



December 2, 2013

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

Re: Encana Oil & Gas (USA) Inc. Comments on the Northwest Colorado
Greater Sage-grouse Land Use Plan Amendment and Environmental
Impact Statement

Ladies and Gentlemen:

Encana Oil & Gas (USA) Inc. (“Encana”) hereby submits the following comments on the Bureau of Land Management and United States Forest Service’s (collectively “BLM”) Greater Sage-grouse Draft 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). Encana 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 Encana’s ongoing and future operations in the NWCO Planning Area (“Planning Area”).

Encana has significant interest in the Planning Area including over 677,000 gross acres of federal oil and gas leases, and nearly 200,000 acres of private leases and mineral deeds. Additionally, Encana has numerous employees and contractors in the Planning Area managed by the BLM and throughout Colorado including Encana’s field office in

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Parachute, Colorado and its regional office in Denver, Colorado. The adoption of the Sage-grouse DLUPA will significantly impact both Encana's existing operations and its future operations in the Planning Area.

GENERAL COMMENTS

Encana supports an alternative which recognizes that additional oil and gas development can take place within the Planning Area without adversely impacting Sage-grouse. Upon a detailed review of each alternative, Encana does not believe any alternative adequately balances oil and gas development with the protection of other resources. It is Encana's assessment that the Sage-grouse DLUPA is written, specific to oil and gas development, 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. Encana 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. Sage-grouse DLUPA, pgs. 296 - 297. The BLM should not unreasonably restrict access to this important source of domestic energy. Encana opposes Alternatives B and C because they place far too many onerous and unreasonable restrictions on future oil and gas development. Alternative B closes 1,347,400 acres to oil and gas leasing, and 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.

National Sage-grouse Policy

Encana understands that the BLM prepared the Sage-grouse DLUPA in order to comply with BLM Instruction Memorandum No. 2012-044 (BLM National Greater Sage-grouse Land Use Planning Strategy). From a National Environmental Policy Act of 1969 (“NEPA”) perspective, Encana understands the need to analyze a range of alternatives, but suggests the BLM was not required to analyze either Alternative B or C in detail given the inherently unreasonable nature of these alternatives. It is well established that NEPA requires an agency only to consider “reasonable alternatives.” 40 C.F.R. § 1502.14 (2012). Federal courts and the Interior Board of Land Appeals (“IBLA”) have long held that “[a]lternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail by the agency.” *Citizens’ Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) (citations and internal punctuation omitted). “The Bureau may eliminate alternatives that are ‘too remote, speculative, impractical, or ineffective,’ or that do not meet the purposes and needs of the project.” *Biodiversity Conservation Alliance, et al. v. Bureau of Land Management, et al.*, 608 F.3d 709, 715 (10th Cir. 2010) (citing *New Mexico ex rel. Richardson*, 565 F.3d at 708-09 & n. 30 (citation omitted)); *Northern Ala. Env’tl. Ctr., et al.*, 153 IBLA 253, 263 (2004). “NEPA does not require agencies to analyze the environmental consequences of

alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective.” *Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1030-31 (internal punctuation omitted). Given the drastic limitations Alternatives B, C and D would have upon oil and gas development, none of the alternatives is reasonable and they must not be selected. Encana urges the BLM not to adopt either Alternative B or C because of the drastic adverse impacts they would have upon oil and gas development and, thus, on the economy of the Planning Area.

Similarly, the BLM is not required to pursue alternatives that are not reasonable because they are not technically or economically feasible. The Council on Environmental Quality (“CEQ”) has described reasonable alternatives as “those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable.” *CEQ’s Forty Most Asked Questions*, Question 2a, 46 Fed. Reg. 18028, 18027 (Mar. 23, 1981) (emphasis added). BLM need not analyze speculative, impractical, or uneconomic alternatives. *Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1030-31. The BLM’s own NEPA regulations also state that the agency is only required to evaluate technically and economically practical alternatives. 43 C.F.R. § 46.420(b). BLM’s NEPA Manual also only requires the evaluation of reasonable and practicable alternatives. BLM NEPA Handbook, H-1790-1, § 6.6.1, pg. 50 (H-1790-1, Rel. 1-1710 01/30/2008). For example, overly stringent restrictions or conditions of approval (“COAs”), such as requiring all directional drilling regardless of technical or economic considerations, may render development uneconomic and need not

be analyzed. The restrictions included in both Alternatives B and C are not reasonable, and, thus, neither is an appropriate alternative.

Role and Purpose of a Resource Management Plan

Pursuant to the Federal Land Policy and Management Act of 1976 (“FLPMA”), the BLM is required to develop DLUPAs to guide the agency’s management of federal lands under its administration. 43 U.S.C. 1711 (2012). DLUPAs, known under the BLM’s regulations as RMPs, are designed to “guide and control future management actions.” *See Norton v. Southern Utah Wilderness Society*, 542 U.S. 55, 59 (2004) (citing 43 U.S.C. § 1712; 43 C.F.R. § 1610.2). “Generally, a land use plan describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 59 (citing 43 C.F.R. 1601.0-5(k)) [currently codified at 43 C.F.R. 1601.0-5(n)]. FLPMA requires the BLM to manage federal lands and minerals “in accordance with” the RMPs developed by the BLM after appropriate notice and comment. 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a) (2012). Nonetheless, the Supreme Court of the United States, in a unanimous decision, recognized that, under FLPMA and the BLM’s own regulations, DLUPAs are not ordinarily the medium for making affirmative decisions. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 69. The Supreme Court further recognized that the development of a RMP is only the “preliminary step in the overall process of managing public lands.” *Norton v. Southern Utah Wilderness Alliance*, 542 at 69; *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 504 (D.C. Cir. 2010). The IBLA has similarly recognized that RMPs are not “static documents” which remain

“fixed for all time.” *Southern Utah Wilderness Alliance, et al.*, 144 IBLA 70, 88 (1998). “On the contrary, for an RMP to have any ultimate vitality, it must be seen as a management tool which is necessarily circumscribed by the values and knowledge existing at the time of its formulation.” *Id.* Finally, the BLM’s Land Use Planning Handbook 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 resource management plan does not include a decision “whether to undertake or approve any specific action”) (citing 43 C.F.R. 1601.0-5(n)).

Given its nature and purpose, the BLM should consider what decisions need to be made in the Sage-grouse DLUPA. The BLM should not attempt to make site-specific decisions, but should develop only broad management goals and objectives. The BLM should not expend unnecessary resources attempting to analyze the potential impacts of oil and gas development on a site-specific basis more than necessary given the uncertainty associated with the location and extent of future development. *See N. Alaska Env’tl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006). Individual development projects will be analyzed on a case-by-case basis if and when operations are actually proposed. Based on the BLM’s own policies and binding legal precedent, the BLM should ensure that the agency does not utilize the land use planning process to impose site-specific COAs or unreasonably limit future management actions when revising the Sage-grouse DLUPA. The BLM attempts to make too many specific decisions in the

Sage-grouse DLUPA that may unreasonably restrict its management opportunities in the future.

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.* Encana recognizes the difficult task the BLM faces to manage public lands in the Planning Area for multiple use, and 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(l). 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 Encana's contracts with the BLM and the BLM's own policies.

Further, the BLM cannot deprive Encana 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. In order to effectuate this purpose, the BLM promulgated policies regarding the contractual rights granted in an oil and gas lease. BLM Instruction Memorandum 92-67 states that “[t]he lease contract conveys certain rights which must be honored through its term, regardless of the age of the lease, a change in surface management conditions, or the availability of new data or information. The contract was validly entered based upon the environmental standards and information current at the time of the lease issuance.” As noted in the BLM's Instruction Memorandum, the lease constitutes a contract between the federal government and the lessee which cannot be unilaterally altered or modified by the BLM.

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 Encana's valid and existing rights to develop its leases through 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 Encana's existing lease rights.

The BLM must acknowledge that when it revises the Sage-grouse DLUPA it is not working from a blank slate. Rather, many of the decisions made by the BLM in its existing DLUPA will, necessarily, impact and limit its options in the current RMP amendment. The BLM must carefully review and understand the limited nature of some of its options during this revision process. As explained throughout these comments, the BLM cannot limit, restrain, or unreasonably interfere with existing rights.

In the amended DLUPA and accompanying environmental impact statement ("EIS"), the BLM should state clearly that an oil and gas lease is a contract between the federal government and the lessee, and that the lessee has certain rights thereunder. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that lease contracts under the Outer Continental Shelf Lands Act gives lessees the right to explore for and develop oil and gas); *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). Although the BLM may revise the existing DLUPA for the Planning Area, the BLM—and the public—should be reminded that the BLM cannot unilaterally alter or modify the terms of existing leases.

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. Encana encourages the BLM to include similar language in the amended DLUPA.

Stipulations Should be the Least Restrictive Possible

When revising the Sage-grouse DLUPA, the BLM should ensure that stipulations developed for future oil and gas leasing are the least restrictive as necessary to adequately protect other resource values. Congress passed the Energy Policy Act of 2005 in the past few years. Section 363 of that Act required the Secretary of the Interior and the Secretary of Agriculture to enter into a Memorandum of Understanding (“MOU”) regarding oil and gas leasing and to ensure that lease stipulations are applied consistently, coordinated between agencies, and “only as restrictive as necessary to protect the resources for which the stipulations are applied.” Energy Policy Act of 2005, Pub. L. No. 109-58, § 363(b)(3), 119 Stat. 594, 722 (2005). The MOU required by § 363 of the Energy Policy Act of 2005 was finalized in April of 2006 as BLM MOU WO300-2006-07. Pursuant to

the Energy Policy Act and the MOU required thereby, the stipulations for oil and gas leases within the revised Sage-grouse DLUPA should not be onerous or more restrictive than necessary. Based on Encana's review of the proposed alternatives in the Sage-grouse DLUPA, the BLM did not follow the guidance in this MOU or the express direction in the Energy Policy Act of 2005. In almost every circumstance, the BLM proposes to adopt stipulations that are more restrictive and limiting than necessary. The BLM must consider the Energy Policy Act MOU when selecting the agency's Preferred Alternative or adopting the Sage-grouse DLUPA.

Withdrawal Procedures Under FLPMA

For both Alternatives B and C, the Department of the Interior would be required to comply with the formal withdrawal requirements imposed by FLPMA. FLPMA defines a withdrawal as:

withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another department, bureau or agency.

43 U.S.C. § 1702(j). Under Alternatives B and C, the BLM proposes to make large areas of land unavailable to oil and gas leasing. Closing an area to fluid mineral leasing constitutes a withdrawal under FLPMA. Under Alternative B, the BLM proposes to close almost 1,347,400 acres and render them unavailable for oil and gas leasing and, under Alternative C, over 2,473,000 acres. Sage-grouse DLUPA, pg. 632. Because closing areas to oil and gas leasing constitutes a withdrawal, the Department of the

Interior will be required to comply with the procedural provisions of section 204 of FLPMA. 43 U.S.C. § 1714.

The BLM cannot escape the withdrawal requirements imposed by FLPMA by suggesting lands are not “closed” to development, but merely “administratively unavailable” to leasing for several reasons. First, the BLM’s Land Use Planning Handbook does not recognize or authorize the BLM to make lands “administratively unavailable” or “removed.” Rather, the Handbook only recognized closed or open with varying levels of constraint. BLM Land Use Planning Handbook H-1601, Appd. C.II.H., pgs. 23-24 (Rel. 1-1693 03/11/05). There is simply no distinction between areas “removed” from leasing and those that are closed. Finally, regardless of whether the BLM terms the closure as “unavailable,” eliminating the land from oil and gas leasing for the life of the plan still meets the definition of a withdrawal because they make large areas of the public lands unavailable for a significant period of time. BLM is making a conscious, deliberate choice not to allow leasing in these areas. It is not merely deferring a few parcels from a particular lease sale. Such a formal closure constitutes a withdrawal. 43 U.S.C. § 1702(j). As such, the BLM must comply with the withdrawal requirements set forth in FLPMA.

Because the BLM’s decisions under Alternatives B and C constitute a withdrawal, the Secretary is required to comply with certain procedural requirements because it is closing large portions of the Planning Area to oil and gas leasing. Section 204 of FLPMA requires the Secretary of the Interior to comply with certain procedural mandates prior to closing an area of 5,000 acres or more to mineral development. 43 U.S.C. §

1714. Because Alternatives B and C propose to close areas of 5,000 acres or more to mineral development, they must comply with section 204 of FLPMA. Among the other requirements imposed on the Department of the Interior is the requirement for the Secretary of the Interior, as compared to the Director of the BLM or a State Director, to make all withdrawals of federal lands. 43 U.S.C. § 1714(a). The Secretary—or a designee in the Secretary’s office appointed by the President and confirmed by the Senate—is authorized to make withdrawals under FLPMA. The Secretary is also required to provide notice of the proposed withdrawal in the Federal Register and conduct hearings regarding the withdrawal. 43 U.S.C. § 1714(b)(1), (h). Finally, the Secretary is required to notify both houses of Congress of the proposed withdrawal. *See* 43 C.F.R. § 1610.6. The notice must include information: (1) regarding the proposed use of the land; (2) an inventory and evaluation of the current natural resource uses and value of the land and adjacent public and private land which may be affected; (3) an identification of present users and how they will be affected; (4) an analysis of the manner in which the existing and potential uses are incompatible with or in conflict with the proposed uses; (5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed uses; (6) a statement as to whether suitable alternative sites are available; (7) a statement of the consultation which has been or will be had with other federal, regional, state, and local government bodies; (8) a statement regarding the potential effects of the withdrawal on the state, local, and regional economy; (9) a statement of the length of time needed for the withdrawal; (10) the time and place of the hearings regarding the withdrawal; (11) the place where the records of the withdrawal can be examined; and (12) a report prepared by a qualified

mining engineer, engineering geologist, or geologist, which shall include information on mineral deposits, mineral production, existing mining claims, and an evaluation of future mineral potential. 43 U.S.C. § 1714(c)(2). To date, the Department of the Interior has not complied with the requirements set forth in section 204 of FLPMA. Prior to approving the Sage-grouse DLUPA, the BLM must comply with these provisions and inform the public how it will be impacted.

FLPMA also requires the Secretary of the Interior to comply with specified procedural requirements before making a management decision that totally eliminates a principal or major use of the public lands for a period of two or more years on a tract of land more than 100,000 acres in size. 43 U.S.C. § 1712(e). Oil and gas development is defined as a principal or major use of the public lands. 43 C.F.R. § 1702(l). Under Alternatives B and C, the BLM would make over 100,000 acres of oil and gas leasing unavailable for a period of two years or more, yet BLM has not complied with the clear and unequivocal requirements of FLPMA. BLM must notify Congress of its intent to close significant areas to future oil and gas development prior to finalizing the Sage-grouse DLUPA.

Encana 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

In the opening sections of the Sage-grouse DLUPA, the BLM identifies several recently completed and on-going revisions to DLUPAs. The BLM has neglected to include the on-going amendment to the White River Resource Management Plan. 77 Fed. Reg. 55222 (Sep. 7, 2012). The BLM should include all relevant and on-going DLUPAs in the overview section.

The BLM needs to explain the scientific basis and methodology for its identification of preliminary 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 Encana to understand or comment on how the BLM identified Sage-grouse habitat. Given the profound impact the proposed DLUPA will have upon Encana’s operations in PPH in particular, it is imperative that Encana and members of the public understand how the BLM adopted and identified these areas. Without a clear understanding of the BLM’s methodologies and how management requirements related to the maps will be applied, it is virtually impossible for Encana to understand exactly which of its operations and existing leaseholds will be impacted by the Sage-grouse DLUPA.

Section 1.2 – Purpose and Need for the Land Use Plan Amendments

Encana recognizes that the BLM is attempting to develop appropriate and long-term mitigation measures in order to prevent a potential listing of the Greater Sage-grouse. Although Encana fully supports the BLM’s purpose, the BLM should include within its overall purpose the need to protect valid and existing lease rights. As described

in detail throughout these comments, the BLM cannot limit, modify, or alter Encana's existing lease rights in an effort to prevent a potential listing of the Greater Sage-grouse.

Section 1.4.2 – Forest Service Planning Process

The Sage-grouse DLUPA indicates that the United States Forest Service (“Forest Service”) utilized the 1982 Planning Regulations (36 C.F.R. part 219). New Forest Service planning regulations were, however, promulgated in April 2012. 77 Fed. Reg. 21260 (Apr. 9, 2012). The Forest Service should explain why it did not utilize the new 2012 Planning Regulations.

On December 18, 2009, the Forest Service issued a Final Rule for the National Forest System land management planning framework. 74 Fed. Reg. 67059 (to be codified at 36 C.F.R. part 219) (2009 Planning Rules). The rulemaking is the result of a United States District Court of Northern California Order dated June 30, 2009, which enjoined the United States Department of Agriculture from putting into effect and using the Land Management Planning Rule published on April 21, 2008 (73 Fed. Reg. 21468). The district court vacated the 2008 rule, enjoined the Forest Service from further implementation of the rules, and remanded the rule for further proceedings. *Citizens for Better Forestry v. United States Dep't of Agriculture*, 632 F.Supp.2d 968 (N.D. Cal. 2009).

The 2009 Planning Regulations were actually a return to the 2000 Planning Regulations, not the 1982 regulations. 65 Fed. Reg. 67568 (Nov. 9, 2000); amendments at 67 Fed. Reg. 35434 (May 20, 2002); 68 Fed. Reg. 53297 (Sept. 10, 2003); and interpretive rules at 66 Fed. Reg. 1865 (Jan. 10, 2001) and 69 Fed. Reg. 58057 (Sept. 29,

2004). The court in *Citizens for Better Forestry* gave the Forest Service the option to reinstate either the 2000 Planning Regulations or the agency's original planning regulations in 1982. 47 Fed. Reg. 43037, but the Forest Service, following precedent from the United States Court of Appeals for the Ninth Circuit, determined that the "effect of invalidating an agency rule is to reinstate the rule previously in effect." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). Please explain why the 1982 rules were used.

Section 1.6 – Planning Criteria

Encana 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 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.

As part of its planning criteria, the BLM also acknowledges that it will utilize the reasonably foreseeable development scenarios (“RFD Scenario”) developed for each of the relevant LUPs within the Planning Area. Sage-grouse DLUPA, pg. 25. When discussing the RFD Scenario, the BLM must be aware, and carefully describe to the public, that the RFD Scenario is not a limit or threshold on future development. Rather, the RFD Scenario is a tool utilized by the BLM to estimate the potential impacts of oil and gas development. The development of the RFD Scenario is not expressly required by FLPMA, NEPA, or the BLM’s planning regulations at 43 C.F.R. Part 1600. Rather, the concept arises from NEPA’s general requirement to consider the potential cumulative impacts of a major federal action significantly affecting the quality of the human environment. The regulations implementing NEPA require agencies to consider cumulative impacts when conducting NEPA analysis. 40 C.F.R. §§ 1508.7, 1508.25(c). The BLM adopted this requirement into its planning regulations by requiring RMPs to estimate the potential physical, biological, economic, and social effects of each alternative considered. 43 C.F.R. § 1610.4-6. The regulations specifically note that this estimate may be stated in terms of probable ranges where effects cannot be precisely determined. 43 C.F.R. § 1610.4-6.

In order to estimate the potential impacts of oil and gas development within a particular resource area, the BLM developed the requirement for the agency to prepare the RFD Scenario in connection with the preparation of the EIS accompanying a new or revised RMP. *See* 43 C.F.R. § 1601.0-6 (requiring the preparation of an EIS when preparing a new or revised RMP). The BLM incorporated this requirement into the BLM

Land Use Planning Handbook H-1624 – Planning for Fluid Mineral Resources. *See* BLM Land Use Planning Handbook H-1624 – Planning for Fluid Mineral Resources, Chapter III (Rel. 1-1582 5/7/90). Thus, the BLM’s Fluid Mineral Planning Handbook is the original source of the term “RFD Scenario.” The BLM’s Fluid Mineral Planning Handbook provides that the cumulative impacts of RFD Scenarios are one of three factors for analysis which should be considered when making fluid mineral determinations in RMPs or plan amendments. *See* BLM Land Use Planning Handbook H-1624 – Planning for Fluid Mineral Resources, Chapter III.A. (Rel. 1-1582 5/7/90). Rather than limit, the RFD Scenario is intended to serve as a tool to assist with NEPA compliance. “To ensure NEPA compliance a minimum level of exploration and development activities should be projected.” *See* BLM Land Use Planning Handbook H-1624 – Planning for Fluid Mineral Resources, Chapter III.B.4.a.(2) (Rel. 1-1582 5/7/90).

The BLM more recently defined and interpreted the purpose and role of the RFD Scenario in an Instruction Memorandum and Amendment to the BLM Land Use Planning Handbook H-1624 – Planning for Fluid Mineral Resources issued in 2004. *See* BLM Instruction Memorandum 2004-089, Policy for Reasonably Foreseeable Development (“RFD”) Scenario for Oil and Gas (Jan. 16, 2004) (I.M. 2004-089).¹ The RFD Scenario is defined by the BLM as a “baseline scenario of activity assuming all potentially productive areas can be open under standard lease terms and conditions, except those

¹ The heading on BLM Instruction Memorandum 2004-089, Policy for Reasonably Foreseeable Development (RFD) Scenario for Oil and Gas (Jan. 16, 2004) indicates that it expired on September 30, 2005, but the actual text of the Instruction Memorandum states that “This policy becomes effective upon date of issuance and remains in effect until cancelled or amended.” *See* BLM Instruction Memorandum 2004-089, Policy for Reasonably Foreseeable Development (RFD) Scenario for Oil and Gas (Jan. 16, 2004), pg. 1. Encana, therefore, assumes Instruction Memorandum 2004-089 is still in effect.

areas designated as closed to leasing by law, regulation or executive order.” See I.M. 2004-089, Attachment 1-1. The RFD is neither a Planning Decision nor the “No Action Alternative” in the NEPA document. See I.M. 2004-089, Attachment 1-1. “In the NEPA document, the RFD baseline scenario is adjusted under each alternative to reflect varying levels of administrative designations, management practices, and mitigation measures.” See I.M. 2004-089, Attachment 1-1. “The RFD is based on review of geologic factors that control potential for oil and gas resource occurrence and past and present technological factors that control the type and level of oil and gas activity.” See I.M. 2004-089, Attachment 1-3. “The RFD also considers petroleum engineering principles, as well as practices and economics associated with discovering and producing oil and gas.” See I.M. 2004-089, Attachment 1-3.

The Secretary of the Interior, through the IBLA, has made clear in at least nine separate decisions that the RFD Scenario is not a planning decision, nor is it a limit on future development.² *Wyoming Outdoor Council, et al.*, 176 IBLA 15, 45 (2008); *Biodiversity Conservation Alliance, et al.*, 174 IBLA 1, 9 – 13 (2008) (holding with respect to the Great Divide RMP that the RFD Scenario is not a limitation on development); *Deborah Reichman*, 173 IBLA 149, 157 – 158 (2007) (holding with respect to the Dakota Prairie Grasslands Little Missouri National Grasslands RMP that the RFD Scenario is not a limitation on development); *National Wildlife Fed’n*, 170 IBLA 240, 249 (2006) (holding with respect to the Great Divide RMP that the RFD Scenario is not a limitation on development); *Wyoming Outdoor Council, et al.*, 164

² The IBLA is the authorized representative of the Secretary of the Interior, 43 C.F.R. § 4.1, and is the final decision-maker for the Department of the Interior. See 43 C.F.R. § 4.21(d), 4.403 (2008). See also *the Morgan Corp.*, 120 IBLA 245, 252 (1991) (describing the authority of the IBLA).

IBLA 84, 99 (2004) (holding with respect to the Pinedale RMP that the RFD Scenario does not establish “a point past which further exploration and development is prohibited”); *Southern Utah Wilderness Alliance*, 159 IBLA 220, 234 (2003) (holding that the Book Cliffs RMP did not establish a well limit); *Theodore Roosevelt Conservation Partnership, et al.*, IBLA Docket No. 2007-208, Order at *22 (Sept. 5, 2007); *Wyoming Outdoor Council, et al.*, IBLA Docket No. 2006-155, Order at *26 - 27 (June 28, 2006) (determining RFD Scenario for Pinedale RMP is not a limitation on future development); *Biodiversity Conservation Alliance, et al.*, IBLA No. 2004-316, Order at *7 (Oct. 6, 2004) (citing *Southern Utah Wilderness Alliance*, 159 IBLA at 234) (holding with respect to the Great Divide RMP that the “RFD scenario cannot be considered to establish a limit on the number of oil and gas wells that can be drilled in a resource area.”).

Even more recently, two federal courts confirmed that the RFD Scenario is not intended as a limit on oil and gas development. First, the United States District Court for the District of Columbia recently affirmed the Secretary’s position that the RFD Scenario is not a limit on future development in Wyoming. *Theodore Roosevelt Conservation Partnership v. Salazar*, 605 F.Supp.2d 263, 283 (D.D.C. 2009). The trial court’s determination was affirmed by the United States Court of Appeals for the District of Columbia Circuit, a decision that can only be overturned by the Supreme Court of the United States. In the decision, the federal appellate court determined that the RFD Scenario is merely an analytical tool, not “a point past which further exploration and

development is prohibited.” *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 509 (D.C. Cir 2010).

As indicated by the number of decisions cited above, the purpose of the RFD Scenario continues to be a source of confusion and litigation. The BLM’s description of the RFD Scenario in the Sage-grouse DLUPA will only exacerbate this confusion and may lead to additional litigation. The BLM must carefully explain to the public that the RFD Scenario is not a cap or limitation on future development in the Sage-grouse DLUPA. In the most recent published decision from the IBLA regarding the RFD Scenario, the IBLA unequivocally determined that the RFD Scenario is not, and cannot be used as, a limitation on future oil and gas development. “While an important tool in the land use planning process, RFD scenarios do not constitute fixed or maximum limits on development under FLPMA such that exceeding them constitutes a violation of that statute.” *Biodiversity Conservation Alliance, et al.*, 174 IBLA 1, 11 (2008).

In order to prevent future litigation and appeals, the BLM must include language in the Record of Decision and the Sage-grouse DLUPA describing the purpose of the RFD Scenario and the fact that the RFD Scenario is not a planning decision or limitation on future oil and gas development. Instruction Memorandum 2004-089, Policy for Reasonably Foreseeable Development (RFD) Scenario for Oil and Gas (Jan. 16, 2004). For example, the BLM could expressly adopt and incorporate the position the Secretary of the Interior, through the IBLA, has expressed regarding the RFD Scenario in a recent published opinion:

Noting that an RFD scenario is an analytical tool, we expressly rejected both the idea that it establishes a point past which further exploration and development is prohibited, and the assumption that the underlying environmental analysis has no validity beyond the RFD scenario. In rejecting that assertion, we implicitly agreed with BLM that an RFD scenario is neither a planning decision nor the No Action Alternative in the NEPA document.

National Wildlife Federation, et al., 170 IBLA 240, 249 (2006) (internal quotations and citations omitted). The BLM must carefully draft any and all references to the RFD Scenario in the Sage-grouse DLUPA and accompanying EIS.

It is particularly important for the BLM to accurately describe that the RFD Scenario is not a limit on future oil and gas development within the Planning Area because it appears the RFD Scenario for the Planning Area is much too low. The BLM currently anticipates that as many as 10,622 wells could be drilled in the Planning Area during the next 20 years. Sage-grouse DLUPA, pg. 801. Encana believes the BLM has significantly underestimated the oil and gas potential within the Planning Area. In addition to the development of the Mesaverde formation that has been ongoing within the Planning Area for the past decade, many oil and gas operators are now developing other formations including the Mancos Shale and other deeper formations using horizontal drilling, development, and completion techniques. Although at the earliest stages, the initial results from this type of development appear very positive.

The BLM should also ensure that nothing in the RFD Scenario limits, discourages, or precludes future innovation or the development of alternative techniques, such as horizontal development, of oil and gas development. Opponents to oil and gas

development may suggest that because horizontal development was not contemplated or sufficiently analyzed in the Sage-grouse DLUPA, it should not be used in this area.

Section 1.7.6 Memorandum of Understanding

Among the MOUs identified in Section 1.7.6, the BLM neglects to include the MOU required by Section 363 of the Energy Policy Act of 2005. That section required the Secretary of the Interior and the Secretary of Agriculture to enter into a MOU regarding oil and gas leasing and to ensure that lease stipulations are applied consistently, coordinated between agencies, and that the stipulations are only as restrictive as necessary to protect the resources for which the stipulations are applied. Energy Policy Act of 2005, Pub. L. No. 109-58, § 363(b)(3), 119 stat. 594, 722 (2005). The MOU required by the Energy Policy Act was finalized in April 2006 as BLM MOU WO 300-2006-07. The BLM should ensure that it complies with the requirements of the Energy Policy Act and ensure that its stipulations are the least restrictive possible in the Sage-grouse DLUPA.

CHAPTER 2 – ALTERNATIVES

Overall, the alternatives in the Sage-grouse DLUPA are overly 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 trying 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 would have devastating 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, C, or D. Although Encana understands the importance of having a wide range of alternatives to satisfy the requirements of NEPA, the BLM must not adopt Alternative B, C, or D.

In particular, Alternatives B and 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. Sothorn 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 removal of vast areas of lands from future oil and gas development and potential restrictions on existing leases under Alternative B or C, and, to a lesser extent, Alternative D, would also significantly restrict regional earnings, jobs, and tax revenue. According to the information presented in the Sage-grouse DLUPA, the adoption of Alternative B, C, or D would reduce regional earnings significantly and reduce local jobs over the current management. *See Sage-grouse DLUPA, Table 4.16, 4.17, pgs. 902, 907.* In these difficult economic times, it is inappropriate for the BLM to significantly restrict economic development opportunities. The Obama Administration has repeatedly indicated that its first priority is to create jobs for the American people, yet the BLM is proposing alternatives, including Alternatives B, C, and D, that would actually reduce

jobs in the Planning Area. Such alternatives are inappropriate and should be eliminated.

The BLM must not adopt an alternative that would reduce economic development, decrease domestic energy supplies, result in a loss of jobs, and harm the local tax base.

Further, 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, a significant portion of the Planning Area is currently leased for oil and gas development. Sage-grouse DLUPA, pg. 299 – 300. 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.

Contrary to the requirements of BLM's Land Use Planning Handbook H-1601, the BLM has not properly identified lands within the Planning Area that are open to oil and gas leasing with moderate constraints and those that are available only with major constraints. BLM Land Use Planning Handbook H-1601, Appd. C.II.H., pgs. 23 – 24 (Rel. 1-1693 03/11/05). The BLM should supplement the information contained in the Sage-grouse DLUPA with this information as soon as possible.

Section 2.5 – Management Common to All Alternatives

Encana appreciates that BLM states it will preserve valid existing rights including oil and gas leases under all alternatives. Sage-grouse DLUPA, pg. 40. The BLM suggests, however, that it will control and modify existing leases through the use of COAs. The Sage-grouse DLUPA cannot defeat or materially restrain Encana's valid and existing rights to develop its leases through 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). Further, the Secretary of the Interior and the federal courts have interpreted the phrase "valid existing rights" to mean that BLM cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F.Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. §

3101.1-2 (2012) (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

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”).

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. Encana encourages the BLM to include similar language in the Sage-grouse DLUPA.

