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Scott Fitzwilliams, Forest Supervisor
c/o Jason Gross
Colorado River Valley Field Office
2300 River Frontage Road
Silt, CO 81652

Re: Lava Boulder Creek Exploratory Development Program

Dear Scott:

Thank you for the opportunity to comment on the Notice of Proposed Action ("NOPA") for the Lava Boulder Creek Exploratory Development Program submitted by Antero Resources Piceance Corporation ("Antero"). I write on behalf of the Pitkin County Commissioners. Because the NOPA is preliminary in nature, we offer comments that are similarly preliminary. We note, however, that the NOPA appears to represent the first drilling proposal within the Thompson Divide area in recent times, and thus will involve drilling techniques and resource issues that have not been previously analyzed for this area by the Forest Service or BLM. Accordingly, we believe analysis of this proposal should be correspondingly thorough. Once the Service releases further NEPA documentation that provides a more detailed examination of affected resources, we anticipate having more detailed comments. In keeping with its standing request to both the Service and BLM concerning oil and gas activities in Pitkin County, the County requests notice of, and an opportunity to comment on, all future proposals and analysis related to Lease COC 66708, and any unitization or suspension request related to the subject lease.

The Proposed Action concerns development of federal gas lease COC 66708 in the headwaters of the East Divide Creek drainage on the White River National Forest ("WRNF"). The lease is situated in Garfield, Mesa, and Pitkin Counties. Our comments are limited to potential lease activities in Pitkin County; we leave to our neighboring jurisdictions comments concerning impacts in their counties. While we understand that the proposal currently contemplates development activities within portions of the lease that are not within Pitkin County, we are also aware that the NEPA process may result in alterations to the project plan that could lead to actions being taken in Pitkin County. Moreover, this lease comprises a portion of a proposed unit that includes several leases located principally in Pitkin County, and it appears that the proposal here may lead to development of, and extending the duration of, those other Pitkin County leases. We offer the following comments with those considerations in mind.

I. Validity of Lease COC 66708 and Roadless Rule Requirements

A. Lease COC 66708 is Invalid

Lease COC 66708 was issued in 2003 when the 2001 Roadless Rule was in full force and effect. The Lease, however, failed to incorporate an express stipulation addressing the Roadless Rule and identifying areas of the lease subject to no surface occupancy. Lease COC 66708 was, however, issued subject to the lessee's compliance with all existing laws and regulations. *See* Form Lease ¶ 3; Notice for Lands of the National Forest System stipulation.

Moreover, the IBLA has ruled that leases issued under essentially identical circumstances violated NEPA. *See Pitkin County*, 173 IBLA 173, 184 (2007). This 2007 Pitkin County IBLA Decision legally binds BLM, and BLM therefore conclusively knows that the NEPA process underlying the issuance of Lease COC 66708 violated NEPA. BLM is barred from asserting now that the NEPA process related to the lease was lawful. Indeed, BLM's decision letter on remand from the *Pitkin County* IBLA decision declared the subject leases to be "invalid ab initio, retroactively withdrawn from the date of issuance . . . and . . . hereby canceled." *See* Letter from BLM to Encana Oil & Gas (USA) Inc. (August 12, 2009), attached hereto as Exhibit 1.

As the *Pitkin County* IBLA decision demonstrates, a violation of key environmental laws like NEPA and the Roadless Rule renders a lease invalid and subject to cancellation. *See also Boesche v. Udall*, 373 U.S. 472, 476 (1963); *Grynberg v. Kempthorne*, 2008 WL 2445564, *4 (D. Colo. 2008); 43 CFR § 3108.3(d). Given that the underlying lease here is invalid, approval of any activities subject to the lease is illegal. To that extent, the County believes the Service must reject the Proposed Action for lack of a valid underlying lease.

B. The 2001 Roadless Rule Controls the Lease

Even assuming that the lease were valid, any rights conveyed by it are subject to the 2001 Roadless Rule. That Rule was applicable when the lease issued, and continues to apply to the lease pursuant to the Colorado Roadless Rule, which preserves pre-existing limitations on surface use. *See* Colorado Roadless Rule, § 294.46(b); 77 Fed. Reg.

39576, 39606: "The rule . . . preserves any existing limitations on surface development rights arising from lease terms, lease stipulations, conditions of approval, 36 CFR 228.100, and Onshore Oil and Gas Orders."

Paragraph 3 of the form lease used here provides that rights granted by it "are subject to applicable laws, the terms, conditions, and attached stipulations of this lease, the Secretary of the Interior's regulations and formal orders in effect as of lease issuance, and to regulations and formal orders hereafter promulgated when not inconsistent with lease rights granted or specific provisions of this lease."

Moreover, Lease COC 66708 included a "Notice for Lands of the National Forest System" stipulation specifying that the lessee "must comply" with all the rules and regulations of the Secretary of Agriculture set forth at Title 36, Chapter II of the C.F.R. At the time of lease issuance (and today), those regulations included the 2001 Roadless Rule.

