

Southern Utah Wilderness Alliance – Center for Biological Diversity –
Green River Action Network – Living Rivers –
Natural Resources Defense Council – Sierra Club

HAND DELIVERED

January 2, 2018

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, Canyon Country District's Notice of Competitive Oil and Gas Lease Sale to be Held on or around March 20, 2018

Dear Director Roberson:

In accordance with 43 C.F.R. §§ 4.450-2 and 3120, the Southern Utah Wilderness Alliance, Center for Biological Diversity, Green River Action Network, Living Rivers, Natural Resources Defense Council, and Sierra Club (collectively, "SUWA") hereby timely protest the March 20, 2018, offering of the following eight (8) oil and gas lease sale parcels in the Bureau of Land Management, Canyon Country District (BLM):

UTU-93004 (Parcel 10); UTU-93005 (Parcel 12); UTU-93006 (Parcel 14); UTU-93007 (Parcel 16); UTU-93008 (Parcel 18); UTU-93009 (Parcel 19); UTU-93010 (Parcel 21); and UTU-93011 (Parcel 23) (Protested Parcels).

See generally Determination of NEPA Adequacy, DOI-BLM-UT-Y010-2017-0285-DNA, March 2018 Competitive Oil and Gas Lease Sale (Nov. 2017) (DNA or Lease Sale DNA). 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, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* and the regulations and policies that implement these laws.¹

I. Leasing Is the Point of Irretrievable Commitment of Resources

It is critical that BLM undertake legally sufficient comprehensive NEPA analysis before deciding to offer, sell and issue the Protested Parcels as subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. Unfortunately, BLM has not fully analyzed potential and reasonably foreseeable impacts that could flow from its leasing

¹ Unless expressly stated otherwise each argument in this protest applies to all Protested Parcels.

decision. The sale of leases without no surface occupancy (NSO) stipulations represents an irreversible 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); *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 “does not reserve to the government the absolute right to prevent all surface disturbing activities” and thus its issuance constitutes “an irretrievable commitment of resources” under section 102 of NEPA.

159 IBLA at 241 (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998)).

As the IBLA 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.*, 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) (finding that 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:

The 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 § I.B.2, at I-2 (Jan. 28, 2013) (emphasis added) (BLM Handbook 1624) (attached); *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 sale of the Protested Parcels and 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, air quality and climate change, cultural and historic resources, and wilderness-caliber lands.

II. Existing NEPA Analysis Did Not Take a Hard Look at the Site-Specific Impacts of Issuing and Developing the DNA Lease Parcels and Therefore BLM’s Reliance on the Lease Sale DNA Is Inappropriate

The Lease Sale DNA and BLM’s response to SUWA’s comments ignore the elephant in the room in this matter: the proper use of a DNA is limited to a situation in which *all site-specific* NEPA analysis was completed in existing NEPA documents and *no* new information, data, or circumstances have arisen since the preparation of that NEPA documentation. The present matter is not one of these situations.

a. A Determination of NEPA Adequacy Is Not a NEPA Document

A DNA is not a NEPA document but rather is an administrative convenience which “confirms that an action is adequately analyzed in existing NEPA document(s) and is in conformance with the land use plan.” BLM, National Environmental Policy Act Handbook H-1790-1 § 5.1 (Jan. 2008) (BLM Handbook 1790) (attached). A DNA “does not itself provide NEPA analysis.” Dep’t of the Interior, Departmental Manual Part 516, Chapter 11: Managing the NEPA Process Bureau of Land Management § 11.6(b) (May 8, 2008) (attached). BLM properly relies on a DNA to authorize an activity only if 1) the proposed action is adequately covered by relevant existing analyses, data, and records; and 2) there are no new circumstances, new information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis. *See id.* § 11.6(a), (b). Stated differently, BLM must consider the following questions prior to preparing a DNA:

- Is the new proposed action a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document(s)?
- Is the range of alternatives analyzed in the existing NEPA document(s) appropriate with respect to the new proposed action, given environmental concerns, interests, and resource values?
- Is the existing analysis valid in light of any new information or circumstances?
- Are the direct, indirect, and cumulative effects that would result from implementation of the new proposed action similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document?