Section 2.6 – Alternatives Considered But Not Analyzed in Detail

The BLM appropriately recognizes its obligation to consider alternatives is not without limitation. It is well established that NEPA requires an agency only to consider “reasonable alternatives.” 40 C.F.R. § 1502.14 (2010). Courts and the IBLA have long held that “[a]lternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail by the agency.” *Citizens’ Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) (citations and internal punctuation omitted). “The Bureau may eliminate alternatives that are ‘too remote, speculative, impractical, or ineffective,’ or that do not meet the purposes and needs of the project.” *Biodiversity Conservation Alliance, et al. v. Bureau of Land Management, et al.*, 608 F.3d 709, 715 (10th Cir. 2010) (citing *New Mexico ex rel. Richardson*, 565 F.3d at 708-09 & n. 30 (citation omitted)); *Northern Ala. Env’tl. Ctr., et al.*, 153 IBLA 253, 263 (2004). “NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective.” *Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1030-31 (internal punctuation omitted).

Similarly, the BLM is not required to pursue alternatives that are not reasonable because they are not technically or economically feasible. The Council on

Environmental Quality (“CEQ”) has described reasonable alternatives as “those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable.” *CEQ’s Forty Most Asked Questions*, Question 2a, 46 Fed. Reg. 18028, 18027 (Mar. 23, 1981) (emphasis added). BLM need not analyze speculative, impractical, or uneconomic alternatives. *Citizens’ Comm. to Save Our Canyons*, 297 F.3d at 1030-31. For example, overly stringent restrictions or COAs, such as requiring all directional drilling regardless of technical or economic considerations, may render development uneconomic and need not be analyzed.

Encana supports the BLM’s decision not to designate all sage-grouse habitat as an area of critical environmental concern (“ACEC”). Sage-grouse DLUPA, pg. 40. Encana agrees designating all potential Sage-grouse habitat as an ACEC would not meet the relevance and importance criteria required under the BLM’s regulations. 43 C.F.R. § 1610.7-2. Encana also believes, however, that given the significant number of unreasonable mitigation measures and other COAs that BLM intends to apply under Alternative B and Alternative C, they are also not reasonable alternatives that should not have been considered in detail by the BLM.

Section 2.7 – Considerations for Selecting the Preferred Alternative

The BLM suggests that the NEPA Handbook requires the BLM to identify a preferred alternative in the draft RMPA/EIS. Sage-grouse DLUPA, pg. 42. The BLM’s planning regulations and planning handbook similarly require the BLM to select a preferred alternative in the draft EIS when preparing a LUP revision or amendment. 43

C.F.R. § 1610.4-7; BLM Land Use Planning Handbook H-1601-1.III.A.7, pg. 23 (Rel. 1-1693 03/11/05). This fact should be noted in the final EIS.

In Section 2.8 the BLM explains that certain site-specific mitigation measures may be imposed under all alternatives. Sage-grouse DLUPA, pg. 42. Encana is opposed to the imposition of the Required Design Features (“RDFs”) contained in Appendix H in a planning level document. The BLM must clarify the extent to which the so-called RDFs will be applied to operations on existing leases. The BLM must 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Given its existing rights, the BLM cannot deprive Encana of its valid and existing lease rights either directly or indirectly.

The BLM’s Land Use Planning Handbook also 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 Encana’s contracts with the BLM and the BLM’s own policies.

The RDFs must also be consistent with existing lease terms. As a federal lessee, Encana has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. *See Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3101.1-2. 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 should also recall that oil and gas lessees have not just the right, but the obligation, to develop their lease. 43 C.F.R. § 3162.1(a) (requiring developed leases to maximize production).

The Sage-grouse DLUPA also cannot defeat or materially restrain Encana’s valid and existing rights to develop its leases through 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)). Further, the Secretary of the Interior and the federal courts have interpreted the phrase “valid existing rights” to mean that BLM cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F.Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. §

3101.1-2 (2012) (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

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”).

Encana also objects to the BLM’s attempt to impose site-specific mitigation measures in the DLUPA. Pursuant to FLPMA, the BLM is required to develop LUPs to guide the agency’s management of federal lands under its administration. 43 U.S.C. 1711. Land use plans, known under the BLM’s regulations as RMPs, are designed to

“guide and control future management actions.” *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004) (citing 43 U.S.C. § 1712; 43 C.F.R. § 1610.2).

“Generally, a land use plan describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 59 (citing 43 C.F.R. 1601.0-5(k)) [currently codified at 43 C.F.R. 1601.0-5(n)]. FLPMA requires the BLM to manage federal lands and minerals “in accordance with” the RMPs developed by the BLM after appropriate notice and comment. 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a) (2012). Nonetheless, the Supreme Court of the United States, in a unanimous decision, recognized that under FLPMA, and the BLM’s own regulations, land use plans are not ordinarily the medium for making affirmative decisions. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 69. The Supreme Court further recognized that the development of RMPs is only the “preliminary step in the overall process of managing public lands.” *Norton v. Southern Utah Wilderness Alliance*, 542 at 69; *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 504 (D.C. Cir 2010). The IBLA has similarly recognized that RMPs are not “static documents” which remain “fixed for all time.” *Southern Utah Wilderness Alliance, et al.*, 144 IBLA 70, 88 (1998). “On the contrary, for an RMP to have any ultimate vitality, it must be seen as a management tool which is necessarily circumscribed by the values and knowledge existing at the time of its formulation.” *Id.*

Finally, the BLM’s Land Use Planning Handbook 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)). In fact, the BLM itself admits that it is not appropriate to make site-specific decision in the Sage-grouse DLUPA. Sage-grouse DLUPA, pg. 43.

Given its nature and purpose, the BLM should carefully consider what decisions need to be made in the Sage-grouse DLUPA. The BLM should not attempt to make site-specific decisions, but should develop only broad management goals and objectives. Further, the BLM should not expend unnecessary resources attempting to analyze the potential impacts of oil and gas development on a site-specific basis more than necessary given the uncertainty associated with the location and extent of future development. *See N. Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006). Individual development projects will be analyzed on a case-by-case basis if and when operations are actually proposed. Based on the BLM's own policies and binding legal precedent, the BLM should ensure that the agency does not utilize the land use planning process to impose site-specific COAs or unreasonably limit future management actions when revising the DLUPAs. Finally, the BLM should ensure that the DLUPA, when adopted, provides sufficient flexibility to address and manage changing development practices, new technology, and new management challenges without amending the DLUPA.

Section 2.8.1 – How to Read Tables 2-3 and 2-4

The BLM's presentation of alternatives in the Sage-grouse DLUPA is inappropriate and unnecessarily confusing. By separating Alternative A and Alternative B from the remaining alternatives in Table 2-3 and by not presenting Alternative A in Table 2-4, the BLM has made it difficult to accurately compare the No Action

Alternative in each of the actual alternatives presented in the draft EIS. One of the primary aims of NEPA is to inform the public of the potential environmental consequences associated with government actions. *See, e.g., Baltimore Gas & Electric v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). Presenting the alternative tables in such a confusing manner significantly undermines the BLM's ability to effectively convey information regarding the proposed alternatives. Encana strongly encourages the BLM to release a new table that directly compares each of the alternatives in a single table in order to allow the public to effectively compare and contrast the alternatives. The BLM's failure to include this type of a comparison makes the document difficult for members of the public and oil and gas operators alike to utilize.

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

Travel

Encana is opposed to the BLM's proposed management action limiting motorized travel to existing roads and trails in PPH. Sage-grouse DLUPA, pg. 143. Encana 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. Encana 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. Encana 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 Encana and other oil and gas operators to continue responsible development of oil and gas resources within the Planning Area.

Encana is strenuously 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.

Encana 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. Encana encourages the BLM not to adopt this radical alternative.

Seasonal road closures may also prohibit routine maintenance operations. As the BLM is aware, many types of routine oil and gas operations and maintenance activities occur year-round on active, producing oil and gas wells. BLM must recognize the routine nature of these activities, many of which do not even require BLM approval prior to the operations. *See* 43 C.F.R. § 3162.3-2 (subsequent well operations). The Sage-grouse DLUPA does not indicate whether, or if, it intends to impose timing limitations on these routine activities in apparent violation of the BLM's regulations. Further, the BLM has not indicated whether it intends to impose timing limitations on other routine subsequent operations, including those that require prior approval. 43 C.F.R. § 3162.3-2(a). In the Planning Area, the BLM routinely approved subsequent well operations quickly and efficiently and without the imposition of timing limitations. Encana is concerned the BLM intends to prohibit such activities during certain portions of the year, which may strand production, limit operational efficiencies, and otherwise reduce development potential. In certain circumstances, the inability to quickly conduct repairs and other operations on producing wells may even lead to loss of a well or permanent damage to a reservoir. The ability to conduct repair and maintenance operations is also a significant safety and environmental issue because as issues arise, operators need to be able to quickly respond to the situation. Forcing operators to comply with seasonal limitations for these otherwise routine issues may create or exacerbate significant safety and environmental issues.

As noted earlier, seasonal road closures will also prevent year-round production operations. Even the very threat of such a radical and unjustified restriction on production operations would seriously hamper future oil and gas development in the Planning Area because oil and gas operators would be unwilling to invest the millions of dollars necessary to drill an oil and gas well if they would be unable to produce the wells throughout the year. The BLM would effectively eliminate all oil and gas development in areas where production would be limited. Further, the BLM has not analyzed or considered the damage that could be done to oil and gas wells if they are shut-in on an annual basis. The BLM has also not analyzed the very real threat that federal minerals would be effectively drained by offsetting wells on State of Colorado and private lands if federal wells are annually shut-in. The BLM must prepare this analysis in order to disclose the significant adverse impacts that would be associated with the closure of oil and gas development on a seasonal basis, including the potential loss of federal reserves and royalties.

It also appears the BLM failed to consider the significant detrimental impact seasonal prohibition on oil and gas operations could have upon the local economy. By precluding production during several months of the year, the BLM would force operators to significantly reduce their workforces on an annual basis. The management action would create a seasonal boom and bust cycle with routine maintenance workers and pumpers being laid off annually. The inconsistent nature of the work would almost certainly reduce the number of local employees operators are able to hire, which would restrict or eliminate the long-term beneficial impacts of the oil and gas development to

the local economy. The BLM's current socio-economic analysis does not account for this cycle. The BLM must eliminate this proposed management action under Alternatives B, C, and D.

To the extent the BLM intends to apply these restrictions to existing leases, the BLM may be violating Encana's existing lease rights or engaging in a taking of Encana's property rights. BLM should review Encana's earlier comments regarding its existing lease rights. 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Further, the BLM cannot deprive Encana 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 land use plans developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701.

For the same reason, Encana does not support the BLM's proposal to limit the construction and reconstruction of new roads in PPH until the completion of a travel management plan for the Planning Area under Alternative D. Sage-grouse DLUPA, pg. 143. The creation of roads is necessary for responsible oil and gas development and the BLM should do all it can to honor existing lease rights and for operators to gain access to those leases. Sage-grouse DLUPA, pgs. 143, 144.

Encana is very concerned regarding the BLM's proposal to limit the construction of new roads even for existing oil and gas leases and valid existing rights. Sage-grouse DLUPA, pg. 144. Encana is particularly opposed to the proposal under Alternative B that would limit disturbance to three percent of an "area" for new road construction and surface disturbance without the imposition of additional mitigation measures. Encana is also opposed to the proposal under Alternative D that would significantly curtail the construction of new roads in PPH. Sage-grouse DLUPA, pg. 144. Encana believes this limitation will significantly curtail oil and gas development and encourages the BLM to develop a more reasonable restriction.

The BLM has failed to justify this restrictive surface disturbance cap or explain how the cap will be applied in conjunction with other LUP restrictions. For example, in the ongoing amendment to the White River LUP, the BLM developed a "threshold" for surface disturbance and other requirements to allow year-round drilling and development. The 5 percent cap is not consistent with the threshold concept and would eliminate its purpose and benefits. The BLM has not explained how the proposed requirements under Alternative D would interplay with the management flexibility the BLM was attempting to develop in the White River Field Office.

The 5 percent cap also creates flawed incentives that may undermine collaborative efforts to promote healthy sage grouse populations. Given the variable topography of the planning area, there is substantial acreage within the mapped PPH that is not sage grouse habitat. The 5 percent cap within PPH ignores the unique local topography. The map of Ecological Sites Supporting Sagebrush also does not

differentiate between sagebrush habitat quality or use by sage-grouse. These factors undercut BLM's ability to work with project proponents to identify site specific plans that allow for development while protecting the sage grouse and high-quality sage grouse habitat.

Encana is also significantly concerned about the implementation of a disturbance cap. Encana believes the BLM should provide far more detailed information regarding how the BLM determined the amount of surface disturbance within each of the Management Zones (MZs). Furthermore, how will BLM ensure that its tracking system will remain current and reclamation is appropriately credited to the cap calculation in a timely fashion when budget constraints and personnel resources may not be consistently available? Before the BLM can assert that a disturbance cap approach will not adversely affect development, they must more accurately define real baseline disturbance and how disturbance will be quantified and tracked consistently.

Rights-of-Way

Encana believes BLM has not sufficiently analyzed the significant extent these limitations on future rights-of-way ("ROW") will have upon oil and gas operations. In particular, Encana is concerned about the management of the PPH and ADH under Alternatives B, C, and D as ROW exclusion and avoidance areas. Sage-grouse DLUPA, pg. 146. The BLM has not justified this substantial increase in the number of acres subject to ROW exclusion and avoidance areas. Encana is particularly concerned that the ROW exclusion and avoidance areas will be utilized to significantly hamper or decrease

oil and gas operations. The BLM must be willing to work with oil and gas lessees and operators to design access routes for proposed oil and gas development projects. Future limitations on road construction could impact Encana's valid and existing lease rights or its rights as the operator of a federal exploratory unit within the Planning Area. While the issuance of an oil and gas lease does not guarantee access to the leasehold, a federal lessee is entitled to use such part of the surface as may be necessary to produce the leased substance. 43 C.F.R. § 3101.1-2. With respect to approved oil and gas units, the IBLA has noted that "when a federal unit has been approved and the unitized area is producing, rights-of-way are generally not required for production facilities and access roads within the units." *Southern Utah Wilderness Society, et. al.*, 127 IBLA 331, 372 (1993). The BLM must recognize the lessee's right to use the lands included within its leasehold or units in order to develop oil and gas resources. Obviously, if lessees are not allowed access to their leased parcels, or are prohibited from installing pipelines necessary to transport the produced resource, they are deprived of the economic benefit of the lease. In such situations, the lessee, the public, the State of Colorado, and the federal government will be deprived of the economic benefit of potential oil and gas development. Encana encourages the BLM to reduce the area subject to ROW avoidance or exclusion limitations as they may adversely impact oil and gas development in the area.

Encana is strenuously opposed to the BLM's proposal to significantly limit ROWs to existing oil and gas leases under Alternatives B and C, and, to a lesser extent, Alternative D. Sage-grouse DLUPA, pgs. 146 – 147. Encana 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 unacceptable. Sage-grouse DLUPA, pgs. 146, 147. Further, the BLM's proposal under Alternatives B and 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.

With respect to Alternative D, the BLM must provide far more information regarding the type and quality of information that will be required to demonstrate that a ROW will not adversely impact Greater Sage-grouse populations. Sage-grouse DULPA, pg. 147. Will actual wildlife studies be required? What information will be sufficient? Absent additional information and well defined criteria, Encana is concerned that this requirement will provide for increased uncertainty and the possibility that Encana's operations will be subject to ever-variable desires of the agency. Encana is also concerned that the requirement for population data will cause unnecessary delays in securing ROWs.

Encana objects to the BLM's decision to require operators and other users to remove, bury, or modify existing power lines within PPH under Alternative B, Alternative C, and Alternative D. Sage-grouse DLUPA, pg. 147. Requiring operators to modify even existing power lines will require significant additional surface disturbance within PPH which may cause adverse impacts to the species. Further, to the extent BLM

does not have continuing jurisdiction over said power lines it does not have the authority to require modifications or burying these lines. Finally, BLM should consider the adverse air quality impacts potentially associated with this management action. In many cases, oil and gas operators install power lines in order to reduce potential air emissions from compressors and other facilities. Requiring these lines to be buried in all circumstances may make it uneconomic to use electrical power which could lead to more air quality impacts from compressors.

