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HAND DELIVERED

November 14, 2016

Ed Roberson
Utah State Director
Bureau of Land Management
440 West 200 South, Suite 500
Salt Lake City, UT 84101-1345

RE: Protest of the Bureau of Land Management, Green River District's Notice of Competitive Oil and Gas Lease Sale to be Held on December 13, 2016

Dear Mr. Roberson,

In accordance with 43 C.F.R. §§ 4.450-2 and 3120, the Grand Canyon Trust, Natural Resources Defense Council, Utah Chapter of the Sierra Club, and Southern Utah Wilderness Alliance (collectively, "SUWA") hereby timely protest the December 13, 2016, offering of the following six oil and gas lease sale parcels in the Bureau of Land Management, Green River District ("BLM"):

UTU-91930 (Parcel 9); UTU-91931 (Parcel 10); UTU-91937 (Parcel 32);
UTU-91938 (Parcel 38); UTU-91939 (Parcel 39); UTU-93940 (Parcel 49).

See generally DOI-BLM-UT-G010-2016-0033-EA (Vernal 2016 Lease Sale) ("Lease Sale EA").¹ As explained below, BLM's decision to sell these parcels violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*; the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101 *et seq.*; the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, and the regulations and policies that implement these laws.

SUWA requests that BLM withdraw these six lease parcels from sale until the agency has fully complied with all federal laws, regulations, and policy discussed herein.

¹ The Lease Sale EA including documents and maps is available at <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=80324> (last updated (Oct. 17, 2016)).

I. Leasing is the Point of Irretrievable Commitment of Resources

It is critical that BLM undertake satisfactory NEPA analysis before issuing these oil and gas leases as subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. Unfortunately, BLM has not fully analyzed potential irreversible and irretrievable impacts that could flow from its leasing decision. The sale of leases without no surface occupancy (“NSO”) stipulations represents a full and irretrievable commitment of resources. BLM cannot make such a commitment without adequate analysis:

BLM regulations, the courts and [Interior Board of Land Appeals (“Board”)] precedent proceed under the notion that the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease.

S. Utah Wilderness Alliance, 159 IBLA 220, 241 (2003) (citing *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (additional citations omitted); *see also Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004) (“Agencies are required to satisfy the NEPA ‘before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.’”) (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988)). Thus, in *Southern Utah Wilderness Alliance*, the IBLA explained that

[t]he courts have held that the Department must prepare an [environmental impact statement (“EIS”)] before it may decide to issue such “non-NSO” oil and gas leases. The reason . . . is that a “non-NSO” lease “do[es] not reserve to the government the absolute right to prevent all surface disturbing activities” and thus its issuance constitutes “an irreversible commitment of resources” under Section 102 of NEPA.

159 IBLA at 241 (quoting *Conner v. Burford*, 848 F.2d 1441, 1449, 1451 (9th Cir. 1988)).

As the Board has recognized, “[i]f BLM has not retained the authority to preclude *all* surface disturbance activity, then the decision to lease is itself the point of ‘irreversible, irretrievable commitment of resources’ mandating the preparation of an EIS.” *Union Oil Co. of Cal. et al.*, 102 IBLA 187, 189 (1988) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983)) (emphasis added); *see also S. Utah Wilderness Alliance*, 159 IBLA at 241-43 (same); *Sierra Club, Or. Chapter*, 87 IBLA 1, 5 (1985) (because issuance of non-NSO oil and gas leases constitutes an irreversible commitment of resources, BLM cannot defer preparation of an EIS unless it either retains authority to preclude development or issues the leases as NSO).

BLM itself identifies lease issuance as the point of irretrievable commitment of resources:

[t]he BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities. *By law, these impacts must be analyzed before the agency makes an*

irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance.

BLM, H – 1624-1 – Planning for Fluid Mineral Resources at I.B.2 (Jan. 28, 2013) (emphasis added);² *see also* *S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006) (“In sum, ‘in the fluid minerals program, the point of irretrievable and irreversible commitment occurs at the point of lease issuance.’”) (quoting *Pennaco*, 377 F.3d at 1160; internal alterations omitted).

In the present case, BLM has failed to analyze all reasonable, foreseeable potential impacts of oil and gas development from the above-listed leases but instead has unlawfully delayed that analysis to a later date. As explained below, this failure may have irreversible negative impacts on numerous values including, but not limited to, cultural resources, lands with wilderness characteristics (“LWC”), special recreation management areas (“SRMA”), areas of critical environmental concern (“ACEC”), and water resources.

II. BLM Failed to Respond to Substantive Issues Raised in Comments

The BLM failed to respond to substantive issues raised by SUWA. Under NEPA, BLM is required to “respond to substantive issues raised in comments.” *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (citing 40 C.F.R. § 1503.4(a)). This obligation “is more than a technical requirement.” *Id.* It is an essential component of NEPA’s hard look obligation as it demonstrates whether the agency considered “the salient problems” and “engaged in reasoned decision-making.” *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970); *see also* *Utahns for Better Transp.*, 305 F.3d at 1163 (federal agencies must “adequately consider[] and disclose[] the environmental impacts of its actions”).

Furthermore, under the APA it is a “fundamental tenet of administrative law” that federal agencies respond to all significant comments. *See Natural Res. Def. Council v. EPA*, 859 F.2d 156, 188 (D.C. Cir. 1988). “[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979)). A comment is “significant” when “if true, [it] raise[s] points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed [action].” *Home Box Office v. FCC*, 567 F.2d 9, 35, n.58 (D.C. Cir. 1977). An agency’s failure to respond to comments “demonstrates that the agency’s decision was not based on a consideration of the relevant factors.” *Sierra Club v. EPA*, 353 F.3d 976, 986 (D.C. Cir. 2004); *see also* *Natural Res. Def. Council v. EPA*, 859 F.2d at 188 (“The fundamental purpose of the response requirement is, of course, to show that the agency has indeed considered all significant points articulated by the public.”).

“[P]ublic scrutiny [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). This means federal agencies must “[e]ncourage and facilitate public involvement in decisions which affect

² Available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_handbooks.html (select hyperlink “H-1624-1) (last updated Oct. 18, 2016).

the quality of the human environment,” *id.* § 1500.2(d), and “are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.” *Utahns for Better Transp.*, 305 F.3d at 1165.

In the present case, BLM did not respond to significant issues and concerns raised in SUWA’s comments. The specific examples of BLM’s failure to respond to SUWA’s concerns will be discussed in detail in each respective section. *See infra*. In such circumstances, BLM has failed to fulfill its obligation to “inform the public that it has considered environmental concerns in its decision-making process.” *Citizens’ Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008). SUWA therefore re-submits and incorporates its comments and all referenced attachments thereto as part of this formal protest. *See generally* SUWA *et al.*, Comments for November 2016 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G010-2016-033-EA (June 2016) (July 15, 2016) (attached as Ex. 1).

III. BLM’s Treatment of Cultural Resources Violated the NHPA

a. The NHPA and Its Implementing Regulations Require BLM to Consider the Adverse Impacts of Its Undertakings on Archeological Resources

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America’s historic and cultural resources. *See* 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal “undertaking” unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 54 U.S.C. §§ 306108, 300320; *see also* *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is a “stop, look, and listen provision” that requires federal agencies to consider the effects of their actions and programs on historic properties and sacred sites before implementation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *see also* *Valley Cmty. Pres. Comm’n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004).

