29 (D. Nev. Oct. 6, 2011) (refusing to overturn BLM action under NEPA where BLM required public lands user to obtain "all necessary state and local permits to ensure compliance with state and local laws."). Thus, the BLM should have, but did not, incorporate Gunnison County's regulatory provisions as lease stipulations for leasing of the Gunnison County Parcels.

B. The BLM Neglected to Rigorously Explore a No Action Alternative and Deferral of the Lease Sale Until Adoption of a Proper RMP.

As BLM recognizes, the BLM's present Resource Management Plan ("RMP") for the UFO is almost 30 years old, and "would not be adequate to address potential resource impacts from

leasing and the development of the proposed leases" because it contains only "three general" lease stipulations. *See* Preliminary EA at 5, 7, 9. Despite this acknowledgement, the BLM neglected to engage in any detailed examination of a "no action alternative [,]" by which the BLM would defer the December 2018 lease sale until adoption of a new RMP that could adequately address such impacts. This also violates NEPA. As explained above, the BLM must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action in comparative form, so as to provide a "clear basis for choice among the options" open to the agency. *See* 40 C.F.R. § 1502.14.

Rather than conduct any rigorous analysis, the Preliminary EA devotes a mere three sentences to the no action alternative of lease deferral, with no reference to the problems with the current RMP in its discussion of this alternative. *See* Preliminary EA at 6. This is made more egregious by the fact that the BLM is in the process of preparing a new RMP that would arguably address the deficiencies in the current RMP. *See id.* at 9. This is not the "hard look" that NEPA requires. *See* 40 C.F.R. 1502.14 (requiring agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives[.]"); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) ("In cases in which a federal agency prepares a FONSI, the reviewing court must insure that the agency took a 'hard look' at environmental consequences[.]") (Internal citations and quotations omitted).

The BLM asserts it has solved this problem by adopting some, but not all, of the provisions of a draft RMP as lease stipulations. *See* Preliminary EA at 6-7. But the EA fails to explain with any detail how only partial application of the current draft RFP "ensure[s] adequate protection of resources and resource uses." *See id.* at 6. This is notwithstanding the fact that the EA acknowledges potential adverse effects to the environment that could potentially be mitigated by the draft RMP or future drafts of the RMP as that plan is revised and modified pursuant to the planning process. *See, e.g. id.* at 41-42 (recognizing adverse effects to endangered fish). Nor does the Preliminary EA explain with any detail why the BLM could not first complete the RMP process and adopt a new RMP before proceeding with the proposed lease sale, particularly in light of considerations outlined in these objections that the BLM either disregarded or failed to properly analyze. Simply deciding to adopt some of the draft RMP stipulations is not enough to satisfy the requirements of NEPA. *See Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1145 (D. Mont. 2004). ("While it is true that some or all of the environmental consequences of oil and gas development may be mitigated through lease stipulations, it is equally true that the purpose of NEPA is to examine the foreseeable environmental consequences of a range of alternatives prior to taking an action that cannot be undone."). Thus, the BLM should have waited for the adoption of a modern, appropriate RMP before proceeding with this proposed lease sale.

C. The BLM Violated NEPA When It Did Not Provide Gunnison County and Its Citizens a Reasonable Opportunity to Comment on the EA Associated with the Lease Sale.

The BLM's failure to notify Gunnison County of the publication of the draft EA, and then provide only 15 days[1] for the BOCC, the citizens of Gunnison County, and other interested parties

[1] The Labor Day holiday fell over the 15-day comment period, suggesting that the BLM was attempting to further limit the amount of time interested parties would have to comment. Moreover, this office made multiple phone calls

to comment on a 157-page document, violates NEPA. As the BLM is aware, on July 17, 2018 the BOCC provided written comments during the scoping period for the proposed lease sale that is the subject of the EA.[2] In those comments, the BOCC expressly indicated its interest in participating in the leasing process, which plainly includes any process under NEPA. Despite this, County records do not indicate that the BLM transmitted its draft EA to the BOCC, or alerted the BOCC to its publication on August 27. On top of this, the BLM allowed a mere 15 days to comment on the draft EA. This is plainly unreasonable and indicates that the BLM is disinterested in the input of the BOCC and other stakeholders. The BLM, like all federal agencies, is required under NEPA to provide "appropriate" time limits for comments to EAs. *See* 40 CFR § 1501.8; *see also Brodsky v. United States NRC*, 704 F.3d 113, 122 n. 4 (2d Cir. 2013) (finding that the court "cannot confidently conclude" that citizens were afforded "substantial opportunity to comment on agency's EA and FONSI). Further, the BLM must consider, when setting an appropriate time limit, the "[d]egree to which the action is controversial." *See id.* § 1501.8(b)(vii). Finally, the BLM must "involve the public in the EA process 'to the extent practicable [.]'" *See Theodore Roosevelt Conservation P'ship v. Salazar*, 392 U.S. App. D.C. 316, 337, 616 F.3d 497, 518 (2010), *quoting* 40 C.F.R. § 1501.4(b).