Accordingly, under governing United States Supreme Court precedent, the 2001 Roadless Rule was incorporated into the lease, and any and all lease activities must comply with that Rule. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620-21 (2000) (holding that offshore federal oil and gas lease incorporated statutes and regulations in effect at the time of lease issuance); *see also Amber Resources Co. v. U.S.*, 538 F.3d 1358, 1368 (Fed. Cir. 2008) (same); *Anadarko Petroleum*, 183 IBLA 1, 12 n.13 (2012) (noting that, as with offshore leases, onshore lease language incorporates regulations in effect at the time of lease issuance).

As you know, the Service's regulations at 36 CFR § 228.112(c) also state that "nothing" in the Service's Oil and Gas regulations "shall be construed to relieve an operator from complying with applicable Federal and State laws or regulations." This emphasizes the obligation to enforce Roadless Rule compliance.

1. BLM Regulations Require Environmental Safeguards

Moreover, BLM regulations require that agency to impose reasonable measures to minimize adverse impacts and protect environmental qualities. Any rights granted in a lease are made "subject to" reasonable measures that may be required by the authorized officer, with such reasonable measures being as needed to "minimize adverse impacts to other resource values, land uses, or users not addressed in the lease stipulations at the time operations are proposed." 43 C.F.R. § 3101.1-2. BLM is empowered, consistent with lease rights granted, to modify the siting or design of facilities, the timing of operations, and can specify interim and final reclamation measures; however, reasonable measures "are not limited to" these actions. *Id.* BLM's authority under this regulation is broad, and not limited by any specific items set forth in § 3101.1-2. *See Yates Petroleum Corp.*, 176 IBLA 144, 156 (2008); *see also* 53 Fed. Reg. 17,340, 17,341 (May 16, 1988).

Section 6 of BLM's standard lease form (form 3100-11) similarly requires the lessee to conduct operations in a manner that "minimizes" adverse impacts to a host of environmental resources. Reasonable measures "deemed necessary by lessor" (i.e., the United States) must be taken by the lessee to accomplish this intent. Again, the BLM can modify the siting or design of facilities, the timing of operations, and specify interim and final reclamation measures to achieve these needs, but its specification of reasonable measures "are not limited to" just these measures. Here, for the reasons stated above BLM must eliminate impacts to roadless areas and roadless area characteristics.
BLM's regulations for leases, permits, and easements also require BLM to minimize environmental impacts. These regulations require that every land use authorization contain terms and conditions which shall "[m]inimize damage to scenic, cultural, and aesthetic values, fish and wildlife habitat, and otherwise protect the environment." 43 C.F.R. § 2920.7(b)(2).

Another source of authority requiring BLM to minimize adverse environmental impacts from oil and gas operations is Onshore Oil and Gas Order No. 1. The Order requires that, "[t]he operator must conduct operations to minimize adverse effects to surface and subsurface resources, prevent unnecessary surface disturbance, and conform with currently available technology and practice." Onshore Order No. 1 § IV. In approving an Application for Permit to Drill (APD), BLM must attach conditions of approval that reflect necessary mitigation measures, including reasonable mitigation measures to ensure that operations "minimize adverse impacts to other resources . . . ." Id. § III.F.a.3.

II. Impact on Potentially Unitized Leases in Pitkin County

It is our understanding that Lease COC 66708 is included within Antero's proposed Wolf Springs Unit, and that Antero plans to rely on the subject well to prevent the entire unit from expiring. As you know, NEPA requires analysis of connected, cumulative, and similar actions. *See* 40 C.F.R. § 1508.25. In light of the pending unit proposal, exploration of this lease is clearly connected to extending the prospect of further development in the area, a great deal of which may take place directly within Pitkin County. Accordingly, we ask that future analysis of this proposal address those connected actions in detail.

We believe the proposal warrants special attention because it appears to be directed at perpetuating a series of leases which were issued illegally in the first place. Moreover, as you know, the Service has released a programmatic Draft Environmental Impact Statement for Oil and Gas Leasing on the WRNF that acknowledges as inadequate for contemporary purposes the analysis contained in the 1993 Oil and Gas EIS and 2002

Land and Resource Management Plan—the two NEPA documents that purportedly justified issuance of Lease COC 66708. Among other things, those legacy documents dramatically underestimated the scale of oil and gas development in this area.

Given Presidential direction contained in, among other things, the White House Blueprint for a Secure Energy Future[1] to require lessees to "use or lose" their leases, we believe the public interest will best be served by allowing these leases to expire and re-evaluating future leasing in this area once the NEPA process underway in the 2012 DEIS concludes. *See also* Department of Interior, Oil and Gas Lease Utilization, Onshore and Offshore, Updated Report to the President (2012).[2] We urge both the Service and BLM to bear in mind that extension of oil and gas leases is generally justified only in "extraordinary circumstances." *Hoyl v. Babbitt*, 129 F.3d 1377, 1384 (10th Cir. 1997). Here, there are no circumstances justifying lease extension, and the natural gas market remains flooded with capacity that has driven down gas prices, a situation that is likely to persist due to financing arrangements put in place during the recent gas boom. *See, e.g.*, Exhibit 2 (newspaper articles). As a result, operators across the Piceance and elsewhere are pulling out, not drilling new wells. Accordingly, the Proposed Action appears aimed only at a speculative purpose that will perpetuate illegal leases in the face of a lack of commodity demand and widespread public opposition.

