



February 6, 2024

Submitted via eplanning.blm.gov

Attn: Director Doug Vilsack
BLM Colorado State Director
Denver Federal Center, Building 40
Lakewood, Colorado 80225

Subject: DOI-BLM-CO-0000-2022-0003-RMP-EIS – Comments on the Draft Resource Management Plan and Environmental Impact Statement for Big Game Habitat Conservation for Oil and Gas Management in Colorado

Dear Director Vilsack:

Western Energy Alliance, the West Slope Colorado Oil and Gas Association, and the Colorado Oil and Gas Association (“the Trades”) timely submit the following comments on the U.S. Bureau of Land Management’s (“BLM”) draft Resource Management Plan (“RMP”) and Environmental Impact Statement (“EIS”) for Big Game Habitat Conservation for Oil and Gas Management in Colorado (“Draft RMP”), as noticed for availability in the Federal Register on November 9, 2023. 88 Fed. Reg. 77,350 (Nov. 9, 2023).

Western Energy Alliance (“the Alliance”) is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for nearly 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The majority of independent producers are small businesses, with an average of fourteen employees.

West Slope Colorado Oil & Gas Association (“WSCOGA”) is a member-based organization focused on promoting the development of natural gas and oil resources in Northwest Colorado. WSCOGA provides a unified political and regulatory voice for the oil and natural gas industry in the Piceance

Basin and Western Colorado. WSCOGA represents over 90 member companies, and its mission is to promote the development of Western Colorado natural gas and petroleum products for the benefit of society. WSCOGA is an affiliated chapter of the Colorado Oil & Gas Association (“COGA”).

COGA is a nationally recognized trade organization that represents over 200 companies throughout the state of Colorado. For nearly 40 years, COGA has sought to create a thriving, innovative and respected oil and natural gas industry in Colorado that embodies the values of our communities, prioritizes the protection of our environment, and provides the natural resources that advance our society. COGA provides a positive, unified, and proactive voice for the oil and natural gas industry in Colorado.

I. The Trades’ preference is that BLM select Alternative A, but the Trades also recognize that Alternative B appropriately aligns with the State of Colorado’s wildlife regulations.

The Trades stress that big game species in Colorado are not only surviving but are thriving. Data supporting this statement is robust:

- Colorado Parks and Wildlife’s (“CPW”) statewide 2018 post-hunt population objective range for elk is 233,000 to 282,000, and the 2018 post-hunt estimate is 287,000. This was an increase from 282,000 in 2017. Elk populations within the state are above the population objectives set in 2018, so much so that CPW stated that it “has intentionally reduced elk population to achieve population objectives.”¹
- The post-hunt population objective for pronghorn sheep is 68,000 to 78,000 and the post-hunt 2018 population is estimated to be at 79,000 – above CPW’s population objective range. CPW has stated that hunting licenses for pronghorn sheep “are issued to provide maximum opportunity for hunters without negatively affecting success rates or exceeding landowner tolerance for pronghorn hunter.”²
- Although there are no current population objective ranges for bighorn sheep, their population numbers have steadily increased in recent years due to management and

¹ CPW 2020 Status Report at 11.

<https://cpw.state.co.us/Documents/Hunting/BigGame/2020BigGameWinterRangeandMigrationCorridorsReport.pdf>.

² *Id.* at 13.

conservation efforts.³ CPW highlights that factors other than oil and natural gas are significant for protecting bighorn sheep populations: “Based on substantial volume of literature, *one of the most important aspects of wild sheep management* is to keep these species separated from domestic sheep and goats ”in order to protect against “diseases and parasites..”⁴

- Mule deer are the only big game species included in the Draft RMP whose population are below the CPW’s objectives. In response, CPW drafted and implemented the 2014 West Slope Mule Deer Strategy that identified seven management priorities, none of which involved limiting oil and gas development. These priorities included: predator management where predation may be limiting deer survival, reducing impacts of highways on mule deer survival, reducing impacts of human recreation on mule deer, regulation of doe harvest and providing youth hunting opportunity, and conducting a disease monitoring program and applied research to improve management of deer populations.⁵

As these examples demonstrate, the current regulatory regime from BLM has clearly done a great job of enhancing big game species in Colorado and no further change is needed or required.

In the event BLM does not select Alternative A, the Trades agree that Alternative B is the next preferred alternative. While the Trades have specific suggestions to improve Alternative B, as listed below, Alternative B appropriately aligns with regulations and processes created by the state of Colorado’s Energy and Carbon Management Commission (“ECMC”) with strong input from the state’s wildlife experts, the CPW.

ECMC is the state agency responsible for regulating oil and natural gas in Colorado. ECMC, with significant input from CPW, passed extensive and very stringent regulations in 2020 that became effective in early January 2021 protecting the same big game High Priority Habitat (“HPH”) that BLM is working to protect in this Draft RMP. These rules (ECMC’s 1200 Series regulations), along with more recent rules enacted by the ECMC, incorporate CPW’s comprehensive mapping of wildlife habitat and provide extensive protection in these areas. This mapping must legally occur every year based on CPW’s latest data, ensuring quick adjustments to changing conditions.

Significantly, ECMC’s regulations allow BLM to participate in state processes to ensure big game HPHs are adequately protected. ECMC regulations require that analyses, stipulations and

³ *Id. at 15.*

⁴ *Id. (emphasis added).*

⁵ *Id. at 8.*

conditions of approval conducted pursuant to federal permitting be carefully considered by the ECMC in imposing any additional conditions of approval for oil and natural gas development in order to achieve complementary permitting outcomes. See ECMC Rule 306.b.(2).B. Also, COGCC Rule 314.f.(4).D. mandates that operators consult with appropriate federal agencies when proposing a comprehensive area plan that involves federal surface or mineral estate.

Furthermore, BLM cannot adopt an alternative such as Alternative C or D that departs from ECMC's regulations and processes. BLM's regulations explicitly state that States "possess[] **primary authority** and responsibility of fish and resident wildlife on [BLM] lands" and, further, recognize that BLM's land management authority "is not a preemption of State jurisdiction over fish and wildlife."⁶

Moreover, the Federal Land Policy and Management Act ("FLPMA"), BLM's planning regulations, and BLM guidance require that BLM's RMPs be consistent with State plans, policies and programs, to the extent consistent with law. Specifically, FLPMA requires that "[l]and use plans . . . **shall** be consistent with State and local plans **to the maximum extent** [the Secretary] finds consistent with Federal law and the purposes of FLPMA."⁷ (Emphasis added.) BLM's planning regulations echo this requirement:

Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.⁸

BLM's land use planning handbook then reiterates this requirement, stating that "BLM's plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law and FLPMA provisions."⁹

⁶ 43 C.F.R. § 24.4(b), (c) (emphasis added).

⁷ 43 U.S.C. § 1712(c)(9) (emphasis added); *accord New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 719 (10th Cir. 2009).

⁸ 43 C.F.R. § 1610.3-2(a) (emphasis added).

⁹ BLM Handbook H-1601-1 – Land Use Planning Handbook 6 (Rel. 1-1693 Mar. 11, 2005) (*id.* at 11 ("Land use plans must be consistent with state and local plans to the maximum extent consistent with Federal law.")).