Unleased Fluid Minerals

The BLM needs to carefully define and explain the extent to which the proposed stipulations and management objectives contained in Alternatives B, C, and 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 Encana'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).

Encana is strenuously 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. Encana 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.

Encana is also generally opposed 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. Given the variable

topography of the planning area and ongoing land uses, there is substantial acreage within four miles of active leks that is not sage grouse habitat. The 4-mile buffer also does not address the variations in habitat quality or habitat use. Furthermore, the BLM's blanket application of the 4-mile buffer contradicts the direction of the Greater Sage-grouse Conservation Objectives Team Report published by the U.S. Fish and Wildlife Service. "Addressing energy development and any subsequent successful restoration activities in sagebrush ecosystems will require consideration of local ecological conditions, which cannot be prescribed on a range-wide level." *Greater Sage-Grouse Conservation Objectives Final Report*, February 2013, pg. 50. The overly broad application of the 4-mile buffer restriction will effectively eliminate year-round development and its associated benefits, which include reduced truck traffic, fewer emissions, and condensed development activity. The BLM should eliminate this proposed timing restriction or, at the very least, develop a mechanism that recognizes unique site-specific conditions and that provides certainty to operators that year-round development can occur.

For the same reason, Encana remains opposed to the five percent surface disturbance cap required under Alternative D. Sage-grouse DLUPA, pgs. 161 - 165. The BLM has failed to justify this restrictive surface disturbance cap or explain how the cap will be applied in conjunction with other LUP restrictions. For example, in the ongoing amendment to the White River LUP, the BLM developed a "threshold" for surface disturbance and other requirements to allow year-round drilling and development. The 5 percent cap is not consistent with the threshold concept and would eliminate its purpose and benefits. The BLM has not explained how the proposed requirements under

Alternative D would interplay with the management flexibility the BLM was attempting to develop in the White River Field Office.

The 5 percent cap also creates flawed incentives that may undermine collaborative efforts to promote healthy sage grouse populations. Given the variable topography of the planning area, there is substantial acreage within the mapped PPH that is not sage grouse habitat. The 5 percent cap within PPH ignores the unique local topography. The map of Ecological Sites Supporting Sagebrush also does not differentiate between sagebrush habitat quality or use by sage-grouse. These factors undercut BLM's ability to work with project proponents to identify site specific plans that allow for development while protecting the sage grouse and high-quality sage grouse habitat. Furthermore, the cap actually encourages operators to monopolize existing cap space rather than working to identify the best development plan. Encana is also significantly concerned about the implementation of a disturbance cap.

Encana also does not support the BLM's proposal under Alternatives B, C, and D that would significantly curtail the use of geophysical and other seismic exploration within the Planning Area. Sage-grouse DULPA, pg. 161. Encana does not agree that the BLM should close the entire Greater Sage-grouse key habitat area to geophysical exploration or propose unnecessary restrictions on geophysical exploration. Overall, Encana believes that seismic exploration can actually reduce impacts to the environment because operators will be less likely to drill unsuccessful wildcat wells in previously undisturbed areas. The BLM should not place unnecessary requirements, limitations, or procedures on seismic and geophysical surveys. On a national scale, the BLM has

recognized that geophysical exploration is the type of activity that does not individually have a significant effect on the human environment because geophysical exploration has been identified as a Department-wide categorical exclusion. “Approval of Notices of Intent to conduct geophysical exploration of oil, gas, or geothermal exploration of oil, gas, or geothermal, pursuant to 43 C.F.R. 3150 or 3250, when no temporary or new roads construction is proposed.” DOI Manual – 516 DM 11.9.B.6., 72 Fed. Reg. 45504, 45539 (Aug. 14, 2007); *see also* BLM NEPA Handbook, H-1790-1, Appendix 4, B.6 (Rel. 1-1710, 01/30/2008); 40 C.F.R. § 1508.4 (defining categorical exclusions). The BLM’s manual regarding seismic operations similarly recognizes that an environmental assessment (“EA”) is not required in most cases. “An [Environmental Assessment] EA is not required if there are no exceptions listed in 516 DM 2, Appendix 2 that apply and the NOI qualifies as a categorical exclusion under 516 DM 2, Appendix 1, Number 1.6.” BLM Manual 3150.21.A. The BLM’s seismic operation manual recognizes that geophysical operations are actually designed to reduce potential impacts. “Vibroseis, shothole, etc. programs are designed to avoid significant surface modifications and generally are considered to be nondestructive data collection.” BLM Manual 3150.21.A. The BLM should ensure that nothing in the Sage-grouse DLUPA eliminates or discourages the use of geophysical exploration or the approval of such exploration using categorical exclusions.

Even if an EA is prepared for a potential seismic or geophysical project, the EA need not be long or complicated. “The EA process need not be time-consuming or complicated. The level of assessment should be commensurate with the anticipated

impacts and the degree of public interest.” BLM Manual 3150.21.C. The BLM’s handbook for seismic exploration similarly states: “The level of assessment should be commensurate with the anticipated impacts and the degree of public concern. The manager responsible for preparing the EA determines the appropriate format within established standards. The EAs may range from a short (1 to 2 pages) finding of no significant impact (“FONSI”) Decision Record document characterized by only a few headings to a relatively long (10 to 15 pages) document characterized by several headings and subheadings.” BLM Handbook H-3150-1.II.D (Rel. 3-289 6/7/94). “The environmental effects of most geophysical proposals can be adequately addressed by using the short document form.” BLM Handbook H-3150-1.II.D (Rel. 3-289 6/7/94). The language in the Sage-grouse DLUPA does not sufficiently recognize the fact that geophysical surveys are designed to have very little impact and rarely cause adverse impacts to the natural environment. The BLM should develop language to encourage seismic exploration in the Sage-grouse DLUPAs.

Leased Fluid Minerals

Encana is strenuously opposed to the BLM’s proposal to limit surface occupancy even on existing leases under Alternatives B, C, and, to a lesser extent, D. Sage-grouse DLUPA, pg. 163. The BLM does not have the authority to deny all development rights once it has issued a federal oil and gas lease. 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Further, the BLM cannot deprive Encana 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 land use plans developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701. The BLM must reconsider this management action.

Encana strongly opposes BLM's proposal to prohibit surface occupancy or disturbance within four miles of active leks during lekking, nesting, and early brood rearing. Sage-grouse DLUPA, pgs. 162-165, GRSG PPH COA-47-51d. Given the variable topography of the planning area and ongoing land uses, there is substantial acreage within four miles of active leks that is not sage grouse habitat. The 4-mile buffer also does not address the variations in habitat quality or habitat use. Furthermore, the BLM's blanket application of the 4-mile buffer contradicts the direction of the Greater sage-grouse Conservation Objectives Team Report published by the U.S. Fish and Wildlife Service. "Addressing energy development and any subsequent successful restoration activities in sagebrush ecosystems will require consideration of local ecological conditions, which cannot be prescribed on a range-wide level." *Greater Sage-Grouse Conservation Objectives Final Report*, February 2013, pg. 50. The overly broad application of the 4-mile buffer restriction will effectively eliminate year-round development and its associated benefits, which include reduced truck traffic, fewer emissions, and condensed development activity. The BLM should eliminate this

proposed timing restriction or, at the very least, develop a mechanism that recognizes unique site-specific conditions and that provides certainty to operators that year-round development can occur.

Encana 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 Encana's existing lease rights. Sage-grouse DLUPA, pg. 163 – 165. Finally, should the BLM deny or unreasonably delay Encana's ability to develop its leases, the BLM's proposal under Alternatives B and 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 Encana's leases, Encana will be able to demonstrate a taking. Additionally, any alternative that would substantially modify Encana'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 Encana's property and contract rights.

Encana is opposed to the BLM's proposal under Alternatives B, C, and D that would apply seasonal restrictions on exploratory drilling in PPH. Sage-grouse DLUPA,

pg. 166. First, the BLM has not defined or explained what constitutes “exploratory drilling.” How does the BLM intend to define “exploratory drilling” and how will an operator know when they are no longer proposing exploratory operations? BLM cannot use a RMP to develop COAs or other limitations that are inconsistent with 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. *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”).

Encana is strenuously 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.

Encana 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. Encana encourages the BLM not to adopt this radical alternative.

Further, seasonal road closures may prohibit routine maintenance operations. As the BLM is aware, many types of routine oil and gas operations and maintenance

activities occur year-round on active, producing oil and gas wells. BLM must recognize the routine nature of these activities, many of which do not even require BLM approval prior to the operations. *See* 43 C.F.R. § 3162.3-2 (subsequent well operations).

The Sage-grouse DLUPA does not indicate whether, or if, it intends to impose timing limitations on these routine activities in apparent violation of the BLM's regulations. Further, the BLM has not indicated whether it intends to impose timing limitations on other routine subsequent operations, including those that require prior approval. 43 C.F.R. § 3162.3-2(a). In the Planning Area, the BLM routinely approved subsequent well operations quickly and efficiently and without the imposition of timing limitations. Encana is concerned the BLM intends to prohibit such activities during certain portions of the year, which may strand production, limit operational efficiencies, and otherwise reduce development potential. In certain circumstances, the inability to quickly conduct repairs and other operations on producing wells may even lead to loss of a well or permanent damage to a reservoir. The ability to conduct repair and maintenance operations is also a significant safety and environmental issue because as issues arise, operators need to be able to quickly respond to the situation. Forcing operators to comply with seasonal limitations for these otherwise routine issues may create or exacerbate significant safety and environmental issues.

Second road closures will also prevent year-round production operations. Even the very threat of such a radical and unjustified restriction on production operations would seriously hamper future oil and gas development in the Planning Area because oil and gas operators would be unwilling to invest the millions of dollars necessary to drill

an oil and gas well if they would be unable to produce the wells throughout the year. The BLM would effectively eliminate all oil and gas development in areas where production would be limited. Further, the BLM has not analyzed or considered the damage that could be done to oil and gas wells if they are shut-in on an annual basis. The BLM has also not analyzed the very real threat that federal minerals would be effectively drained by offsetting wells on State of Colorado and private lands if federal wells are annually shut-in. The BLM must prepare this analysis in order to disclose the significant adverse impacts that would be associated with the closure of oil and gas development on a seasonal basis, including the potential loss of federal reserves and royalties.

It also appears the BLM failed to consider the significant detrimental impact seasonal prohibition on oil and gas operations could have upon the local economy. By precluding production during several months of the year, the BLM would force operators to significantly reduce their workforces on an annual basis. The management action would create a seasonal boom and bust cycle with routine maintenance workers and pumpers being laid off annually. The inconsistent nature of the work would almost certainly reduce the number of local employees operators are able to hire, which would restrict or eliminate the long-term beneficial impacts of the oil and gas development to the local economy. The BLM's current socio-economic analysis does not account for this cycle. The BLM must eliminate this proposed management action under Alternatives B, C, and D.

To the extent the BLM intends to apply these restrictions to existing leases, the BLM may be violating Encana's existing lease rights or engaging in a taking of Encana's

property rights. BLM should review Encana's earlier comments regarding its existing lease rights. 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Further, the BLM cannot deprive Encana 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 land use plans developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701.

Encana 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)).

Encana 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.

Encana is strenuously opposed to the BLM's proposed limitation on surface disturbing operations, fluid minerals under Alternatives B, C, and D. Under all alternatives, the BLM proposed to limit surface disturbing operations to either three percent within the management zone ("MZ") or five percent within the MZ. Sage-grouse, DLUPA, pg. 166. As already discussed, the BLM cannot impose such limitations on Encana's existing oil and gas lease rights. 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Further, the BLM cannot deprive Encana 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 land use

plans developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701.

The BLM does not have the authority to impose such strict surface disturbing restrictions on existing leases under existing IBLA case law. 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 DLUPAs. 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”).

BLM needs to develop a policy regarding mitigation measures to address the issues in NTT recommendations regarding offsite mitigation on page 167 of the Sage-grouse DLUPA. First, the BLM needs to ensure that its proposed requirements for off-

site or voluntary mitigation are consistent with existing BLM policy. This provision is inconsistent with the BLM's current policy regarding off-site mitigation as expressed in BLM Instruction Memorandum No. 2008-204.³ Instruction Memorandum 2008-204 makes it clear that off-site mitigation may be offered voluntarily by a project proponent and can only be a condition of a permit on a site-specific basis, under very specific criteria. It is contrary to BLM's policy to require off-site mitigation for any and all surface disturbing authorization. The Instruction Memorandum makes it clear that it "is not the intent of the policy to solicit or require aptly committed mitigation that exceeds the impact of the Applicant's proposed project. Furthermore, not all adverse impacts can or must be fully mitigated either on-site or off-site. A certain level of adverse impacts may be acceptable and should be identified during the environmental review and acknowledged in its decision document." Instruction Memorandum 2008-204, pg. 2. The BLM's current policy regarding off-site mitigation makes it absolutely clear that off-site mitigation is only required or appropriate when impacts cannot be mitigated to an acceptable level on-site. It is not intended to be applied in all circumstances. Such a position is contrary to BLM policy and past procedures. The BLM cannot require offsite mitigation for all oil and gas development. Such a policy ignores the fact that oil and gas development is an appropriate use of federal lands.

Encana is strenuously opposed to the BLM's management objective that would require unitization when deemed necessary to protect other resources. Sage-grouse DLUPA, pg. 167. First, as set forth above, the BLM cannot impose new requirements on

³ BLM Instruction Memorandum 2008-204 expired in September 2009. To date, however, no additional guidance has been issued by the BLM, and thus this is the most current guidance regarding off-site or compensatory mitigation.

Encana'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.

Encana is strenuously opposed to the BLM's proposal under Alternatives B and C that would require identification of areas where acquisition of federal mineral lands could be secured. Sage-grouse DLUPA, pg. 167. It is inappropriate for the BLM to continue the acquisition of additional lands and minerals within the Planning Area given its significant degree of federal authority already exercised in the Planning Area. Additionally, given current limitations and funding for BLM and other land management agencies, Encana believes it is particularly unwise to continue to require additional federal lands. The BLM should remove this proposed management action.

Encana 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.

Encana 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.

Encana is opposed to BLM's proposal that would explore options to amend, cancel, or buy-out leases, or include as COAs the relinquishment of leases within the Planning Area under Alternative C. Sage-grouse DLUPA, pg. 168. The BLM simply does not have the authority to require operators to relinquish leases or to cancel existing leases. As the BLM is aware, an oil and gas lease is a contract between the federal government and a lessee, and the lessee has certain rights thereunder. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000); *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). Under well-established precedent, after BLM accepts the bid, the lessee fully pays for the lease, and a lease is issued, a contract exists between the lessee and BLM based solely on those identified terms and conditions. *See e.g., Coastal States Energy Co.*, 80 IBLA 274, 279 (1984). A retroactive amendment or cancellation of a lease would be a unilateral breach of the lease contract. "To hold otherwise would . . . violate the equal opportunity for all bidders to compete on a common basis for leases." *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

Finally, should the BLM deny or unreasonably delay Encana's ability to develop its leases, the BLM's proposal 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 Encana's leases, Encana will be able to demonstrate a taking. Additionally, any alternative that would substantially modify Encana'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 Encana's property and contract rights.