III. Resource-Specific Issues

A. Roadless Areas

The 2001 Roadless Rule and the Colorado Roadless Rule seek to protect high quality or undisturbed soil, water and air; sources of public drinking water; diversity of plant and animal communities; habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land; primitive, semi-primitive non-motorized, and semi-primitive motorized classes of dispersed recreation; reference landscapes; natural appearing landscapes with high scenic quality; traditional cultural properties and sacred sites; and other locally identified unique characteristics. *See* 66 Fed. Reg. 3,244, 3,245; 77 Fed. Reg. 39,576, 39,603.

The importance of these values to the citizens of Pitkin County, the economy of Pitkin County, and the organizational interests of the County itself cannot be overstated. We ask that further analysis address these issues in detail, including impacts on grazing users and adjacent lands. As you know, Pitkin County has invested some $15 million in preserving the landscape and agricultural operations of the Jerome Park parcel, which is immediately adjacent to federal lands in the Divide. Harm to roadless values, and indeed

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[1] http://www.whitehouse.gov/sites/default/files/blueprint_secure_energy_future.pdf
[2] http://www.doi.gov/news/pressreleases/upload/Final-Report.pdf

oil and gas development in the Divide in general, may directly affect the continuing viability of the agricultural operations at Jerome Park, which would significantly impair the value of Pitkin County's investment in the property. We will provide further details concerning this issue once the Service completes further environmental review.

B. Air Quality

Further analysis of this proposal must thoroughly address air quality impacts flowing both from the Proposed Action and other reasonably foreseeable development. In this regard, the WRNF DEIS provides recent guidance on expected levels of development. We are particularly concerned about the impacts on our property interests at Jerome Park and elsewhere from ozone and other pollutants; about impacts to ski areas that are the lifeblood of the Pitkin County economy; and impacts to Class 1 airsheds in Pitkin County that are similarly essential to our thriving recreational and resort economy. The Clean Air Act imposes on "the Federal Land Manager and the Federal official charged with direct responsibility for management of such lands an affirmative responsibility to protect the air related values (including visibility) of any such lands within a Class I area." 42 U.S.C. § 7475(d)(2)(B); 40 C.F.R. § 51.166(p)(2).

The Clean Air Act also "declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Mandatory federal Class I areas include national parks (over 6,000 acres) and wilderness areas (over 5,000 acres). *See* 42 U.S.C. § 7472(a). Class I areas that may be impacted by reasonably foreseeable development include the Maroon Bells/Snowmass Wilderness Area in Pitkin County, and historical monitoring indicates likely deterioration of air quality at Aspen Mountain and other nearby ski areas. Should air quality deterioration be severe enough, the County could well be forced to undertake, at its expense, steps to minimize air quality impacts from already-existing sources, as was necessary in connection with the expansion of Highway 82.

Attached is a preliminary report on air quality impacts associated with oil and gas development on the White River National Forest prepared by Megan Williams, whose expertise in air quality analysis is documented in her attached CV. We ask that further environmental review address her comments and the issue in more detail. We will then provide further comments of our own, including the possibility of additional comments from Ms. Williams, who reserves the right to supplement or otherwise modify her report.

Finally, we ask that further analysis address climate-change impacts from the proposal in light of other reasonably foreseeable development in the area. Climate change, with its potential to diminish seasonal snow cover, threatens the economy of not only Pitkin County, but Colorado as a whole.

C. Water Quality

Natural gas extraction that involves hydraulic fracturing threatens long-term water quality impacts that are still poorly understood. The U.S. Environmental Protection Agency is in the midst of a study of fracking that is slated for completion in 2014. Nonetheless, a draft EPA report from a study underway at Pavillion, Wyoming indicates that fracking led to widespread contamination of groundwater.[3]

We ask that further analysis of this proposal take into account that finding, as well as the hydrologic connection, if any, between the Lava Boulder site and the aquifers underlying Jerome Park and other lands in Pitkin County so that potential impacts on the County's water resources can be better understood for future comment.

D. Impacts to Existing Uses

The Thompson Divide includes a number of active grazing allotments and contains numerous range improvements, including lands utilized by those operating ranches at Jerome Park. Loss of productive grazing lands, water contamination, noise and traffic, and direct loss of livestock as a result of oil and gas operations in areas that have traditionally supported agriculture should be analyzed and disclosed in further analysis of this proposal. Similarly, we ask that further analysis address impacts to recreational users, including sportsmen. Pitkin County depends on a healthy recreational and resort economy, which in turn depends on healthy ecosystems and landscapes that support the wildlife prized by sportsmen and other citizens. The Thompson Divide provides some of the most productive hunting units in the state. We will provide further comments in response to such additional analysis.

Thank you for this opportunity to comment. We look forward to working with you to address the issues presented by this proposal.

Very Truly Yours,

Christopher G. Seldin
Assistant County Attorney

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[3] http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf