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Sent via email to psicc_oandg@fs.fed.us and cara.ecosystem-management.org/Public//CommentInput?Project=33788

John Dow, Forest Planner
Pike and San Isabel National Forests and
Cimarron and Comanche National Grasslands
2840 Kachina Drive
Pueblo, Colorado 81008

Re: Scoping Comments on the Pike and San Isabel National Forests and Cimarron and Comanche National Grasslands Oil and Gas Leasing Environmental Impact Statement

Dear Mr. Dow:

Devon Energy Production Company, L.P. ("Devon") hereby submits the following scoping comments in response to the Forest Service's Notice of Intent to prepare an environmental impact statement ("EIS") for oil and gas leasing ("Oil and Gas Leasing EIS") within the Pike and San Isabel National Forests and Cimarron and Comanche National Grasslands ("Grasslands"). 78 Fed. Reg. 29,318 (May 20, 2013). Devon has significant interest in the Grasslands, including over 9,900 acres of oil and gas leases. Devon submits these scoping comments because the Forest Service's future leasing decisions following the Oil and Gas Leasing EIS potentially may impact Devon's future operations and leasing activities in the Grasslands.

The Oil and Gas Leasing EIS Should Promote Oil and Gas Production.

When identifying lands for leasing and the terms on which they will be leased, the Forest Service must ensure compliance with the Energy Policy Act of 2005, Energy Policy and Conservation Act of 2000 ("EPCA"), the National Energy Policy, Executive Order Number 13212 (66 Fed. Reg. 28357 (May 18, 2001)), and the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, and reduce rather than increase impediments to federal oil and gas leasing and development. Hydrocarbon production from the Grasslands will benefit the national, state, and local economies. Development of one oil or gas well can yield hundreds of thousands of dollars that are paid to governments and reinvested in the local community. Production of hydrocarbons provides revenue to county, state, and federal governments through royalties and taxes. Furthermore, development of the hydrocarbon resource will require increased employment, and producers will make substantial economic investments in the local economies.

In the Oil and Gas Leasing EIS, the Forest Service should consider alternatives that further these statutory and administrative directives. Although the Forest Service has identified a potential alternative under which it would close all lands within the Pike and San Isabel National Forests and the Grasslands to future oil and gas leasing, see 78 Fed. Reg. at 29,320 (identifying a "No New Leasing" alternative as a possible alternative for analysis), this alternative does not meet the objectives of the statutory and administrative directives described above. Therefore, the Forest Service should not adopt a No New Leasing alternative in its Record of Decision.

Stipulations Should Not be More Restrictive than Necessary to Protect Affected Resources.

The Notice of Intent states that, as part of the Oil and Gas Leasing EIS, the Forest Service will consider stipulations to attach to future oil and gas leases to protect other resource values. 78 Fed. Reg. at 29,319. The Forest Service should ensure that stipulations developed for future oil and gas leases are the least restrictive necessary to adequately protect other resource values. Since the Forest Service issued its last leasing document for the Grasslands in 1992 (the 1992 Oil and Gas Leasing Final EIS and Record of Decision, known as the “1992 Oil and Gas Leasing EIS”), Congress passed the Energy Policy Act of 2005. 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 Section 363 of the Energy Policy Act of 2005 was finalized in April of 2006 as Forest Service Agreement No. 06-SU-11132428-052. Pursuant to the Energy Policy Act and the MOU required thereby, the stipulations for oil and gas leases within the Grasslands should not be onerous or more restrictive than necessary. The Forest Service must consider the MOU when selecting the alternatives analyzed in the Oil and Gas Leasing EIS and adopting an alternative in the Record of Decision.

The Proposed Listing of the Lesser Prairie-Chicken is Not a Changed Condition that Requires Additional NEPA Analysis.

The Notice of Intent states that the Oil and Gas Leasing EIS is necessary to evaluate changed conditions since the 1992 Oil and Gas Leasing EIS, including the proposed listing of the lesser prairie-chicken (“LPC”) as threatened under the Endangered Species Act (“ESA”). 78 Fed. Reg. at 29,319; see 77 Fed. Reg. 73,828 (Dec. 11, 2012). The proposed listing of the LPC as threatened, however, is not a changed condition that requires additional NEPA analysis. Federal courts have held that a decision to list a species as threatened or endangered under the ESA is not a new circumstance that compels supplemental analysis under the National Environmental Policy Act (“NEPA”). See *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 344 (9th Cir. 1996). The courts have reasoned that a change in the listing status of a species is not a change in the species’ biological status. *Id.* Because the Forest Service examined the effects of leasing on the LPC in the 1992 Oil and Gas Leasing EIS, the question before the agency is not whether the status of the LPC has changed but whether the biological circumstances surrounding the LPC has changed since this analysis so that additional analysis is necessary.

Not only is the Forest Service’s characterization of the proposed listing of the LPC as a changed circumstance erroneous, it is also premature. The U.S. Fish and Wildlife Service (“FWS”) has not reached a final decision on whether to list the LPC as threatened. Devon disputes the FWS’s proposal to list the LPC as threatened because the FWS overstated the perceived threat of land use activities, particularly oil and gas development, on the LPC and because the FWS ignored the significant ongoing voluntary conservation activities that benefit the LPC. Only if and when the LPC is listed as threatened will the LPC receive the protections afforded threatened species under the ESA and will the Forest Service’s obligations toward threatened species under Section 7 of the ESA be triggered. See 16 U.S.C. § 1536.