BLM Handbook 1790 § 5.1.2. Notably, if the answer to any of these questions is “no” then “a new EA or EIS must be prepared.” *Id.* Here, the answer to several of these questions is “no” and thus BLM must prepare a new NEPA analysis to support its leasing proposal.

b. BLM’s Past Use of DNAs Demonstrates the Inappropriateness of Its Use of the Lease Sale DNA

Utah BLM’s recent, limited use of DNA’s in the oil and gas development context demonstrates the inappropriateness of BLM’s attempt to rely on a DNA here. In those instances, BLM prepared a DNA to 1) re-authorize the *same* project previously analyzed and authorized in a site-specific NEPA document, 2) authorize a minor modification to the *same* project previously analyzed and authorized in a site-specific NEPA document, or 3) authorize a step-down version of a project previously analyzed and authorized in a site-specific NEPA document. For example:

- In Finley Resources, Inc. Pelican 15-4A-7-20 Oil Well, DOI-BLM-UT-G010-2017-0046-DNA (April 2017) (Finley DNA) (attached), BLM prepared a DNA that tiered to a site-specific EA because the “project ha[d] remained similar to the original proposal with two minimal changes. First, Finley ha[d] requested to move the project 101 feet to the northeast. Second, the 0060-EA analyze[d] a total surface disturbance of 4 acres and the newly proposed project ha[d] reduced the surface disturbance to 2.4 acres.” *Id.* at *3.
- In QEP Energy Company’s RW 9C1-16A Pipeline Reroute, DOI-BLM-UT-G010-2015-0170 (DNA) (Sept. 2015) (attached), BLM prepared a DNA to approve slight alterations to the placement of a pipeline in the Uinta Basin. The *same* pipeline had already been analyzed in a site-specific environmental assessment including NEPA alternatives and its direct, indirect, and cumulative impacts. *See id.* at *15.
- In Koch Exploration North Alger 27-31 Multi Well Pad, DOI-BLM-UT-G010-2015-0128-DNA (Oct. 2015) (attached), BLM prepared a DNA to approve a drilling project in which the direct, indirect, and cumulative impacts of that development had previously been analyzed in an environmental assessment. In other words, the development activities were a step-down of the *exact same* activities analyzed in the environmental assessment.
- In EnCana/Crescent Point-Lease Reinstatement, DOI-BLM-UT-G010-2015-0123-DNA (May 2017) (EnCana DNA) (attached), BLM prepared a DNA to reinstate the *same* oil and gas leases previously analyzed and authorized in the November 2016 competitive oil and gas lease sale environmental assessment. *Id.* at 2.

In each of these scenarios, BLM initially prepared NEPA documents to analyze the site-specific direct, indirect, and cumulative impacts of the exact same (or nearly identical) project authorized in the DNA, and the purpose and need statement for each project was the exact same as

envisioned in the DNA. For example, the EA for the Finley Resources Inc. drilling project had the stated objective to decide “whether or not to approve the APDs.” Finley Proposes The Pelican 15-3A-7-20, 15-4A-7-20, 15-6A-7-20 Wells, DOI-BLM-UT-G010-2016-0060-EA at 2 (Oct. 2016) (attached). The DNA which relied on that EA modified the decision by allowing the already authorized well to be drilled 101 feet to the northeast in an area with a smaller surface disturbing footprint. *See* Finley DNA at *3. Similarly, the EnCana DNA relied on the environmental assessment prepared for the November 2016 competitive oil and gas lease sale, the stated purpose and need of which was to “respond” to lease nominations and to promote oil and gas development on public lands, respectively. *See* November 2016 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G010-2016-033-EA at 2 (Oct. 2016) (attached). This is the same (general) purpose and need of the DNA. Moreover, the site-specific direct, indirect, and cumulative impacts of the leases to be reinstated in the EnCana DNA – UTU-75675 and UTU-74837 – had been analyzed in that EA. *See* EnCana DNA at 2 (citing to the EA through which the leases were analyzed and subsequently issued).²

In contrast, as discussed *infra*, here the Lease Sale DNA relied on broad level programmatic NEPA documents that do not share the same (or similar) purpose and need as the DNA, nor do they contain the requisite site-specific direct, indirect, and cumulative impact analyses. Thus BLM’s reliance on the Lease Sale DNA is inappropriate.

c. The Purpose and Need of the DNA Is not a Feature of, or Essentially Similar to, an Alternative in Existing NEPA Documents

The alternatives analyzed in the Moab and Monticello RMPs and the Moab MLP were *not* oil and gas leasing alternatives and thus cannot be relied on to satisfy BLM’s NEPA alternatives obligations in the present matter. Instead, those alternatives considered only broad level management options for entire field offices (or large planning areas) such as designating Federal public lands as open or closed to oil and gas leasing and development. Notably they did not make site-specific leasing decisions or mandate that any particular parcels be offered for lease. The dissimilarities between those alternatives and an oil and gas leasing alternative is made clear by examining BLM’s stated purpose and need for each project. For example:

- BLM’s stated purpose for the Monticello RMP was “to provide a comprehensive framework for BLM management of public lands within the [planning area] and allocation of resources pursuant to the multiple-use and sustained-yield requirements of FLPMA[.]” Monticello FEIS at 1-1. The Moab RMP had an identical purpose. *See* Moab FEIS at 1-1.
- BLM’s stated need for the Monticello RMP was “to allow the BLM to review the management of public lands comprehensively and inventory their resources and . . . to make decisions for managing those lands and their resources and allocating present and future uses.” Monticello FEIS at 1-1. And BLM’s stated need for the Moab RMP was to account for “significant alterations in the [planning area] in light of new information and changed resources, circumstances, and policies that may be relevant to the future

² SUWA does not concede that BLM’s reliance on these DNA’s satisfied its NEPA hard look mandate. However, they are illustrative of the narrow nature and scope of projects for which BLM has prepared a DNA.

management of public lands and allocation of resources under the multiple-use and sustained yield mandate.” Moab FEIS at 1-1 to 1-2.

