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Rockies Business Unit

December 2, 2013

BLM Greater Sage-grouse EIS
2815 H Road
Grand Junction, CO 81506

Re: ConocoPhillips Company Comments on the Northwest Colorado Greater Sage-grouse Land Use Plan Amendment and Environmental Impact Statement

Ladies and Gentlemen:

ConocoPhillips Company (“CoP”) hereby submits the following comments on the Bureau of Land Management and United States Forest Service’s (collectively “BLM”) Greater Sage-grouse Land Use Plan Amendment and Environmental Impact Statement (“Sage-grouse DLUPA”) as announced in the Federal Register on August 16, 2013. 78 Fed. Reg. 50088 (Aug. 16, 2013); 78 Fed. Reg. 50054 (Aug. 16, 2013). CoP submits these comments to the BLM because of the significant impact the proposed revision to the Land Use Plans (“LUP”) for Northwest Colorado (“NWCO”) will have upon CoP’s ongoing and future operations in the NWCO Planning Area (“Planning Area”).

CoP has significant interests in the Planning Area including over 97,000 gross and 500,000 net acres of oil and gas leases and fee mineral interests. The adoption of the Sage-grouse DLUPA will significantly impact both CoP’s existing operations and its future operations in the Planning Area including potential oil and gas and oil shale development.

GENERAL COMMENTS

CoP does not support any of the Alternatives as currently drafted as CoP supports Alternative D, as modified, in accordance with these comments. CoP supports an alternative which recognizes that additional development can take place within the Planning Area without adversely impacting Sage-grouse. Upon a detailed review of each alternative, CoP does not believe any alternative adequately balances development with the protection of other resources. It is CoP’s assessment that the Sage-grouse DLUPA is written in a manner that does not fully support further development and does not provide alternatives with adequate provisions for development of these vitally important energy sources. We are aware of the difficulties inherent in managing the public lands for multiple uses, but are concerned the existing alternatives are not

adequate. CoP is particularly concerned that BLM's Preferred Alternative will not honor existing rights in violation of federal law.

As the BLM is aware, portions of the Planning Area have significant potential for oil and gas development as well as oil shale development. Sage-grouse DLUPA, pgs. 296 - 297. The BLM should not unreasonably restrict access to this important source of domestic energy. CoP opposes Alternative B and Alternative C because they place far too many onerous and unreasonable restrictions on future oil and gas development. In particular, Alternatives B and C place overwhelming operational restrictions and timing stipulations on lands within the Planning Area. Alternative B closes 1,347,400 acres to oil and gas leasing. Alternative C closes 2,437,999 acres to oil and gas leasing. Sage-grouse DLUPA, pg. 188. Additionally, as described in more detail below, the BLM proposes far too many onerous restrictions on future oil and gas development. The BLM also intends to subject up to one million additional acres to no surface occupancy ("NSO") restrictions under Alternative D. Sage-grouse DLUPA, pg. 43. The BLM must assure it does not unreasonably restrict future oil and gas development.

Inappropriate Reliance on the National Technical Team Report

Overall, the BLM places undue importance on the December 21, 2011, Report on National Greater Sage-grouse Conservation Measures developed by the BLM's Sage-grouse national technical team ("NTT"). As demonstrated in the attached report by Dr. Rob Ramey, the BLM science and conservation measures contained therein are not based on sound or reliable science. In fact, it appears the BLM developed onerous mitigation measures and then attempted to justify the same by any means necessary. In other words, the BLM selected the conservation measures it wanted to impose first and then attempted to find science to justify those restrictions rather than identifying appropriate mitigation measures based on scientific study. CoP requests the BLM review, in its entirety, its reliance on the NTT Report to ensure that only the most appropriate science is utilized. CoP incorporates herein both the report of Dr. Ramey attached hereto as Exhibit A and the comments by the American Petroleum Institute attached hereto as Exhibit B.

The BLM Must Manage Public Lands in the Sage-grouse DLUPA for Multiple Use – Including Oil and Gas Development

The development of oil and gas resources from public lands is a critical part of the BLM's responsibilities. *See, eg.*, 43 U.S.C. § 1702(l) (defining mineral exploration and development as a principal or major use of public lands). Under FLPMA, the BLM is required to manage the public lands on the basis of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7). " 'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals,

watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.’ ” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 58 (quoting 43 U.S.C. § 1702(c)). “Of course not all uses are compatible.” *Id.* CoP recognizes the difficult task the BLM faces to manage public lands in the Planning Area for multiple use, but encourages the BLM to remember that oil and gas development is a crucial part of the BLM’s multiple use mandate. The BLM must ensure that oil and gas development is not unreasonably limited in the revision to the Sage-grouse DLUPA. Under FLPMA, mineral exploration and development is specifically defined as a principal or major use of the public lands. 43 U.S.C. § 1702(1). FLPMA requires the BLM to foster and develop mineral activities, not stifle and prohibit such development.

Existing Lease Rights

The BLM does not adequately or sufficiently protect valid existing rights in the Sage-grouse DLUPA. The BLM’s Land Use Planning Handbook specifically recognizes that existing rights must be honored. BLM Land Use Planning Handbook H-1601-1, III.A.3, pg. 19 (Rel. 1-1693 3/11/05). The BLM must comply with its planning handbook and recognize existing rights. Any attempts to modify existing rights could violate the terms of CoP’s contracts with the BLM and the BLM’s own policies.

Further, the BLM cannot deprive CoP of its valid and existing lease rights either directly or indirectly. When it enacted FLPMA, Congress made it clear that nothing therein, or in the DLUPAs developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701.

The BLM should also recognize that its authority conferred by FLPMA is expressly made subject to valid existing rights. 43 U.S.C. § 1701. Thus, a RMP prepared pursuant to FLPMA, after lease execution and after drilling and production has commenced, is likewise subject to existing rights. *See Colorado Environmental Coal, et al.*, 165 IBLA 221, 228 (2005). The Sage-grouse DLUPA, when revised, cannot defeat or materially restrain CoP’s valid and existing rights to develop its leases through conditions of approval (“COAs”) or other means. *See Colorado Environmental Coal, et al.*, 165 IBLA 221, 228 (2005) (citing *Colorado Environmental Coal.*, 135 IBLA 356, 360 (1996) *aff’d*, *Colorado Environmental Coal. v. Bureau of Land Management*, 932 F.Supp. 1247 (D.Colo. 1996)). Similarly, the BLM cannot impose COAs or other restrictions to interfere with CoP’s existing lease rights.

The BLM often cites a relatively recent decision from the IBLA for the proposition that the agency can impose COAs on existing leases or otherwise modify existing lease rights. *Yates Petroleum Corp.*, 176 IBLA 144 (2008). The *Yates* decision does not stand for the proposition that BLM can impose COAs whenever it deems necessary or in broad programmatic documents such as the Sage-grouse DLUPA. Rather, in *Yates*, the IBLA merely affirmed the imposition of an additional COA based on site-specific information including recent and directly applicable

scientific research. *Yates*, 176 IBLA at 157; *William P. Maycock*, 177 IBLA 1, 16-17 (2009). The *Yates* decision does not authorize the BLM to ignore relevant lease terms or the BLM regulations at 43 C.F.R. § 3101.1-2. Further, BLM must recall that it cannot impose new, unreasonable mitigation requirements on existing leases. Courts have recognized that once the BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, the BLM cannot later impose unreasonable mitigation measures that take away those rights. *See Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

The BLM recently recognized the nature of existing oil and gas lease rights in the Pinedale, Wyoming RMP issued by the BLM in November 2008. “Existing oil and gas or other mineral lease rights will be honored. When an oil and gas lease is issued, it constitutes a valid existing right; BLM cannot unilaterally change the terms and conditions of the lease . . . Surface use and timing restrictions from this RMP cannot be applied to existing leases.” Pinedale RMP, pg. 2-19. Similar language exists in the December 2008 Rawlins, Wyoming RMP. Rawlins RMP, pg. 20. CoP encourages the BLM to include similar language in the amended DLUPA.

CoP additionally offers the following comments regarding the Sage-grouse DLUPA. For the agency’s convenience, these comments are organized by chapter and section of the Sage-grouse DLUPA.

CHAPTER 1 – INTRODUCTION

Section 1.1.1 – Overview

The BLM needs to explain the scientific basis and methodology for its identification of preliminary and priority habitat (“PPH”), preliminary general habitat (“PGH”) and linkage/connectivity habitat (collectively “ADH”). The information presented in the Sage-grouse DLUPA is not sufficient for CoP to understand or comment how the BLM identified Sage-grouse habitat. Given the profound impact the proposed DLUPA will have upon CoP’s operations in PPH in particular, it is imperative that CoP and members of the public understand how the BLM adopted and identified these areas. Understanding the BLM’s methodologies is particularly important because the quality of the maps contained in the Sage-grouse DLUPA are such a low quality and scale it is virtually impossible for CoP to understand exactly which of its operations and existing leaseholds will be impacted by the Sage-grouse DLUPA.

Section 1.6 – Planning Criteria

CoP appreciates the BLM’s acknowledgement it will recognize valid existing rights in its planning criteria. Sage-grouse DLUPA, pg. 24. Throughout the remainder of the Sage-grouse

DLUPA, however, the BLM does not adequately ensure that valid rights will be protected. While noting that it cannot modify existing rights, the BLM repeatedly indicates that it intends to infringe or limit valid existing rights through the use of COAs or other restrictions on development. The BLM must address this concern in the Final EIS for the Sage-grouse DLUPA.

Given the limitations on the BLM's authority on split-estate lands, the BLM must carefully consider the extent to which it intends to limit oil and gas development when the surface is privately owned, but the minerals are owned by the United States. The BLM does not have the authority to control or limit a private surface owner's use of their lands. It would be inappropriate for the BLM to limit oil and gas development when, from a practical perspective, the BLM will be virtually unable to control or limit activities on private surface.

CHAPTER 2 – ALTERNATIVES

Overall, the alternatives in the Sage-grouse DLUPA are restrictive, unnecessarily limiting to oil and gas development on the Western Slope of Colorado, and should be eliminated from further consideration. Oil and gas development is one of the primary employment and tax revenue sources on the Western Slope of Colorado. Sage-grouse DLUPA, pgs. 422 - 424. In these economic times, the BLM should take every action to promote and foster the employment and revenue opportunities in Colorado, not limit economic development and job creation. The BLM's adoption of Alternatives B, C, or D, to the extent Alternative D is not modified, would have negative economic impacts upon the region, State of Colorado, and even the nation. Oil and gas development, even on existing leases, would be significantly hampered by the BLM's management actions under Alternative B, Alternative C, or Alternative D. Although CoP understands the importance of having a wide range of alternatives to satisfy the requirements of NEPA, the BLM must not adopt Alternative B, Alternative C, or Alternative D.