Although the FWS’s proposal to list the LPC as threatened is not a changed circumstance that compels additional NEPA analysis, Devon recognizes the importance of the Grasslands for the conservation of the LPC. Devon is aware that LPC exist within the Grasslands and that the Forest Service has been actively managing the Grasslands to benefit the LPC and improve its habitat. Devon encourages the continuation of such management to benefit the LPC and its habitat. Furthermore, Devon believes that responsible oil and gas development can coexist with management to improve LPC populations and its habitat. Land management agencies and oil and gas operators have successfully

worked cooperatively to develop reasonable approaches to conserving the LPC while allowing continued oil and gas exploration and production, such as in the Carlsbad and Roswell Resource Areas of the Bureau of Land Management (“BLM”) in New Mexico. Devon encourages the Forest Service to consult with oil and gas operators before it considers altering management of oil and gas development on the Grasslands to conserve the LPC.

The Oil and Gas Leasing EIS Must Consider Changed Technology that Reduces Impacts from Oil and Gas Development.

The Notice of Intent identifies “new and improved oil and gas drilling, completion, and production technology” as a changed circumstance that has occurred since the 1992 Oil and Gas Leasing EIS. 78 Fed. Reg. at 29,319. The Notice of Intent states that a purpose of the Oil and Gas Leasing EIS is to “[e]nsure that the new technology and information is considered and adequately addressed in a NEPA document.” *Id.* The Oil and Gas Leasing EIS must consider that technological improvements and regulatory changes associated with oil and gas drilling, completion, and production activities have dramatically reduced the impacts of these activities since the 1992 Oil and Gas Leasing EIS was completed. Directional and horizontal drilling technologies have allowed multiple wells to be drilled from a single pad, thus reducing the surface impacts resulting from oil and gas development. Improved rig engines have also reduced the air quality impacts from oil and gas development. Furthermore, tightened regulatory standards have reduced potential impacts from oil and gas development. In 2012, the U.S. Environmental Protection Agency (EPA) issued a final rule imposing federal air standards on natural gas wells that are hydraulically fractured and imposing requirements to limit emissions from other equipment used in the oil and natural gas industry. *See* 77 Fed. Reg. 49,490 (Aug. 16, 2012). The Bureau of Land Management is also in the process of developing a rule to regulate hydraulic fracturing activities on federal lands. *See* 78 Fed. Reg. 31,636 (May 24, 2013) (proposed rule to be codified at 43 C.F.R. pt. 3160). These technological improvements and regulatory developments are just a handful of the changes that have occurred since 1992. The Forest Service must consider these and similar technological improvements and regulatory changes and their effect of reducing potential impacts from oil and gas development in the Oil and Gas Leasing EIS.

The Oil and Gas Leasing EIS Must Respect Existing Lease Rights.

Devon commends the Forest Service’s recognition in the Notice of Intent that “[c]urrent valid existing leases, including the associated terms, conditions, and stipulations would not be considered nor affected by this analysis, nor would the exercising of reserved and outstanding mineral rights on [National Forest Service] lands.” 78 Fed. Reg. at 29,320. Oil and gas leases are existing rights that cannot be modified unilaterally by the Forest Service or the BLM. Once the BLM, on behalf of the Forest Service, has issued a federal oil and gas lease without NSO stipulations, and in the absence of a nondiscretionary statutory prohibition against development, neither the BLM nor the Forest Service can 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). Like the Notice of Intent, the Oil and Gas Leasing EIS must expressly state that existing leases and rights will not be affected by the Forest Service’s prospective leasing decisions.

In the Oil and Gas Leasing EIS, the Forest Service should also recognize 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). The EIS should expressly recognize that the Forest Service cannot unilaterally alter or modify the terms of existing leases.

Finally, the Forest Service may not utilize conditions of approval (“COAs”) to attempt to modify or constrain valid existing rights. 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 the existing leases either uneconomic or unprofitable. See *Utah v. Andres*, 486 F.Supp. 995, 1011 (D Utah 1979); *Connor 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”). This analysis is equally true for the Forest Service. The Forest Service cannot attempt to impose unreasonable mitigation measures or COAs on Devon’s existing leases within the Grasslands; the Forest Service must fully and completely honor all valid existing rights, including Devon’s existing oil and gas lease rights.

Reasonably Foreseeable Development Scenario is an Analytical Tool.

To the extent the Forest Service utilizes a Reasonably Foreseeable Development Scenario (“RFD Scenario”) to anticipate the potential impacts of its leasing decisions, the Forest Service must explain that the RFD Scenario is not a limit or threshold on future development. Rather, the RFD Scenario is a tool to estimate the potential impacts of oil and gas development.

Federal court decisions have confirmed that the RFD Scenario is not intended as a limit on oil and gas development. The U.S. District Court for the District of Columbia recently affirmed that the RFD Scenario is not a limit on future oil and gas development. *Theodore Roosevelt Conservation P’ship v. Salazar*, 605 F.Supp.2d 263, 283 (D. D.C. 2009). The trial court’s determination was affirmed by the U.S. 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).

Similarly, 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. 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 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.”).

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 Forest Service must carefully explain to the public in the

John Dow, Forest Planner
Pike and San Isabel National Forests and
Cimarron and Comanche National Grasslands
Page 5
June 18, 2013

Oil and Gas Leasing EIS that the RFD Scenario is not a cap or limitation on future development in the Grasslands.

CONCLUSION

Devon appreciates the opportunity to submit scoping comments on the Oil and Gas Leasing EIS. Devon would like to participate in the process for the Oil and Gas Leasing EIS as it moves forward. Please place Angie Burckhalter (333 W. Sheridan Ave., Oklahoma City, OK 73102, angie.burckhalter@dyn.com) on the mailing list for all future information regarding this EIS and do not hesitate to contact her at (405) 552-8069 or by email should you require additional information. We request that you please provide Devon complete paper copies of the draft EIS, final EIS, Record of Decision at the address provided above.

Sincerely,



Darren Smith, Manager
Corporate EHS Policy