

WILDERNESS WORKSHOP ◆ THE WILDERNESS SOCIETY ◆
CONSERVATION COLORADO ◆
WESTERN SLOPE CONSERVATION CENTER

July 17, 2018

Bureau of Land Management
Uncompahgre Field Office
2465 S Townsend Ave, Montrose, CO 81401
Via electronic submission: <https://eplanning.blm.gov/epl-front-office/eplanning/comments/commentSubmission.do?commentPeriodId=68060>

Dear Land Managers,

Please accept the following comments from Wilderness Workshop, The Wilderness Society, Conservation Colorado, and Western Slope Conservation Center in response to the Bureau of Land Management’s (BLM or agency) proposed December 6, 2018 Oil and Gas Lease Sale. These comments pertain, but are not limited to, Gunnison Energy’s Expression of Interest (“EOI”) and Nomination of Oil and Gas Leases in Sandborn Creek—parcels 8389, 8390 and 8391 as listed in the scoping notice. *See* Expression of Interest & Nomination for Oil & Gas Leases (“EOI 2488”), at 2 (May 18, 2018) (attached as Exhibit 1) We recommend that BLM remove these lease parcels from the December 6, 2018 sale. BLM can and should accomplish the stated goals for including these parcels in the lease sale through a different and timely mechanism.

Gunnison Energy requested that BLM grant the company oil and gas leases for the capture and sale of coal mine methane (CMM) from the recently idled Bowie #2 Coal Mine. *See* Exhibit 1, at 2 (noting GE’s desire to “produce and sell natural gas from the Mine”); Colo. Energy Office, *Coal Mine Methane in Colorado Market Research Report*, at 17 (Mar. 2016) (attached as Exhibit 2). Currently, Bowie Resource Partners, LLC owns the federal Coal Leases and operates the Bowie #2 mine. However, the company does not capture the vented methane. Exhibit 2, at 17 (“Bowie #2 does not use its drained gas except to fuel the blowers used to vent the gob areas.”).

We support the capture and sale of CMM because methane is a potent greenhouse gas that contributes to climate change, and because capturing and selling the methane should result in a financial return to the American public. Any significant further delay in addressing CMM is unacceptable to our organizations, and we strongly support the timely advancement of policy solutions to capture and sale of CMM. Nonetheless, as explained below, the competitive oil and gas leasing process is not the proper mechanism to facilitate the capture and sale of CMM. Instead of issuing new oil and gas leases for that purpose, we ask BLM to consider, 1) authorizing methane capture activities through existing coal leases, or 2) issuing separate leases under the Federal Land Policy and Management Act (FLPMA) section 302.

The Interior Board of Land Appeals (IBLA) has determined that an oil and gas lease issued pursuant to the Mineral Leasing Act (MLA), 30 U.S.C. § 226 (2000) is not the appropriate mechanism for capturing methane. *Vessels Coal Gas*, 175 IBLA 8, 9 (2008). In the *Vessels Coal Gas* case, a company sought the right to explore, drill, mine, or develop gas deposits from an existing coal mine. To the BLM, this was a question of first impression, and therefore the agency decided to issue a separate oil and gas lease granting the company the exclusive right for the surface capture of methane from mine vents. *Id.* at 16. The IBLA held that the BLM lease was an inappropriate mechanism for methane gas capture.¹ *Id.* at 22.

The Board reasoned that the MLA authorizes the leasing of oil and gas deposits, but because methane gas is an inadvertent byproduct of coal mining, it is not a “deposit” and, therefore not subject to a lease issued under the MLA. *Id.* at 11, 14, 25-26.

Turning to BLM’s proposed December 2018 Lease Sale, Gunnison Energy’s EOI states, “[a]ccording to the BLM, in order to produce and sell the natural gas from the Mine, it is necessary to own a federal Oil and Gas Lease covering the parcel.” *See* Exhibit 1, at 2. However, Gunnison Energy not only fails to cite any authority in support of this statement, but the company’s statement also contravenes the holding in the *Vessels Coal Gas* case. On a fact-to-fact analysis, Gunnison Energy’s EOI is similar to the *Vessels* case because the company seeks the right to develop gas deposits over an existing coal mine owned and operated by a separate corporation. Consequently, pursuant to the Board’s decision in *Vessels*, BLM should decline to offer a new oil and gas lease to Gunnison Energy for CMM pursuant to the company’s EOI, and the agency should confirm that oil and gas leases are not the appropriate mechanisms for methane capture and sale.²

In order to appropriately capture CMM, the BLM should amend existing coal leases to include the capture and sale of methane. Traditionally, federal coal leases issued under the Coal Lands Acts of 1909 and 1910 did not convey the right to capture natural gas. *See AMOCO Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 875 (1999). In response to the country’s methane waste dilemma, the BLM issued Instruction Memorandum (IM) 2017-037, addressing the appropriate means for the capture and sale of Waste Mine Methane (WMM).³ BLM Instruction Memorandum No. 2017-037 (Jan. 20, 2017). The Memorandum instructed the BLM to implement lease addendums to new and existing coal leases for the capture of methane, stating, “when issuing a new coal or other solid mineral lease, lease modification, readjustment, or renewal, the BLM will include an addendum to the lease to authorize the lessee to capture or destroy WMM.” *Id.* While IM 2017-037 has since been rescinded, it demonstrates that BLM can legally authorize methane capture and sale through coal lease addenda. Further, IM 2018-018, which rescinded IM 2017-037, does not state that BLM lacks such authority and in fact reiterates

¹ The IBLA did not make a decision on the correct method and deferred a decision to the agency for further research. *Id.*

² The BLM has consistently issued policies supporting the claim that oil and gas leases are not compatible to overlap with coal mine operations. *See Vessels Coal Gas* at 10 (Quoting Utah State Office BLM Policy for Oil and Gas Leasing on Lands Presently Being Developed for Underground Coal (Mar. 23, 2001) (“We have determined that oil and gas development is incompatible with underground longwall mines, so oil and gas leases will not be offered over coal lands contained within the mine permit areas for existing coal mines or within coal lease tracts.”))