In particular, Alternative B and Alternative C are not reasonable alternatives because they virtually eliminate oil and gas development from the public lands contrary to the BLM's multiple use mandate. Under FLPMA, the BLM is required to manage the public lands on the basis of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7). " 'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.' " *Norton v. Sothern Utah Wilderness Alliance*, 542 U.S. at 58 (quoting 43 U.S.C. § 1702(c)). Further, under FLPMA, mineral exploration and development is specifically defined as a principal or major use of the public lands. 43 U.S.C. § 1702(l). Under FLPMA, BLM is required to foster and develop mineral development, not stifle and prohibit such development. Alternative B and Alternative C do not comply with the BLM's multiple use mandate and must be eliminated.

The overall minerals management under Alternative B and Alternative C is inappropriate because they unreasonably limit oil and gas development. As noted above, the BLM is significantly limiting potential future oil and gas development in the Planning Area by making 1,347,400 acres under Alternative B and 2,473,000 acres under Alternative C unavailable for oil and gas leasing.

As the BLM is aware, mineral exploration and production is identified as a principal or major use of the federal lands under FLPMA. 43 U.S.C. § 1702(l). Federal agencies are required to expedite projects which increase domestic energy production under existing executive orders. Executive Orders 13211, 13212, and 13302. The adoption of Alternative B or Alternative C, and, to a lesser extent, Alternative D would significantly curtail domestic production compared to both the baseline scenario and any of the other alternatives analyzed by the BLM. The loss of such an enormous energy supply is contrary to the best interests of the nation, and inconsistent with the Energy Policy Act of 2005.

The BLM recently recognized the nature of existing oil and gas lease rights in the Pinedale RMP issued by the BLM in November of 2008. “Existing oil and gas or other mineral lease rights will be honored. When an oil and gas lease is issued, it constitutes a valid existing right; BLM cannot unilaterally change the terms and conditions of the lease Surface use and timing restrictions from this RMP cannot be applied to existing leases.” Pinedale RMP, pg. 2-19. Similar language exists in the December 2008 Rawlins RMP. Rawlins RMP, pg. 20. CoP encourages the BLM to include similar language in the Sage-grouse DLUPA.

Table 2-4 – Description of Alternatives B, C, and D

Travel and Rights-of-Way

CoP is opposed to the BLM’s proposed management action limiting motorized travel to existing roads and trails in PPH and making PPH and ADH right-of-way exclusion areas. Sage-grouse DLUPA, pgs. 143 - 147. CoP and other oil and gas operators routinely are required to travel off existing roads and trails when evaluating and selecting potential new locations for oil and gas development. In the past, this type of use has been considered casual use and has not required BLM approval or been subject to timing limitations. CoP always attempts to minimize potential impacts to the environment during these activities, but limiting an oil and gas operator’s ability to utilize off-highway vehicles during site selection and staking activities will have significant impacts on oil and gas development. CoP therefore requests the BLM develop a specific exception to this management action for the limited purpose of oil and gas exploration, site location, and staking and permitting activities. Doing so will allow CoP and other oil and gas operators to continue responsible development of oil and gas resources within the Planning Area.

CoP is opposed to the BLM's proposed management action under Alternatives B, C, and D that would impose seasonal road closures on certain roads and trails. Sage-grouse DLUPA, pg. 143. As the BLM is aware, current seasonal stipulations in most RMPs prohibit construction and drilling activities in specific crucial winter ranges, but do not prohibit routine production operations necessary to safely maintain facilities or other routine operations. It would be inappropriate for the BLM to preclude all production operations in crucial winter range areas. Such a decision would essentially preclude year-round production operations and would lead to a significant decrease in domestic energy production. Moreover, many species such as pronghorn and mule deer have been found to habituate to increased traffic so long as the movement remains predictable. See Reeve, A.F. 1984. *Environmental Influences on Male Pronghorn Home Range and Pronghorn Behavior*, PhD. Dissertation; Irby, L.R. et al., 1984; "Management of Mule Deer in Relation to Oil and Gas Development in Montana's Overthrust Belt" Proceedings III: Issues and Technology in the Management of Impacted Wildlife. The BLM has not justified seasonal limitations on production operations.

CoP is also concerned that the BLM's proposed management action to apply seasonal road closures would propose significant safety concerns to existing facilities. To the extent the BLM applies the limitation on even routine maintenance in this action, it is very possible minor issues necessitating repairs will not be timely corrected, which could contribute to significant or even catastrophic spills and other hazards. CoP encourages the BLM not to adopt this radical alternative.