Moreover, “consistency” is a goal required by the Secretarial Order 3362, as noted by the Trades in their scoping comments to BLM. As BLM acknowledges: “A driver for this amendment is to evaluate land use planning decisions to be consistent with the [COGCC] rulemaking, which adopted new rules [1200 series] regulating the permitting, development, and operation of oil and gas facilities in wildlife habitat.” Big Game Habitat Movement Route Corridor Resource Management Amendment Public Scoping Brochure (“Scoping Brochure”) at 2. Consistency is important because it increases efficiency and prevents unnecessary permit amendments or revisions at the federal and state levels. Consistency is best achieved when there is no conflict between BLM and state rules.

Accordingly, BLM must defer to this comprehensive set of state regulations already in place during the amendment and EIS process. In the event BLM does not select Alternative A, the Trades agree that Alternative B is the next preferred alternative. BLM should reject, just as the ECMC and CPW did during that state rulemaking in 2020, any 3% surface disturbance thresholds or complete closure of lands to leasing as proposed in Alternatives C and D.

II. Of the Action Alternatives, Alternative B is the Best Alternative to Protect Big Game HPHs and to Promote Big Game Habitat Conservation in Colorado.

The Draft RMP states that the goal of this RMP amendment is to provide “additional measures to promote big game habitat conservation,” which includes “... enhance[d] protection for important habitat areas for elk, mule deer, pronghorn, and bighorn sheep (Rocky Mountain and Desert).”¹⁰

The Trades share BLM’s goal and strongly believe that of all the action alternatives, Alternative B in the Draft RMP accomplishes this goal. Under Alternative B, 2,163,000 acres (25% of HPH) will be subject to a No Surface Occupancy (“NSO”) restriction, which is a 9% increase from current operations in Alternative A.¹¹ Additionally, 7,406,000 acres (85.7% of HPH) will be subject to a Controlled Surface Use (“CSU”) restriction, a 181% increase from current operations, and 7,176,000 acres (83.0% of HPH) will be subject to a Timing Limitation (“TL”) restriction, a 23% increase from current operations.¹² Of particular note, 64% of bighorn sheep production areas in Colorado would be subject to NSO stipulations under Alternative B compared to only 13% today under Alternative A.¹³ These are highly significant and impactful increases in the amount of Colorado land subject to NSO, CSU and TL restrictions.

¹⁰ Draft RMP at 1-1.

¹¹ *Id.* at 3-97.

¹² *Id.*

¹³ *Id.* at 3-98.

Additionally, Alternative B would require operators to obtain BLM approval of a wildlife mitigation plan and pay compensatory mitigation to offset direct and indirect impacts to wildlife.¹⁴ Alternative B would prohibit surface occupancy within migratory crossing pinch points¹⁵, would implement CSU stipulations when access roads exceed one linear mile per square mile or exceed one oil and natural gas location per square mile¹⁶, and allow BLM to implement conditions of approvals on any operation approval such as on Applications to Permit to Drill (“APD”) to protect wildlife and habitat resources under the lease contract. None of these additional requirements are required under Alternative A.

In summary, Alternative B includes ample protections for big game wildlife and habitat. The extensive increases provided in Alternative B in the use of NSO, CSU and TL restrictions, the inclusion of required wildlife mitigation plans and compensatory mitigation, and significant density requirements “will reduce impacts to big game and HPH within the decision area to a greater degree than under Alternative A.... Management under this alternative would be consistent with current CPW and [ECMC] recommendations, would mitigate direct and indirect impacts to big game HPH, and would help to maintain and conserve intact, connected HPH within the decision area.”¹⁷

III. Implementing a 3% Surface Disturbance Threshold in Alternatives C and D is Not Needed to Protect Big Game Habitat in Colorado or Scientifically Supportable.

The primary difference between Alternatives C and B is that Alternative C includes a CSU that would prescribe a 3% surface disturbance threshold on oil and natural gas development within big game HPH on BLM surface lands. Alternative D also includes a CSU density limitation prescribing a 3% surface disturbance threshold on oil and natural gas development within big game HPH, but the application of this threshold applies to big game HPH on all lands regardless of land ownership. The 3% surface disturbance threshold under either Alternative C or D should be rejected for several reasons.

¹⁴ *Id.* at 2-34.

¹⁵ *Id.* at 2-27.

¹⁶ *Id.* at 2-27 to 2-29.

¹⁷ *Id.* at 3-98.

1. After Considering Extensive Evidence, ECMC and CPW Rejected Adopting a Surface Disturbance Threshold During The 2020 Wildlife Rulemaking.

During ECMC's 2020 wildlife rulemaking for oil and natural gas operations, ECMC and CPW reviewed and considered no fewer than 17 studies¹⁸ on impacts to big game species from oil and natural gas operations in western states. At least four of these studies were performed in Colorado while roughly half of the studies were based in Wyoming. BLM considered nearly all of these same studies in producing the Draft RMP.

After reviewing these studies and performing detailed technical analysis for what is best for big game species in Colorado, the ECMC and CPW rejected implementing any surface disturbance thresholds in the 2020 wildlife regulations.

CPW and ECMC found that well pad densities, rather than overall surface disturbance, was the critical factor that created unavoidable adverse impacts to big game species. ECMC stated in the Statement of Basis and Purpose for the 1200 Series rulemaking ("SBP"): "Based on well-documented displacement distances and avoidance of active wells and roads, unavoidable adverse impacts to western big game species increase in sage-dominated basin and range winter and migratory habitats when well pad densities exceed one well pad per square mile.... As well densities increase beyond a tolerable threshold in crucial winter habitat and migration corridors, adverse impacts to western big game species are unavoidable and occur from reduced habitat effectiveness...."¹⁹

To address this concern, CPW recommended, and ECMC implemented, a regulation requiring operators to prepare a CPW-approved wildlife mitigation plan to address any potential unavoidable adverse impacts to these big game species when development density exceeds one oil and natural gas location per square mile. These plans "must include site-specific measures to address unavoidable adverse indirect impacts to wildlife that occur in these habitats when the development density exceeds one oil and gas location per square mile," ECMC, 1202.d. BLM had incorporated the same provision into Alternative B.

As part of the rationale for focusing on well pad density rather than surface disturbance, the ECMC noted that "CPW researchers have documented that under the right circumstances, mule deer in the Piceance Basin may be able to tolerate slightly higher levels of energy development ... than in more open sage-dominated landscapes with less variable topography. This diverse topography, vegetative cover and ample forage availability in the Piceance Basin appeared to

¹⁸ Energy and Carbon Management Commission, [Statement of Basis, Specific Statutory Authority, and Purpose 800/900/1200 Mission Change Rulemaking](#) (ECMC Wildlife SBP), Pages 274-288 (labeled as Pages 28-42).

¹⁹ *Id.* at 203-204.

help lessen the severity of indirect impacts to mule deer.”²⁰ And more generally, “evidence in the administrative record demonstrates that when properly regulated, development can occur within these areas in a manner protective of wildlife populations in their habitat.”²¹

Accordingly, rather than adopting a surface disturbance cap, ECMC adopted a more flexible, site-by-site analysis approach: “site-specific circumstances that clearly indicate higher tolerance of development activity, such as those found in the Piceance Basin, will be addressed on a case-by-case basis as part of the wildlife mitigation plan.”²²

CPW and ECMC used these factors in rejecting implementation of a surface disturbance cap because it was not needed to protect big game species. BLM should reject use of a surface disturbance cap for the same reason.