Here, the BLM's own FONSI, published contemporaneously with the EA, admitted that the proposed lease sale is controversial. *See* FONSI at 2. ("The majority of the public opinions expressed in the North Fork area have expressed opposition to the proposed new leasing and to existing oil and gas operations in the project vicinity.").[3] Accordingly, the BLM should have ensured that all interested parties, including the BOCC, received notice of the draft EA, and also should have afforded those parties reasonable time to submit comments. The BLM did neither. The BLM's decision to forego providing appropriate notice to interested parties and severely curtailing the time such parties can comment on the Preliminary EA is improper.

D. The BLM Violated FLPMA and NEPA by Disregarding the Lack of an Economic Need for Additional CBM Drilling in the North Fork Basin.

In its July 2018 preliminary comments, the BOCC indicated that natural gas prices were at historic lows, and, therefore, questioned whether a present oil and gas lease sale in the North Fork made economic sense. The BLM's Preliminary EA associated with the sale discounted the comments, declaring them "outside the scope" of NEPA analysis. *See* Preliminary EA at 5. Further, the BLM has decided to proceed with the lease sale regardless of economic considerations. Accordingly, the BLM's decision to proceed violates the law. The Federal Lands Policy Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), expressly provides that one of the BLM's management goals is "sustained yield," which "requires BLM to control depleting uses over time, ***so as to ensure a high level of valuable uses*** in the future." *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58, 124 S. Ct. 2373, 2376 (2004), *citing* 43 U.S.C. § 1702(h) (emphasis added); *see also N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) ("It is past doubt that the

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to obtain a copy of the Preliminary EA but these calls were not returned in a timely manner, requiring this office to obtain a copy of the Preliminary EA from another source.

[2] Those comments included a request for an extension of the scoping period to provide Gunnison County citizens and other stakeholders additional time to comment. The BLM did not respond to this request.

[3] Indeed, the BLM should have prepared an EIS rather than an EA, given the proposed Finding of No Significant Impact's ("FONSI's") identification of controversy surrounding the proposed lease sale. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001).

principle of multiple use does not require BLM to prioritize development over other uses. . . . 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.") (emphasis in original); *Babbitt*, 167 F.3d at 1290 ("'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."). It is axiomatic that increased natural gas supply reduces the value of produced natural gas, as opposed to unproduced gas that is not produced prices increase. *See, e.g.*, U.S. Energy Information Administration, "Factors Affecting Natural Gas Prices" (Aug. 23, 2017) *available at* www.eia.gov. In other words, by authorizing the development of natural gas now, the BLM is devaluing natural gas in the North Fork in arguable violation of FLPMA.

In addition, the BLM's claim that "evaluation of economic needs" is outside the scope of a NEPA process is inaccurate. While it is true that NEPA prohibits the elevation of economic considerations over environmental ones, NEPA recognizes that its purpose is to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." *See* 42 U.S.C. § 4331(a). Thus, economic considerations, particularly when they can result in additional protection of natural resource values and the environment, should be a part of the "hard look" NEPA requires the BLM to perform as part of any proposed lease sale, including this one. *See* 40 C.F.R. § 1508.14 ("When an environmental impact statement is prepared and ***economic . . . effects*** are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.") (Emphasis added). In short, while economic considerations "occupy a lesser tier of importance in an EIS than do purely environmental or ecological concerns [,] . . . NEPA requires a narrowly focused, indirect review of the economic assumptions underlying a federal project described in an impact statement." *See, e.g.*, *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1009 (S.D. Tex. 2004) (internal citations and quotations omitted).