Rights-of-Way

CoP is opposed to the BLM's proposal to significantly limit rights-of-way ("ROWS") even to existing oil and gas leases under Alternatives B and C, and, to a lesser extent, Alternative D. Sage-grouse DLUPA, pgs. 146 – 147. CoP appreciates that the BLM is trying not to deprive all access to existing leases, but the proposal to significantly limit road construction in ADH under Alternative C is completely unacceptable. Sage-grouse DLUPA, pgs. 146, 147. Further, the BLM's proposal under Alternative B and Alternative C to limit surface disturbance to three percent of an area is inappropriate for several reasons. First, the BLM has not defined the "area" that is subject to the three percent limitation. Is the BLM going to be evaluating individual sections of land or larger landscape areas? Sage-grouse DLUPA, pg. 147. Second, the BLM has not provided adequate scientific justification for the use of the three percent surface disturbance cap.

Unleased Fluid Minerals

The BLM needs to carefully define and explain the extent to which the proposed stipulations and management objectives contained in Alternative B, Alternative C, and Alternative D would be applied to existing federal leases. The language in Table 2-4 suggests

that the new requirements would only be applied to unleased federal minerals. The majority of language in the remainder of the document suggests, however, that the limitations will be applied on both existing and new federal oil and gas leases within the Planning Area. In particular, the language in Appendix I suggests that the RDFs will be imposed on both existing and new federal leases. As set forth above, in significant detail, given the limitations of its authority under FLPMA, the BLM cannot impose new stipulations or COAs inconsistent with CoP's existing lease rights. *National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). *Colorado Environmental Coal, et al.*, 165 IBLA 221, 228 (2005).

CoP is opposed to the BLM's proposal under Alternative B and Alternative C to close the vast majority of ADH to all fluid mineral leasing and development. Sage-grouse DLUPA, pg. 161. The BLM has not justified such significant closures of the federal estate nor has it complied with the withdrawal requirements of FLPMA. CoP also believes the BLM has failed to adequately analyze the potential impact such a closure would have on existing operations. This closure will have significant impacts on future oil and gas operations, particularly where operators are not able to secure a sufficient acreage block to develop the area. Any responsible oil and gas producer who decides to take the risk of exploring by drilling a wildcat area must do so only after assembling a large enough block of leasable acreage so that, if the drilling is successful, it can obtain an adequate return on the high-risk dollars invested. The BLM must recognize, study, and report the economic impact of its decision to close such a significant portion of the Planning Area to oil and gas leasing or making a portion of the Planning Area available only with major constraints.

CoP is also opposed to the BLM's proposal to the BLM's proposal to apply NSO restrictions in PPH for future mineral leasing. Sage-grouse DLUPA, pg. 161. The BLM has not justified this significant restriction on future oil and gas development. Similarly, the BLM has not justified or provided sufficient science to demonstrate that, even within ADH, surface occupancy should be prohibited within four miles of active leks during lekking, nesting and early brood rearing seasons. The BLM must provide sufficient science to demonstrate such restrictions are necessary based on research in Colorado, not parts of Wyoming with very different habitat characteristics. [If possible, CoP needs to provide additional attacks on the science justifying the four mile lek requirements.]

CoP appreciates the BLM is trying to authorize some level of development on leases if they are fully encompassed by PPH, but such minimum protections are wholly insufficient and do not appropriately honor CoP's existing lease rights. Sage-grouse DLUPA, pg. 163 – 165. Finally, should the BLM deny or unreasonably delay CoP's ability to develop its leases, the BLM's proposal under Alternative B and Alternative C in particular, but also Alternative D, may constitute a taking in violation of the Fifth Amendment to the U.S. Constitution. The Federal

Court of Claims has recognized that a temporary taking occurs when the BLM prohibits oil and gas development on a lease for a substantial period of time. *Bass Enterprise Prod. Co. v. United States*, 45 Fed.Cl. 120, 123 (Fed.Cl. 1999). A lessee who can demonstrate a taking of an oil and gas lease is entitled to damages in the fair market rental value of the leasehold. *See Bass Enterprise Prod. Co. v. United States*, 48 Fed.Cl. 621, 625 (Fed.Cl. 2001). If the BLM denies all development opportunities on CoP's leases, CoP will be able to demonstrate a taking. Additionally, any alternative that would substantially modify CoP's lease rights could subject the BLM to rescission and restitution claims. *Amber Resources Co. v. United States*, 538 F.3d 1358, 1377 – 78 (Fed. Cir. 2009). The BLM must not adopt an alternative that unconstitutionally takes CoP's property and contract rights.

CoP is opposed to the management action under Alternative C that would impose seasonal restrictions on all vehicular traffic and human presence within ADH during the lekking, nesting, and early brood rearing seasons. Sage-grouse DLUPA, pg. 166. As the BLM is aware, current seasonal stipulations in most RMPs prohibit construction and drilling activities in specific crucial winter ranges, but do not prohibit routine production operations necessary to safely maintain facilities or other routine operations. It would be inappropriate for the BLM to preclude all production operations in crucial winter range areas. Such a decision would essentially preclude year-round production operations and would lead to a significant decrease in domestic energy production. Moreover, many species such as pronghorn and mule deer have been found to habituate to increased traffic so long as the movement remains predictable. *See* Reeve, A.F. 1984. *Environmental Influences on Male Pronghorn Home Range and Pronghorn Behavior*, PhD. Dissertation; Irby, L.R. *et al.*, 1984; “*Management of Mule Deer in Relation to Oil and Gas Development in Montana's Overthrust Belt*” Proceedings III: Issues and Technology in the Management of Impacted Wildlife. The BLM has not justified seasonal limitations on production operations.