2. No Big Game Wildlife Study Based in Colorado Recommends a 3% Surface Disturbance Threshold to Protect This Habitat.

When evaluating a 3% surface disturbance threshold and alternatives thereto, BLM must make decisions based on the best available science. Secretarial Order 3362 specifically directs the use of “best available science to inform development of specific guidelines . . . related to planning and developing energy, transmission, or other relevant projects to avoid or minimize potential negative impacts on wildlife.”²³ Similarly, the President has established a national policy that agencies “make evidence-based decisions guided by the best available science and data.”²⁴ Here, the best available science—studies of mule deer conducted on the western slope of Colorado—demonstrate that a 3% surface disturbance threshold is not necessary in Colorado.

In their analysis, the ECMC and BLM each referenced four mule deer studies²⁵ conducted on the western slope in Colorado (collectively, with the four studies referenced above, “the Colorado

²⁰ *Id.* at 203-204.

²¹ *Id.* at 202.

²² *Id.* at 204-205.

²³ Secretarial Order 3362 § 3(d).

²⁴ Presidential Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, 86 Fed. Reg. 8845 (Feb. 10, 2021). *See also* Executive Order 13563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (requiring agencies to use the “best available science” in carrying out their regulatory functions).

²⁵ Lendrum, P. E., C. R. J. Anderson, R. A. Long, J. G. Kie, and R. T. Bowyer. 2012. Habitat selection by mule deer during migration: effects of landscape structure and natural-gas development. *Ecosphere* 3: 82 (Lendrum 2012) **and** Lendrum PE, Anderson CR Jr, Monteith KL, Jenks JA, Bowyer RT (2013) Migrating Mule Deer: Effects of Anthropogenically Altered Landscapes. *PLoS ONE* 8(5): e64548. <https://doi.org/10.1371/journal.pone.0064548> (Lendrum 2013) **and** Northrup, J. M., C. R. Anderson, and G. Wittemyer. 2015. Quantifying spatial habitat loss from hydrocarbon development through assessing habitat selection patterns of mule deer. *Global Change Biology* 21:

Studies”). The ECMC also referenced an additional one mule deer study that covered several western states including Colorado.²⁶

These studies demonstrate that a 3% surface disturbance threshold is not required to protect mule deer species or habitat in Colorado, and rejected implementing any surface disturbance threshold, let alone a 3% threshold. While several of the studies acknowledged that lower densities of well pad development could reduce impacts to mule deer, they did not recommend any cap threshold on surface disturbance. Instead, several of these studies emphasized the need for greater consultation with wildlife agencies and additional assessments of proposed development in areas with greater density of oil and natural gas development.

As examples, the Lutz 2011 study under its general guidelines #1 aligns with the ECMC’s requirement for a wildlife mitigation plan by suggesting consultation with appropriate wildlife agencies.²⁷ The Northrup 2021 study states: “Thus, we propose that planning be based on conditions present on proposed development.... Considerations of topographic and vegetative diversity and whether or not there is evidence that animals are habitat limited should be incorporated into development planning options. This approach may ultimately foster a collaborative and likely more successful planning process.”²⁸

The Northrup 2015 and Lendrum 2013 studies also supported additional monitoring and collaboration. In Northrup 2015, the authors concluded that “[t]his study, and the methods we employed, provides a template for quantifying spatial take by industry activities in natural areas and the results offer guidance for policy makers, managers, and industry when attempting to mitigate habitat loss due to energy development.”²⁹ The Lendrum 2013 study states “Continued monitoring of mule deer and energy-development interactions are necessary to identify potential development strategies that minimize behavioral shifts in traditional migratory patterns.”³⁰

Moreover, the Colorado Studies directly stated or inferred that impacts to mule deer in their studies were significantly more pronounced during drilling operations than production operations. For example, the Northrup 2015 study concluded that: “The drilling stage of natural

3961–3970 (Northrup 2015) **and** Northrup, J. M., C. R. Anderson, B.D. Gerber, and G. Wittemyer. 2021. Behavioral and Demographic Responses of Mule Deer to Energy Development on Winter Range Wildlife Monographs 208:1–37; 2021; DOI: 10.1002/wmon.1060 (Northrup 2021).

²⁶ Lutz et al. 2011. Mule Deer Working Group, Western Association of Fish and Wildlife Agencies, USA. Energy Development Guidelines for Mule Deer (Lutz 2011).

²⁷ Lutz 2011 at 18.

²⁸ Northrup 2021 at 62.

²⁹ Northrup 2015 at 1.

³⁰ Lendrum 2013 at 9.

gas development elicited the strongest response by deer in our system.... The other development infrastructure (i.e., roads, and producing pads) altered deer behavior, but to a lesser extent.”³¹ And in the Northrup 2021 study, the authors concluded that deer can adjust to relatively high densities of well pads in the production phase provided there is sufficient vegetative and topographic cover available: “Our demographic results indicate that at the current development and deer population densities, natural gas well pads in the production phase on winter range are not affecting the measured individual demographic and physiological parameters in our study. Our sample sizes were large and thus we had the power to detect relatively small differences between study areas and years.”³²

Finally, the Lendrum 2013 study called into question whether oil and natural gas development in the production phase impacts mule deer migration at all. The study concluded that: “[i]n the most developed study areas..., female deer selected areas closer to well pads, regardless of time of day” and “[d]eer selected areas closer to well pads in the most developed areas, which was contrary to our prediction.”³³

Because of the relatively minimal impacts to mule deer occurring during the production phase, all the studies emphasized mitigation efforts during the drilling phase of development. These mitigation measures during the drilling phase included seasonal drilling restrictions, sound and light barriers, reduction in vehicle traffic, reduction of roads constructed, and installation of remote operations.³⁴

In sum, the Colorado Studies emphasized that impacts to mule deer from oil and natural gas operations are far less during production operations, which is the longest phase of oil and natural gas production. As an example, the average time to drill and complete a well in Colorado’s DJ Basin is roughly 10 to 12 days for a well that will produce for 20 to 30 years. As such, the studies pointed out that the drilling phase of wells occurs during a relatively short period of time and impacts during this period can be managed through timing limitations and other mitigation measures to reduce and eliminate these impacts on mule deer, rather than through surface-disturbance caps or thresholds. This is the same approach taken by the ECOMC in their regulations and what BLM would implement in Alternative B. As the Colorado Studies demonstrate, there is no need for the BLM to implement a 3% surface disturbance threshold for oil and natural gas operations.

³¹ Northrup 2015 at 8.

³² Northrup 2021 at 48.

³³ Lendrum 2012 at 9 and 13.

³⁴ Northrup 2015 at 8, Northrup 2021 at 60 and Lutz 2011 at 18.

3. The One Study Conducted in Wyoming which Recommended a 3% Surface Disturbance Threshold Is Significantly Flawed and Not Applicable in Colorado.

BLM references one study (the “Sawyer Study”) in the Draft RMP that recommended land managers implement a surface disturbance threshold to protect big game species.³⁵ This study was based on mule deer migratory patterns in the Pinedale natural gas field in western Wyoming and recommends a 3% surface disturbance threshold. This study has significant flaws and is of little relevance to Colorado.

a) The Migratory Route Data in the Study Shows that Over Half of the Migration Sequences Did Not Avoid Areas With Over 3% Disturbance When Migrating.