To adequately “take into account” the impacts on archeological resources, all federal agencies must comply with binding Section 106 regulations established by the Advisory Council on Historic Preservation (“Advisory Council”).³ Under these regulations, the first step in the Section 106 process is for an agency to determine whether the “proposed [f]ederal action is an undertaking as defined in [Section] 800.16(y).” 36 C.F.R. § 800.3(a). Undertakings include any permit or approval authorizing use of federal lands. *Id.* § 800.16(y). If the proposed action is an undertaking, the agency must determine “whether it is a type of activity that has the potential to cause effects on historic properties.” *Id.* § 800.3(a). An effect is defined broadly to include

³ The Advisory Council, the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA’s requirements. *See Nat’l Ctr. for Pres. Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C. 1980), *aff’d per curiam*, 635 F.2d 324 (4th Cir. 1980); *CTIA-Wireless Ass’n v. F.C.C.*, 466 F.3d 105, 115 (D.C. Cir. 2006) (“[T]he Advisory Council regulations command substantial judicial deference.”) (quotations and citations omitted). The Advisory Council’s regulations “govern the implementation of Section 106” for all federal agencies. *Nat’l Ctr. for Pres. Law*, 496 F. Supp. at 742; *see also Nat’l Trust for Historic Pres. v. U.S. Army Corps of Eng’rs*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

direct, indirect and/or cumulative adverse effects that might alter the characteristics that make a cultural site eligible for listing in the National Register of Historic Places. *See id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

The agency next “[d]etermine[s] and document[s] the area of potential effects” and then “[r]eview[s] existing information on historic properties within [that] area.” 36 C.F.R. § 800.4(a)(1)-(2). “Based on the information gathered, . . . the agency . . . shall take the steps necessary to identify historic properties within the area of potential effects.” *Id.* § 800.4(b). “The agency shall make a reasonable and good faith effort to carry out appropriate identification efforts.” *Id.* § 800.4(b)(1).

If the undertaking is a type of activity with the potential to affect historic properties then the agency must determine whether in fact those properties “may be affected” by the particular undertaking at hand. 36 C.F.R. § 800.4(d)(2).⁴ Having identified the historic properties that may be affected, the agency considers whether the effect will be adverse, using the broad criteria and examples set forth in section 800.5(a)(1). Adverse effects include the “[p]hysical destruction of or damage to all or part of the property.” *Id.* § 800.5(a)(2)(i). If the agency concludes that the undertaking’s effects do not meet the “adverse effects” criteria, it is to document that conclusion and propose a finding of “no adverse effects.” *Id.* § 800.5(b), 800.5(d)(1).

In addition to identifying and consulting with Native American tribes, “[c]ertain individuals and organizations with a demonstrated interest in [an] undertaking may participate as consulting parties due to . . . their concern with the undertaking’s effects on historic properties.” 36 C.F.R. § 800.2(c)(5). If BLM “proposes a finding of no adverse effect, [it] shall notify all consulting parties and provide them with the documentation specified” in § 800.11(e). *Id.* § 800.5(c). “If, within the 30 day review period . . . any consulting party notifies [BLM] in writing that it disagrees with the [no adverse effect] finding and specifies the reason for the disagreement in the notification, [BLM] shall either consult with the party to resolve the disagreement, or request the [ACHP] to review the findings.” *Id.* § 800.5(c)(2)(i).

“The agency official should [also] seek the concurrence of any Indian tribe . . . that has made known to the agency official that it attaches religious and cultural significance to a historic property subject” to a no adverse effect finding. 36 C.F.R. § 800.5(c)(2)(iii).

If the agency official concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native American tribes, and the Advisory Council in an effort to resolve the adverse effects. 36 C.F.R. §§ 800.5(d)(2), 800.6.

b. Consulting Party Review of this Undertaking

Southern Utah Wilderness Alliance is a consulting party for this undertaking. *See* Letter from David Christensen, BLM, to Ray Bloxham, SUWA (Aug. 16, 2016) (inviting SUWA to participate as a consulting party to the November 2016 oil and gas lease sale) (attached as Ex. 2).

⁴ The agency may also determine that there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them, at which point it consults with the State Historic Preservation Officer and notifies relevant Native American tribes of its conclusion. *Id.* § 800.4(d)(1).

In a September 19, 2016 letter, the Colorado Plateau Archaeological Alliance (“CPAA”) and the Southern Utah Wilderness Alliance detailed their disagreement with BLM’s no adverse effect determination for the November 2016 lease sale. *See* Letter from Jerry Spangler, CPAA, to Michelle Brown, BLM (Sept. 19, 2016) (accepting consulting party invitation and providing comments on November 2016 lease on behalf of CPAA and the Southern Utah Wilderness Alliance) (attached as Ex. 3).

On October 28, 2016, the BLM Vernal field office hosted a telephone conference call with consulting parties, the stated intent of which was to “[r]esolve the disagreement between the agency official and consulting parties regarding the determination of [no adverse] effect for the November 2016 Oil and Gas Lease Sale as [it] pertains to 36 CFR PART 800 of the National Historic Preservation Act.” *See* Agenda, Section 106 Consulting Party Meeting Regarding the November 2016 Oil and Gas Lease Sale (attached as Ex. 4). Representatives from Southern Utah Wilderness Alliance, CPAA, and Nine Mile Canyon Coalition – all consulting parties to the lease sale – participated in this October 28 call, along with a representative from the National Trust for Historic Preservation, the State Historic Preservation Office, and several BLM staff. The consulting parties’ disagreements with BLM’s no adverse effect were not resolved on that call and remain unresolved.

BLM and SHPO participants on the October 28 call suggested that BLM would consider engaging the Advisory Council in Historic Preservation to review BLM’s no adverse effect determination. BLM, however, has not notified that it has done so. *Cf.* 36 C.F.R. § 800.5(c)(2) (“The agency official shall also concurrently notify all consulting parties that such a submission has been made [to the Council]”). Likewise, BLM indicated that it would follow-up with representatives from The Hopi Tribe regarding this undertaking. Based on information and belief, BLM has not yet done so.

c. Native American Review of this Undertaking

On June 6, 2016, The Hopi Tribe contacted the Vernal field office and requested that BLM provide the Tribe with the “Class I overview of the areas of potential effect for review and comment.” Letter from Leigh Kuwanwisiwama, The Hopi Tribe, to Michelle Brown, BLM (June 6, 2016) (attached as Ex. 5). On August 16, 2016, Ms. Brown sent Mr. Kuwanwisiwama a copy of BLM’s “November 2016 Oil and Gas Lease Records Search” for The Hopi Tribe’s review and comment. On August 29, 2016, Mr. Kuwanwisiwama wrote to Ms. Brown and stated The Hopi Tribe’s disagreement with BLM’s no adverse effect determination with regard to lease parcels 004, 005, 009, 010, and 014. Letter from Leigh Kuwanwisiwama, The Hopi Tribe, to Michelle Brown, BLM (Aug. 29, 2016) (attached as Ex. 6). Mr. Kuwanwisiwama expressed the Tribe’s disagreement with BLM’s assertion that the agency had made a reasonable and good faith effort to identify historic properties that may be affected by the November 2016 lease sale and requested that BLM withdraw these five parcels from the sale. *See id.* BLM has not resolved The Hopi Tribe’s disagreements over this lease sale. *See* 36 C.F.R. § 800.5(c)(2)(iii).