CoP is not supportive of BLM's proposal to limit categorical exclusions under Alternatives B, C, and D. Sage-grouse DLUPA, pg. 166. The BLM should specifically state that the agency is free to utilize categorical exclusions established by section 390 of the Energy Policy Act of 2005 without applying the extraordinary circumstances as provided for in the CEQ regulations (40 C.F.R. § 1508.4) and the BLM's NEPA regulations (43 C.F.R. § 46.205). As a result of litigation in Wyoming, the BLM specifically abrogated Instruction Memorandum 2010-118 (May 17, 2010) that purported to require BLM offices to apply the extraordinary circumstances test to section 390 Categorical Exclusions. Instruction Memorandum 2002-146 (June 20, 2012). As the BLM is aware, section 390 Categorical Exclusions do not require agencies to utilize the extraordinary circumstances test. 30 U.S.C. § 15942(b) (Energy Policy Act of 2005, Pub. L. No. 109-58, § 390(b) 119 Stat. 594, 748 (2005)).

CoP is concerned about BLM's proposal to require Master Development Plans (“MDP”) on all but wildcat wells (Alternatives B and C) or exploratory wells (Alternative D). Sage-

grouse DLUPA, pg. 166. First, the BLM has not defined a wildcat well or exploratory well. How will operators know when it will apply? Second, the BLM should allow infill development within existing fields without a MDP. Often only one or two wells are needed within existing fields to continue production levels, a full MDP would not be an appropriate use of the BLM or operator's resources.

CoP is strenuously opposed to the BLM's management objective that would require unitization would be necessary to protect other resources. Sage-grouse DLUPA, pg. 167. First, as set forth above, the BLM cannot impose new requirements on CoP's existing leases. Requiring operators to join federal units is a radical mitigation measure because it requires those lessees not designated as the unit operator of the federal exploratory unit to surrender control over all development operations to another party. 43 C.F.R. § 3186.1; *Law of Federal Oil and Gas Leases*, Chapter 18 Unitization, § 18.01[2][b][ii], Rocky Mountain Mineral Law Foundation (Rel. 45-8/2010 Pub.515). The BLM should not impose such a significant mitigation measure on existing leases.

CoP is significantly opposed to the proposal to require full reclamation bond for all oil and gas operations. Sage-grouse DLUPA, pg. 168. First, such a requirement is not consistent with the BLM regulations regarding the amount of bonds. Under the BLM's existing regulations, the agency is only to increase bond amounts when an operator has a history of previous violations, a notice from the Office of Natural Resources Revenue that there are uncollected royalties due, or where there is a significant reason to believe the operator will default. 43 C.F.R. § 3104.5(b). Additionally, the proposed management objective is not consistent with the BLM's recently released Instruction Memorandum regarding bonds. Instruction Memorandum 2013-151 (Jul. 3, 2013). The new Instruction Memorandum not only states that it is inappropriate to automatically raise bonds without conducting specific reviews, it also acknowledges that if an operator conducts all operations in a prudent and timely manner and has a history of compliance, there is no reason to increase their bonds. Instruction Memorandum 2013-151, pg. 2. The BLM should not attempt to override national policies and regulations through a regional RMP. Given the release of Instruction Memorandum 2013-151 in July of 2013, the BLM absolutely must eliminate this proposal from the Sage-grouse DLUPA.

CoP is opposed to the BLM's proposed management under Alternatives B, C, and D that requires the "restoration" of Sage-grouse habitat rather than reclamation as is normally required. Sage-grouse DLUPA, pg. 168. *See e.g.*, Onshore Oil and Gas Order No. 1, III, D.4.j, 72 Fed. Reg. 10308 (Mar. 7, 2007); Wyoming Instruction Memorandum 2012-032 (Mar. 27, 2012). First, the BLM has not adequately identified or defined the difference between restoration and reclamation. Second, existing BLM policies for oil and gas development, including Onshore Order No. 1, do not require restoration of areas disturbed by oil and gas operations. *See e.g.*, Onshore Oil and Gas Order No. 1, III, D.4.j, 72 Fed. Reg. 10308 (Mar. 7, 2007). Rather, BLM regulations and Onshore Orders specifically require the development of adequate reclamation

plans. *See e.g.*, Onshore Oil and Gas Order No. 1, III, D.4.j, 72 Fed. Reg. 10308 (Mar. 7, 2007). The BLM must ensure that its proposed management actions under Alternatives B, C, and D are entirely consistent with existing BLM regulations and policies. *See e.g.*, Onshore Oil and Gas Order No. 1, III, D.4.j, 72 Fed. Reg. 10308 (Mar. 7, 2007). Requiring restoration rather than reclamation suggests a very different standard.

CoP is also opposed to the proposed management action under Alternative C that would not authorize waivers or suspensions of federal oil and gas leases. Sage-grouse DLUPA, pg. 168. The BLM does not have the authority to refuse to grant lease waivers or suspensions under Alternative C particularly when the BLM is the cause of delays associated with mineral development. When the BLM is specifically prohibiting any and all development on a lease while waiting, or denies the use of a lease, it would be inappropriate and possibly illegal for the BLM to refuse to grant a suspension. *Atchee CBM LLC, et al.*, 183 IBLA 389, 398 (2013); *Savoy Energy, L.P.*, 178 IBLA 313, 325, (2010). The BLM must provide specific legal authority demonstrating it has the right to deny an oil and gas lease suspension when the BLM is the cause of the delay associated with mineral development.

