

April 3, 2008

Bakersfield Field Manager, Tim Smith
Bureau of Land Management
Bakersfield Field Office
3801 Pegasus Drive
Bakersfield, California 93308

Re: Oil and gas exploration on the Carrizo Plain National Monument

Dear Mr. Smith:

We, the undersigned groups, are writing to express our concerns over plans to explore for oil and gas within the Carrizo Plain National Monument (the “Monument”), including the recent request from Vintage Production to conduct geophysical exploration. Given the special context of the Monument, we urge and expect the BLM to conduct an Environmental Impact Statement on any and all such proposals and to apply rigorous protections to fulfill the requirements of the Monument Proclamation and other applicable federal laws.

As you know, the Monument is a very special place. It is home to the highest concentration of threatened and endangered species in California including the giant kangaroo rat, San Joaquin kit fox, and the blunt-nosed leopard lizard. It is also one of the last remaining remnants of the San Joaquin grassland ecosystem, providing essential habitat for these species. In fact, thousands of acres outside of the Monument boundaries have already been severely impacted by oil and gas exploration and development, which is one of the reasons the Carrizo Plain National Monument is so important to these species and highlights the critical nature of managing such activities.

The BLM has the authority to deny development or restrict the manner in which oil and gas development can occur and should thoroughly explore such alternatives.

Although the Monument was established “subject to valid existing rights” the BLM also has an obligation to manage these lands for the protection of the Monument’s values. As the manager of the surface, the BLM has the authority to deny requests for access to conduct geophysical exploration and applications for permits to drill altogether, or to impose other restrictions on development to protect important ecological and cultural values, such as requiring directional drilling from existing well pads or phasing development to ensure limited disturbance at any given time. The BLM has argued in federal district court that the agency retains full discretion to prohibit development of a lease after it is issued. The agency stated that:

if BLM identifies an unacceptable environmental or other impacts during its review under the National Environmental Policy Act (“NEPA”) of an APD submitted under the Resource Management Plan Amendment (“RMPA”) at issue in this litigation, BLM retains the right to institute “reasonable measures” to protect that resource, including denying the APD if necessary. See 43 C.F.R. § 3162.3-1(h).

State of New Mexico v. Bureau of Land Management, Civ. No. 05-0460 BB/RHS, Federal Defendants’ Reply Brief, p. 3 (February 27, 2006), copy attached. The agency’s authority is heightened in the context of protecting Monument objects and could support denial of Vintage’s request altogether in light of the threats to the Monument and threatened and endangered species.

Further, the requirements of the Endangered Species Act may also require the denial of access where exploration or development could adversely affect threatened and endangered species. *See e.g.*, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) (once a species is listed, Section 7 of the ESA

mandates that every federal agency “consult” with FWS when taking any action that “may affect listed species”; the purpose of the Section 7 consultation process is to insure that no agency actions “jeopardize the continued existence” of a listed species.). In the Monument, the presence of many threatened and endangered species requires the BLM to consider denial of access for exploration and development. Additional limitations may be imposed by application of the National Historic Preservation Act. *See, e.g.*, 16 U.S.C. § 470f ; 36 CFR § 800.1 (Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties; the results of the consultation and consideration should lead to a range of alternatives that will protect cultural resources). The Monument Proclamation identifies the historic and cultural resources in the Monument as values that the BLM must protect as a priority over other uses.

The BLM can also protect the Monument by requiring that any subsequent development be conducted from non-sensitive lands, by imposing “no surface occupancy” (NSO) as a condition of approval, such that lessees could still access oil and gas by using **directional drilling**. Directional drilling allows companies to access fossil fuel reserves from existing well pads, often by drilling at an angle, thereby reducing the footprint of new extraction. This approach has been demonstrated to be cost-effective on many BLM lands and has been technologically feasible at a distance of 5-6 miles (see below). Directional drilling from an existing well pad seems a feasible alternative to disturbing additional acreage in this highly valuable area, where irreplaceable wildlife habitat and cultural resources may be destroyed.

The Executive Branch has made it clear that the employment of low-impact drilling technologies should be a priority in the implementation of energy development on public lands:

Enormous advances in technology have made oil and natural gas exploration and production both more efficient and more environmentally sound. Better technology means fewer rigs, more accurate drilling, greater resource recovery and environmentally friendly exploration.

High-tech drilling allows us to access supplies five to six miles away from a single compact drilling site, leaving sensitive wetlands and wildlife habitats undisturbed...

“Overview,” National Energy Policy, The White House, May 2001 (emphasis added) (available online at: <http://www.whitehouse.gov/energy/>). The Energy Policy also touts “highly sophisticated directional drilling that enables wells to be drilled long horizontal distances from the drilling site . . .” *Id.* at “21st Century Technology: The Key to Environmental Protection and New Energy Production” (emphasis added). Pursuant to making these priorities effective “on the ground,” it is incumbent upon BLM, as custodian of the public lands, to actively encourage environmentally sound development by carefully considering directional drilling alternatives.