d. BLM's No Adverse Effect Determination is Unsupported and Arbitrary

BLM's conclusion that the sale of the six parcels at issue in this protest will result in "no adverse effect" to historic properties is arbitrary and capricious. The Lease Sale EA makes clear BLM's position that "there may be indirect impacts" from the December lease sale. EA at 43. *See also id.* at 188 ("Many of these parcels may also have indirect impacts to cultural site setting, and the development of parcels in those areas may increase the cumulative impacts of the area as well."); *id.* at 155 ("there may be indirect future impacts due to possible subsequent development"); *id.* at 164 (same). For purposes of the NHPA there is no distinguishing between direct, indirect, or cumulative effects; they are all "effects" and thus the potential for indirect effects from leasing means BLM's assertion that there will in fact be "no adverse effects" is plainly incorrect. Precisely because there *may be* adverse effects BLM must continue to follow the processes set forth in 36 C.F.R. §§ 800.5 to 800.6 to consult about these effects. In addition, the gist of BLM's arguments – that leasing is simply a paper transaction – has been flatly rejected. To the contrary, and as described *supra*, the sale of non-NSO leases is the point that BLM engages in an irreversible and irretrievable commitment of resources.

e. BLM Has Not Made a Reasonable and Good Faith Effort to Identify Historic Properties

The BLM Vernal field office prepared a cultural resources "records search" to support the November 2016 oil and gas lease sale. That is, BLM staff reviewed previous survey results (if any) located in the Vernal field office and SHPO's office and summarized those records. This is not the same thing as a "Class I – Existing Information Inventory;" rather, BLM's records search "is generally the brief first step before initiating a field survey." BLM, 8110 – Identifying and Evaluating Cultural Resources at § 2.21.A.1.b (Dec. 3, 2004) ("BLM Manual 8110").⁵ This minimal effort is insufficient to meet BLM's obligation to make a reasonable and good faith effort to identify historic properties *before* it makes an irreversible commitment of resources.

As the Advisory Council emphasized in its preamble to the Section 106 regulations, knowing the historic properties at risk from an undertaking is essential: "[i]t is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place." 65 Fed. Reg. 77,698, 77,715 (Dec. 12, 2000). The Vernal field office has failed to make such a reasonable and good faith effort here to identify historic properties.

⁵ BLM Manual 8110 is available at https://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html (select hyperlink for "MS-8110") (last updated Oct. 31, 2016). BLM Manual 8110 explains that completing a "records review" like the one the Vernal field office prepared here "means consulting the part II documentation of a completed, up-to-date class I inventory (see .21A4) and/or the SHPO's automated database." *Id.* § 2.21. A.1.b (emphasis added). "Sometimes it means checking relatively undeveloped BLM and SHPO survey and site records to learn whether any survey has been conducted and any cultural properties have been records nearby." *Id.* The Vernal field office is just beginning to prepare a Class I Inventory and thus the underpinnings for the Records Search for this sale are flawed. Moreover, the Records Search does not reveal the date of the surveys it relies on and to the extent they are more than ten years old and thus do not meet the standards set forth in its own Manual to perform this rudimentary records check.

Of the six parcels at issue in this protest, one (parcel 49) has never been previously surveyed and five have been surveyed less than 15% (parcels 9, 10, 32, 38 and 39). Nevertheless, BLM concluded for all six parcels that leasing could proceed without first conducting any additional surveys, or, with regard to parcel 49, any surveys whatsoever before leasing. This minimal effort does not comply with the NHPA's requirements.

IV. Utah BLM Instruction Memorandum No. 2016-027

BLM failed to take the requisite “hard look” at impacts to the Currant Canyon and Desolation Canyon LWCs, as evidenced by its failure to comply with Utah BLM's Instruction Memorandum No. 2016-027, *Bureau of Land Management (BLM) – Utah Guidance for the Lands with Wilderness Characteristics Resource* (Sept. 30, 2016) (“IM. 2016-27”) (attached as Ex. 7). With regards to IM 2016-27, there is no record evidence that BLM “reviewed the [new information], evaluated the significance – or lack of significance – of the new information, [or] provided an explanation for its decision not to supplement the existing analysis” and therefore its decision is arbitrary and capricious. *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1178 (10th Cir. 1999); *see also id.* at 1167 (an agency's decision is arbitrary and capricious when the agency “entirely failed to consider an important aspect of the problem”) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

IM 2016-27 became “effective immediately” upon issuance and “outlines the process by which BLM Utah will analyze potential impacts to [LWCs] through the [NEPA] process and consider potential management options for the [LWCs] resources outside of the land use planning process.” *Id.* at 1. The IM applies to “site-specific NEPA.” *Id.*

The process described in this guidance should be followed in all implementation-level NEPA reviews to ensure that impacts to [LWCs] are analyzed, and that appropriate mitigation is considered before implementation-level decisions are made. This may include avoidance, minimization and compensation . . . BLM should implement reasonable measures to minimize impacts to wilderness characteristics that are consistent with the purpose and need for the project, *even when a [land use plan] decision does not offer de facto protection for wilderness characteristics in land use planning allocations.*

IM 2016-27 at Attachment 2-2 (emphasis added); *see also id.* at Attachment 2-1 (“Analysis of the effects on an action on [LWCs] must be completed whether or not the [governing resource management plan] selected an alternative to manage the lands for protection of wilderness characteristics.”) (emphasis in original).

IM 2016-27's requirements are broken down into three broad categories, each of which BLM must consider in its NEPA analysis:

- 1) LWCs identified in the process leading up to the approval and signing of the applicable resource management plan (“RMP”) – referred to as “Scenario 1.” *See id.* at Attachment 2-4.

- 2) LWCs identified *after* approval of the applicable RMP – referred to as “Scenario 2.” *Id.*
- 3) BLM must take into account certain factors for LWCs regardless of when BLM identified the wilderness character resource. *Id.*

Furthermore, IM 2016-27 is significant new information relevant to environmental concerns in the Lease Sale EA and became “effective immediately.” As such, BLM had an obligation to supplement its NEPA analysis in the Lease Sale EA to consider this significant new information. *See S. Utah Wilderness Alliance v. Norton*, 457 F.Supp.2d at 1264 (“it would be incongruous with . . . [NEPA’s] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.” (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989))). “NEPA’s duty to supplement applies equally to [EIS] and environmental assessments.” *Id.* (citation omitted). NEPA expressly requires BLM to supplement its analysis when “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action.” 40 C.F.R. § 1502.9(c)(1)(ii); *see also Marsh*, 490 U.S. at 378 (“courts should not automatically defer to the agency’s express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information.”).

The court in *Southern Utah Wilderness Alliance v. Norton*, expressly held that BLM had violated NEPA in the lease sale context by failing to supplement its analysis to incorporate significant new information regarding wilderness characteristics – information that BLM itself had produced. *See S. Utah Wilderness Alliance v. Norton*, 457 F.Supp.2d at 1266 (“The Court finds that the Utah BLM arbitrarily ignored new information (information produced by the agency itself) in an effort to approve oil and gas leasing and ultimately development of these lands.”). The court explained further that

NEPA does not sanction this approach of “lease now, think later.” To the contrary, NEPA required that BLM postpone leasing in areas where the agency had significant new information about wilderness values that had not been adequately accounted for.