The Sawyer Study does not demonstrate that mule deer avoid areas with over 3% surface disturbance. In looking at the evidence of mule deer migratory patterns, the authors found that “[a]t the migratory route scale, a histogram of surface disturbance within migratory routes showed that 50 of 117 migration sequences of the mule deer migrated in routes with < 3% surface disturbance (Fig. 3B).”³⁶

This means that the majority of mule deer migratory routes from the study occurred in areas with greater than 3% surface disturbance. And, indeed, a substantial number of the migratory routes (14 out of 117 studied) occurred in areas with 8% or greater surface disturbance. The following table summarizes the plotted migratory patterns of mule deer in Figure 3B of the study:

Table 1 – Summary of Figure 3B in the Sawyer Study

Disturbance Level in Percentage	# of Migratory Routes
0	7
0.5	7
1.0	6
1.5	11
2.0	5
2.5	14
3.0	7
Total 3.0 or less	57 of 117 (49%)
3.5	12
4.0	9

³⁵ Sawyer, H., M. S. Lambert, and J. A. Merkle. 2020. Migratory Disturbance Thresholds with Mule Deer and Energy Development. *Journal of Wildlife Management* 84: 930-937 (Sawyer Study).

³⁶ *Id.* at 5.

4.5	4
5.0	6
5.5	5
6.0	3
6.5	5
7.0	1
7.5	1
8.0	5
8.5	4
>=9.0	5
Total 3.5 or more	60 of 117 (51%)
TOTAL	117

In sum, more migration sequences took place during the study in areas above the 3% surface disturbance than below that threshold. The author’s conclusion in the study that “...the likelihood of individuals migrating through a particular area generally declined as surface disturbance increased, and this avoidance was pronounced above 3% surface disturbance” does not appear to be borne out by the actual migratory route data in the study.

b) The Sawyer Study Was Conducted in an Open Sagebrush Landscape in Western Wyoming with Far Different Landscape Characteristics than Colorado.

Additionally, the Sawyer Study was conducted in an area of open sagebrush in Western Wyoming that differs substantially from the landscape in Colorado. The Sawyer Study authors admit their study has limited relevance to more diverse landscapes in Colorado: “We conducted our study in an open sagebrush landscape, where disturbance effects appear to be exacerbated compared to more vegetated and topographically diverse areas such as pinyon-juniper woodlands.”³⁷

The lack of relevance of the Sawyer Study to migratory patterns in Colorado is highlighted by the Northrup 2015 and 2021 studies focused on Colorado wildlife patterns. The Northrup 2015 study states: “Although our results show similar general behavioral responses [to the Sawyer report] ... the scale of displacement was less. This likely relates to differences in the landscapes between the study areas, where the Piceance system has substantially greater topographic and vegetative diversity than the open, flat areas in the Pinedale area of Wyoming where Sawyer et al. conducted their work. We hypothesize that the structural diversity of the habitat and topography

³⁷ *Id.* at 6.

provide refuge areas for deer in our system at relatively close proximity to infrastructure that allows them to behaviorally mediate impacts”³⁸

The Northrup 2021 study even more directly refutes the conclusion of the Sawyer Study regarding the need for a 3% surface disturbance threshold, concluding that: “In contrast to Sawyer et al. 2017, deer in our study in northwest Colorado that were subject to similarly high densities of development (i.e., deer in the high-development study area) avoided well pads during the drilling phase and used all but the closest areas around well pads that were in the production phase as available. Further, deer in our study appeared to increase their use of cover in the more developed areas. We believe the strong differences in the habitat of the 2 study systems drove these contrasting findings.”³⁹ The authors of the 2021 Northrup study further explained that: “...Sawyer et al. (2020), working with mule deer during migration, found deer use during migration strongly declined at surface disturbance levels of around 3%. However, they did not assess any demographic consequences of these responses. In our heavily developed study area, around 4% of the landscape is disturbed by well pads, facilities, and roads. Deer still use these areas, albeit in an altered manner, but we documented no large-scale avoidance as in the study by Sawyer et al (2020).”⁴⁰

Finally, the ECMC and CPW also noted the topographic differences between the Pinedale natural gas field in western Wyoming and Colorado in the 2020 rulemaking. As the ECMC stated in the SBP: “CPW researchers have documented that under the right circumstances, mule deer in the Piceance Basin may be able to tolerate slightly higher levels of energy development ... than in more open sage-dominated landscapes with less variable topography. This diverse topography, vegetative cover and ample forage availability in the Piceance Basin appeared to help lessen the severity of indirect impacts to mule deer.”⁴¹

Every study in Colorado examining wildlife migratory patterns in the vicinity of oil and natural gas development rejects the need for a 3% surface disturbance threshold, and the one study recommending such a cap in Wyoming has little relevance to wildlife migratory patterns in Colorado. BLM should avoid implementing the 3% surface disturbance threshold in Alternatives C and D.

³⁸ Northrup 2015 at 8.

³⁹ The 2 study systems in the study referred to two separate areas of the Piceance Basin. One with high oil and gas development and one with lower oil and gas development. Northrup 2021 at 44.

⁴⁰ Northrup 2021 at 52.

⁴¹ [ECMC Wildlife SBP](#) at 203-204.

4. BLM Cannot Apply the 3% Disturbance Threshold to Prevent Exercise of Valid Existing Rights

In Appendix G, BLM observes, “If the APD is proposed on a lease that does not have a 3 percent disturbance cap stipulation, valid and existing rights may allow for the development with COAs.”⁴² BLM must revise this statement to recognize that, when an existing lease does not have a 3 percent disturbance cap stipulation, valid existing rights “must” – rather than “may” – allow for development. Therefore, BLM must make the following change to page G-3 of the Draft RMP:

If the APD is proposed on a lease that does not have a 3 percent disturbance cap stipulation, valid and existing rights ~~may~~ **must** allow for the development with COAs.

IV. Implementing an NSO on No-Known, Low, or Medium Potential Areas in Alternative D Should Not Be Considered.

Alternative D precludes oil and natural gas leasing on any lands that are within big game HPH and are also located in areas identified with no-known, low, or moderate oil and natural gas development potential in BLM’s latest Reasonable Foreseeable Development (“RFD”) analysis. This provision in Alternative D should be rejected for several reasons.

1. If BLM chooses to consider closing certain lands to leasing as required by Alternative D, it should reclassify areas by Potential Use Using the 2016 USGS Resource Assessment.

Alternative D relies upon the outdated 2002 United States Geological Survey (“USGS”) Resource Assessment in several Colorado field offices in determining which areas in big game HPH should be closed to leasing. The areas considered no-known, low, or moderate oil and natural gas development potential in the 2002 USGS Resource Assessment, however, are badly outdated and BLM should instead rely upon the updated 2016 USGS Resource Assessment for the Piceance Basin. The later Resource Assessment found significantly greater potential oil and natural gas resources, as demonstrated in Table 3. Since the Uinta Basin was excluded from the 2016 assessment but included in the 2002 assessment, the increase in potential resources in the Piceance are even greater than the percentage increase shown below.

⁴² Draft RMP at G-3.