To the extent Encana's leases are already producing, they cannot be administratively cancelled by the BLM, and can only be cancelled through a judicial proceeding. 30 U.S.C. § 188(b); 43 C.F.R. § 3108.3(b), (c). Further to the extent Encana acquired its leases within the Planning Area from another party, they similarly cannot be administratively cancelled by the BLM. Under the terms of the Mineral Leasing Act, the Secretary of the Interior does not have the right to cancel a lease of a bona fide purchaser. 30 U.S.C. § 184(h)(2); 43 C.F.R. § 3108.4; *Clayton W. Williams, Jr.*, 103 IBLA 192, 210 – 216 (1988). The BLM's own Handbook specifically recognizes that the bona fide purchaser protections of the Mineral Leasing Act apply to leases potentially issued in violation of established procedures, including potential violations of NEPA. "The bona fide purchaser protection does extend to voidable leases, *e.g.*, the lease is issued for the lands available for leasing but is not issued to the first-qualified applicant,

or the lease is issued in violation of the established procedures (*e.g.*, National Environmental Policy Act procedures, etc. (*See Clayton W. Williams, Jr. Exxon Corp.*, 103 IBLA 192 (1988))”; BLM Handbook H-3108-1 Relinquishment, Terminations, and Cancellations, § V, pg. 77 (Rel. 3-301 (1/27/95)).

Encana 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.

Encana also does not support the language on page 168 that suggests that all oil and gas activities would be conducted to maximize the avoidance of impacts based on the evolving scientific knowledge. Sage-grouse DLUPA, pg. 168. Such a restriction does not recognize Encana’s valid existing rights. Read broadly, this language could be construed by opponents of oil and gas development to prohibit virtually any oil and gas development within the Planning Area even if unrelated research demonstrates there may be adverse impacts. The BLM should modify this language to specifically state that oil

and gas activities would be conducted in a manner to minimize impacts while still protecting existing rights.

For all of the reasons described herein, Encana is also opposed to the management action that would apply RDFs and Preferred Design Features on Encana's operations.

CHAPTER 3 AFFECTED ENVIRONMENT

Section 3.1 – Introduction

The BLM indicates in Section 3.1 that a Baseline Environmental Report regarding Sage-grouse was produced by the United States Geologic Survey for the BLM and Forest Service in 2003. The Baseline Environmental Report apparently examined each threat identified in the United States Fish and Wildlife Service Listing Decision for the Greater Sage-grouse published on March 15, 2010. Sage-grouse DLUPA, pg. 197. The BLM should make this document publically available to Encana and other members of the public as it was obviously an important component in the BLM's development of the Sage-grouse DLUPA. To the extent the document plays a substantive role in the BLM's development of the Sage-grouse DLUPA, the BLM should have included it as an appendix to the Sage-grouse DLUPA so that the public could also submit comments on the Baseline Environmental Report.

Section 3.3.1 – Special Status Species Existing Conditions

The BLM notes that the sage brush mosaic was historically subject to impacts from natural components from the environment such as small fires. Sage-grouse DLUPA, pg. 242. Given the relatively decadent state of Sage-grouse within much of the

Planning Area, oil and gas development may actually lead to potential Sage-grouse habitat and particularly lekking areas in the future.

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. 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.

Encana 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, Encana questions whether the RDFs and other onerous mitigation measures contained within the Sage-grouse DLUPA are really necessary in order to protect the species.

Section 3.5 – Vegetation

Encana believes the BLM has not accurately described the efforts by oil and gas operators such as Encana to minimize noxious weeds within its leasehold. Sage-grouse DLUPA, pg. 284. Encana is engaged in substantial efforts to limit the number of noxious weeds wherever it operates.

Section 3.7 – Minerals (Leasable)

The BLM incorrectly suggests that NEPA authorizes the BLM to impose COAs on oil and gas operations. Sage-grouse DLUPA, pg. 293. As the BLM is aware NEPA is a procedural statute only, it does not authorize or require agencies to regulate environmental concerns. *United States Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 756 – 57 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 – 51 (1989). NEPA does not, under any circumstances, authorize BLM to impose COAs.

Section 3.14 – Special Designations

The BLM should clarify its description of the process used to designate wilderness study areas under section 603 of FLPMA, 43 U.S.C. § 1782, as compared to its responsibility to monitor and inventory lands for potential wilderness characteristics under section 201 of FLPMA, 43 U.S.C. § 1711. The BLM's authority to review and designate new wilderness study areas pursuant to section 603 of FLPMA terminated on October 21, 1993. *Utah v. United States Department of the Interior*, 535 F.3d 1184,

1187-88 (10th Cir. 2008); *Biodiversity Conservation Alliance et al.*, 183 IBLA 97, 109 (2013). Comparatively, the BLM’s authority to inventory federal lands under section 201 of FLPMA is a continuing on-going requirement. 43 U.S.C. § 1711. However, the BLM cannot create or designate new wilderness study areas under FLPMA. *Utah v. United States Department of the Interior*, 535 F.3d 1184, 1187-88 (10th Cir. 2008); *Biodiversity Conservation Alliance et al.*, 183 IBLA 97, 109 (2013). It is important that members of the public understand this distinction.

The BLM next incorrectly suggests that under 36 C.F.R. § 219.17 the Forest Service is required to inventory and review inventoried roadless areas. As described earlier, under the current Forest Service Planning Regulations, section 219.17 relates to the effective dates and transition for the new planning regulations. The portion of the 2000 regulations regarding inventoried roadless areas was abrogated by the department on April 9, 2012. The agencies must correct this incorrect information in the final EIS for this project.

Section 3.15 – Water Resources

The BLM states that “oil and gas development is also expected to have impacts on ground and surface water resources (BLM 2012).” Sage-grouse DLUPA, pg. 363. The BLM must provide support and justification for this statement. It is true that oil and gas development utilizes water for drilling and development activities, but this statement could be misconstrued by opponents of oil and gas development to suggest that oil and gas operations will necessarily harm water resources within the Planning Area.

Encana disagrees with the BLM's characterization that the BLM has authority over air quality within the Planning Area pursuant to FLPMA. The BLM does not have direct authority over air quality or air emissions under the Clean Air Act ("CAA"). 42 U.S.C. §§ 7401 *et seq.* Under the express terms of the CAA, the Environmental Protection Agency ("EPA") has the authority to regulate air emissions. In Colorado, the EPA has delegated its authority to the Colorado Department of Public Health and Environment ("CDPHE"). *See* COLO. REV. STAT. §§ 25-7-1309 (2012). The CDPHE recently issued regulations for oil and gas-related emissions. *See* CDPHE, Air Quality Control Division, Regulation No. 7, CCR 1001-9 (Dec. 2006), and these regulations are the only authority for regulation of oil and gas-related emissions in Colorado.

With respect to potential visibility impacts, the BLM's authority is also limited by existing federal law. Under the CAA, a federal land manager's authority is strictly limited to considering whether a "proposed major emitting facility will have an adverse impact" on visibility within designated Class I areas. 42 U.S.C. § 7475(d)(2)(B) (2012). Oil and gas operations do not meet the definition of a major emitting facility. Further, under the CAA, the regulation of potential impacts to visibility and authority over air quality in general, rests with the CDPHE. 42 U.S.C. §§ 7407(a). The goal of preventing impairment of visibility in Class I areas will be achieved through the regional haze state implementation plans ("SIPs") that are being developed. 42 U.S.C. §§ 7410(a)(2)(J). Although federal land managers with jurisdiction over Class I areas may participate in the development of regional haze SIPs, the BLM has no such jurisdiction in Colorado. 42 U.S.C. §§ 7491; *see also* COLO. REV. STATE. §§ 25-7-1008 (2010). Accordingly, the

BLM has no authority over air quality and cannot impose emissions restrictions, either directly or indirectly, on natural gas operations in Colorado, particularly if the overall goal is to reduce potential visibility impacts. The BLM's proposed Management Actions relating to visibility must be eliminated.

The Secretary of the Interior, through the IBLA, has unequivocally determined that, in states such as Colorado, the state and not the BLM, has authority over air emissions:

In Wyoming, ensuring compliance with Federal and State air quality standards, setting maximum allowable limits (NAAQS and WAAQS) for six criteria pollutants CO (carbon monoxide), SO₂ (sulfur dioxide), NO₂, ozone and particulate matter (PM₁₀ and PM_{2.5}), and setting maximum allowable increases (PSD Increments) above legal baseline concentrations for three of these pollutants (SO₂, NO₂, and PM₁₀) in Class I and Class II areas is the responsibility of WDEQ [Wyoming Department of Environmental Quality], subject to EPA oversight.

Wyoming Outdoor Council, et al., 176 IBLA 15, 26 (2008). Decisions of the IBLA are binding upon the BLM and have the same force and effect of a Secretarial Decision. 43 C.F.R. § 4.1 (2012) (noting that the Office of Hearings and Appeals, which includes the IBLA, may decide matters as fully and finally as the Secretary of the Interior); *see also IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009 (10th Cir. 2000) (holding that IBLA has *de novo* review authority over the decisions of subordinate agencies such as the BLM). Encana encourages the BLM to add a statement in the Sage-grouse DLUPA clarifying the scope of the BLM's authority as defined by the IBLA. The BLM does not have the authority to impose regulations or mandate control measures on emission sources, including oil and gas operations, within Colorado.

The BLM suggests that the typical threshold for significance and visibility monitoring be where there is a change greater than 0.5dv. Sage-grouse DLUPA, pg. 373. Encana does not believe that the 0.5dv standard is scientifically justifiable. The most widely referenced scientific basis for setting the “just noticeable” change threshold at 1.0dv comes from a paper written by Pitchford and Malm in 1994. M.L. Pitchford and W.C. Malm, 1994 “Development and Application of a Standard Visual Index” Atmospheric Environment Vol. 28, No. 5, pp. 1049-1054. Pitchford and Malm concluded that “a one to two dv change corresponds to a small, visible perceptible change in appearance where the assumptions used in developing the deciview scale are met.” Pitchford and Malm specifically reference a 1.0 to 2.0dv change implicitly indicating that the level of deciview increases the results of the just noticeable change could vary among Class I areas. In particular, Pitchford and Malm suggested a 1.0 to 2.0dv change, not a 0.5dv change, represents a just noticeable change. Other scientists have concluded in detailed analyses that “the deciview scale is not uniform in perception over a wide range of visibility conditions. In fact, the change in deciviews needed to be noticeable varies greatly depending on the optimal distance from the landscape features and its inherent colorfulness.” Henry, Ronald “Just Noticeable Differences in Atmospheric Haze” Vol. 52, October 2002, Journal of Air and Waste Management Association. Thus, it is even possible the 1.0dv standard is not appropriate in all circumstances and in all weather conditions, landscapes, or other conditions. The BLM must demonstrate its justification for utilizing the 0.5dv standard. The BLM appears to rely upon the Federal Land Managers Air Quality Values Workgroup (“FLAG”) report from 2010 as a source for its

decision to utilize the 0.5dv standard. It is important to remember that BLM was not a signatory to the FLAG report and, thus, its reliance on this source is not appropriate.

Regardless of what standard is used, it is important to note that visibility is generally improving within the entire Planning Area. Sage-grouse DLUPA, pg. 384. While some members of the public may believe that oil and gas development on the west slope is having a negative impact on air quality, the BLM's analyses demonstrates that air quality in the region is actually improving.

Section 3.22 – Cultural Resources

In its discussion of cultural resources, the BLM appropriately recognizes that almost all of the compliance investigations for cultural resources within the Planning Area have been associated with proposed energy development projects. The BLM should acknowledge that oil and gas development has contributed to significant scientific cultural discoveries over the past several years within the Planning Area.

Section 3.23 – Paleontological Resources

Encana appreciates the BLM's acknowledgement that inventories and results prepared as part of oil and gas development is one of the main drivers for the paleontology program within the Planning Area. Sage-grouse DLUPA, pg. 412. Encana also appreciates that the BLM acknowledges the positive effect that energy mineral development can have on paleontological resources through additional surveys and discoveries.

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

Encana 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.

Section 4.3.2 – Terrestrial Wildlife

In its list of assumptions in Chapter 4, the BLM states that timing limitations, controlled surface use ("CSU") restrictions, and other COAs may be applied for discretionary approval such as ROWs and applications for permits to drill ("APDs").

Sage-grouse DLUPA, pg. 458. The BLM's statement is not entirely clear and should be revised in the final EIS.

The BLM must 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Given its existing rights, the BLM cannot deprive Encana of its valid and existing lease rights either directly or indirectly.

The BLM's Land Use Planning Handbook also 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 Encana's contracts with the BLM and the BLM's own policies.

In the revised Sage-grouse DLUPAs and accompanying EIS, the BLM should also state clearly that an oil and gas lease is a contract between the federal government and the lessee, and that the lessee has certain rights thereunder. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000)

(recognizing that lease contracts under the Outer Continental Shelf Lands Act give lessees the right to explore for and develop oil and gas); *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). Although the BLM may revise the existing RMPs for the Planning Area, the BLM—and the public—should be reminded that the BLM cannot unilaterally alter or modify the terms of existing leases.

Under well-established precedent, after BLM accepts the bid, the lessee fully pays for the lease, and a lease is issued, a contract exists between the lessee and BLM based solely on those identified terms and conditions. *See e.g., Coastal States Energy Co.*, 80 IBLA 274, 279 (1984). BLM may not later amend the lease with terms not identified in the sale notice and not part of the contract subject to the bidding process. A retroactive amendment of lease terms by BLM would be a unilateral breach of the lease contract. “To hold otherwise would . . . violate the equal opportunity for all bidders to compete on a common basis for leases.” *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

As a federal lessee, Encana has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. *See Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3101.1-2. 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 should also recall that oil and gas lessees have not just the right, but the obligation, to develop their lease. 43 C.F.R. § 3162.1(a) (requiring developed leases to maximize production).

The Sage-grouse DLUPA also cannot defeat or materially restrain Encana’s valid and existing rights to develop its leases through 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)). Further, the Secretary of the Interior and the federal courts have interpreted the phrase “valid existing rights” to mean that BLM cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F.Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (2006) (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

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 DLUPAs. 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”).

Encana 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, land use plans 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)).

Encana specifically 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. Encana does not believe the BLM has fully acknowledged the efforts operators such as Encana have made to reduce habitat fragmentation across the Planning Area.

When describing potential impacts from fluid mineral leasing, the BLM, again, notes that under Alternative B and Alternative D, seasonal restrictions would be applied to exploratory wells. Sage-grouse DLUPA, pg. 475. BLM has still failed to identify or adequately explain the difference between exploratory wells, wildcat wells, and development wells.

The BLM notes that the designation of an ACEC in PPH would not have any significant improvements or benefits for terrestrial wildlife species. Sage-grouse DLUPA, pg. 485. Since there are no benefits to wildlife species, Encana remains steadfastly opposed to the designation of an ACEC in all PPH under Alternative C.

Section 4.3.3 – Aquatic Species

The BLM indicates that fluid mineral development may result in loss, reduction, or alteration of riparian areas for vegetation. Sage-grouse DLUPA, pg. 497. The BLM needs to provide justification for this alleged impact. As the BLM is well aware, the vast majority of Field Offices within the Planning Area impose at least a 500 foot NSO area around all riparian habitats. Further, other agencies such as the Army Corps of Engineers regulate and monitor any activities that may adversely impact waters of the United States and tributaries thereto. Thus, oil and gas operations have very few, if any, impacts on riparian areas. In fact, the BLM later admits in the very same section that in most cases

NSO and CSU stipulations, as well as the current state and federal processes “would be fully capable of reducing projected oil and gas development effects” to aquatic systems. Sage-grouse DLUPA, pg. 498. Contrary to its earlier statements, the BLM effectively admits that the current regulations under Alternative A eliminate potential adverse impacts associated with oil and gas development to aquatic and riparian systems. The BLM should modify the misleading information contained in section 4.3.3.