S. Utah Wilderness Alliance v. Norton, 457 F.Supp.2d at 1267; *see also Marsh*, 490 U.S. at 371 (“By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”).

In the present case, BLM ignored IM 2016-27, making no attempt to supplement the Lease Sale EA with the new information or to follow the guidance contained therein. *See generally* Lease Sale EA at 4-5 (no reference to IM 2016-27 in Section 1.6). Lease parcels 32, 38, 39, and 49 are in the Desolation Canyon LWC, which BLM identified as possessing wilderness characteristics in the BLM Vernal field office’s approved RMP. *See, e.g.*, Lease Sale EA at 24; BLM, Vernal Field Office, Record of Decision and Approved Resource Management Plan at Approved RMP – Fig. 12a (Oct. 2008) (“Vernal RMP”). These lease parcels are subject to IM 2016-27’s

“Scenario 1” requirements and the requirements applicable to all LWCs. *See* IM 2016-27 at Attachment 2-4.

In addition, lease parcels 9 and 10 are in the Currant Canyon LWC, which BLM identified as possessing wilderness characteristics *after* the 2008 Vernal RMP. *See, e.g.,* Lease Sale EA at 24. As such, these parcels are subject to IM 2016-27’s “Scenario 2” requirements as well as the requirements applicable to all LWCs.

a. Parcels 32, 38, 39, and 49 – Scenario 1 Requirements

BLM did not satisfy the “Scenario 1” requirements for lease parcels 32, 38, 39, and 49. For example, BLM failed to, among other things:

- “[C]onsider an alternative that minimizes effects to [LWCs].” IM 2016-27 at Attachment 2-5;
- “[D]ocument whether the existing inventory information reflects current conditions or whether there have been any changes, including significant new information submitted by the public.” *Id.* at Attachment 2-6;
- “[E]xplain how the effects of the action being considered do not exceed those analyzed or approved in the RMP.” *Id.* at Attachment 2-9; or
- “Explain how approval of the action is necessary to meet the purpose and need of the project.” *Id.* at Attachment 2-9.

BLM’s analysis in the Lease Sale EA falls significantly short of what is required in IM 2016-27. *See, e.g.,* Lease Sale EA at 13 (BLM considered only the proposed action and no action alternatives); *id.* at 24 (stating only that “[t]he Desolation Canyon unit was inventoried during revision of the [Vernal RMP] and found to have wilderness characteristics”); *id.* at 44-45 (no baseline comparison to Vernal RMP or explanation why the action is necessary).

b. Parcels 9 and 10 – Scenario 2 Requirements

BLM did not satisfy the “Scenario 2” requirements for lease parcels 9 and 10. For example, BLM failed to, among other things:

- “Include an alternative . . . that is modified by appropriate protections, relocations, or design features to eliminate or considerably reduce the effects on wilderness characteristics.” IM 2016-27 at Attachment 2-5; *see also id.* at Attachment 2-9 (“BLM should consider selection of another alternative . . . that avoids the lands with wilderness characteristics.”);
- Explain “why BLM selected [the preferred alternative] rather than another alternative that includes management actions to protect wilderness characteristics in the decision document.” *Id.* at Attachment 2-10; or

- “[C]onsider whether a plan amendment [to the Vernal RMP] is appropriate.” *Id.* at Attachment 2-10.

The Lease Sale EA completely ignored the Scenario 2 requirements. *See, e.g.*, Lease Sale EA at 13 (BLM considered only the proposed action and no action alternatives); *id.* at 44-45 (no explanation for why BLM had to select the preferred alternative, and no consideration of whether to prepare a plan amendment).

c. Requirements Applicable to Lease Parcels 9, 10, 32, 38, 39, and 49

In addition to ignoring each of the requirements discussed above, the Lease Sale EA also failed to comply with other requirements applicable to all parcels in BLM-identified LWCs regardless of when the agency identified the wilderness resource value. For example, BLM did not, among other things:

- “Analyze a *full* range of reasonable alternatives to provide a basis for comparing impacts to wilderness characteristics and to other resource values or uses.” IM 2016-27 at Attachment 2-5 (emphasis added);
- “[A]nalyze relevant short- and long-term effects on the [LWC’s] size, its apparent naturalness, and outstanding opportunities for solitude or primitive and unconfined types of recreation and identified supplemental values.” *Id.* at Attachment 2-7; or
- “[D]isclose whether the visual and auditory effects from the project on naturalness and solitude or primitive recreation opportunities would extend beyond the area of direct disturbance.” *Id.*

The Lease Sale EA did not consider any of these factors. *See, e.g.*, Lease Sale EA at 13, 44-45.

In sum, the Lease Sale EA completely ignores IM 2016-27. By so doing, BLM’s analysis of impacts to LWCs is woefully inadequate and not in compliance with its own policies. Furthermore, by ignoring IM 2016-27, BLM has failed to take the requisite “hard look” at the potential direct, indirect, and cumulative impacts to wilderness characteristics. Therefore, BLM should defer from leasing parcels 9, 10, 32, 38, 39, and 49, until it complies with IM 2016-27 and takes a hard look at impacts to wilderness characteristics.

V. BLM Failed to Consider Appropriate Alternatives

Section 102(2)(E) of NEPA requires consideration of “appropriate alternatives” to a proposed action, as well as their environmental consequences. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1501.2(c). “The requirement that appropriate alternatives be studied applies to the preparation of an [environmental assessment] even if no [environmental impact statement] is found to be warranted.” *S. Utah Wilderness Alliance*, 122 IBLA 334, 338 (1992); *see also* 40 C.F.R. § 1508.9(b). “These alternatives include reasonable alternatives to a proposed action, which will

accomplish the intended purpose, are technically and economically feasible, and yet have a lesser or no impact.” *Mary Byrne, d/b/a/ Hat Butte Ranch*, 174 IBLA 223, 237 (2008) (citing 40 C.F.R. § 1500.2(e)). “Consideration of alternatives ensures that the decisionmaker has before him and takes into proper account all possible approaches to a particular project.” *Bales Ranch, Inc. et al.*, 151 IBLA 353, 363 (2000) (internal quotations omitted).

In regards to Section 102(2)(E), the Board has explained that

NEPA is essentially procedural, rather than substantive. Nevertheless, because the purpose of the statute is to insure a fully informed and well-considered decision, the procedural nature of NEPA does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for the decision, adequately explores the reasonably foreseeable impacts, and fairly analyzes alternatives to the proposed activity. Indeed, the opposite is true. Precisely because the NEPA mandate is primarily procedural, *it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA. Informed and meaningful consideration of alternatives – including the no action alternative is an integral part of NEPA.*

S. Utah Wilderness Alliance, 122 IBLA at 339 (internal quotations and citations omitted) (emphasis added).

The sufficiency of an environmental assessment, including the requirement that it take a hard look at appropriate alternatives, is determined under a “rule of reason.” *S. Utah Wilderness Alliance*, 182 IBLA 377, 390 (2012). “A ‘rule of reason’ applies to both the range of alternatives that must be considered and the extent to which each alternative must be addressed.” *Id.* at 390-91. A reasonable alternative is one that is “non-speculative . . . and bounded by some notion of feasibility.” *Utahns for Better Transp.*, 305 F.3d at 1172 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978)) (additional citations omitted). The Tenth Circuit employs two “guideposts” in judging the reasonableness of alternatives: whether the agency actions fall within the agency’s statutory mandate and whether the actions meet the agency’s objectives for a particular project. *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 709 (10th Cir. 2009) (citations omitted).