The necessity to rigorously explore and objectively evaluate reasonable alternatives that include directional drilling has been recognized by the Interior Board of Land Appeals. Biodiversity Associates, IBLA 2001-166 (2001) at 9 (where the Board set aside a BLM FONSI because “the record fails to...provide a rational basis for failing to analyze fully the alternative of directional drilling...”). In Biodiversity Associates, BLM had offered “without elaboration” directional drilling “[a]lternatives to the proposed action [that] were considered but dropped from analysis due to geologic and economic restraints at the time the EA was written.” *Id.* at 8. Another factually similar case held that BLM’s analysis of alternatives was inadequate when it relied unquestioningly upon statements by the project applicant that the alternative in dispute was not

feasible and required the agency to consider directional drilling as an alternative for development. Southern Utah Wilderness Alliance v. Norton, 237 F.Supp.2d 48, 52-53 (D.D.C. 2002).

Former oil and gas industry manager of exploration and development, and certified professional geo-scientist, Ken Kreckel has reviewed the history of directional drilling in the Rockies and concluded that directional drilling technology has evolved to the point that is certainly economically viable in the current market and should be required by the BLM to protect surface resources as part of responsible multiple use management. See the attached report, *Directional Drilling: The Key to the Smart Growth of Oil and Gas Development in the Rocky Mountain Region*, for details on his analysis and conclusions.

Another option would be for the BLM to require any development in the Monument be conducted under a strategic approach of **phased development**. Phased development is an overarching plan that spreads out the harms created by oil and gas exploration and development over time and/or over a geographic area so that other uses and values of the land can be sustained both during and after the lifetime of oil and gas extraction. Phased development can limit both the amount of equipment in use at any given time and amount of surface disturbance on a lease at any given time, and can require successful restoration before permitting additional disturbance. It can also allow for core habitat and wildlife corridors to be left undeveloped to ensure sufficient habitat exists and allow for wildlife movement.

The long-term nature of phased development supports FLPMA's requirement for "sustained yield" by allowing "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources consistent with multiple use." 43 U.S.C. § 1702(b). FLPMA's provision that the Secretary of Interior shall take any action "necessary to prevent unnecessary or undue degradation of the lands" is consistent with the use of phased development. 43 U.S.C. § 1732(b). Phased development is another environmentally preferable alternative that BLM should examine in detail to comply with its NEPA obligations. A federal court in Montana has held that phased development falls within the "range" of alternatives to be considered. Northern Plains Resource Council v. Bureau of Land Management, CV 03-69-BLG-RWA (D.Montana February 25, 2005). That court stated that phased development is "within the range of reasonable alternatives" and must therefore be "given detailed consideration" when the BLM is considering a plan for development rather than a site specific project. Lastly, the court held that phased development "is not the functional equivalent of a no-action alternative" and should be considered in addition to other reasonable alternatives. A similar approach should be considered prior to approval of any development in the Monument.

The BLM must prepare an environmental impact statement (EIS).

NEPA requires preparation of an Environmental Impact Statement (EIS) when the proposed action may significantly impact the environment. 40 C.F.R. § 1501.4. The definition of "significantly" (set out at 40 C.F.R. § 1508.27) requires preparation of an EIS with consideration of geophysical exploration in the Carrizo Plain National Monument.

"Significantly," as used in NEPA and defined in the NEPA regulations (set out at 40 C.F.R. § 1508.27 and excerpted in part below) requires considerations of both context and intensity:

Context means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality, depending upon the setting of the proposed action.

Intensity refers to the severity of impact and includes consideration of:

- **Unique characteristics** of the geographic area, such as proximity to historic or cultural

resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

- The degree to which the effects on the quality of the human environment are likely to be ***highly controversial***.
- The degree to which the action may ***establish a precedent*** for future actions with significant effects or represents a decision in principle about a future consideration.
- The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or ***may cause loss or destruction of significant scientific, cultural, or historical resources***.
- The degree to which the action may adversely affect an ***endangered or threatened species*** or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- Whether the action ***threatens a violation*** of Federal, State, or local law or ***requirements imposed for the protection of the environment***.

The establishment of the Carrizo Plain National Monument and the potential impacts from oil and gas exploration or development are very important in the *context* of the BLM's National Landscape Conservation System, regionally, and in California, as shown by the many values listed in the Monument Proclamation. Moreover, the impacts of the oil and gas exploration and development are of high *intensity/severity* due to the precedent-setting nature of such activity in this Monument and also because of the special characteristics of the Monument, many of which are of the types specifically mentioned in the regulation (as excerpted above), such as significant resources and endangered or threatened species and their habitat. Additionally, balancing the development of oil and gas resources while protecting ecological integrity and other Monument values is *highly controversial*, having been the subject of much public comment and concern.