Table 3 – Comparison of the USGS 2002 and 2016 Resource Assessments

Resource	2002 USGS Assessment	2016 USGS Assessment	% Increase
Natural Gas	21 trillion cubic feet	66.3 trillion cubic feet	318% increase
Oil	60 million barrels	74 million barrels	23% increase
Natural Gas Liquids	43 million barrels	45 million barrels	5% increase

BLM has an obligation under NEPA and the Administrative Procedure Act (“APA”) to use the best available information. See *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (agency should use “up-to-date” data and not use “stale” data); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086–87 (9th Cir. 2011) (agency acted arbitrarily and capriciously by using “stale” data and therefore failed to take the required “hard look” under NEPA); see also Presidential Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, 86 Fed. Reg. 8845 (Feb. 10, 2021) (requiring use of best available information in agency decision making). If BLM chooses to consider closing lands to leasing as suggested in Alternative D, BLM must update its RFD based on the USGS 2016 Resource Assessment to see potential impact before the true impacts to Alternative D can be assessed.

2. The NSO Proposed in Alternative D Completely Ignores the Technological Innovation within the Oil and Natural Gas Industry that Continually Expands Technically Recoverable Reserves.

The three-fold increase of commercially-available natural gas resources between the 2002 and 2016 USGS Resource Assessments demonstrates how projections for recoverable resources increases as technology advances and knowledge of geologic information expands. For this reason, closing off areas currently deemed no-known, low, and medium potential is short-sighted and unnecessary. Instead, BLM could assign appropriately tailored lease stipulations in these areas to ensure protections for other resources should the areas become more productive in the future.

Technological improvements in the oil and natural gas industry markedly advanced between 2002 and the present. In the Denver-Julesburg (DJ) Basin of Colorado, horizontal well development started in 2010. Prior to 2010, operators drilled what were known as “S Shaped” directional wells that had a lateral reach of roughly 1,000 feet away from the wellhead. Lateral lengths for horizontal wells in the DJ Basin in 2010 to 2011 increased to over 4,000 feet, and the total average depth of wells increased to over 11,000 feet today.⁴³

⁴³ [“EOR/IOR technology: Advanced shale oil EOR methods for the DJ basin,”](#) *World Oil*, May 2023.

Not surprisingly, improvements in technology have also substantially increased oil and natural gas resources available in the Piceance Basin in northwest Colorado. Oil and natural gas operators have increased the number of wells drilled from a single pad in the Piceance from an average of 2.5 wells in 2002 to 9.1 in 2016.⁴⁴ This was accomplished by oil and natural gas operators moving from vertical wells to directional wells.

At the same time, operators were able to increase the lateral reach of these directional wells. The maximum lateral reach for wells in the early 2000s was well under 2,000 feet. That number doubled by the 2020s, allowing substantially more resources to be produced from a single well pad.

Given these technological improvements in the DJ and the Piceance Basins, and the further improvement that will almost certainly occur in the coming decades, it would be myopic for BLM to consider adopting Alternative D and closing off areas currently deemed no-known, low, and medium potential for oil and natural gas development.

V. The Trades Support an NSO Within Migratory Crossing Pinch Points Themselves But Do Not Believe it is Appropriate to Include a 0.5 Mile Buffer in the NSO.

In Alternative B, BLM recommends an NSO to “Prohibit surface occupancy and use within 0.5-mile of identified big game migratory highway crossing pinch points in big game HPH....”⁴⁵

The Trades support the NSO for the identified pinch points listed on Figure 2-103 in the Draft RMP. The Trades do not, however, support including a 0.5 NSO buffer for each of these crossing pinch points.

There is no evidence in the Draft RMP supporting the need for a 0.5-mile buffer around the pinch point to protect big game species and their habitat. Rather than implement an NSO for this 0.5 buffer, BLM could implement a CSU requiring a consultation between BLM, CPW, and the operator within the 0.5 buffer to determine which project-specific measures would be appropriate to protect these highway crossing pinch points.

This is the approach the State of Wyoming took in 2020 when Wyoming’s Governor signed an Executive Order titled “Wyoming Mule Deer and Antelope Migration Corridor Protection.”⁴⁶ In this Executive Order, a bottleneck is defined as “Any portion of a mule deer or antelope migration

⁴⁴ “[Oil and gas development footprint in the Piceance Basin, western Colorado](#),” Cericio Martinez and Todd M. Preston, *Science Direct*, March 2018.

⁴⁵ Draft RMP at 2-27.

⁴⁶ State of Wyoming Executive Department, [Wyoming Mule Deer and Antelope Migration Corridor Protection Executive Order](#).

corridor where animals are significantly physically or behaviorally restricted.” The Order implements a “No surface disturbance or seasonal-human presence shall be permitted within bottlenecks, and state agencies shall restrict uses to those that do not impair migration corridor functionality, except in cases necessary for human safety.” Notably, the Order did not implement a 0.5-mile NSO buffer, or indeed any NSO buffer, around each of the bottlenecks restricting mule deer or antelope migration corridors.

VI. BLM Should Defer to CPW to Ensure that Only One Set Of Compensatory Mitigation Measures Will Be Imposed for Each Oil and Natural Gas Development on Federal Lands.

It is of tantamount importance that BLM defer to compensatory mitigation measures established by CPW and ECMC pursuant to Rule 1203. First, operators cannot be required to submit separate mitigation measures to compensate for the same impact. Second, FLPMA requires that BLM defer to the State’s compensatory mitigation measures. Finally, BLM lacks authority to condition development of federal oil and natural gas leases that predate any final RMP amendments (“Existing Federal Oil and Gas Leases”) on compensatory mitigation.

1. Operators Cannot Be Required to Twice Compensate for One Impact.

BLM must defer to compensatory mitigation measures established by CPW because it would make no sense and amount to impermissible double-counting if the BLM and CPW required an operator to pay separate compensatory mitigation fees for the same unavoidable impacts to wildlife.

In the Draft RMP, BLM emphasizes the need for it to work closely with CPW in establishing any required compensatory mitigation. The Draft RMP provides that: “The compensatory mitigation program will be implemented at a state level in collaboration with BLM’s partners (e.g., federal, tribal, and state agencies)... The BLM in coordination with CPW and ECMC will determine whether compensatory mitigation proposed by the operator is sufficient to protect big game and HPH...”⁴⁷ BLM also states “New oil and gas locations in big game HPH require a BLM-approved Wildlife Mitigation Plan (“WMP”) or other BLM-approved conservation plan and compensatory mitigation plan consistent with state oil and gas regulations.”⁴⁸ These WMPs and other mitigation measures for big game habitat “should be coordinated among the BLM, CPW, and the operator.”⁴⁹

⁴⁷ Draft RMP at 2-19.

⁴⁸ *Id.* at 2-34.

⁴⁹ *Id.* at 2-19.

The Draft RMP, therefore, strongly suggests that operators should be subject to **one** compensatory mitigation program and submit only **one** WMP, rather than impose different and likely contrary mitigation measures. The Trades agree with this approach and maintain that BLM should defer to CPW's mitigation.

The Trades request that BLM provide confirmation of this intent in the final version of the Draft RMP to avoid any potential confusion in the future. Alternatively, BLM could update the *Memorandum of Understanding ("MOU") Among Bureau of Land Management, Colorado State Office, U.S. Forest Service, Rocky Mountain Region, and Colorado Oil and Gas Conservation Commission* to set forth how BLM and ECOM will manage and lead compensatory mitigation and WMPs on federal lands to ensure agreement upon a single set of mitigation measures for each oil and natural gas development on federal lands.

2. FLPMA Obligates BLM to Defer to State Compensatory Mitigation Measures.

Moreover, FLPMA obligates BLM to defer to CPW-approved compensatory mitigation measures. FLPMA requires that "[l]and use plans . . . **shall** be consistent with State and local plans **to the maximum extent** [the Secretary] finds consistent with Federal law and the purposes of" FLPMA.⁵⁰ BLM's planning regulations echo FLPMA's requirement and elaborate on it, providing that BLM RMPs be consistent with "policies and programs" associated with State plans, to the extent consistent with Federal law.⁵¹

Here, BLM must defer to compensatory mitigation measures established by CPW to ensure consistency with the State's compensatory mitigation plans and, more generally, the State's wildlife rules. The narrow circumstance in which BLM may depart from State plans, policies, and programs—when they are inconsistent with Federal law, purposes, and policies—does not apply here. The Draft RMP offers no suggestion that State-approved compensatory mitigation measures will be inconsistent with BLM's policies and purposes, as set forth in the Draft RMP.⁵² Accordingly, BLM must defer to CPW compensatory mitigation measures.

⁵⁰ 43 U.S.C. § 1712(c)(9) (emphasis added); accord *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 719 (10th Cir. 2009).

⁵¹ 43 C.F.R. § 1610.3-2(a).

⁵² Draft RMP at 2-18 – 2-20.

3. BLM Cannot Condition Development of Existing Federal Oil and Natural Gas Leases on Compensatory Mitigation.

BLM also must defer to CPW's compensatory mitigation measures because BLM cannot require compensatory mitigation from lessees of Existing Federal Oil and Gas Leases. Because Existing Federal Oil and Gas Leases are valid existing rights under FLPMA, and contracts between the United States and the lessee, as explained in section VII below, BLM may not condition development of an Existing Federal Oil and Gas Leases on an operator providing off-site mitigation. A requirement that lessees provide compensatory mitigation alters the rights and obligations of Existing Federal Oil and Gas Leases and imposes new duties on lessees.

Existing Federal Oil and Gas Leases do not contain express or implied terms allowing BLM to require compensatory mitigation.⁵³ Although lease rights are subject to "applicable laws, the terms, conditions, and attached stipulations of [the] lease, the Secretary of the Interior's regulations and formal orders in effect as of lease issuance,"⁵⁴ neither BLM's planning regulations nor its leasing regulations contain any requirement to provide compensatory mitigation and therefore do not authorize BLM to require compensatory mitigation.⁵⁵ The regulations only address BLM's ability to require lessees to **minimize** impacts to resources.⁵⁶ Likewise, BLM standard oil and natural gas lease only requires that lessees "conduct operations in a manner that **minimizes** adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land users."⁵⁷ Minimization measures differ from compensatory mitigation. The Council on Environmental Quality ("CEQ") describes minimization of impacts as "limiting the degree or magnitude of the action at its implementation" and identifies "[c]ompensating for the impact by replacing or providing substitute resources or environments" as a separate form of mitigation.⁵⁸ Accordingly, the requirement to provide compensatory mitigation cannot be characterized as interpreting FLPMA or BLM regulations.

⁵³ BLM Form 3100-11, Offer to Lease and Lease for Oil and Gas (Mar. 2023).

⁵⁴ *Id.*

⁵⁵ 43 C.F.R. pts. 1600, 3100. For nearly two decades, BLM consistently took the position that it would not require compensatory mitigation of lessees. See BLM Instruction Memorandum No. 2008-204, Offsite Mitigation (Oct. 3, 2008); BLM Instruction Memorandum No. 2005-069, Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal, and Energy Rights-of-Way Authorizations (Feb. 20, 2005); Wyoming BLM Instruction Memorandum No. WY-96-21, Statement of Policy Regarding Compensation Mitigation (Dec. 14, 1995).

⁵⁶ 43 C.F.R. § 3101.1-2 (allowing BLM to require reasonable measures "to minimize adverse impacts to other resource values" (emphasis added)).

⁵⁷ BLM Form 3100-11 – Offer to Lease and Lease for Oil and Gas § 6 (Mar. 2023) (emphasis added).

⁵⁸ 40 C.F.R. § 1508.1(s)(2), (5).

In fact, the Solicitor of the Interior has implicitly recognized that BLM cannot require compensatory mitigation of lessees of Existing Federal Oil and Gas Leases. In Solicitor Opinion No. M-37039, the Solicitor detailed at length her opinion that generally FLPMA allows BLM to require compensatory mitigation.⁵⁹ But, in this 30-page opinion, she failed to identify any provision of federal oil and gas leases or BLM's regulations that would allow BLM to require compensatory mitigation of lessees of Existing Federal Oil and Gas Leases.⁶⁰ Rather, the Solicitor only identified BLM's existing oil and gas regulations that allow BLM to "require an oil and gas operator to move the proposed location of a drilling pad for reasons such as safety or effects on wildlife"—and nothing else.⁶¹ The Solicitor's omission confirms that BLM lacks the authority to require compensatory mitigation associated with development of Existing Federal oil and Gas Leases.

Because BLM cannot require compensatory mitigation from lessees of Existing Federal Oil and Gas Leases, BLM instead may only, at best, defer to CPW's compensatory mitigation measures for such leases. And, because BLM cannot require compensatory mitigation from lessees of Existing Federal Oil and Gas Leases, it would be illogical and inefficient for BLM to attempt to separately require compensatory mitigation from lessees of new leases issued under any final RMP. Rather, BLM should develop a uniform approach to compensatory mitigation for all federal leases. This approach logically and efficiently should defer to CPW's compensatory mitigation measures.

VII. BLM Must Recognize the Limits of Its Authority When Imposing Conditions of Approval.

As part of Alternative B in the Draft RMP, BLM intends to: "Apply conditions of approval ("COAs") to operational approvals (e.g., APDs) as determined necessary by the authorized officer to protect other resources and values within the terms, conditions, and stipulations of the lease contract. Within big game HPH on leased federal fluid mineral estate, apply these COAs when approving APDs, consistent with applicable law and lease terms."⁶² When applying COAs, BLM must ensure they are consistent with lease terms, warranted by site-specific conditions, and within BLM's jurisdiction. Although the Draft RMP mentions the first two of these three elements

⁵⁹ Solicitor Opinion No. M-37039, "The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation" (Dec. 21, 2016). The Trades do not necessarily agree with the conclusions in this opinion.

⁶⁰ *Id.* at 27 n.156.

⁶¹ *Id.* (citing *Yates Petroleum Corp.*, 176 IBLA 144 (2008)).

⁶² *Id.* at 2-35.

in Appendix E,⁶³ any Proposed RMP must, first, recognize that COAs must be within BLM's jurisdiction and, second, clearly state all three elements in the primary body of the RMP.

1. Any Conditions of Approval Applied at the APD Level for Lands Already Leased Must Be Consistent with the Original Lease Terms.

The Trades support BLM applying COAs to operational approvals on lands already leased--so long as these COAs are consistent with the existing lease terms. As recognized in the Draft RMP, BLM may not implement COAs that violate or otherwise contradict existing lease terms, for multiple reasons.⁶⁴

a) BLM May Not Constrain Valid Existing Rights.