In the present case, BLM considered only the proposed action and no action alternatives and failed to consider appropriate alternatives such as not leasing in LWCs, SRMAs, and/or ACECs due to “unresolved resource conflicts.” Such an alternative(s) falls within FLPMA’s multiple use mandate while allowing BLM to meet the objective of the proposed action (*i.e.*, “respond to the public’s lease nomination requests”) and therefore should have been considered and analyzed in the Lease Sale EA. *See* Lease Sale EA at 2 (discussing the purpose and need of the proposed action); *New Mexico ex rel. Richardson*, 565 F.3d at 710 (“It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.”). Therefore, the Lease Sale EA violates NEPA as well as BLM’s national guidance for lease parcel review both of which require BLM to do more than it has done in the present case.

a. The Lease Sale EA Does Not Comply With Instruction Memorandum No. 2010-117

BLM's failure to consider appropriate alternatives is evidenced by the agency's failure to comply with Instruction Memorandum No. 2010-117, *Oil and Gas, Planning, and National Environmental Policy Act (NEPA)* (May 17, 2010) ("IM 2010-117") (attached as Ex. 8). IM 2010-117 states that

[t]he [oil and gas leasing] EA *will* analyze [1] a no action alternative (no leasing), [2] a proposed leasing action (lease the parcel(s) in conformance with the land use plan), *and* [3] any alternatives to the proposed action that may address unresolved resource conflicts.

IM 2010-117 § III.E (emphases added); *see also id.* § III.C.4 (an oil and gas leasing EA must evaluate "other considerations" such as whether "[i]n undeveloped areas, non-mineral resource values are greater than potential mineral development values"). IM 2010-117 – which has not been superseded – is binding on BLM. *See Desert Sportsman's Rifle & Pistol Club, Inc.*, 188 IBLA 339, 346 (2016).

NEPA requires consideration of appropriate alternatives and IM 2010-117 broadened this requirement to include "alternatives to the proposed action that may address unresolved resource conflicts." Also, and as discussed *supra*, IM 2016-27 extended this requirement by expressly listing factors to be considered in each alternative.

Inexplicably, the Lease Sale EA considers only the proposed action and no action alternatives, and does not consider or analyze any alternative(s) to address unresolved resource conflicts including LWCs, the Nine Mile Canyon SRMA, and Nine Mile Canyon ACEC.

i. Lands with Wilderness Characteristics

IM 2010-117 instructs BLM to "review [lease] parcels in light of the most current national and local program-specific guidance to determine availability of parcels for leasing and/or applicable stipulations." IM 2010-117 § III.C.3. This instruction thus implicates IM 2016-27 which identifies BLM-identified LWCs as "unresolved resource conflicts" subject to continuing analysis and consideration. *See, e.g.*, IM 2016-27 at Attachment 2-1 ("Analysis of the effects of an action on [LWCs] *must* be completed whether or not the RMP selected an alternative to manage the lands for protection of wilderness characteristics.") (second emphasis added). However, the Lease Sale EA does not comply with IM 2010-117 or the more recent IM 2016-27. Specifically, BLM concluded in the Lease Sale EA that consideration of an alternative in which lease parcels were not offered in LWC was unnecessary because "[a]ll parcels in BLM identified LWCs have been through the RMP planning process, therefore, there are no unresolved resource conflicts." Lease Sale EA at 168 (BLM response to SUWA comment #8). Moreover, such an alternative was unnecessary, according to BLM, because "[t]he no action alternative addresses not leasing and would eliminate any impact to the resource." *Id.* These conclusions are arbitrary for several reasons.

First, BLM is wrong that each identified LWC has been through the RMP planning process. In the Lease Sale EA, BLM itself explains that “[t]he Currant Canyon [LWC] unit was inventoried after the completion of the [Vernal RMP]” and therefore, “the unit *has not been analyzed through a land use planning process.*” Lease Sale EA at 24 (emphasis added); *see also id.* at 45 (“Impacts to wilderness characteristics for the Currant Canyon [LWC] Unit *have not been analyzed within a land use plan.*”) (emphasis added).

Moreover, IM 2016-27 makes clear that BLM-identified LWCs continue to be “unresolved resource conflicts” even if in the applicable RMP, BLM elected not to manage the LWC for the protection of its wilderness values:

[E]ven when a decision to select an alternative that impairs wilderness characteristics conforms to the RMP, the impacts to the [LWC] unit must still be documented.

IM 2016-27 at Attachment 2-1 to 2-2. As discussed *supra*, IM 2016-27 states that “[a]lternatives should be developed to address unresolved resource conflicts.” *Id.* at Attachment 2-4. IM 2016-27 builds on IM 2010-117’s mandate to consider an alternative for unresolved resource conflicts by specifically detailing the information and analysis that should be addressed by BLM. *See supra* Section IV (discussing the numerous requirements in IM 2016-27); *see also* IM 2016-27 at Attachment 2-6 to 2-9 (listing numerous “questions” that BLM must answer “for each alternative analyzed in the NEPA process” regarding size, naturalness, solitude and primitive and unconfined recreation, and supplemental values).

Second, it is immaterial that BLM considered a no leasing alternative in the Lease Sale EA. BLM is *required by law* to consider the no leasing alternative and cannot use that alternative as a substitute for other alternatives that it may also be required by law (or policy) to consider.

Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact the environment to assiduously fulfill the obligations imposed by NEPA. Informed and meaningful consideration of alternatives – including the no action alternative is an integral part of NEPA.

S. Utah Wilderness Alliance, 122 IBLA at 338; *see also S. Utah Wilderness Alliance v. Norton*, 457 IBLA at 1262 (“an agency’s [NEPA document] must consider the ‘no-action’ alternative.”) (citation omitted).

Furthermore, IM 2010-117 requires consideration of *three* alternatives, at a minimum, if unresolved resource conflicts may be impacted by a proposed action – the proposed action, no action, *and* unresolved resource conflicts alternative(s). IM 2010-117 § III.E. Because IM 2016-27 recognizes LWCs as unresolved resource conflicts, BLM should have prepared an alternative to consider leasing outside of the Currant Canyon and Desolation Canyon LWCs. *See, e.g.,* IM 2016-27 at Attachment 2-4 (“BLM must explore alternative means of meeting the purpose and need . . . This includes consideration of whether or not the purpose and need of the proposed action could be fulfilled while avoiding or minimizing impacts to wilderness characteristics.”).