CHAPTER 3 AFFECTED ENVIRONMENT

As described in more detail in the American Petroleum Institute's comments, there are significant fundamental flaws within the NTT Report, and it should not be utilized by the BLM for the DULPA. For example, the NTT Report failed to acknowledge that modern oil and gas development has far less of an impact on Sage-grouse habitat as demonstrated in the Ramey, Brown and Blackgoat 2010 paper. The BLM should specifically remove the Ramey, Brown and Blackgoat paper and include its conclusions in their findings. BLM should also acknowledge the many technical errors contained in the NTT Report and the conflicts of interest that are inherent within that report. *See* Ramey and API comments.

The BLM's information regarding Sage-grouse trends is significantly out of date. Although the information demonstrates there may have been historic declines in Sage-grouse populations on a nationwide basis between 1964 and 2004, the BLM and other agencies have expended tremendous effort over the past decade to develop mitigation measures to minimize potential impacts to Sage-grouse. Sage-grouse DLUPA, pg. 252. The BLM must provide far more detailed information regarding Sage-grouse populations in order for members of the public to understand the current status of the species. Further, it is important to note that Sage-grouse populations begin increasing, according to the Connolly data from 2004, within Colorado between 1994 and 2004. This coincides with the increased awareness regarding the status of the Sage-grouse and efforts by BLM, Forest Service, and oil and gas operators to increase mitigation measures for the species. Sage-grouse DLUPA, pg. 253. It is also important to note that Sage-grouse populations within Colorado have actually been improving in the past 17 years. Sage-grouse DLUPA, pgs. 253 – 254. The information in the draft EIS also demonstrates that the

Sage-grouse population has been relatively stable within Colorado in the Northern Eagle/Southern Route Area. Sage-grouse DLUPA, pg. 254. The BLM's information also indicates that there have been increased lek counts in both the Grand Junction and White River Field Offices. Sage-grouse, DLUPA, pg. 255. Similarly, the population in the Middle Park and Kremmling Field Offices demonstrate relatively stable populations. Sage-grouse DLUPA, pgs. 258 – 259.

CoP agrees with the BLM's statement that management efforts by BLM, Forest Service, United States Fish and Wildlife Service, and Colorado Parks and Wildlife, as well as oil and gas operators, have reversed the downward trend for most Sage-grouse populations. Given the recent increases in Sage-grouse populations, CoP questions whether the RDF and other onerous mitigation measures contained within the Sage-grouse DLUPA are really necessary in order to protect the species.

Section 3.24 – Social and Economic Conditions

The BLM acknowledges that oil and gas development is a significant driver of the economies within NWCO. Between the period of time from 2001 to 2012 there was actually a 204% increase in employment within the mining and oil and gas development sector. Sage-grouse DLUPA, pg. 422. There has also been an almost 200% increase in labor income over the same time period. Sage-grouse DLUPA, pg. 423. Mining and oil and gas development is clearly a key contributor to the economic well-being of the Planning Area and the BLM must ensure that it does not take any actions that will adversely impact oil and gas development and, thus, the economy within the Planning Area as a whole. BLM's analyses also demonstrates that mining and oil and gas development jobs generally provide much higher salaries and other employment opportunities in the area which, in turn, drives the entire economy. Sage-grouse DLUPA, pg. 435.

CHAPTER 4 ENVIRONMENTAL CONSEQUENCES

Section 4.1 – Introduction

CoP appreciates the BLM's acknowledgment that the BLM and Forest Service are required to manage federal lands for multiple use including oil and gas development. Sage-grouse DLUPA, pg. 453.

CoP also objects to the BLM's attempt to impose site-specific mitigation measures in RMPs. The Supreme Court of the United States, in a unanimous decision, recognized that under FLPMA, and the BLM's own regulations, LUPs are not ordinarily the medium for making affirmative decisions. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 69. The BLM's Land Use Planning Handbook also specifies that RMPs are not normally used to make

site-specific implementation decisions. *See* BLM Handbook H-1601-1, II.B.2.a, pg. 13 (Rel. 1-1693 3/11/05); *see also Theodore Roosevelt*, 616 F.3d at 504, (holding that a RMP does not include a decision “whether to undertake or approve any specific action”) (citing 43 C.F.R. 1601.0-5(n)). The BLM should not use RMPs to impose site-specific measures.

CoP also encourages the BLM to discuss the benefits of directionally drilling multiple wells from a single pad, horizontal development, and cluster development in section 4.3 when describing the adverse impacts associated with habitat fragmentation. Sage-grouse DLUPA, pg. 473. CoP does not believe the BLM has fully acknowledged the efforts operators such as CoP have made to reduce habitat fragmentation across the Planning Area.

Section 4.4.2 – Greater Sage-grouse

The BLM should provide the scientific justification and rationale for the statement that Greater Sage-grouse are highly sensitive to habitat fragmentation, development, or changes in habitat conditions. Once again, CoP brings to the BLM’s attention the failings in the NTT Report as described in more detail in the paper by Dr. Ramey and the attached API comments. The BLM should carefully consider these when deciding which mitigation measures should be imposed.