In addition, it is important that the BLM prepare an EIS to fully consider alternatives to any proposed action and ensure that those actions do not foreclose alternatives being considered under the Monument RMP, which has not yet been completed. In considering any requests for exploration or development of oil and gas in the Monument, the BLM must act within the framework of the Monument Proclamation and the new RMP. NEPA prescribes limitations on the actions that any agency may take while preparing a new RMP such that prior to completion, the BLM must not take any action that will:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

40 C.F.R. § 1506.1(a). Further,

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

40 C.F.R. § 1506.1(c) (emphasis added). *See also* 40 C.F.R. § 1502.2(f) (stating agencies “shall not commit resources prejudicing selection of alternatives before making a final decision.”).

An EIS should be prepared to fully analyze the significant impacts of oil and gas decisions. The minimum 45-day comment period required by NEPA (40 C.F.R. § 1506.6) would provide the public with a more reasonable amount of time to review and comment on these important issues. Further, BLM should provide formal response to public comments, as required by 40 C.F.R. § 1503.4.

Seismic exploration may have significant impacts in the Monument.

Geophysical exploration has been shown to lead to significant potential damage to public lands. Seismic testing has direct and indirect effects, as well as cumulative impacts, to a host of natural and historic resources including, but not limited to the following: soils (including cryptobiotic soils – damage to which, according to the U.S. Geological Survey, can take over 200 years to recover), vegetation, wildlife, water (including seeps, springs, and riparian habitat), historic properties (i.e., cliff dwellings, rock art, pictographs, petroglyphs, and pit houses), and wilderness values. *See, e.g.*, Letter from Larry Svoboda, EPA, to Patrick Gubbins, BLM Re: Stone Cabin 3-D Seismic Survey Project, Draft Environmental Assessment (Oct. 3, 2003), raising concerns about cumulative impacts from seismic exploration and related development. A copy is attached.

Because of the likelihood of significant and long-lasting damage, BLM decisions to approve geophysical testing have been set aside or stayed (until BLM added mitigation measures) in several federal court and administrative decisions. In Southern Utah Wilderness Alliance v. Norton (“Yellow Cat”), 237 F. Supp. 2d 48 (D.D.C. 2002), the district court reversed and remanded a BLM decision to approve a 2-D seismic project in Grand County, Utah because, among other things, the BLM had failed to consider a reasonable range of alternatives to the proposed action.¹ The Yellow Cat court, and earlier the Office of Hearing and Appeals, enjoined the Yellow Cat project, even though a portion of the work had already been completed, because of potentially significant impacts to cryptobiotic soils. *See* Southern Utah Wilderness Alliance, D-2002-177 (Order, February 23, 2002, copy attached, noting that the resulting delay and economic injury to the project proponent “pale in comparison to resource harms”). Likewise, in Biodiversity Conservation Alliance, IBLA 2006-43 (Order, Jan. 12, 2006, copy attached), the Interior Board of Land Appeals issued a stay of the Cherokee West 3-D seismic project citing the risk of damage that seismic exploration posed to paleontological resources. *See also* San Juan Citizens Alliance v. Norton, Civil Action No. 02-B-1597 (MJW) (2002) (court issued temporary restraining order because of the threat seismic activities – the North Mail Trail 3-D seismic project – posed to historic properties in Canyons of the Ancients National Monument).

We have also attached photos of the equipment used for geophysical exploration and the resulting impacts to soils and vegetation for your consideration of permitting this activity in the fragile environment of the Monument.

This type of damage should not be risked on the Carrizo Plain National Monument without preparation of an EIS and full consideration of prohibiting access altogether or imposing stringent requirements on any such activity.

¹ In Yellow Cat, the plaintiffs also challenged the BLM’s failure to prepare an EIS to evaluate the project’s potentially significant impacts. The court, however, declined to address this argument after concluding that the agency had failed to consider a reasonable range of alternatives.

BLM does not have to simply allow unrestrained entry on the Carrizo Plain National Monument for oil and gas exploration and development. The BLM should consider whether to deny or significantly restrict the manner of any such access not only in the immediate context of Vintage's request, but also in a broader context in the Monument RMP. Preparation of an EIS will assist the BLM in fulfilling its responsibilities for managing the Monument as well as in advancing NEPA's goals. We hope to see BLM respond appropriately to Vintage as soon as possible. We would be happy to discuss the BLM's approach in this matter with you in person at your convenience. Please contact Alice Bond if you would like to arrange such a meeting.

Sincerely,

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