³ WMM “is defined as methane released as a direct consequence of underground mining before, during and after the mining of coal or other solid leasable materials.” IM, *supra*, at 2.

that such activities are permissible and voluntary. Thus, the appropriate mechanism to convey the rights to capture methane is through addendums to new and amendments to existing coal leases. *Id.* Despite the rescission of IM 2017-037, it remains the only policy outlining the appropriate means for methane capture, and therefore the BLM should still find it persuasive.

We also note that the current administration rescinded IM 2017-037 pursuant to Executive Order (EO) 13783, an order that does not undermine BLM's authority to issue methane capture addendums. *See* Exec. Order 13783, 82 FR 16093 (Mar. 28, 2017). The EO did not rescind IM 2017-037 exclusively, but rather it withdrew a long list of decisions and policies implemented by the Obama Administration. The EO was a political statement with a stated goal to "promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." *Id.* We argue that issuing lease addendums for existing coal leases to capture and sell CMM complies with the intent of the new EO in many ways (e.g., avoiding waste of valuable energy and avoiding unnecessary burdens associated with selling, administering new leases).

Nonetheless, the BLM has already determined that amendments to old leases or addendums to new leases are the appropriate mechanism for the capture of methane. *See West Elk Coal Lease Addendum*, at 1 (Jan. 14, 2009) (attached hereto as Exhibit 3). The West Elk Coal Mine Lease Addendum states, "lessee is authorized to drill for, extract, remove, develop, produce, and capture for use or sale any or all of the coal mine methane from the above described lands that would otherwise be required to vent or discharge for safety purposes."⁴ *Id.* Therefore, the BLM is already issuing and should continue to use lease amendments for the capture and sale of methane.

On May 16, 2017, Gunnison Energy and Oxbow Mining proposed a revision to the Bowie #2 coal mine permit. *See* Bowie Resources, LLC Application Form for a Revision to a Coal Mining and Reclamation Permit (May 16, 2017) (attached hereto as Exhibit 4). The companies attempted to coordinate an effective strategy for the development of CMM capture and sale. *Id.* at 2. The BLM denied the companies' request in a response letter stating:

"The policy [IM 2017-037] does not provide the authorization to capture the WMM. The policy is clear that the authorization to conduct methane capture is based solely on a Waste Mine Methane Capture Lease Addendum to the coal lease. None of the coal leases held by Bowie include that addendum."

BLM Letter from Field Manager Gregory Larsen, RE: Bowie Resources, LLC, Bowie No. 2 Mine TR-112, Oxbow Drilling, 1 (July 17, 2017) (emphasis original) (attached hereto as Exhibit 5). Therefore, it has been and should continue to be, BLM's policy that the appropriate mechanism for the capture and sale of CMM is through lease addendums.

Alternatively, the BLM should also consider whether FLPMA Section 302 is the appropriate authority to grant leases for the capture of methane gas. *Vessels Coal Gas*, 175 IBLA at 27. Under Section 302, the Secretary shall regulate through leases the proper use, occupancy, and

⁴ If the lessee sells the methane, they must pay a 12.5% royalty to the BLM. *See* Exhibit 3, at 1.

development of public lands. 43 C.F.R. § 2920.0-3. Distinct from MLA leases, FLPMA may offer noncompetitive land use leases when “no competitive interest exists or where competitive bidding would represent unfair competitive and economic disadvantage to the originator of the unique land use concept.” 43 C.F.R. § 2920.5-4(b). Therefore, a new lease issued through FLPMA for the capture and sale of methane is another option to permit capture and sale of methane.

To the extent that BLM intends to proceed with competitive oil and gas leasing to capture CMM despite the *Vessels Coal Gas* case and the agency’s own historic policies, it is imperative that the agency explicitly limit the terms of any new leases to CMM capture between specified geologic depths. If the goal of the agency and the companies nominating these parcels is to capture CMM, the terms of the leases should be so limiting.

In conclusion, oil and gas leases are not the appropriate legal tool for approving CMM. Instead, the BLM should amend the existing coal leases to allow for the capture and sale of methane. Alternatively, the agency could consider using Section 302 of FLPMA to issue new noncompetitive leases that allow for the capture and sale of vented methane from the mine. Either way, parcels 8389, 8390 and 8391 should not be included in the December 2018 Lease Sale. If BLM does proceed to sell these parcels for the capture of CMM, the lease terms should make it very clear that the leases are limited to specified depths (where the coal mine exists) for the purpose of capturing CMM.

Thank you for the opportunity to comment,

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Enclosures: 5 Exhibits