Third, the Vernal RMP by necessity must be able to evolve and adapt to respond to new information and changed circumstances as they arise, as recognized by FLPMA. *See, e.g.*, 43 U.S.C. § 1711(a) (“[BLM] shall prepare and maintain *on a continuing basis* an inventory of all public lands and their resource and other values.”) (emphasis added). “This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.” *Id.*; *see also* IM 2010-117 § III.C.3 (“Field offices will review parcels in light of the most current national and local program-specific guidance to determine the availability of parcels for leasing and/or applicable stipulations.”). In fact, IM 2010-117 was issued in response to BLM’s highly controversial and publicly criticized (and successfully challenged) 2008 decision to lease parcels in and near environmentally sensitive areas including Dinosaur National Monument and numerous LWCs. *See, e.g.*, BLM, Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah’s December 2008 Lease Sale (Oct. 7, 2009); BLM, BLM Releases Report on Utah Oil and Gas Leases (Oct. 8, 2009), http://www.blm.gov/wo/st/en/info/newsroom/2009/october/blm_releases_report.html.

In other words, IM 2010-117 recognized that the existing Utah BLM RMPs – including the Vernal RMP – had shortchanged Utah’s remarkable wild lands and thus, the decisions made therein should be reconsidered and “do[] not mandate leasing.” IM 2010-117 § I.A. BLM continues to shortchange Utah’s wild lands when it claims improperly that the decisions made in the 2008 Vernal RMP are immutable.

Finally, BLM failed to respond to two of SUWA’s substantive comments regarding shortcomings in the Lease Sale EA. First, as explained by SUWA, there is no record evidence that BLM analyzed “other considerations,” including whether “non-mineral resource values are greater than potential mineral development” in “undeveloped areas.” *See* IM 2010-117 § III.C.4 (requiring consideration of such factors). BLM does not dispute this point. *See generally* Lease Sale EA at 164-71 (BLM’s responses to SUWA’s comments). Second, there is no record evidence that BLM evaluated whether oil and gas management decisions made in the Vernal RMP for identified LWCs adequately protect such values, or whether lease stipulations established in the Vernal RMP need to be updated or replaced. *See* IM 2010-117 § III.C.2 (requiring such analysis). BLM also does not dispute this point. *See generally* Lease Sale EA at 164-71 (BLM’s responses to SUWA’s comments).

BLM is required by law to respond to these substantive comments. *Utahns for Better Transp.*, 305 F.3d at 1165 (agencies must “respond to substantive issues raised in comments”) (citation omitted); *see also ACLU v. FCC*, 823 F.2d at 1581 (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”) (citation omitted). In addition, BLM’s failure to consider this information – in its response to comments and/or the Lease Sale EA – is undisputable evidence that the agency failed to comply with IM 2010-117.

Therefore, for the above-discussed reasons, BLM failed to take a hard look at appropriate alternatives, and failed to respond to substantive comments raised by SUWA. BLM should defer leasing in these areas until it resolves these issues.

ii. The Nine Mile Canyon Special Recreation Management Area

The Lease Sale EA does not take a hard look at potential impacts to the Nine Mile Canyon SRMA and forecloses future management options in violation of NEPA. BLM designated the Nine Mile Canyon SRMA in the Vernal RMP to “protect-high value cultural values and scenic quality.” Vernal RMP at 35; *see also id.* at Approved RMP – Fig. 13b (depicting the Nine Mile Canyon SRMA). To accomplish this goal, BLM must prepare an “activity management plan” that “emphasize[s]” the protection of the SRMA’s identified values. *Id.* at 110. To date, BLM has yet to prepare the management plan. *See* BLM, Vernal RMP Five-Year Evaluation Report at 1, http://www.blm.gov/ut/st/en/fo/vernal/planning/rmp/rod_approved_rmp.html (follow hyperlink for “RMP 5-Year Review”) (“No program-specific or integrated activity level plans have been completed”) (“Vernal RMP 5-Year Review”) (last updated Sept. 28, 2015).⁶ Lease parcels 9 and 10 are located in the Nine Mile Canyon SRMA. *See* Lease Sale EA at 27.

Because BLM has yet to prepare the management plan for the Nine Mile Canyon SRMA, oil and gas leasing in this area is an “unresolved resource conflict” which, as discussed *supra*, requires BLM to consider an alternative in the Lease Sale EA to address that issue. *See* IM 2010-117 § III.E. The EA fails to do so. *See* Lease Sale EA at 13 (BLM considered only the proposed action and no action alternative). BLM does not dispute this point but instead attempts to justify its decision by stating that

[t]he oil and gas leasing decisions were made in the [Vernal RMP] and are independent of the Nine Mile Canyon SRMA plan . . . A SRMA . . . plan is not a master leasing plan. The SRMA plan will manage recreation activity.

Lease Sale EA at 169 (BLM response to SUWA comment #11). BLM’s response is arbitrary.

First, NEPA prohibits BLM from making a decision that would “[l]imit the choice of reasonable alternatives” in future management actions. 40 C.F.R. § 1506.1(a)(2). However, that is exactly what BLM has done here. Because no management plan has been completed for the Nine Mile Canyon SRMA, BLM’s decision to lease in the SRMA unlawfully restricts future management options in the management plan for the affected lands and adjacent lands.

To extract mineral resources from parcels 9 and 10 – which are offered with NSO stipulations – surface development activities will have to take place on adjacent Federal, state, or private land, and may adversely affect the cultural and scenic qualities of the SRMA. In fact, the Lease Sale EA acknowledges that oil and gas leasing in the Nine Mile Canyon SRMA *will* limit BLM’s choice of reasonable alternatives in future management planning actions such as the Nine Mile Canyon SRMA plan. *See* Lease Sale EA at 59 (“Cumulatively, this would reduce the availability and/or quality of outdoor recreation opportunities (both dispersed and developed).” For example, any development activities that occur on tracts of land adjacent to parcels 9 and 10, may affect how and where BLM designates hiking trails or scenic viewpoints in the SRMA plan.

⁶ BLM has started the NEPA process to prepare the Nine Mile Canyon SRMA plan. *See* DOI-BLM-UT-G020-2015-0060-EA (Nine Mile Canyon Special Recreation Management Area Plan), <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=80819> (last updated March 29, 2016).

See, e.g., Lease Sale EA at 9 (“Several parcels [i.e., parcels 9 and 10] are located in areas identified [in the Vernal RMP] as [NSO] with no exceptions, waivers, or modifications. Access to the minerals within the lease would have to occur from BLM-managed private, and State lands adjacent to these parcels.”).

Finally, it is immaterial whether oil and gas leasing decisions were made in the Vernal RMP because that same document also required preparation of the Nine Mile Canyon SRMA plan.⁷ By offering lease parcels in the Nine Mile Canyon SRMA before the required management plan is prepared, BLM is ignoring its obligation to “think first, then act.” *See S. Utah Wilderness Alliance*, 457 F.Supp.2d at 1267 (“NEPA does not sanction this approach of “lease now, think later.”). Thus, BLM must prepare an alternative – other than the proposed action and no action alternatives – to address the impacts of leasing in this area, and should defer leasing parcels 9 and 10 until such an alternative is prepared.

iii. The Nine Mile Canyon Area of Critical Environmental Concern

The Lease Sale EA also failed to take a hard look at impacts to the Nine Mile Canyon ACEC, and does not give priority to the protection of the ACEC’s identified values. The Vernal RMP designated the Nine Mile Canyon ACEC to protect the area’s relevant and important cultural, high quality scenic, and special status plant species values. *See* Vernal RMP at 36. ACECs are defined as “areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes.” 43 U.S.C. § 1702(a). BLM must “give priority to the designation and protection of [ACECs].” *Id.* § 1712(c)(3). Lease parcels 9 and 10 are located in the Nine Mile Canyon ACEC. *See* Lease Sale EA at 44.