The BLM asserts, without support, that areas designated as ACEC would be more beneficial to aquatic wildlife. The BLM has provided no support or justification for this statement. The designation of the ACEC would not modify, impact, or alter the current suite of regulations and other protections that the BLM has already admitted is sufficient to protect riparian resources. Sage-grouse DLUPA, pg. 504. The BLM must provide support or justification for its statement that the designation of an ACEC will somehow improve riparian conditions. Absent additional support for this language, it should be removed from the final EIS. This is particularly true since the BLM admits in the same section that impacts to wildlife under Alternative C are expected to be identical under Alternative A, Alternative B, and Alternative D. Sage-grouse DLUPA, pg. 504. Given the fact the BLM admits the ACEC designations would provide no additional protection to wildlife species, the BLM statement that ACEC designations would somehow improve conditions for aquatic habitat is simply unsupportable. Sage-grouse DLUPA, pg. 504.

Section 4.4.2 – Greater Sage-grouse

The BLM indicates that not all habitats within the priority area in Greater Sage-grouse ranges are capable of supporting Sage-grouse populations. Sage-grouse DLUPA,

pg. 507. BLM should clarify in the final EIS and the actual record of decision for the Sage-grouse RMPs that the management restrictions imposed by the RMPs are not applied outside of the Greater Sage-grouse habitat. It would be inappropriate to apply additional restrictions on habitat that does not support the Sage-grouse. Doing so will provide important incentives for operators to locate surface disturbing operations outside of Greater Sage-grouse habitat whenever possible. If the BLM imposes a cap regardless of whether the habitat is suitable or not, operators will have no incentive to avoid Sage-grouse habitat within the Planning Area.

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. The BLM's statement is contradicted by other reports 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.

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.

The overall minerals management under Alternative B, Alternative C, and Alternative D are inappropriate because they unreasonably limit oil and gas development. Sage-grouse DLUPA, pg. 529. 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. The BLM is additionally making 1,315,700 acres available to oil and gas leasing using only NSO restraints. Sage-grouse DLUPA, pg. 529. The adoption of Alternatives B or 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. Sage-grouse DLUPA, pg. 529. 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 removal of vast areas of lands from future oil and gas development and potential restrictions on existing leases under Alternatives B and C, and, to a lesser

extent, Alternative D, would also significantly restrict regional earnings, jobs, and tax revenue. According to the information presented in the Sage-grouse DLUPA, the adoption of Alternatives B, C, and D would reduce regional earnings significantly and reduce local jobs over the current management. *See Sage-grouse DLUPA, Table 4.16, pg. 902.* In these difficult economic times, it is inappropriate for the BLM to significantly restrict economic development opportunities. The Obama Administration has repeatedly indicated that its first priority is to create jobs for the American people, yet the BLM is proposing alternatives, including Alternative B, Alternative C, and Alternative D, that would actually reduce jobs in the Planning Area. Sage-grouse DLUPA, Table 4.18, pg. 908. Such alternatives are inappropriate and should be eliminated. The BLM must not adopt an alternative that would reduce economic development, decrease domestic energy supplies, and harm the local tax base.

Further, 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 4.4.3 – Other Special Status Species of Issue

The BLM indicates on pages 537 and 547 of the Sage-grouse DLUPA that the agency can assert COAs that may be inconsistent with existing lease rights. The BLM’s statement is incorrect and is not supported by law.

The BLM must 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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Given its existing

rights, the BLM cannot deprive Encana of its valid and existing lease rights either directly or indirectly.

In order to effectuate this purpose, the BLM promulgated policies regarding the contractual rights granted in an oil and gas lease. BLM Instruction Memorandum 92-67 states that “[t]he lease contract conveys certain rights which must be honored through its term, regardless of the age of the lease, a change in surface management conditions, or the availability of new data or information. The contract was validly entered into based upon the environmental standards and information current at the time of the lease issuance.” As noted in the BLM’s Instruction Memorandum, the lease constitutes a contract between the federal government and the lessee which cannot be unilaterally altered or modified by the BLM.

The BLM’s Land Use Planning Handbook also 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 Encana’s contracts with the BLM and the BLM’s own policies.

In the revised Sage-grouse DLUPAs and accompanying EIS, the BLM should also state clearly that an oil and gas lease is a contract between the federal government and the lessee, and that the lessee has certain rights thereunder. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that lease contracts under the Outer Continental Shelf Lands Act give

lessees the right to explore for and develop oil and gas); *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). Although the BLM may revise the existing RMPs for the Planning Area, the BLM—and the public—should be reminded that the BLM cannot unilaterally alter or modify the terms of existing leases. Under well-established precedent, after BLM accepts the bid, the lessee fully pays for the lease, and a lease is issued, a contract exists between the lessee and BLM based solely on those identified terms and conditions. *See e.g., Coastal States Energy Co.*, 80 IBLA 274, 279 (1984). BLM may not later amend the lease with terms not identified in the sale notice and not part of the contract subject to the bidding process. A retroactive amendment of lease terms by BLM would be a unilateral breach of the lease contract. “To hold otherwise would . . . violate the equal opportunity for all bidders to compete on a common basis for leases.” *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

As a federal lessee, Encana has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. *See Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3101.1-2. 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 should also recall that oil and gas lessees have not just the right, but the obligation, to develop their lease. 43 C.F.R. § 3162.1(a) (requiring developed leases to maximize production). The BLM cannot deny use of existing leases.

The revised DLUPA also cannot defeat or materially restrain Encana’s valid and existing rights to develop its leases through 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). Further, the Secretary of the Interior and the federal courts have interpreted the phrase “valid existing rights” to mean that BLM cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F.Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (2006) (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

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 DLUPAs. 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 incorrectly assumes that fluid mineral development will necessarily adversely impact special status plant species. Sage-grouse DLUPA, pg. 560. As the BLM is well aware, operators are required to conduct extensive studies prior to initiating any oil and gas related operations. Through these surveys, operators are able to locate and avoid special status plant species in virtually all circumstances. Operators additionally use these surveys to avoid and minimize potential impacts to special status species within the Planning Area.

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.

The BLM suggests in section 4.5 that it will impose NSO restrictions on existing leases. Sage-grouse DLUPA, pg. 585. Such a management action is inconsistent with the BLM’s own regulations that authorize oil and gas lessees to occupy their leasehold. As a federal lessee, Encana has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. *See Pennaco Energy v. United States Dep’t of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3101.1-2. 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 should also recall that oil and gas lessees have not just the right, but the obligation, to develop their lease. 43 C.F.R. § 3162.1(a) (requiring developed leases to maximize production). The BLM cannot deny use of existing leases.

To the extent BLM intends to impose restrictions on existing leases, the BLM’s action 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 Encana’s leases, Encana will be able to demonstrate a taking. Additionally, any alternative that would substantially modify Encana’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 Encana’s property and contract rights.

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. 621.⁴ 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, Encana objects to the BLM's imposition of different mitigation measures on exploratory and wildcat wells. Encana 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.

Encana 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

⁴ 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.

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.

As the BLM is aware, NEPA is a procedural statute intended to produce informed decision making by federal agencies. *United States Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Lee v. United States Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004). The preparation of a land use plan, such as the Sage-grouse DLUPA, requires the BLM to prepare an EIS. 43 C.F.R. § 1601.0-6. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). The BLM should have included additional information in the draft EIS.

Encana 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 Encana's oil and gas operations. The BLM's brief analyses 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.

The BLM indicates that at least three of the 21 identified Colorado MZs have already exceeded the three percent disturbance cap and that ten more are more than half-way to the three percent cap. The BLM should specifically disclose which MZs are close to their caps so that oil and gas operators fully understand how their future operations may be impacted. Sage-grouse DLUPA, pgs. 645 - 646.

Section 4.16 – Soil and Water Resources

Encana appreciates the BLM's acknowledgement that the completion operations such as hydraulic fracturing do not adversely impact ground-water resources. Encana agrees with the BLM's statement that, with proper drilling and completion practices, it is incredibly unlikely that groundwater from different horizons could be contaminated from drilling, completion, and hydraulic fracturing operations. Sage-grouse DLUPA, pg. 778.

Section 4.17 – Air Quality

The BLM incorporates by reference the air resource impacts analysis included in the draft Colorado River Valley RMP, the draft Grand Junction RMP, and the draft White

River RMPA. Sage-grouse DLUPA, pgs 782-783. The modeling and assumptions used in these analyses drastically overestimate the emission rates and modeled impacts. For example, Section 2.4.1 of the White River RMP ARTSD notes that all sources identified in the permit review were conservatively modeled at maximum emission rates based on the permit limits. This approach will overestimate the emission rates and modeled impacts noted in this plan. Most equipment is permitted with potential to emit limits which represent the upper limit of what the equipment could emit and may not represent actual conditions.

Furthermore, pages 3-4 through 3-7 of the White River RMP ARTSD document (3.1.4) describes the assumptions related to activities and equipment used in the near-field AERMOD model. Figure 3-2 contained in this section is a visual representation of the layout and proximity of all equipment that was considered for the modeling run. Within a one square mile area, the following activities were included: 4 drilling rigs, 4 completions, 24 producing wells, and one large compressor station (17,500 hp). This scenario drastically overestimates the amount of activity and emissions that would occur in a one square mile area. Based on the model assumptions found in the ARTSD, the compressor station engine emissions alone would be well above prevention of significant deterioration thresholds. The White River RMP ARTSD also does not take into account proper controls required by major source standards. In addition, completing four wells at the same time within one square mile is not representative of actual operations. This model is not representative of the actual field layout or the emissions that would be expected from the modeled equipment. The BLM is only required to disclose the

potential reasonable impacts of development. The modeled scenario is neither reasonable nor realistic.

The BLM suggests that it, along with the Forest Service, will continue to review projects and impose mitigation measures as necessary. Sage-grouse DLUPA, pg. 790. The BLM does not have direct authority over air quality or air emissions under the CAA. 42 U.S.C. §§ 7401 *et seq.* Under the express terms of the CAA, the EPA has the authority to regulate air emissions. In Colorado, the EPA has delegated its authority to the CDPHE. *See* COLO. REV. STAT. §§ 25-7-1309 (2012).

With respect to potential visibility impacts, the BLM's authority is also limited by existing federal law. Under the CAA, a federal land manager's authority is strictly limited to considering whether a "proposed major emitting facility will have an adverse impact" on visibility within designated Class I areas. 42 U.S.C. § 7475(d)(2)(B). Oil and gas operations do not meet the definition of a major emitting facility. Further, under the CAA, the regulation of potential impacts to visibility and authority over air quality in general, rests with the CDPHE. 42 U.S.C. §§ 7407(a) (2006). The goal of preventing impairment of visibility in Class I areas will be achieved through the regional haze state implementation plans ("SIPs") that are being developed. 42 U.S.C. §§ 7410(a)(2)(J). Although federal land managers with jurisdiction over Class I areas may participate in the development of regional haze SIPs, the BLM has no such jurisdiction in Colorado. 42 U.S.C. §§ 7491; *see also* COLO. REV. STATE. §§ 25-7-1008. Accordingly, the BLM has no authority over air quality and cannot impose emissions restrictions, either directly or

indirectly, on natural gas operations in Colorado, particularly if the overall goal is to reduce potential visibility impacts.

The Secretary of the Interior, through the IBLA, has unequivocally determined that states such as Colorado, not the BLM, have authority over air emissions:

In Wyoming, ensuring compliance with Federal and State air quality standards, setting maximum allowable limits (NAAQS and WAAQS) for six criteria pollutants CO (carbon monoxide), SO₂ (sulfur dioxide), NO₂, ozone and particulate matter (PM₁₀ and PM_{2.5}), and setting maximum allowable increases (PSD Increments) above legal baseline concentrations for three of these pollutants (SO₂, NO₂, and PM₁₀) in Class I and Class II areas is the responsibility of WDEQ [Wyoming Department of Environmental Quality], subject to EPA oversight.

Wyoming Outdoor Council, et al., 176 IBLA 15, 26 (2008). Decisions of the IBLA are binding upon the BLM and have the same force and effect of a Secretarial decision. 43 C.F.R. § 4.1 (noting that the Office of Hearings and Appeals, which includes the IBLA, may decide matters as fully and finally as the Secretary of the Interior); *see also IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009 (10th Cir. 2000) (holding that IBLA has *de novo* review authority over the decisions of subordinate agencies such as the BLM). Encana encourages the BLM to add a statement in the Sage-grouse DLUPA clarifying the scope of the BLM's authority as defined by the IBLA. The BLM does not have the authority to impose regulations or mandate control measures on emission sources, including oil and gas operations, within Colorado.

It is only in the air quality section of Chapter 4 that members of the public begin to understand the significant impacts Alternatives B, C, and D would have upon oil and gas development. The imposition of the three percent in PPH, for example, would

eliminate between 90% and 95% of all oil and gas development within the Colorado River Valley Field Office. Sage-grouse DLUPA, pg. 793. Similarly, Alternative D would eliminate between 81% and 90% of all oil and gas development within the White River Field Office. Sage-grouse DLUPA, pg. 795. These staggering limitations would virtually eliminate oil and gas development in these areas. The BLM must more clearly explain to members of the public that 90% of the jobs, revenue, and earnings associated with oil and gas development could be eliminated under Alternative B. Even under the BLM's preferred alternative, Alternative D, there would be significant loss to oil and gas development. It is also important to note that the BLM incorrectly analyzed the potential loss of oil and gas development under Alternative D. Rather than utilizing the five percent surface cap imposed in Alternative D, throughout section 4.17 the BLM assumes the position of a three percent cap under Alternative B. *See e.g.*, Sage-grouse DLUPA, pgs. 802 – 803. The BLM has nonetheless demonstrated that virtually all oil and gas development within both the Colorado River Valley and the White River Field Office will be eliminated by the imposition of the five percent cap. BLM must not utilize the five percent or three percent cap under Alternatives B, C, or D.

Section 4.19 – Visual Resources

Encana appreciates the BLM's statement in section 4.19 that valid existing leases would be managed under the stipulations in effect when the leases were issued. Sage-grouse DLUPA, pg. 808. Unfortunately, BLM does not support the statement through the rest of the document.

The BLM incorrectly suggests that the imposition of ROW avoidance and exclusion areas in PGH and PPH would necessarily reduce potential visual impacts. In fact, the opposite is true as oil and gas operators may be required to build more extensive and longer road access routes in order to avoid the BLM's ROW exclusion and avoidance areas. The impacts would also necessarily be shifted to adjoining private lands which may still adversely impact view sheds for users of public lands. The BLM must more carefully analyze the potential impacts the ROW exclusion and avoidance areas will have upon visual resources.

Section 4.22 – Cultural Resources

Encana appreciates the BLM's acknowledgement that surveys conducted by oil and gas operators in order to comply with section 106 of the National Historic Preservation Act have beneficial impacts on cultural resources. Sage-grouse DLUPA, pg. 857. Encana would not be surprised to learn the vast majority of all surveys prepared within the Planning Area have been the result of oil and gas and other energy development operations.

Section 4.23 – Paleontological Resources

Encana appreciates the BLM's acknowledgement that oil and gas development could help locate, record, and collect paleontological resources that would not otherwise have been discovered. As with cultural resources, surveys conducted prior to oil and gas operations and the discovery of paleontological resources during surface disturbing operations generally lead to beneficial impacts to paleontological resources in the area.

Section 4.24 – Social and Economic Impacts

As already described, oil and gas development is a significant driver of the economy within the Planning Area. The BLM's analysis demonstrates that Alternative B, Alternative C, and Alternative D would have significant adverse impacts to the local and regional economies. It is estimated that Alternatives B and C would reduce oil and gas earnings \$105,177,247 and \$313,398,999 respectively. Sage-grouse DLUPA, pg. 902. Alternative D would similarly result in a loss of over \$52,588,624 from oil and gas earnings. This is a significant loss of regional earnings and should be avoided by the BLM. Sage-grouse DLUPA, pg. 902. The BLM's own analysis also indicates that Alternative B would result in a loss of over 2,000 jobs which is directly contrary to the statements by the Obama Administration indicating they would take any and all steps necessary to ensure that jobs are gained not lost during this difficult economic times. Sage-grouse DLUPA, pg. 903. Additionally, the analysis indicates that there will be significant job loss under both Alternative C and Alternative D. The BLM should ensure that its actions are improving not destroying the economy of the Western Slope.

