December 2, 2019

Via ePlanning

Director (210)
Attn: Protest Coordinator
20 M Street SE
Room 2134LM
Washington, DC 20003

Dear Protest Coordinator:

This Proposed Resource Management Plan Protest is submitted on behalf of the Center for Biological Diversity ("Center") regarding the Bureau of Land Management's (BLM) Proposed Resource Management Plan (PRMP) and Final Environmental Impact Statement (FEIS) for the Oklahoma, Kansas, and Texas (OKT) Joint Environmental Impact Statement (EIS)/Bureau of Land Management (BLM) Resource Management Plan (RMP) and Bureau of Indian Affairs (BIA) Integrated Resource Management Plan..

The Notice of Availability of the PRMP and FEIS was published by the Environmental Protection Agency (EPA) in the Federal Register on November 1, 2019 (84 FR 58740); therefore this Protest is being timely filed in accordance with 43 C.F.R § 1601.5-2. Pursuant to the instructions contained in BLM's "Dear Reader" letter accompanying the PRMP, this protest is being provided via ePlanning with a flash drive of references sent via Federal Express to the address above.[1]

PROTEST

1. Protesting Parties: Contact Information and Interests:

This Protest is filed on behalf of the Center for Biological Diversity, its board, and members by:

Wendy Park
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Center for Biological Diversity
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[1] The flash drives were shipped on November 29, 2019 for timely delivery to BLM on December 2, 2019.

wpark@biologicaldiversity.org

The Center is a non-profit environmental organization with over 67,000 member activists, including members who live and recreate in the areas in and affected by actions taken within the areas governed by the OKT planning area. The Center uses science, policy and law to advocate for the conservation and recovery of species on the brink of extinction and the habitats they need to survive. The Center has and continues to actively advocate for increased protections for species and habitats in the planning area on lands managed by the BLM. The lands and waters that will be affected by the decision include habitat for many listed, rare, and imperiled species that the Center has worked to protect including the lesser prairie chicken, American burying beetle, interior least tern, whooping crane, red cockaded woodpecker, and many other species which will be affected by actions authorized or allowed under the proposed RMP. The Center's board, staff, and members use the lands and waters within the planning area, including the lands and waters that would be affected by actions under the proposed RMP, for quiet recreation (including hiking and camping), scientific research, aesthetic pursuits, and spiritual renewal.

The Center participated in the planning process to the degree required by lawThe center submitted comments on the Draft Environmental Impact Statement (DEIS) and the draft PRMP. These comments are included in Attachment B and are incorporated by reference herein.

As detailed in those comment and others, and as explained below, the Center believes that the PRMP and accompanying FEIS are inadequate to ensure compliance with the procedural and substantive mandates of the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) and other federal and state laws and policies.

2. Issues and Parts of the PRMP Protested:

The Center protests the proposed adoption of the BLM's preferred alternative, which, absent modification, provides for continued and expanded oil leasing and development on BLM lands and mineral estate without adequate analysis of, or mitigation for, the direct, indirect and cumulative impacts of such activities on air quality, water resources, public health, wildlife, seismicity, and climate. As outlined below, by adopting the preferred alternative, BLM would find itself in violation of NEPA and FLPMA. BLM should therefore withdraw the proposed RMP and FEIS, prepare a Supplemental Environmental Impact Statement (SEIS) that addresses the deficiencies in the FEIS, and issue a new proposed RMP that complies with applicable statutory mandates and better protects the resources BLM is entrusted to manage.

3. Statement of Reasons as to Why the Proposed Decision to Adopt the PRMP Is Unlawful:

As noted above, BLM's proposed decision to adopt the proposed RMP is substantively and procedurally flawed. A concise statement of those reasons is provided below.

A. BLM Failed to Adequately Notify the Public of its Proposed Action, the DEIS, and Public Meetings

BLM failed to notify the Center for Biological Diversity and other interested parties of the availability of the DEIS or of public meetings about the proposed RMP. As a result, BLM only received 34 written submissions on the DEIS or planning process (several of them from the Center), despite the issues of significant public interest at stake in the planning process—e.g., whether public drinking water reservoirs in three different states should be open to fracking and oil and gas leasing, and whether 4.8 million acres of BLM-administered minerals across three states should be made available to leasing . Only five non-governmental organizations commented on the DEIS despite that the planning area encompasses 269,650,000 acres across three states. (FEIS vol. 6 at O-4.) No local governmental entities commented on the DEIS. The only governmental entities that commented were EPA and the Pawnee Nation of Oklahoma. (*Id*.)

NEPA requires agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," and to "[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents *so as to inform those persons and agencies who may be interested or affected*." 40 C.F.R. § 1506.6(b) (emphasis added). For those actions "with effects of national concern notice *shall* include publication in the Federal Register and notice by mail to *national organizations reasonably expected to be interested in the matter*." 40 C.F.R. § 1506.6(b)(2). The management of federal lands and minerals in Texas, Oklahoma, and Kansas is an issue of national concern, and the Center for Biological Diversity is a national organization that has been heavily involved in commenting on and protesting leasing decisions in Oklahoma, Kansas, and Texas since 2016, and has raised questions about the sufficiency of the governing RMPs and RMP-EISs to support proposed leasing. Accordingly, we should have received notice of the proposed RMP-DEIS at the time of its release, but did not.

BLM's public notices also failed to notify other individuals and local governments in Texas and Oklahoma about the RMP revision process, and the public's opportunity to weigh in on whether minerals below public drinking water reservoirs should be made available for oil and gas leasing and how oil and gas activities on these parcels should be managed. This includes Lewisville Lake, the drinking water supply for Dallas, Texas; Choke Canyon Reservoir, the drinking water supplies for Corpus Christi; Lake Somerville, the drinking water supply for Brenham Texas; and Lake Canton, a water supply for Oklahoma City. For an April 2016 lease sale involving parcels beneath these lakes, BLM received over 500 protests opposing leasing below these water supplies. (*See* public protests of 2016 Oklahoma-Texas-Kansas lease sale.) This includes protests from numerous towns and cities in the Dallas area who opposed leasing beneath Lewisville Lake. Before the April 2016 lease auction, BLM also received a February 9, 2016 letter signed by numerous organizations in all three states requesting BLM to hold public meetings concerning the proposed leasing in Oklahoma, Kansas, and Texas.[2] In addition, the cities of Brenham and Corpus Christi later opposed leasing below their water supply lakes, when parcels

[2] http://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/pdfs/2016_11_21_BLM_Protest_Letter.pdf.

were offered in a subsequent 2017 lease auction.[3] However, BLM failed to notify any of these organizations or individuals who had previously weighed in on oil and gas leasing below these lakes about its proposed management action. Nor did any of BLM's public notices mention that management decisions concerning oil and gas development below these specific public drinking water supplies (or the dozens of other water supply lakes throughout the planning area [FEIS at 1-9 – 1-11]) was at issue in the planning process.

In addition, BLM failed to provide adequate public notice of its public meetings concerning its proposed plan. It only put out a press release on its website on March 4, 2018 only several days before a March 8, 2018 public meeting in Corpus Christi, Texas, and again, failed to reach out to groups and members of the public who had previously weighed in on leasing in Texas about its proposed action.

In sum, BLM's public involvement efforts fall short of NEPA's requirements for agencies to "[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 40 C.F.R. § 1506.6(b).

B. BLM Failed to Consider a Reasonable Range of Alternatives

BLM improperly rejected alternatives that would prohibit or substantially limit oil and gas leasing within the planning area. The Center suggested alternatives restricting leasing around dams and reservoirs (or stipulations that excluded drilling and/or fracking within certain buffer zones), closing lands to leasing in the planning area, and prohibiting fracking throughout the planning area. (DEIS Comment at 1, 37, 40, 47.) The Center raised numerous concerns about the impact of these activities on sensitive environmental resources in its comments on the DEIS. (DEIS comment at 17-39, describing impacts of fracking on public health); *id*. at 47, citing Exhibit K to Exhibit K to 2018 Lease Sale Scoping Comments at pp. 36-45, which explains limited carbon budget to stay within scientifically advised temperature limits; *see also* Attachment A attached hereto (providing science summary in support of need to limit opening up new areas to oil and gas development and phaseout of existing oil and gas development); and *id*. at 3-17, describing impacts on fracking and drilling on public drinking water supplies, including seismic and water quality impacts on reservoirs and dams).