BLM lacks the authority to impose new restrictions on valid existing leases through an RMP amendment. BLM's planning and regulatory authorities are found principally in the FLPMA. As BLM has acknowledged, under FLPMA the agency's ability to apply new requirements to existing leases is limited by the terms of those leases and the requirements of due process.⁶⁵

"Valid existing rights" language is used hundreds of times in federal public lands law. In fact, BLM's organic statute includes twelve references to valid existing rights and uses similar language throughout to prevent infringement on private interests. Sometimes the statutes use the precise term "valid existing rights" and sometimes the statute (or other action) uses different language that accomplishes the same end. For example, FLPMA provisions regarding management of wilderness study areas are made subject to mineral leasing in the manner and degree in which the same was being conducted prior to passage of FLPMA.⁶⁶ And when a land withdrawal occurs, vested existing rights are unaffected.⁶⁷ For these reasons, a Presidential Proclamation for the Upper Missouri River Breaks National Monument was made subject to valid existing rights,⁶⁸ as indeed are all other Presidential Proclamations.

When it enacted FLPMA, Congress made it clear that nothing within the statute, or in the land use plans developed under FLPMA, was intended to terminate, modify, or alter any valid or

⁶³ Draft RMP, at E-1, E-2 ("Any additional mitigation measures would need to be justifiable, still provide for lease development, and be incorporated in a site-specific document.").

⁶⁴ *Id.*

⁶⁵ 87 Fed. Reg. 43,050, 43,051, 43,052 (July 19, 2022).

⁶⁶ 43 U.S.C. § 1782(c).

⁶⁷ *Grand Canyon Trust v. Williams*, 98 F.Supp.3d 1044 (Ariz 2015), *aff'd in part and remanded in part*, *Havasupai v. Provencio*, 906 F.3d 1155 (9th Cir. 2018).

⁶⁸ 66 Fed. Reg. 7359 (Jan. 17, 2001).

existing property rights. See 43 U.S.C. § 1701. Thus, an RMP prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights.⁶⁹ It cannot defeat or materially restrain a federal lessee's valid and existing rights to develop its leases through unreasonable COAs or other means.⁷⁰

BLM's Land Use Planning Manual reinforces that RMPs must respect existing lease rights as valid existing rights. "All decisions made in land use plans, and subsequent implementation decisions, will be subject to valid existing rights. This includes, but is not limited to, valid existing rights associated with oil and gas leases . . ." ⁷¹ Any attempts to modify a federal lessee's existing rights would violate FLPMA and BLM's own policies.

b) BLM May Not Modify Existing Contractual Rights in Oil and Natural Gas Leases Through Conditions of Approval.

Additionally, COAs must be consistent with existing leases because BLM cannot modify existing contractual rights. Oil and natural gas leases are both real property rights⁷² and contracts that BLM cannot unilaterally modify.⁷³ An amendment of competitive lease terms by BLM would be a unilateral breach of the lease contract and would "violate the equal opportunity for all bidders to compete on a common basis for leases."⁷⁴

Moreover, the imposition of additional restrictions infringes on the lessee's right to conduct operations under the lease. A federal lease conveys the right to occupy the surface to explore for, produce, and develop oil and natural gas resources.⁷⁵ Courts have recognized that once BLM

⁶⁹ *Colo. Env't'l Coal., et al.*, 165 IBLA 221, 228 (2005).

⁷⁰ *Id.* (citing *Colo. Env't'l Coal., et al.*, 135 IBLA 356, 360 (1996), *aff'd*, *Colo. Env't'l Coal. v. Bureau of Land Mgmt.*, 932 F. Supp. 1247 (D. Colo. 1996)); *Mitchell Energy Corp.*, 68 IBLA 219, 224 (1982) (citing Solicitor's Opinion, M-36910, 88 I.D. 908, 913 (1981)).

⁷¹ BLM Manual 1601 – Land Use Planning, 1601.06.G (Rel. 1-1666 Nov. 22, 2000).

⁷² *Winkler v. Andrus*, 614 F.2d 707, 712 (10th Cir. 1980); *Union Oil v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975).

⁷³ *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that federal oil and gas leases are contracts and that the federal government's breach of lessee's right to explore for and develop oil and gas entitles lessee to refund); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006-7 (10th Cir. 2001) (noting that the Tenth Circuit has long held that federal oil and gas leases are contracts), *rev'd on other grounds*, *BP America Production Co. v. Burton*, 549 U.S. 84 (2006).

⁷⁴ *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

⁷⁵ *Pennaco Energy v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3162.1(a) (requiring a federal lessee to maximize production).

has issued an oil and natural gas lease conveying the right to access and develop the leasehold, BLM cannot later impose unreasonable mitigation measures that take away those rights.⁷⁶

Because an oil and natural gas lease is a contract that the United States may not unilaterally modify, BLM's authority to impose new restrictions on existing leases is particularly circumscribed when it has already imposed protective stipulations on an existing lease. Section 3101.1-2, 43 C.F.R., states that BLM may impose "reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted." BLM, however, has expressly recognized that this regulation does not allow it to expand the scope of stipulations attached to leases upon issuance. In the Federal Register preamble to the rule finalizing 43 C.F.R. § 3101.1-2, BLM unequivocally stated that this regulation "will not be used to increase the level of protection of resource values that are addressed in lease stipulations."⁷⁷ BLM further explained that "the intent of the proposed rulemaking" was not to impose measures that, for example, "might result in an unstipulated additional buffer around an area already stipulated to have a buffer."⁷⁸ Any attempt by BLM to impose measures that expand express stipulations attached to leases are inconsistent with the leases' contractual terms.

The Trades emphasize the importance of existing vested and contractual rights as constraints on whatever the RMP amendments may seek to accomplish on public lands. RMP amendments adopted as part of this process cannot materially diminish the lease rights previously acquired from BLM.

2. Conditions of Approval Must be Based on Site-Specific Resource Conditions.

Appendix E of the Draft RMP correctly recognizes that BLM may only apply COAs when justified by site-specific resource conditions.⁷⁹ While 43 C.F.R. § 3101.1-2 allows BLM to require "reasonable measures" to minimize adverse impacts to resource values, this provision only allows BLM to require measures based on site-specific conditions. The U.S. Court of Appeals for the District of Columbia has interpreted a similar regulation of the National Park Service that allowed the agency to include "additional reasonable conditions" on the permits it issues.⁸⁰ The court determined that, "[b]y its own terms, the language allows the Park Service only to attach specific limitations to individual permits as part of its permit-granting procedure, not to adopt

⁷⁶ *Conner v. Burford*, 836 F.2d 1441, 1449-50 (9th Cir. 1988).

⁷⁷ 53 Fed. Reg. 17,340, 17,341-42 (May 16, 1988).

⁷⁸ *Id* (emphasis added).

⁷⁹ Draft RMP at E-1, E-2.

⁸⁰ *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989).

rules applicable to the general public.”⁸¹ Accordingly, BLM cannot categorically attach uniform COAs to APDs.

BLM’s Handbook on Planning for Fluid Mineral Resources, H-1624-1, confirms this interpretation. It explains that protective measures imposed on APDs, rather than stipulations attached upon lease issuance, are “conditions of approval.”⁸² The Handbook defines COAs as “site specific requirements or measures imposed to protect resources or resource values.”⁸³ This definition contemplates that site-specific resource information must be used to justify COAs.