The BLM places far too much emphasis on the Holloran study from 2005 and it should not be cited for the proposition that oil and gas development necessarily causes adverse impacts to Sage-grouse given the limitations of the study. In discussing the Holloran study, and any potential conclusions derived therefrom, the BLM should specifically disclose the fact that the BLM purposely waived the seasonal and timing stipulations normally associated with Sage-grouse leks and specifically allowed oil and gas operators in the area to drill near an active lek during the strutting season in order to assess the potential impacts. Additionally, the BLM should remember that the Holloran study was based on data from only two leks and, again, the BLM’s normal timing restrictions were not applied. Further, Mr. Holloran’s data was obtained in 2004 during a state-wide decline in Sage-grouse populations that is attributable to drought and other factors. Finally, BLM should not place significant emphases on the Holloran study given the fact his overall conclusions and predictions have been demonstrated to be untrue. Holloran predicted population declines between 8.7% to 24.4% annually within the Pinedale Field Office. Despite Holloran’s predictions of catastrophic population declines in the unmitigated area, this prediction has been clearly refuted by the data. Instead, Sage-grouse in the Pinedale Area are above state-wide averages in Wyoming.

When discussing the potential impacts of fluid minerals on Sage-grouse, the BLM often overstates potential impacts to the Sage-grouse. Although some studies suggest there have been declines in Sage-grouse populations, other studies demonstrate the impact of oil and gas development on Sage-grouse is not a negative. The BLM’s statement is contradicted by other

studies that have been prepared regarding Greater Sage-grouse. Dr. Ramey reported in 2011 that:

Current stipulations and regulations for oil and gas development in sage-grouse habitat are largely based on studies from the Jonah Gas Field and Pinedale Anticline. These and other intensive developments were permitted decades ago, using older, more invasive technologies and methods. The density of wells is high, due to the previous practice of drilling many vertical wells to tap the resource (before the use of directional and horizontal drilling of multiple wells from a single surface location became widespread), and prior to concerns over sage-grouse conservation. These fields and their effect on sage-grouse are not necessarily representative of sage-grouse responses to less-intensive energy development. Recent environmental regulations and newer technologies have lessened effects to sage-grouse.

Ramey (2011). Additionally, Taylor *et. al.*, in 2007 noted that:

- Sage-grouse population trends are consistent among populations regardless of the scope or age of energy development fields, and that population trends in the six development areas mirror trends state-wide;
- Application of the BLM standard sage-grouse stipulations appear to be effective in reducing the impact of oil and gas development on male-lek attendance;
- Male lek attendance in areas that are not impacted by oil and gas development is generally better than areas that are impacted;
- Displacement from impacted leks to non-impacted leks may be occurring; research is needed to assess displacement and its implications for developing sage-grouse conservation strategies;
- Lek abandonment was most often associated with two conditions, including high density well development at forty-acre spacing (sixteen wells per square mile), and regardless of well spacing when development activity occurred within a the quarter-mile lek buffer;

- Extirpation of sage-grouse has not occurred in any of the study areas;
- Long-term fluctuations in sage-grouse population trends in Wyoming reflect processes such as precipitation regimes rather than energy development activity; however, energy development can exacerbate fluctuations in sage-grouse population trends over the short-term.

Finally, the BLM should consider most of the recorded effects on Sage-grouse populations have been based on lek counts. These studies indicate that oil and gas activities have reduced lek counts in the vicinity of oil and gas developments but have not shown that population losses have occurred. Ramey *et. al.*, (2011) reported: “In the case of Sage-grouse, reduction in male lek counts has been assumed to equate to population losses. To our knowledge, this hypothesis has not been tested with probability based population counts.”

Section 4.5 – Lands and Realty

The BLM has not analyzed or disclosed the potential impacts the restrictions on future leasing may have upon operations on existing leases. As the BLM acknowledges in Figure 3-8, a significant portion of the Planning Area is currently leased for oil and gas development. Some leases, however, are isolated making them virtually impossible and not economically feasible to develop in their current state. Any responsible oil and gas producer who decides to take the risk of exploring by drilling a wildcat area must do so only after assembling a large enough block of leasehold acreage so that, if the drilling is successful, it can obtain an adequate return on the high-risk dollars invested. The BLM has, in another context, recognized the need for control of a reasonable acreage block. *See Prima Oil & Gas Co.*, 148 IBLA 45, 51 (1999) (BLM policy to suspend leases when “a lessee is unable to explore, develop, and produce leases due to the proximity, or commingling of other adjacent Federal lands needed for logical exploration and development that are currently not available for leasing”). The BLM must recognize, study, and report the economic impact of its decision to close significant portions of the Planning Area to leasing, or to make significant portions of the Planning Area only available with major constraints will have upon future exploration and development in the area. It is not enough for the BLM to simply assert that existing lease rights will be protected, the BLM must analyze further how existing lease rights will be impacted by future limitations on leasing and development and what protection it will afford existing leases in the above-described scenario.