BLM's chief response to comments suggesting the above alternatives is that prohibiting leasing or fracking would violate its multiple-use mandate:

> Section 1.4.1, page 1-23 [of the DEIS], clearly states that "the purpose of this RMP is to ensure that BLM-administered lands in the planning area are managed in accordance with the multiple-use and sustained-yield principles mandated by

[3] http://www.brenhambanner.com/oil-leases-around-lake-generate-protests/article_7502c983-b11c-5e46-a45d-c72e20f12dce.html; http://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/pdfs/2016_11_21_BLM_Protest_Letter.pdf.

> the FLPMA (43 US Code [USC] 1702).” A no-leasing or no-fracking alternative would not meet the purpose and need, so was not considered (see Section 2.5.2).

(FEIS, vol. 6 at O-72; *see also id.* at O-25 [“Only an alternative that would prevent development across all BLM-administered or BIA-managed lands would be inconsistent with the Energy Policy Act of 2005, which was dismissed from further analysis in Section 2.5.2 of the Draft Joint EIS/ BLM RMP and BIA Integrated RMP.”])

The Tenth Circuit has rejected the argument that closing an area entirely to oil and gas development would “violate the concept of multiple use.” *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009).

> [T]his argument misconstrues the nature of FLPMA's multiple use mandate. The Act does not mandate that every use be accommodated on every piece of land; rather, delicate balancing is required. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). “‘Multiple use' requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes without the infliction of permanent damage." *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1290 (10th Cir. 1999) (citing 43 U.S.C. § 1702(c)); *see also Norton*, 542 U.S. at 58.

Id. BLM recognized as much in its response to comments on the OKT RMP-DEIS: “[T]he range includes evaluation of alternatives that focus on conservation of resources, as well as on development of resources, all of which fall within the breadth of FLPMA’s multiple use and sustained yield requirements as well as the Mineral Leasing Act. *Under FLPMA, not all uses must take place on all acres.* (FEIS vol. 6 at O-12 (emphasis added).)

Accordingly, in *New Mexico*, the court held because “the principle of multiple use does not require BLM to prioritize development over other uses,” BLM’s multiple-use obligation did not require it to allow oil and gas development on New Mexico’s Otera Mesa, an area spanning over 427,000 acres. *New Mexico*, 565 F.3d at 710. Thus, in a challenge to BLM’s failure to consider a reasonable range of alternatives in deciding what lands should be open to oil and gas development in its RMP planning process, the Tenth Circuit held BLM improperly rejected consideration of an alternative that restricted development in the Mesa: “[A]n alternative that closes the Mesa to development does not necessarily violate the principle of multiple use, and the multiple use provision of FLPMA is not a sufficient reason to exclude more protective alternatives from consideration.” *Id*. Further, the court held BLM should have considered such an alternative:

> Given the powerful countervailing environmental values, we cannot say that it would be “impractical” or “ineffective” under multiple-use principles to close the Mesa to development. Accordingly, the option of closing the Mesa is a reasonable management possibility. BLM was required to include such an alternative in its NEPA analysis, and the failure to do so was arbitrary and capricious.

Id. at 711.

Just as BLM improperly rejected an alternative that would have closed the entire Otera Mesa to oil and gas development in *New Mexico*, here, BLM improperly rejected alternatives that would have either (1) closed the entire planning area or substantial areas to oil and gas leasing; (2) closed the planning area to fracking; and/or (3) closed all reservoirs and dams within certain scientifically-recommended buffer zones to oil and gas leasing, drilling, and/or fracking.

Even if multiple-use principles were to require some amount of development activity to continue within the entire planning area, an end to *new* oil and gas leasing would not prohibit *all* federal oil and gas development throughout the planning area. Oil and gas development could continue on existing leases (although once those leases expired, those areas could not be leased). Nor would a ban on fracking necessarily prohibit all oil and gas development within the planning area. Oil and gas development has occurred throughout the planning area for many years without the use of modern fracking techniques (i.e., the combination of high-volume hydraulic fracturing with horizontal drilling). Further, closing dams and reservoirs to leasing, drilling, or fracking would not prohibit these activities in the rest of the planning area.