The Interior Board of Land Appeals (IBLA) has reached a similar conclusion in *Yates Petroleum Corporation*.⁸⁴ In *Yates*, the IBLA upheld BLM’s imposition of a seasonal limitation within three miles of active sage-grouse leks as a condition of approval on an existing oil and natural gas lease as within BLM’s authority under 43 C.F.R. § 3101.1-2. BLM had based the conditions of approval at issue on site-specific information pertaining to the location of proposed activity on the lease.⁸⁵ The IBLA upheld the COAs as within BLM’s authority under 43 C.F.R. § 3101.1-2 and its Planning for Fluid Minerals Handbook.⁸⁶

Given the strong authority that requires that COAs be based on site-specific resource conditions, the Trades request that BLM restate this requirement in the body of the RMP rather than only in an appendix.

3. BLM Correctly Recognizes the Limits of Its Jurisdiction When Identifying Conditions of Approval.

The Draft RMP correctly recognizes that BLM lacks the authority to require mitigation of surface impacts for federal wells located on private surface above private minerals – so-called “fee/fee/fed” situations.⁸⁷ For fee/fee/fed wells, “BLM’s regulatory jurisdiction is limited to federal lands (including minerals). Because BLM’s regulatory jurisdiction is so limited, BLM activities that affect non-Federal lands must be carefully examined to ensure that BLM does not

⁸¹ *Id.* at 347.

⁸² BLM Handbook H-1624- 1 – Planning for Fluid Mineral Resources § IV(C)(2), pg. IV-2 (Rel. 1-1580 5/7/90).

⁸³ *Id.* at § IV(C)(2), pg. IV-2, and Glossary, pg. V-10.

⁸⁴ 176 IBLA 144, 155 (2008)

⁸⁵ *Yates*, 176 IBLA at 157 (“The specific mitigation adopted by the [BLM] and update in [State Director Review] Decisions was recommended by BLM’s technical experts following submission of detailed [Plans of Development], on the basis of environmental analysis unrefuted with any specificity [by the operator].”).

⁸⁶ *Yates*, 176 IBLA at 157 n.14; *see also William P. Maycock*, 177 IBLA 1, 16-17 (2009).

⁸⁷ Draft RMP at 3-8.

exceed its authority.”⁸⁸ In some parts of the state, including the DJ basin, much of the surface is privately owned while federal (subsurface) mineral resources are scattered throughout the area.

With respect to fee/fee/fed wells, “BLM’s jurisdiction extends to surface facilities on entirely non-Federal lands solely to the extent of assuring production accountability for royalties from Federal and Indian oil and gas”⁸⁹ “Neither [FLPMA] nor the [Mineral Leasing Act] provide the BLM with authority to require mitigation of surface disturbances on non-Federal lands, and NEPA’s procedural requirements do not expand or extend the BLM’s authority beyond that provided in those statutes.”⁹⁰ Therefore, for fee/fee/fed wells, the management prescriptions BLM identifies in the RMP amendments to protect big game cannot be applied as COAs on an APD. Importantly, however, the ECMC’s 1200 Series would apply so these lands do not escape protections for things like large mammal migration routes or wintering areas. The Trades ask that constraints on BLM’s authority continue to be acknowledged in the Proposed RMP.

VIII. BLM Cannot Modify the Requirements for Surface Use Plans of Operations.

The Draft RMP improperly states that BLM may require operators to include in Surface Use Plans of Operations (“SUPOs”) information detailing offsite mitigation. Specifically, the Draft RMP states:

For proposed operations in HPH, the Surface Use Plan of Operations (SUPO) (see 43 CFR 3162.3-1(f)) **shall** address, at a minimum, the road and drill pad location, details of pad construction, methods for containment and disposal of waste material, plans for surface reclamation, and **other pertinent data. Data pertinent for evaluating potential impacts to big game, may include**, but are not necessarily limited to, the anticipated noise, amount of disturbance, mechanical movement (e.g., pump jacks), permanent and temporary facilities, ancillary pads, pipelines, powerlines, traffic, phases of development over time, **offsite mitigation**, and expected periods of use associated with the proposed project.⁹¹

This statement conflicts with BLM’s regulation governing SUPOs and Onshore Order No. 1, which do not require submission of – and in fact make no mention of – offsite mitigation, which may or may not occur on federal lands. By regulation, BLM has defined a SUPO as a “plan for surface

⁸⁸ BLM Instruction Memorandum (IM) 2018-014.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Draft RMP, at 2-36 (emphasis added); *see also id.* at F-1.

use, disturbance, and reclamation.”⁹² This definition does not address offsite mitigation. Similarly, BLM’s regulation at 43 C.F.R. § 3162.3-1(f) provides only that SUPOs contain “information specified in applicable orders or notices, including the road and drill pad location, details of pad construction, methods for containment and disposal of waste material, plans for reclamation of the surface, and other pertinent data as the authorized officer may require.” It does not address offsite mitigation. And, although Onshore Order No. 1 provides additional detail on the contents of SUPOs, it also does not mention or address offsite mitigation.⁹³

BLM cannot modify the requirements in its regulations or Onshore Order No. 1 without undertaking a formal rulemaking, consistent with the APA.⁹⁴ Because BLM has not undertaken such a rulemaking, BLM must revise the statement on page 2-36 of the Draft RMP to eliminate the suggestion that BLM may require operators to submit information about offsite mitigation in SUPOs.

IX. BLM Must Provide the Regulated Community the Opportunity to Comment on Air Quality and Climate Management Measures.

The Draft RMP does not identify air quality and climate management measures for Alternatives B – D; instead, the Draft RMP provides that these management measures will “be completed when the impact analyses for climate is finalized.”⁹⁵ The Trades request the opportunity to review and comment on these management measures before BLM releases a Proposed RMP.

X. BLM Must Not Use the SDARTT to Restrict Oil and Natural Gas Development Related to Big Game Habitat.

The Trades were very recently made aware that BLM is considering using the Surface Disturbance Analysis and Reclamation Tracking Tool ("SDARTT") to conduct and track disturbance percent mapping even if the final BLM RMP does not include a surface disturbance threshold. SDARTT is the national repository for surface disturbance and reclamation data and analysis tool pertaining for the BLM authorizations.

As previously discussed in this comment letter, the Trades strongly argue that the technical information and scientific research absolutely demonstrates that no surface disturbance threshold, including a 3% threshold, is needed to protect big game habitat in Colorado. Because of that, BLM must not use SDARTT in any regulatory manner, including administratively, to

⁹² 43 C.F.R. § 3160.0-5.

⁹³ 72 Fed. Reg. 10,308, 10,331–33 (Mar. 7, 2007).

⁹⁴ 5 U.S.C. § 553.

⁹⁵ Draft RMP at 2-4.

restrict oil and natural gas development in big game habitat based on mapped surface disturbance levels calculated within the tool.

Furthermore, the Trades question why BLM is considering use of a tool without any mention of it in the Draft RMP. By taking this action, BLM is not allowing stakeholders the ability to assess the tool and provide more sufficient and technical comments on its use and functionalities during the formal comment period for the Draft RMP. This violates the operators' due process rights and circumvents the entire purpose of having public comment during the establishment of the RMP.

XI. Conclusion

The Trades appreciate the opportunity to provide comment on the Draft Resource Management Plan and Environmental Impact Statement for big game habitat Conservation for Oil and natural Gas Management in Colorado, and we look forward to continuing to cooperatively engage on the recommendations provided herein.

Sincerely,



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President
WESTERN ENERGY ALLIANCE



Chelsie Miera
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WEST SLOPE COLORADO OIL AND GAS ASSOCIATION



William Groffy
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