Section 4.8 – Fluid Mineral Leasing - Impacts on Leasable Minerals

The BLM correctly notes that oil and gas operations are sensitive to costs, especially when prices are depressed. Sage-grouse DLUPA, pg. 621.¹ Given the sensitivities to oil and gas development based on price structures, BLM should not impose onerous or unnecessary restrictions on oil and gas development. As the BLM is aware, the price of natural gas remains very low across Colorado. Imposing additional significant restrictions on oil and gas development will significantly harm the industry and may effectively prohibit most future development within the area. This will result in a significant loss of jobs and reduction in income to the entire area. As the BLM acknowledges in section 4.24, oil and gas development is a significant source of tax revenue and earnings for the entire Planning Area.

As described earlier, CoP objects to the BLM's imposition of different mitigation measures on exploratory and wildcat wells. CoP is specifically concerned because the BLM does not provide definitions of either exploratory or wildcat wells. Even more concerning, the BLM seems to admit that it has not and cannot define "exploratory drilling." Sage-grouse DLUPA, pg. 635. The BLM must define and utilize a consistent definition of exploratory drilling if it intends to impose different mitigation measures in such areas.

CoP is very concerned that the BLM has not attempted to quantify the number of leases within PPH that would be prohibited from development under most of the BLM's alternatives. Sage-grouse DLUPA, pg. 635. The BLM should prepare such analyses as soon as possible for members of the public and, in particular, oil and gas operators to understand how their operations will be impacted. The BLM has all the information necessary to prepare an analysis of how its alternatives will adversely impact oil and gas operations and should have included such information in this document. Doing so would allow the BLM to quantify the adverse socio-economic impact the alternatives would have on the region given the strict limits on oil and gas development. The BLM must prepare this analysis in the final EIS so that members of the public are aware of the full impacts of the BLM's proposed action. The failure to include this important analysis may constitute a violation of NEPA.

CoP is strenuously opposed to the proposal under Alternative B, Alternative C, and Alternative D to impose mandatory best management practices ("BMPs") such as those set forth on pages 638 and 639 of the DLUPA. The imposition of these mitigation measures would make oil and gas development in the region incredibly expensive, if not impossible. The BLM has failed to appropriately quantify, analyze, or disclose the impacts mandatory imposition of these mitigation measures would have on CoP's oil and gas operations. The BLM's meager analyses

¹ The BLM failed to include appropriate headings or section guidance for the entire "Fluid Mineral" section. The reader is forced to discern when the oil and gas section begins by its review of the document. During the BLM's preparation of the final EIS, the BLM should ensure that all appropriate headings are included.

on pages 638 and 639 of the DLUPA is insufficient to provide members of the public full understanding of how oil and gas operations would be adversely impacted by the imposition of all the mitigation measures identified in Appendix I. Although the BLM may have been unable to fully analyze the potential for socio-economic impacts, the BLM should have included far more information.

Appendix I – Required Design Features

The BLM has not adequately explained how the proposed BMPs contained in Appendix I will be applied to existing leases. The BLM must expressly recognize that oil and gas leases are existing rights that cannot be modified. *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983); Solicitor’s Opinion M-36910, 88 I.D. 909, 912 (1981). Once the BLM has issued a federal oil and gas lease without NSO stipulations, and in the absence of a nondiscretionary statutory prohibition against development, the BLM cannot completely deny development on the leasehold. *See, e.g., National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued.

The BLM often cites a relatively recent decision from the IBLA for the proposition that the agency can impose COAs on existing leases. *Yates Petroleum Corp.*, 176 IBLA 144 (2008). The *Yates* decision does not stand for the proposition that BLM can impose COAs whenever it deems necessary or in broad programmatic documents such as the Sage-grouse DLUPA. Rather, in *Yates*, the IBLA merely affirmed the imposition of an additional COA based on site-specific information including recent and directly applicable scientific research. *Yates*, 176 IBLA at 157; *William P. Maycock*, 177 IBLA 1, 16-17 (2009). The *Yates* decision does not authorize the BLM to ignore relevant lease terms or the BLM regulations at 43 C.F.R. § 3101.1-2. Further, BLM must recall that it cannot impose new, unreasonable mitigation requirements on existing leases. Courts have recognized that once the BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, the BLM cannot later impose unreasonable mitigation measures that take away those rights. *See Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

CoP is particularly opposed to the Required Design Features and BMPs affecting fluid minerals on pages I-4 – I-6. It would be impossible for an oil and gas operator to economically utilize all of the proposed Required Design Features contained in this section. The BLM needs to specifically modify Appendix I to indicate that it does not and cannot impact existing leases. Given the fact that the BLM cannot modify or alter CoP existing rights, CoP is very concerned regarding the language in Appendix I suggesting that the Required Design Features will be imposed on both existing and new oil and gas development projects and leases within the Planning Area.

CONCLUSION

CoP appreciates the opportunity to submit its comments on the Sage-grouse DLUPA and looks forward to participating in the BLM's analysis of this important project. The Sage-grouse DLUPA will have a significant impact on our existing and future operations in the Planning Area. Because of the implications for future development, the DLUPA will also have major effects on local economies, jobs, and revenues for federal, state and local governments.

CoP does not support any of the Alternatives as drafted. The BLM's preferred management proposal would unreasonably restrict access and impose unnecessary and burdensome operational restrictions on oil and gas development. The BLM should find a more reasonable and balanced approach that promotes oil and gas development, respects existing lease rights, provides adequate flexibility for future site-specific planning decisions, and recognizes the limitations of the agency's authority and expertise.

Sincerely,

S/ EILEEN DANNI DEY

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