In addition, a *temporary* ban on leasing, drilling, and/or fracking until (1) the federal government has a plan to ensure that GHG emissions do not take us over scientifically advised temperature limits, and/or (2) BLM or surface management agencies have resolved uncertainties as to the impacts of oil and gas development beneath water supply reservoirs and dams, would not conflict with principles of multiple use. As BLM notes, the RMP planning process is only intended to address management of the planning area for the next 20 years, and the current plan is being revised to respond to changing conditions. (FEIS vol. 1 at 1-10, 1-24.) Thus, in another 20 years, BLM could certainly consider reopening lands to leasing in response to changed conditions. Indeed, the proposed RMP would open an additional 416,600 acres compared to the existing plan. (FEIS vol. 1 at 2-5.)

Moreover, the failure to consider closures of the planning area to oil and gas leasing short of closing the entire planning area to leasing violates NEPA. *See New Mexico*, 565 F.3d at 711 ("While agencies are excused from analyzing alternatives that are not 'significantly distinguishable' from those already analyzed, *Westlands*, 376 F.3d at 868, the alternative of closing only the Mesa--which represents a small portion of the overall plan area--differs significantly from full closure."); *Wilderness Workshop v. United States BLM*, 342 F. Supp. 3d 1145, 1166 (D. Colo. 2018) (BLM "having considered an option of no development in the planning area at whole [does] not relieve [it] of the duty to consider any other alternative along the spectrum between complete closure and the studied alternative which provided for the greatest closure.").

Here, BLM only considered the no-action alternative, which would have maintained the status quo in terms of the amount of lands available for leasing; two alternatives that *increased* lands available to oil and gas leasing throughout the planning area by roughly ten percent compared to the no-action alternative (Alternatives B and D); and an alternative that reduced the acreage available to leasing in the planning area by only three percent compared to the no-action

alternative (Alternative C). (*See* FEIS vol. 1 at Table 2-1.) Respectively, these alternatives would close 10.3%, 1%, and 13.9% of the planning area to oil and gas leasing. (*Id*.) This is not a reasonable range of alternatives. *See W. Org. of Res. Councils v. United States BLM*, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, at *28 (D. Mont. Mar. 26, 2018) (faulting BLM for failing to consider alternatives that would make available differing amounts of coal for extraction in planning areas).

The FEIS also incoherently suggests that closing areas to leasing could conflict with the management decisions of surface management agencies:

> BLM did not consider alternatives proposing a maximum resource use or maximum protection strategy, where one resource value or use would be adopted at the expense of another. This is because most BLM-administered lands in the planning area have mineral estate underlying other SMA surface estate or split private surface estate. In these areas, management decisions must first be authorized by the resident surface manager. This administrative arrangement precludes a maximum or minimum resource use alternative option.

(FEIS vol. 6 O-72, citing section 2.5.2, vol. 1 at 2-8.) Along similar lines, in response to comments that BLM require that leases prohibit drilling within certain buffer zones around reservoirs and dams, BLM arbitrarily rejected this alternative on the improper basis that it lacks the authority to do so:

> Stipulations for lakes and dams in the planning area are defined by other surface management agencies. For example, USACE special stipulation CE-SS 1-A (USACE special stipulation 1-A) requires a 3,000-foot-wide buffer zone around all dams, spillways, and embankments. The BLM has no authority over the surface estate managed by these agencies.

(FEIS vol. 6 at O-90.) BLM, however, has authority over the *subsurface* estate, including authority to decide what minerals in the planning area may be open to leasing, and which minerals may be drilled and/or fracked. It can choose not to make available subsurface federal minerals for lease, regardless of the surface management agency's management decisions over the surface. Indeed, it routinely decides whether to offer lands for leasing in quarterly lease auctions, although the surface may be managed by other agencies.

Table 2-1 of the FEIS belies BLM's suggestion that it cannot close to leasing lands managed by other surface agencies or entirely preclude oil and gas leasing, drilling, or fracking within a particular area. The table notes for each alternative how many acres of lands managed by "Other Federal [Surface Management Agencies]" BLM would close to leasing: 410,800 acres for Alternative A; 44,800 acres for Alternatives B and D; and 567,500 acres for Alternative C. (FEIS at 2-5.) The different acreages among the alternatives contradicts BLM's suggestion that it may not close lands to leasing if they are managed by other agencies. (*See also* FEIS vol. 1 at ES-6: "The BLM-administered Federal mineral estate decision area includes 4,810,900 acres of Federal minerals underlying BLM-administered surface land, split-estate tracts (Federal minerals underlying private or state surface lands), and Federal minerals underlying land administered by

other Federal SMAs plus any applicable Federal lands along the 116-mile stretch of the Red River between the North Fork of the Red River and the 98th Meridian.").