Undoubtedly, the Preliminary EA avoids the question of whether immediate natural gas development is economically sensible because the data clearly indicates that it is not. As the BOCC explained in its July 2018 comments, natural gas prices remain historically low and are predicted to remain so until 2019, thus raising the question of whether it makes sense to develop additional natural gas resources at present. *See* United States Energy Information Administration, "EIA expects 2018 and 2019 natural gas prices to remain relatively flat", *available at* www.eia.gov/todayinenergy/detail.php?id=34672. Indeed, even the BLM's pending draft RMP, while painting a rosier picture of natural gas prices, asserts that "the price of natural gas is projected to increase at an annual rate of [only] 1.2 percent." *See* United States Department of the Interior, Bureau of Land Management, *Uncompaghre Field Office Draft Resource Management Plan and Environmental Impact Statement* (May 2016) ("Draft RMP") at 3-121. Moreover, the Preliminary EA itself recognizes that despite its approval of numerous wells in the North Fork basin, producers have drilled only a tiny few, strongly evidencing the low price and lack of demand for CBM at present. *See* Preliminary EA at 13-14. This only makes sense; as of October 30, 2018, the commodity price for natural gas (at the Henry Hub) was $3.21 per mcf, a 60% decrease from its high in 2008 of almost $ 14.[4] *See* Natural Gas (Henry Hub) Price, *available at*

[4] To the extent the BLM considered the economics of oil and gas leasing, it relied upon erroneous assumptions. The 2012 Reasonable Foreseeable Development Scenario for Oil and Gas used by the BLM to prepare the current draft

https://markets.businessinsider.com/commodities/natural-gas-price. Simply put, the current price of natural gas does not support the proposed lease sale, and the EA's failure to consider this economic reality is inconsistent with the BLM's obligations under FLPMA and NEPA.

III. CONCLUSION

For the reasons set forth above, the BOCC objects to and protests the December 2018 lease sale with regard to the Gunnison County Parcels.

ON BEHALF OF THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF GUNNISON, COLORADO

By: _____
David Baumgarten, Esq.
Matthew Hoyt, Esq.
County Attorney's Office
Gunnison County, Colorado

cc: Colorado State Director Gregory Shoop, United States Bureau of Land Management
The Honorable John Hickenlooper, Governor of the State of Colorado
The Honorable Michael Bennet, United States Senate
The Honorable Cory Gardner, United States Senate
The Honorable Scott Tipton, United States House of Representatives

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RMP recognizes the fall of natural gas prices, but nonetheless predicts a natural gas price of around $5.00 by 2018, or almost double the present actual price. *See* Stilwell, Dean P. *et al.*, "Reasonable Foreseeable Development Scenario for Oil and Gas for the Uncompahgre Field Office, Colorado" Final Report" (Feb. 16, 2012) at 58-59, Fig. 20. Obviously, the BLM's forecast was off the mark, and to the extent the BLM is continuing to rely on such estimates, it should cease doing so.

Gunnison County
COLORADO

Office of the Gunnison County Attorney
David Baumgarten • County Attorney
Matthew R. Hoyt • Deputy County Attorney

November 2, 2018

Gregory Shoop
Acting Director
Bureau of Land Management
Colorado State Office
2850 Youngsfield Street
Lakewood, Colorado 80215

VIA FACSIMILE (303) 239-3799
& FIRST CLASS MAIL

Re: Gunnison County Protest of the December 2018 Oil & Gas Lease Sale by the Uncompahgre Field Office of the BLM, COC # 79293, 79294, 79295, and 79296

Dear Mr. Shoop,

The office of the Gunnison County Attorney, on behalf of the Board of County Commissioners of the County of Gunnison, Colorado ("BOCC") and pursuant to 43 C.F.R. § 3120.1-3, hereby informs the Bureau of Land Management that due to inadvertence, the parcel bearing the serial number COC 79297 was included in the BOCC's November 2, 2018 letter of protest. We are writing to withdraw COC 79297 from the BOCC's protest because according to the Competitive Oil & Gas Lease Sale Notice, COC 79297 lies wholly within Delta County and not within Gunnison County.

ON BEHALF OF THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF GUNNISON, COLORADO

By: _____
David Baumgarten, Esq.
Matthew Hoyt, Esq.
County Attorney's Office
Gunnison County, Colorado

cc: Colorado State Director Gregory Shoop, United States Bureau of Land Management (by email)

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