The BLM's analysis also demonstrates that there would be significant loss to federal royalty and state taxes under Alternative B, Alternative C, and Alternative D. Sage-grouse DLUPA, pg. 907. Given the dependence the State of Colorado and governments on the Western Slope have on oil and gas revenues, the BLM must not adopt Alternative B, C, or D as they would all have significant adverse impacts upon royalty earnings in the area. Sage-grouse DLUPA, pg. 908.

Appendix E – Stipulations

Under many of the proposed stipulations, BLM allows for exemptions only if an operator is able to provide data demonstrating the Greater Sage-grouse populations in the applicable Colorado Management Zone (“MZ”) are healthy and stable by meeting or exceeding State of Colorado objectives and that an exemption, modification or waiver would not adversely affect Greater Sage-grouse populations due to habitat loss or disruptive activities. The collection of adequate data to demonstrate population health and trends could require several years of data. This is not conducive to the planning timeframes necessary for economically viable and competitive energy development. Furthermore, these exemptions should allow for site-specific considerations beyond population data. For example, BLM’s habitat designations are broadly imposed and may not recognize dramatic topographical differences or variations in the value of sage brush habitat. Without an exemption for site-specific analysis, the BLM could impose an unnecessary stipulation or prohibit an activity from occurring in a preferred location.

Appendix E., Stipulations Applicable to Fluid Mineral Leasing and Land Use Authorizations, Description of Alternative D number 46 in Chapter 2, Table 2-4

“Within ADH, prohibit surface occupancy within a minimum of 4 miles from active leks during lekking, nesting, and early brood rearing (see Chapter 2, Table 2-6, Existing Timing Limitations by Field Office, for timing limitation specifications).” Pg. E-6.

The Sage-grouse DLUPA references the specific seasonal timing limitation prescribed by individual field offices (Table 2.5, incorrectly referenced in the text as Table 2.6) for the application of GRSG ADH TL-46d. The BLM fails to explain, however, how this timing limitation will work with the Threshold Model proposed in

White River's draft RMP. Under the threshold model, operators who keep their disturbance within certain limitations are allowed to operate year-round.

There may be significant amounts of land which does not support Greater Sage-grouse habitat encompassed by a buffer with a 4-mile radius around lek. As worded, this stipulation provides no assurance that ongoing or future land uses will be able to occur in areas that do not contain sage-grouse habitat if they fall within ADH and inside a 4 mile radius of an active lek.

Appendix E., Stipulations Applicable to Fluid Mineral Leasing and Land Use Authorizations, Description of Alternative D numbers 47-51 in Chapter 2, Table 2-4

“Prohibit surface occupancy or disturbance within 4 miles of a lek during lekking, nesting, and early brood-rearing.” Pg. E-8.

Encana strongly opposes BLM's proposal to prohibit surface occupancy or disturbance within four miles of active leks during lekking, nesting, and early brood rearing. Given the variable topography of the planning area and ongoing land uses, there is substantial acreage within four miles of active leks that is not sage grouse habitat. The 4-mile buffer also does not address the variations in habitat quality or use. Furthermore, the BLM's blanket application of the 4-mile buffer contradicts the direction of the Greater Sage-grouse Conservation Objectives Team Report published by the U.S. Fish and Wildlife Service. “Addressing energy development and any subsequent successful restoration activities in sagebrush ecosystems will require consideration of local ecological conditions, which cannot be prescribed on a range-wide level.” *Greater Sage-grouse Conservation Objectives Final Report*, February 2013, pg. 50. The overly broad application of the 4-mile buffer restriction will effectively eliminate year-round

development and its associated benefits, which include reduced truck traffic, fewer emissions, and condensed development activity. The BLM should eliminate this proposed timing restriction or, at the very least, develop a mechanism that recognizes unique site-specific conditions and that provides certainty to operators that year-round development can occur. The proposed exception is too narrow and fails to provide this mechanism. Additionally, the BLM offers no exceptions within 0.6 miles of a lek, which makes no allowances for topography or sagebrush value in areas like Piceance.

Appendix E., Stipulations Applicable to Fluid Mineral Leasing and Land Use Authorizations, Description of Alternatives B/D number 52 in Chapter 2, Table 2-4

“Apply a seasonal restriction on exploratory drilling in PPH to prohibit surface-disturbing activities during the lekking, nesting, and early brood rearing season.”Pg. E-9.

Encana is opposed to the BLM’s proposal under Alternatives B, C, and D that would apply seasonal restrictions on exploratory drilling in PPH. Sage-grouse DLUPA, pg. 166. First, the BLM has not defined or explained what constitutes “exploratory drilling.” Encana requests that the BLM defines “exploratory drilling” and specifies how an operator will know when they are no longer proposing exploratory operations. BLM cannot use a RMP to develop COAs or other limitations that are inconsistent with existing lease rights.

Appendix F – Disturbance Cap Management

Encana opposes the five percent surface disturbance cap required under Alternative D. Sage-grouse DLUPA, pg. F-1. The BLM has failed to justify this restrictive surface disturbance cap or explain how the cap will be applied in conjunction

with other LUP restrictions. For example, in the ongoing amendment to the White River LUP, the BLM developed a “threshold” for surface disturbance and other requirements to allow year-round drilling and development. The 5 percent cap is not consistent with the threshold concept and would eliminate its purpose and benefits. The BLM has not explained how the proposed requirements under Alternative D would interplay with the management flexibility the BLM was attempting to develop in the White River Field Office.

The 5 percent cap also creates flawed incentives that may undermine collaborative efforts to promote healthy sage grouse populations. Given the variable topography of the planning area, there is substantial acreage within the mapped PPH that is not sage grouse habitat. The 5 percent cap within PPH ignores the unique local topography. The map of Ecological Sites Supporting Sagebrush also does not differentiate between sagebrush habitat quality or use by sage-grouse. These factors undercut BLM’s ability to work with project proponents to identify site specific plans that allow for development while protecting the sage grouse and high-quality sage grouse habitat. For example, in 2010 Encana proposed a well pad in Section 28 of Township 4 South Range 96 West. This location was constructed in the valley bottom, which is more than 400 feet below the sage-grouse habitat on Barnes Ridge. The pad location was chosen based on CPW’s and BLM’s preference to utilize the valley bottoms that are less suited for Greater Sage-grouse use and have little to no historical pattern of use, rather than the ridgelines that are frequently used habitat. Based on the Ecological Areas Able to Support Sagebrush (ESSS) map used under Alternative D, this location would count

against the disturbance cap strictly because the well pad is sited in a place capable of supporting sagebrush. In contrast, areas adjacent to this proposed location and on top of Barnes Ridge are not mapped as habitat able to support sagebrush and are therefore not treated as valuable under the disturbance cap. Numerous potential conflicts may arise because operators are propelled to site disturbance based on the ESSS map, not site-specific habitat quality or actual sage-grouse use. BLM must provide a mechanism for evaluating site-specific proposals to ground truth the habitat map and determine the best development plan.

Encana is also significantly concerned about the implementation of a disturbance cap. Encana believes the BLM should provide far more detailed information regarding how it determined the amount of surface disturbance within each of the MZs. Based on meetings with the BLM, Encana understands the BLM utilized generalized assumptions regarding the amount of surface disturbance associated with particular anthropogenic disturbances such as roads, well pads and transmission lines. In particular, operators need additional information regarding how oil and gas facilities were evaluated. For example, did the BLM utilize different matrixes or measurements for conventional vertical development from conventional vertical pads as compared to directional pads? Furthermore, how will BLM ensure that its tracking system will remain current and reclamation is appropriately credited to the cap calculation in a timely fashion when budget constraints and personnel resources may not be consistently available? Before the BLM can assert that a disturbance cap approach will not adversely affect development,

they must more accurately define real baseline disturbance and how disturbance will be quantified and tracked consistently.

Encana applauds the BLM's description of valid existing rights in Appendix F. Sage-grouse DLUPA, pg. F-4. Encana agrees that the BLM has no authority to deny valid existing rights. Encana encourages the BLM to add additional information in detail regarding how it will select which operations will be authorized by the BLM in the event the agency is concerned that the surface disturbance cap may be exceeded. Additionally, Encana requests the BLM provide more information regarding whether the BLM will deny or modify authorizations in order to minimize surface disturbance prior to mirroring the surface disturbance caps within specific MZs. The BLM indicates on page F-6 of the Sage-grouse DLUPA that it will consider certain criteria but Encana requests additional information regarding how projects will be compared.

Appendix G – Surface Reclamation Plan

Overall, BLM's proposed reclamation requirements in Appendix G are overly restrictive, arduous, and unnecessarily prescriptive. The proposal will undercut successful, current reclamation practices. The agencies would achieve reclamation goals more effectively by setting performance-based standards and enabling companies to meet them using innovative reclamation methods, rather than relying on overly prescriptive – and in some cases unworkable – requirements that will jeopardize successful reclamation.

BLM proposes several conflicting requirements. For example, erosion control regulatory requirements proposed in the EIS conflict with seeding requirements and

seeding timeframes for both the state of Colorado and local BLM. Regulatory rules and other land use agreements require continual stormwater management regardless of season. For continual stormwater management to be effective, continual seeding efforts and timeframes are required.

The BLM also proposes using early-seral successional stages of the NRCS Ecological Site Descriptions (ESDs) to determine if reclamation success has been achieved for Phase II and Final reclamation. It is unrealistic to measure reclamation success by range-site or idealized ESDs when BLM's required seed mixes do not support nor encourage a reclamation site towards these descriptions.

Successful reclamation should be judged on the seed mix and plants adjacent or juxtaposed to the reclamation site, rather than solely on the plants listed in reference materials for the range or ESD. Adjacent or juxtaposed reference areas better reflect wildlife, recreation, grazing, climatic, and moisture regime impacts on undisturbed reference areas and reclamation sites.

Appendix G, Section 1.1 – Background

The BLM states when the Natural Resource Conservation Service (NRCS) Range Site Descriptions are available, the WRFO will transition from using range sites to the updated Ecological Site Descriptions (ESDs). Sage-grouse DLUPA, pg. G-2. Comparison to adjacent sites or nearby reference areas is more appropriate than referencing NRCS Range Site Descriptions or ESDs. Adjacent sites or nearby reference areas will better reflect the local micro-climate effect on non-disturbed habitat and

reclamation sites and will better reflect local plant material, wildlife habitat, recreation, grazing, climatic, and moisture regime impacts on undisturbed reference areas and reclamation sites; whereas range/ESD sites are not impacted because they occur only in existing reference material.

Appendix G, Section 2.1 – Introduction

Encana is seriously concerned about many aspects of BLM's proposed reclamation plan requirements. The BLM's proposal fails to respect existing permits and is unnecessarily burdensome. Encana believes onerous obligations arise if the BLM requires operators to apply new or current reclamation standards to existing locations where parties have already agreed to preexisting obligations. Sage-grouse DLUPA, pg. G-3. As written, NRS would have more leverage to modify preexisting agreed to practices such as topsoil placement, desirable vegetation, grading techniques, drainage controls, erosion controls and material requirements. The new reclamation standards would essentially be an amendment to the original conditions of approvals (COAs). Operators should not be held to new standards solely because the operator does not have final abandonment notices (FANs). This requirement will cause a financial burden by costing operators millions of dollars to re-reclaim existing leases.

Retroactively applying different standards to existing/legacy locations may also have a negative environmental impact. Sage-grouse DLUPA, pg. G-3. New grading operations would eliminate desirable vegetation coverage that has developed through years of plant succession (establishing a climax community of diverse plant species takes

approximately five years in western areas). Destabilizing slopes can cause pollutant discharges (permit requirements) and increase the likelihood of undesirable vegetation and weeds becoming established.

The BLM also says that “reclamation plans should be updated and re-submitted for approval if any changes occur that may influence reclamation.” Sage-grouse DLUPA, pg. G-3. This requirement is too broad. Reclamation timelines can vary depending on many conditions that are outside of the operator’s control. Additionally, operators should not be held to standards and requirements that prescribed seed mixes cannot achieve.

Appendix G, Section 2.2 – Plan Components

The BLM’s proposed documentation requirements for the project specific reclamation plans are unreasonable as well as inconsistent and should be removed. Sage-grouse DLUPA, pgs. G-3 and G-4. “Photos of the area to be disturbed, taken from permanent photo points” will result in highly inconsistent results and may become obsolete due to construction disturbance affecting the photo point location. Pg. G-3. The requirement for permanent photo points should be removed.

The proposed methods for documenting pre-disturbance ground cover (G-4, 1.e) are contradictory. The six Core Terrestrial Indicators include Bareground (amount), Vegetation Composition, Nonnative invasive plant species (presence and cover), Plant species of management concern (TES), Vegetation Height, and Proportion of soil surface in large intercanopy gaps. However, the BAR Line Intercept Method is included in the Monitoring Manual for Grassland, Shrubland and Savanna Ecosystems, Volume I. It

appears that an operator could use an “approved method” and still not meet the requirement for measuring the Core Terrestrial Indicators. Furthermore, if pre-approval of other data collection methods is an option, the BLM should provide more information regarding the process for pre-approval.

The BLM also proposes survey requirements for noxious and/or invasive weeds within the project disturbance and a 330-foot buffer. Sage-grouse DLUPA, pg. G-4. Encana questions the technical basis for the 330-foot buffer. Furthermore, BLM does not have the authority to require operators to treat, report the presence of, or manage undesirable invasive weeds that are not considered noxious. Pg. G-4, 3.a. The requirement for washing all vehicles and equipment to prevent the spread of weeds is not feasible in all areas. These requirements should be eliminated or applied to all stakeholders (e.g. livestock trailers, recreationists, agency personnel, etc.).

Appendix G, Section 2.3 – Additional Instances Requiring Site-Specific Reclamation Plan Submission

Encana believes the requirement to complete a Reclamation Plan for a request to abandon a right-of-way should be removed. Sage-grouse DLUPA, pg. G-6. Additionally, if the BLM requires a summary of past reclamation efforts on locations that previously were not required to have a Reclamation Plan, the summary should be addressed separately from the Reclamation Plan.

Appendix G, Section 3.1.1.3 – Requirements (Phase I)

Encana opposes the requirements proposed in Section 3.1.1.3 because they are vague and potentially subjective. Sage-grouse DLUPA, pgs. G-8 and G-9.

Requirements for cleaning equipment must be applied to all stakeholders and users (e.g. livestock trailers, vehicles for hunting, agency vehicles, etc.) and compliance of all parties must be ensured. If not, this requirement unfairly singles out oil and development as the only operators of equipment that may act as a vector for weeds.

Encana recommends an option to masticate all vegetation and incorporate into topsoil for cold composting. Additionally, incorporating carbon material into the topsoil will increase micro-wildlife and any potential nitrogen sink can be addressed by amendments if needed.

Encana believes that the prescribed topsoil management requirements are not always the most practical approach. For example, a ten acre site with two foot of topsoil we require a disturbance of 20 acres of habitat. This is not a sustainable approach to topsoil conservation.

Appendix G, Section 3.1.2.2 – Success Criteria (Phase II)

Encana proposes using a reference site as criteria for successful reclamation. As the site changes so can our efforts, creating an adaptable management strategy that makes sense for a given site.