To date, BLM has yet to prepare a management plan for the Nine Mile Canyon ACEC and, therefore, has failed to give priority to the protection of the area’s relevant and important values. *See* Vernal RMP 5-Year Review at 1 (“No program-specific or integrated activity level plans have been completed” for ACECs); *but see* 43 U.S.C. § 1701(a)(11) (“plans for the protection of public land [ACECs will] be promptly developed.”). Furthermore, like the Nine Mile Canyon SRMA discussed *supra*, because BLM has yet to prepare a management plan for the Nine Mile Canyon ACEC, the ACEC is an “unresolved resource conflict” that pursuant to IM 2010-117 and 2016-27 needs to be addressed in an alternative in the Lease Sale EA.⁸ *See, e.g.*, IM 2010-117 § III.E; IM 2016-27 at Attachment 2-4. Unfortunately, no such alternative is included in the Lease Sale EA. *See, e.g.*, Lease Sale EA at 13 (BLM considered only the proposed action and no action alternatives).

Furthermore, BLM’s decision to lease parcels 9 and 10 would unlawfully “[l]imit the choice of reasonable alternatives” available to BLM for selection in the Nine Mile Canyon ACEC plan. 40 C.F.R. § 1506.1(a)(2). For example, BLM is required by law to protect identified relevant and

⁷ Similarly, SUWA never argued, nor implied, that the Nine Mile Canyon SRMA plan is a “master leasing plan.”

⁸ It is immaterial that BLM attached an NSO stipulation to parcels 9 and 10 to protect the Nine Mile Canyon ACEC. The NSO stipulation does not excuse (or satisfy) BLM’s *additional* obligations to prepare a management plan and, in the present case, consider an alternative – besides the proposed action and no action – that addresses leasing outside the Nine Mile Canyon ACEC if no such plan has been prepared (*i.e.*, unresolved resource conflict remains).

important values in the ACEC including high quality scenery. However, regardless of whether lease parcels 9 and 10 are issued with NSO stipulations, any development activity on adjacent Federal, state, or private land (including in Nine Mile Canyon itself) that is visible from within the ACEC will adversely affect the high quality scenery. *See* Lease Sale EA at 9 (because parcels 9 and 10 are offered with NSO stipulations development will “occur from BLM-managed private, and State lands adjacent to these parcels”). The Lease Sale EA does not address this factor. *See, e.g.,* Lease Sale EA at 43-44.

Finally, BLM failed to respond to SUWA’s comments regarding the need to analyze impacts to, and prioritize the protection of, the Nine Mile Canyon ACEC. *See* Lease Sale EA at 168 (BLM’s response to SUWA’s comment #9). Instead, BLM’s only response to SUWA’s concerns takes the unsupportable position that once the agency has identified an ACEC, BLM has *no* obligation to protect its relevant and important values. *See* Lease Sale EA at 168 (BLM response to SUWA comment #9). This position is wrong as a matter of law because it ignores FLPMA’s mandate to “give priority to the designation and protection of [ACECs],” 43 U.S.C. § 1712(c)(3), and to “promptly” develop plans to protect the identified relevant and important values.

Moreover, BLM ignores the concerns raised in SUWA’s comments, specifically: 1) the ACEC is an “unresolved resource conflict,” so BLM needed to prepare an alternative to address that conflict, and 2) BLM should defer leasing parcels 9 and 10 until it completes the Nine Mile Canyon ACEC management plan so as not to foreclose future management options. *See* Ex. 1 at 10. In addition, BLM’s failure to consider this information – in its response to comments and/or the Lease Sale EA – is undisputable evidence that the agency failed to comply with IM 2010-117. BLM should therefore defer from leasing parcels 9 and 10 until the above-discussed shortcomings in the Lease Sale EA are resolved.

VI. Water Resources, Including Suitable or Eligible Wild and Scenic Rivers

BLM failed to take a hard look at impacts to water resources and failed to respond to SUWA’s substantive comments regarding water quality and wild and scenic rivers.

a. BLM Has Failed to Take a Hard Look at Water Resources

The Lease Sale EA failed to take a hard look at impacts to water resources from leasing parcels 9, 10, and 38, among others. To date, BLM has never reviewed or evaluated whether the lease stipulations in the Vernal RMP intended to protect water resources are effective or adequate to protect those resource values. BLM’s obligation under NEPA to make “informed” decisions requires BLM to analyze whether established stipulations actually protect the intended resource value. *S. Utah Wilderness Alliance*, 159 IBLA at 241 (“the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease.”) (citation omitted); *Pennaco*, 377 F.3d at 1159 (“Agencies are required to satisfy the NEPA ‘before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values’”) (citation omitted).

BLM is required by law and policy to monitor and evaluate the effectiveness of management decisions made in the Vernal RMP. FLPMA requires BLM to manage the public lands “in a manner that will protect . . . water resources.” 43 U.S.C. § 1701(a)(8). It requires further that BLM “prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values.” *Id.* § 1711(a). “This inventory *shall* be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.” *Id.* (emphasis added).

Building on FLMPA’s mandate, IM 2010-117 requires BLM, in the oil and gas lease review process, to “determine whether leasing the parcel is in conformance with the RMP . . . [and] . . . *evaluate whether oil and gas management decisions identified in the RMP (including lease stipulations) are still appropriate and provide adequate protection of resource values.*” IM 2010-117 § III.C.2 (emphasis added). Further, BLM is required to “[m]onitor the effectiveness of management decisions” for suitable and/or eligible Wild and Scenic rivers – such as Argyle Creek, Ninemile Creek, and the Green River. BLM, 6400 – Wild and Scenic Rivers – Policy and Program Direction for Identification, Evaluation, Planning, and Management (Public) § 1.6.9 (July 13, 2012).

In the present case, there is no record evidence in the Lease Sale EA that BLM evaluated the effectiveness of management decisions made in the Vernal RMP for water resource values. BLM does not dispute this point. *See, e.g.*, Lease Sale EA at 126-28 (water resources were issues found to be “present, but not affected to a degree that detailed analysis is required”); *id.* at 170 (BLM response to SUWA comment 12). BLM elected not to analyze any impacts to water resource values, asserting instead that “[l]easing of the proposed parcels would not, by itself, authorize any ground disturbance which could contribute runoff affecting surface water quality.” Lease Sale EA at 170. This conclusion is arbitrary. BLM’s conclusion ignores NEPA’s mandate to make informed decisions, FLPMA’s mandate to protect water resources, and relevant policies that requires BLM to evaluate the effectiveness of management decisions such as those made in the Vernal RMP.

Furthermore, BLM itself has concluded that the Vernal RMP did *not* address numerous important water resources issues including, but not limited to:

- 1) Water quantity;
- 2) Thresholds for Clean Water Act “303(d)” waters;
- 3) What actions should be taken if a stream is placed on the 303(d) list;
- 4) Priority watersheds;
- 5) Ground water impacts;
- 6) Climate change impacts to water resources; or
- 7) Hydraulic fracturing.

See Vernal RMP 5-Year Review at 46-48 (concluding that these issues were not addressed in the Vernal RMP). The Lease Sale EA does not address or analyze these issues.⁹ *See, e.g.*, Lease

⁹ The Lease Sale EA provides a generic overview of hydraulic fracturing in Chapter 2 but does not analyze impacts to resource values, including water quality and quantity, from such activity in either Chapter 3 or 4. *See* Lease Sale EA at 11.