To the extent BLM intends to rely on the determinations of other surface management agencies as to which lands should remain open to leasing, BLM does not point to any NEPA-compliant planning process by another agency that has already made this determination or show that BLM has adopted the NEPA document of the surface-management agency. 40 C.F.R. § 1506.3 ("A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied."). For example, in its management of reservoirs throughout Texas and Oklahoma, we are unaware of any Bureau of Reclamation planning process to make lands available to oil and gas leasing and to analyze the effects of leasing under NEPA.

In sum, BLM should have analyzed a reasonable range of alternatives under NEPA, including the alternatives of no leasing or closing substantial areas to leasing (greater than 14%), no fracking, and no leasing, drilling, and/or fracking beneath and around dams.

C. BLM Failed to Analyze the Impacts of Fracking on Dams and Reservoirs in the Planning Area

BLM failed to take a hard look at the impacts of fracking, drilling, induced seismicity, wastewater injection disposal, and other indirect effects of making lands available for oil and gas leasing on localized water resources throughout the planning area. (*See* DEIS Comments at 3-17; FEIS at O-88 – O-93.) The proposed RMP would allow drilling and fracking beneath dozens of lakes throughout the planning area in Kansas, Texas, and Oklahoma, but the EIS fails to analyze the potential for significant harm to these drinking water supplies from seismicity (e.g., destabilization of dams), water depletion, spills and leaks, frack hits, and communication between old wells and new wells, among other issues. The EIS fails to describe existing conditions at each of these lakes, reservoirs, or dams; only provides the most general of statements as to the potential for environmental impacts; and fails to analyze the potential severity of harm that could result from leasing (e.g., the potential for major spills and loss of a community's drinking water supply, or flooding of downstream communities if seismicity led to dam instability).

The EIS is deficient in its failure to analyze these risks and impacts.

D. BLM Failed to Adequately Analyze the Climate Impacts of its Proposed Action

BLM failed to adequately analyze the direct, indirect, and cumulative effects of its action on climate change. (*See* FEIS at 4-17, 4-19, Appendix G.) It failed to fully quantify and analyze the greenhouse gas emissions (GHG) from making available lands within the planning area for oil and gas and coal leasing, as well as cumulative emissions from past, present, and future oil and gas wells and coal development throughout the entire planning area. (*Id.*)

For example, BLM failed to fully quantify emissions from flaring and venting, fugitive emisions (e.g., leaks from pipelines and tanks), vegetation clearing, and downstream emissions from refining and transporting the extracted oil and gas. As explained in our comments on the DEIS, BLM must fully quantify all emissions from oil and gas leasing. (DEIS Comment at 39-47.)

Moreover, the FEIS lacks a clear explanation of the methodology and the assumptions used in projecting total GHGs (e.g., emissions factors it used and the specific emissions sources it quantified), making it impossible for the public to understand how BLM derived its total GHG emissions estimates.

BLM also failed to quantify cumulative emissions from all federal and non-federal oil and gas wells and coal development throughout the planning area, precluding an adequate cumulative impacts analysis. Further, BLM failed to analyze the cumulative impact of the proposed action on climate change in connection with other past, present, and reasonably foreseeable oil and gas wells in the planning area (including non-federal wells and non-federal coal development), and the significance of these impacts at the local, regional, and national scale. (*See* FEIS at 5-30, Appendix G.) *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) (requiring agency to consider cumulative impacts of rule governing auto emissions standards on climate change in connection with similar rulemakings); *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 578-79 (D. Mont. 2018) (requiring agency to consider climate change effects of pipeline combined with effects of other pipeline in its vicinity).

Finally, BLM's cumulative impacts analysis is narrowly constrained to analyzing oil, gas, and coal emissions in the context of national coal, oil, and gas in the energy sector and gross U.S. emissions. Lacking in that discussion are emissions of the proposed action in the context of (1) transportation sector emissions, (2) overall federal fossil fuel emissions, and, (3) the role of overall federal fossil fuel emissions and gross U.S. emissions in contributing to climate harm. Attachment A provides an overview of the impact of federal fossil fuel emissions and gross U.S. emissions in contributing to climate harm.

Best,

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