Appendix G, Section 3.2.2 – Success Criteria (Final)

BLM's proposed seed mixes are not diverse enough to support the resulting plant community requirements. Sage-grouse DLUPA, pgs. G-14 and G-15. The BLM states the resulting plant community must have a composition of at least five desirable plant species, at least three, two, one (depending on Alternative chosen) of which one must be a forb or shrub, each comprising at least five, three, two percent (depending on Alternative chosen) relative cover. The BLM further specifies no one species may exceed 70 percent relative cover to ensure that site species diversity is achieved. However, Seed Mix 1, 8, and 10 are the only seed mixes that have a prescribed shrub component. Additionally, Seed Mix 9 has only four species and two alternates, which do not meet the "five desirable plant species" requirement mentioned above. Encana's past experience in reclamation efforts have shown that certain soil moisture, soil temperature, and other seasonal conditions can result in over 70% cover with individual varieties. Operators should not be held responsible for the resulting composition if there was adequate establishment of a cover species. Establishment of a species is the result of the seed mix and climatic conditions. Thus, more diverse seed mixes are preferred to meet the BLM's revegetation requirements.

Appendix G, Table G-1 – Timeline for Reclamation Activities

Encana is concerned about several aspects of the proposed Timeline for Reclamation Activities. Sage-grouse DLUPA, pg. G-17. Encana believes the requirement to begin Phase I interim reclamation within 24 hours from the time surface disturbing

activities ended is infeasible. It would be safer and more effective to specify Phase I reclamation must commence when safe access and sufficient acreage is available to avoid conflict with ongoing construction activities. Additionally, Phase II reclamation requires reclamation within 6 months, which may not fall within the prescribed BLM seeding periods. Finally, the requirement for reclaiming roads should occur at the end of reclamation efforts to ensure roads are available for maintenance and monitoring of other revegetation/reclamation efforts.

Appendix G, Section 5.1 – Seed Mix Selection, Application Methods, and Rates

As with many other aspects of Appendix G, Encana opposes the overly prescriptive nature of the seed mix selection requirements proposed by BLM. The existing seed mixes are inadequate for meeting habitat restoration goals. Sage-grouse DLUPA, pg. G-20. Performance-based standards for reclamation are more appropriate and effective.

Appendix G, Table G-3 – Seed Mix Selection, Application Methods, and Rates

Encana does not agree that the proposed application rate of 50 seeds/square foot is adequate. Sage-grouse DLUPA, pg. D-22. Different seed mixes need to be applied at different rates to achieve site-specific reclamation goals. We would like to work with the BLM to find the optimum seed count for each mix with consideration for variables like precipitation, elevation, slope, and aspect.

Appendix G, Section 5.2 – Acceptable Seeding Dates

Encana believes the prescribed seeding dates undercut the BLM's major management objectives for Phase I topsoil and subsoil stabilization. Sage-grouse DLUPA, pg. G-26. Topsoil and subsoil stabilization should be a performance-based metric. Currently, seed material is provided under the Stormwater best management practices (BMPs). Requiring operators to wait for the seeding date and removing all Stormwater BMPs is unnecessary; Encana has demonstrated through past performance that seeding can occur all year. Additionally, requiring that all interim reclamation for all operators occur within the timeframe proposed is unreasonable because skilled, efficient reclamation contractors are limited in availability.

Appendix H – Areas of Critical Environmental Concern

Encana disagrees with the BLM's evaluation of the proposed ACEC for Sage-grouse habitat. Given the prevalence of Sage-grouse habitat across the western United States, Encana does not believe the BLM appropriately applied the relevance and importance criteria in the regulations. 43 C.F.R. § 1610.7-2. Encana strenuously urges the BLM not to adopt the proposed ACECs for Sage-grouse habitat.

Appendix I – Required Design Features

The BLM has not adequately explained how the proposed Best Management Practices 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 no surface occupancy (“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. *Western Colorado Congress*, 130 IBLA 244, 248 (1994). Given its existing rights, the BLM cannot deprive Encana 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 land use plans developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701 (2012). 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 Encana’s valid and existing rights to develop its leases through 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).

The BLM’s Land Use Planning Handbook also 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 Encana’s contracts with the BLM and the BLM’s own policies.

As a federal lessee, Encana has a legal right to occupy the surface to explore for, produce, and develop oil and gas resources on its leases. *See Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3101.1-2. 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 should also recall that oil and gas lessees have not just the right, but the obligation, to develop their lease. 43 C.F.R. § 3162.1(a) (requiring developed leases to maximize production).

The Sage-grouse DLUPA also cannot defeat or materially restrain Encana’s valid and existing rights to develop its leases through 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)). Further, the Secretary of the Interior and the federal courts have interpreted the phrase “valid existing rights” to mean that BLM cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F.Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (2006) (BLM can impose only “reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted”).

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”).

Encana is particularly opposed to the Required Design Features and Best Management Practices 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 Encana existing rights, Encana 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.

BLM's suggestion that operators use liquid gathering facilities has been largely impeded by the BLM's prohibition on commingling. Although the BLM has attempted to clarify the prohibitions contained in Washington Office Instruction Memorandum 2011-184, in the more recently released Instruction Memorandum 2013-152 (Jul. 3, 2013) it has been Encana's experience that the BLM still continues to prohibit commingling of even federal production in most circumstances. The BLM cannot require gathering facilities and clustering development when the agency itself is the impediment to these types of mitigation practices. Furthermore, while Encana prefers to use liquid gathering where possible, the system requires gravity to make the fluids flow to the central facility. The varying terrain and drastic elevation changes in Colorado make the system very difficult to build except under ideal conditions.

Encana encourages the BLM to eliminate BMP's for phased development. The United States Court of Appeals for the Tenth Circuit, which has authority over all of Wyoming, recently affirmed a BLM decision not to require a phased leasing RMP in the Buffalo Field Office specifically because such an alternative would delay the production of energy resources and was not otherwise practical. *Biodiversity Conservation Alliance, et al. v. Bureau of Land Management, et al.*, 608 F.3d 709, 715 (10th Cir. 2010). The BLM need not analyze such an unreasonable and impartial alternative. Further, allowing oil and gas developers to secure leases in only one portion of a geologic basin or area at a

time will limit and preclude exploration and development activities. Before an oil and gas operator will be willing to commit the millions of dollars necessary to drill even a single exploratory oil and gas well, it must secure a large enough lease position to justify the expense. If phased leasing was mandated by the BLM, the operator may be unable to secure such lease positions and new exploration would come to a halt, along with the economic benefits associated therewith.

BLM also incorrectly references “Appendix H, Required Design Features” several times in Chapter 2. Sage-grouse DLUPA, pgs. 42, 189, and 190. BLM should clarify that the correct citation is “Appendix I, Required Design Features.”

Additionally we offer the following specific comments regarding Appendix I:

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, West Nile Virus All Designated Habitat No. 1

“Increase the size of ponds to accommodate a greater volume of water than is discharged. This will result in un-vegetated and muddy shorelines that breeding Cx. tarsalis avoid (De Szalay and Resh 2000). This modification may reduce Cx. tarsalis habitat but could create larval habitat for Culicoides sonorensis, a vector of blue tongue disease, and should be used sparingly (Schmidtman et al. 2000). Steep shorelines should be used in combination with this technique whenever possible (Knight et al. 2003).”

These requirements need to be subject to the preferences of landowners. On split estate lands where the surface is owned by private landowners, BLM must defer decisions regarding what facilities remain on the land and the size of ponds to those private landowners.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, West Nile Virus All Designated Habitat No. 2

“Build steep shorelines to reduce shallow water (>60 cm) and aquatic vegetation around the perimeter of impoundments (Knight et al. 2003). Construction of steep shorelines also will create more permanent ponds that are a deterrent to colonizing mosquito species like Cx. tarsalis which prefer newly flooded sites with high primary productivity (Knight et al. 2003).”

While the intent of steep shorelines may be advantageous for the control of mosquito species, it presents a hazard to mammals being able to escape from the impoundment. This is something that needs to be considered in administering this measure.

This entire section on West Nile Virus is missing any reference to insecticide applications which are effective in controlling mosquito larvae. We recommend this measure be included in the list of requirements.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Roads Priority Habitat No. 9

“Locate roads to avoid important areas and habitats.”

This requirement needs to be subject to the preferences of landowners on split estate lands where the surface is owned by private landowners. BLM must defer decisions regarding road location with those private landowners.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Roads Priority Habitat No. 13

“Establish trip restrictions (Lyon and Anderson 2003) or minimization through use of telemetry and remote well control (e.g., Supervisory Control and Data Acquisition).”

Remotely monitoring a site may not always identify all operational considerations, so there is sometimes the need inspect a well or facility. In order to conduct safe and effective oil and gas operations, certain inspection and maintenance activities must be conducted regularly. Further, the economics associated with some leases may not allow telemetry to be installed. This requirement should be subject to operational considerations and economic viability.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 19

“Use directional and horizontal drilling to reduce surface disturbance.”

The phrase “technically feasible and as part of the downhole design objectives” should be added to provide necessary flexibility to this requirement.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 22

“Apply a phased development approach with concurrent reclamation.”

The term “phased development” needs clarification. This means different things to different people. Encana opposes phased development which only allows certain portions of a leasehold or unit to be developed over time until that portion is plugged or abandoned before proceeding to another portion of the leasehold or unit. This is a clear violation of existing lease terms since this type of terminology has not been used in lease language before.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 23

“Place liquid gathering facilities outside of priority areas. Have no tanks at well locations within priority areas (minimizes perching and nesting opportunities for ravens and raptors and truck traffic). Pipelines must be under or immediately adjacent to the road (Bui et al. 2010).”

This requirement is confusing. Placing liquid gathering facilities inside priority areas would reduce truck traffic which would be advantageous in priority areas. Further, if liquid gathering or trucking is not allowed inside priority areas, there is no way to remove liquid production from the lease. This requirement conflicts with standard operational practices and is not feasible and needs to be removed.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 24

“Restrict the construction of tall facilities and fences to the minimum number and amount needed.”

It is unclear what is meant by “tall”. Certain facilities, particularly those for compression or natural gas treatment, require the use of designs which incorporate vessels or equipment that, by their design, can involve height. Furthermore, fences are typically installed for reasons of security and safety. Although some flexibility is mentioned such as the “minimum number and amount needed”, this requirement lacks specificity and the reality of what is needed to construct a facility and needs to be removed.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 27

“Bury distribution power lines.”

This requirement is excessive and cost-prohibitive. We urge BLM to add flexibility that takes into account technical feasibility and economic considerations.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 29

“Design or site permanent structures which create movement (e.g., a pump jack) to minimize impacts to GRSG.”

This requirement is unreasonable and lacks scientific justification. We are unaware of any studies on Sage-grouse which correlate movement and distances relative to Sage-grouse response. Considering the existing NSO from leks, pump jacks at a distance of at least 0.6 mile will not create an issue. We recommend this requirement be removed.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 33

“Use only closed-loop systems for drilling operations, with no reserve pits.”

It is not always reasonable or feasible to require closed loop mud systems for drilling. Many drilling rigs are not equipped for closed loop drilling, which could complicate development in some situations. Further, even if a closed system were available on a drilling rig, some type of pit will be needed for placement of drilling cuttings. This requirement must provide the flexibility to allow this as an option.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 37

“Require noise shields when drilling during the lek, nesting, brood-rearing, or wintering seasons.”

This requirement is too broad and vague. First, the measure does not define the types of noise shields that are required. Further, the shield can take any number of shape and form. It is also important to realize that noise shields cannot be used at a site without being engineered for safety factors such as wind load. Shields are not merely installed near a noise source. They must be carefully anchored, potentially with a foundation, to meet wind load requirements depending upon the material used to build a “shield.” Additionally, expanded well pads may be needed to accommodate the configuration of a “shield”, which increases surface disturbance. It is also important to consider the attenuation of noise from a site to receptors such as leks, nesting, and brood rearing. Moreover, simply stating that noise shields are required during “wintering seasons” may not be necessary if the drilling is occurring where the noise attenuation would not be a problem. This requirement needs to be completely reworded to provide more clarification and flexibility.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations Priority Habitat No. 40

“Locate new compressor stations outside priority habitats and design them to reduce noise that may be directed towards priority habitat.”

This requirement is overly broad and unnecessarily prescriptive. There are many items to consider when siting compressor stations, such as the engineering and design constraints inherent to gas gathering systems. With regard to directing compressor station noise away from priority habitat, proximity to other receptors, such as homes, also

needs to be considered. This item needs to be subject to technical feasibility, as well as landowner preferences when private land is involved.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Reclamation Priority Habitat No. 45

“Restore disturbed areas at final reclamation to the pre-disturbance landforms and desired plant community.”

If the disturbance is on private land, this requirement needs to be subject to the preferences of landowners.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Reclamation Priority Habitat No. 46

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations General Habitat No. 59

“Cover (e.g., fine mesh netting or use other effective techniques) all drilling and production pits and tanks regardless of size to reduce GRSG mortality.”

This requirement is not practical. Fine mesh netting is not only extremely difficult to deploy, but difficult to maintain, especially during winter with snow accumulation. It is unclear why tanks are included here, unless this is referring to open-top tanks. We urge BLM to remove this requirement or revise it reflecting these concerns. Suitable fencing/netting requirements are already required by the state.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Fluid Mineral Development, Fluid Mineral Operations General Habitat No. 61

“Use remote monitoring techniques for production facilities and develop a plan to reduce the frequency of vehicle use.”

Remotely monitoring a site may not always identify all operational considerations, so sometimes there is the need to go out and look at a well or facility. In order to conduct safe and effective oil and gas operations, certain inspection and maintenance activities must be conducted regularly. We recognize that limitation on some disruptive activities and access to well locations during critical seasons may be necessary, such as prohibiting construction activities (e.g. well pads, roads, pits) or limiting the number of trips allowed. Basic maintenance and operation activities are necessary to maintain safe, effective, and environmentally sound operations. Further, the economics associated with some leases may not allow telemetry to be installed. This requirement should be subject to operational considerations and economic viability.

Appendix I., Required Design Features, Preferred Design Features, and Suggested Design Features, Locatable Minerals, Locatable Minerals Reclamation All Designated Habitat No. 91

“Irrigate interim reclamation if necessary for establishing seedlings more quickly.”

“Irrigate interim reclamation as necessary during dry periods.”

These RDFs should be reworded to recognize feasibility and to reflect that irrigation needs to be done in a way that will prevent vegetation from being unable to withstand drought conditions after the irrigation has been removed.

Appendix J – Monitoring

Encana is extremely concerned that flaws in a monitoring program, combined with BLM’s proposed 5 percent cap, will create an administrative nightmare that stops or delays oil and gas development. The relationship between the proposed disturbance cap and the Appendix J monitoring framework is unclear. For example, while the Disturbance

Cap Management (Appendix G) credits reclamation, there is no clear path by which reclamation information is incorporated into the BLM's monitoring framework. Instead, the monitoring framework seems to create and assess its own disturbance information. This means that site-specific anthropogenic disturbances such as well pads and pipelines will be included in the DLUPA's monitoring, but reclamation and mitigation projects may be ignored and the disturbance area for energy development will not be reduced during subsequent analyses, which would artificially inflate disturbance estimates. Likewise, vegetation alteration or manipulation on private lands for which there is no vegetation monitoring or reclamation data will be captured as disturbance but will not be reduced in a meaningful timeframe. This will affect the evaluation of disturbance in state- or range-wide analyses.

The BLM does not clearly define criteria for calculating disturbance. For example, do adjacent ancillary facilities such as the secondary pads for liquid gathering systems count as one well pad, or two pads? Without clear criteria, BLM's data will lack consistency between field offices, and operators will have no certainty regarding implementation.

Limited funding and staff resources at BLM will exacerbate the problem. Encana is extremely concerned that land users will be dependent on a spatial tracking and management system managed by a federal agency with tight budgets and limited staff hours for system development, management, updates, and user training. BLM cites a sage grouse tracking and management system in Wyoming as a model for effectively tracking disturbance; however, it is important to note that these systems have faced

significant challenges and would require significant resources to translate the system cited in Wyoming to a working model for Colorado. BLM should clearly define its criteria for determining the disturbance level and rely on a non-federal entity or entities to manage the database.

CONCLUSION

Encana 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.

Encana 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,
Encana Oil & Gas (USA) Inc.



Darrin Henke
Interim President USA Operations