Sale EA at 126 (groundwater quality is an issue “present, but not affected to a degree that detailed analysis is required”); *Id.* at 128 (same but for surface water quality).

Despite an overall dearth of information, BLM intends on leasing parcels that may impact water resource values such as parcels 9, 10, and 38, and to do so without any record evidence that the stipulations and BMPs are effective or appropriate. This approach violates FLPMA’s mandate to manage the public lands “in a manner that will protect . . . water resources,” 43 U.S.C. § 1701(a)(8), as well as NEPA’s “hard look” requirement. *See S. Utah Wilderness Alliance v. Norton*, 457 F.Supp.2d at 1267 (“NEPA does not sanction this approach of ‘lease now, think later.’”).

Lease parcels 9 and 10 are located near Ninemile Creek which is on the state of Utah’s “303(d)” list of impaired waters. The Lease Sale EA, like the Vernal RMP, does not address thresholds for 303(d) listed waters including Ninemile Creek,¹⁰ or “what things should be done if a stream is listed on the 303d list.” Vernal RMP 5-Year Review at 47; *see also* Lease Sale EA at 128 (BLM did not analyze impacts to surface water quality). The need to evaluate the effectiveness of stipulations and BMPs intended to protect surface water quality is all the more necessary in the present case because BLM has concluded that “[a] primary source of impairment for streams/water bodies located on BLM managed lands is from [oil and gas] development that BLM has permitted.” Vernal RMP 5-Year Review at 46.

Finally, the leasing of parcels 9, 10, and 38, threatens BLM-identified outstandingly remarkable values in Argyle Creek, Green River, and Ninemile Creek. For example, BLM has not monitored or evaluated the effectiveness of management decisions regarding rivers determined to be suitable and/or eligible for inclusion in the National Wild and Scenic River System such as Argyle Creek, Green River, and Ninemile Creek. *See* Vernal RMP at Fig. 14a (Lower Green River identified as “suitable”); BLM, Vernal Field Office, Proposed Resource Management Plan and Final Environmental Impact Statement at EIS Fig. 32 (Aug. 2008) (Argyle Creek and Ninemile Creek identified as “eligible”); *but see* Vernal RMP 5-Year Review at 52 (stating that “Appendix C [of the Vernal RMP] covers the WSR segment determination”). Instead, to date, BLM has considered only whether “interim management measures [have] been established” and concluded that such measures have been established only for the Upper and Lower Green River but not for other eligible/suitable segments such as Argyle Creek and Ninemile Creek. Vernal RMP 5-Year Review at 53.

Therefore, for the foregoing reasons, BLM should defer from leasing parcels 9, 10, and 38, as well as any other parcel which may adversely impact water resources.

¹⁰ Ninemile Creek is on the state of Utah’s “303(d)” list of impaired waters for temperature. *See* Utah Dep’t of Env’tl. Quality, Div. of Water Quality, Monitoring and Reporting, Chapter 5: Rivers and Stream Assessment at PDF 165/214, http://www.deq.utah.gov/ProgramsServices/programs/water/wqmanagement/assessment/docs/2016/02feb/chapter_5_river_and_stream_assessments_final20122014ir.pdf (last visited Nov. 10, 2016).

b. BLM Failed to Respond to Substantive Comments Regarding Water Resources

In the Lease Sale EA, BLM failed to respond to the following substantive comments provided by SUWA:

- “The [Lease Sale] EA does not address . . . or analyze whether the issuance of leases in the Nine Mile Canyon region will impair efforts to bring Ninemile Creek into compliance with relevant water quality standards.” Ex. 1 at 12; and
- “[T]here is no record evidence in the Lease Sale EA that BLM has monitored the effectiveness of management decisions made in the [Vernal RMP] for rivers identified as eligible or suitable.” *Id.* at 13 (internal alterations omitted; citation omitted).

It is immaterial that BLM concluded in the Lease Sale EA that water resources were an issue “present, but not affected to a degree that detailed analysis is required” because regardless of that decision, BLM had a separate and independent obligation to respond to SUWA’s substantive comments. *See Utahns for Better Transp.*, 305 F.3d at 1165 (NEPA requires Federal agencies to “respond to substantive issues raised in comments”); *Natural Res. Def. Council v. EPA*, 859 F.2d at 188 (under the APA it is a “fundamental tenet of administrative law” that federal agencies respond to all significant comments). In addition, BLM’s failure to consider this information – in its response to comments and/or the Lease Sale EA – is undisputable evidence that the agency failed to take a hard look at impacts to water resources.

VII. Graham’s and White River Beardtongue

The BLM should defer leasing any parcel which overlaps Graham’s beardtongue (*Penstemon grahamii*) and/or White River beardtongue (*Penstemon scariosus*) habitat because the Conservation Agreement for those species relied on in the Lease Sale EA was recently invalidated by the United States District Court for the District of Colorado. *See Rocky Mountain Wild, et al. v. Walsh, et al.*, Case 1:15-cv-00615-WJM (Oct. 25, 2016) (attached as Ex. 9). In particular, the court held that the United States Fish and Wildlife Service (“FWS”) violated the Endangered Species Act (“ESA”) by:

- 1) “[C]oncluding that yet-to-be-enacted regulatory and non-regulatory measures mandated by the Conservation Agreement were ‘existing regulatory mechanisms’;
- 2) “[F]ailing to account for the [Conservation] Agreement’s expiration when determining whether the beardtongues face material threats in the ‘foreseeable future’”; and
- 3) Failing to take “into account economic considerations when imposing a 300-foot buffer zone around each beardtongue.”

Rocky Mountain Wild, Case 1:15-cv-00615-WJM at *2-3. Rather than immediately set-aside the Conservation Agreement and order FWS to re-consider listing the species as threatened or endangered under the ESA, the court ordered the parties “to meet in person and discuss whether the Conservation Agreement may be modified in a manner satisfactory to Plaintiffs.”¹¹ *Id.* at *3. However, the court’s decision had an immediate effect on BLM’s leasing decision which, at least in part, is based on management decisions made in the Conservation Agreement for Graham’s and White River beardtongues. *See, e.g.*, Lease Sale EA at 25 (Graham’s beardtongue is present on lease parcels 32, 121, and 122); *id.* at 26 (noting that parcels subject to the Conservation Agreement “will require additional mitigation measures if developed”); *id.* at 80, 86 (lease stipulations and notices for parcels 32, 121, and 122).

Therefore, BLM should defer from leasing all parcels in Graham’s and White River beardtongue habitat until either a modified Conservation Agreement is prepared or FWS reexamines whether the species should be listed as threatened or endangered under the ESA.

REQUEST FOR RELIEF

SUWA respectfully requests the withdrawal of the six protested parcels from the December 13, 2016, Competitive Oil and Gas Lease Sale until such time as BLM resolves the above-discussed violations. This protest is brought by and through the undersigned on behalf of SUWA. The members and staff of SUWA reside, work, recreate, or regularly visit the areas to be impacted by the proposed lease sale and therefore have an interest in, and will be adversely affected by, the proposed action.

DATED November 14, 2016



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¹¹ To date, these meetings have yet to be scheduled.