- BLM’s stated purpose for the Moab MLP was “to 1) evaluate in-field considerations such as optimal parcel configurations and potential development scenarios; 2) identify and address potential resource conflicts and environmental impacts from development; 3) develop mitigation strategies through leasing stipulations and best management practices; and 4) consider a range of new constraints, including prohibiting surface occupancy or closing areas to leasing.” Moab MLP FEIS at 1-2. And BLM’s stated need for that document is to provide “additional planning and analysis . . . prior to new or additional leasing and development.” *Id.*

The DNA does not contain a purpose and need statement. Recent Utah BLM’s competitive oil and gas lease sale EAs have stated their purpose and need this way: to “respond” to lease parcel nominations and to “promote the development of oil and gas on public domain.” Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA, March 2018 Competitive Oil and Gas Lease Sale 3-4 (Nov. 2017) (March 2018 Lease Sale EA) (attached). *See also* Environmental Assessment, DOI-BLM-UT-G010-2017-0028-EA, December 2017 Competitive Oil and Gas Lease Sale 3 (June 1, 2017) (same – Utah BLM Vernal field office) (Vernal BLM 2017 Lease Sale EA) (attached); Environmental Assessment, DOI-BLM-UT-G020-2017-0030-EA, December 2017 Competitive Oil and Gas Lease Sale 3 (Aug. 2017) (same – Utah BLM Price field office) (Price BLM 2017 Lease Sale EA) (attached).

In the present case, there are no similarities between the purpose and need statements of the Moab and Monticello RMPs or Moab MLP and the purpose for which BLM has prepared the Lease Sale DNA – to consider offering certain parcels for lease. As noted *supra*, the RMPs and MLP are programmatic field office (or large planning area wide) NEPA documents that made broad level management decisions regarding resource values under BLM’s management, not site-specific leasing decisions. Likewise, they did not analyze the site-specific direct, indirect, and cumulative impacts of leasing the Protested Parcels. These programmatic NEPA documents do not contain a sufficiently narrow purpose and need statement and sufficiently detailed site-specific impacts analysis to justify the subsequent use of a DNA to approve a site-specific project such as issuance of oil and gas leases. This is precisely why IM 2010-117, which established the MLP concept, anticipated that BLM would still need to prepare an EA or EIS to support oil and gas leasing within the MLP boundaries, even though the MLP may have analyzed *some* potential site-specific impacts from leasing and development.

It is expected that the DNA process will only be appropriate in cases where the existing NEPA documentation has adequately incorporated the most current program-specific guidance . . . *Most parcels that the field office determines should be available for lease will require site-specific NEPA analysis. This analysis will typically take the form of an EA, which would be tiered, as appropriate, to the RMP/EIS or a MLP/EA or EIS, if one has been completed for any of the parcels.*

BLM, Instruction Memorandum No. 2010-117, *Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews* § III.E (May 17, 2010) (Emphasis added) (attached).

d. The Moab and Monticello RMPs and the Moab MLP did not Analyze all of the Site-Specific Direct, Indirect, and Cumulative Impacts of the Issuance and Development of the Protested Parcels

The programmatic RMPs relied on by BLM did not analyze site-specific direct, indirect, and cumulative impacts of oil and gas leasing and development for the Protested Parcels. The Moab MLP, while more narrowly focused than the RMPs, based its impact analysis on broad-level assumptions “for purposes of equitably *comparing the alternatives* . . . based on observations, historic trends and professional judgment.” Moab MLP FEIS at 4-2 (emphasis added). It may be appropriate for BLM to rely on the Moab MLP for certain site-specific NEPA analyses, but BLM cannot rely on the Moab MLP (or any NEPA document) for analysis that was not prepared. In the present case, BLM cannot rely on the Moab MLP for impact analyses for air quality and GHG emissions and wilderness-caliber lands because the requisite site-specific analysis was never prepared.

NEPA requires BLM to take a hard look at all environmental impacts of a proposed action. This includes direct, indirect, and cumulative impacts. Direct effects are “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* at § 1508.8(b). Cumulative impact “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7.

i. The DNA Failed to Take a Hard Look at Air Quality and GHG Emissions Impacts

The Moab MLP did not analyze certain site-specific air quality impacts from oil and gas leasing and development because, as explained by BLM at that time, “certain information is unavailable or requires site-specific information to analyze.” Moab MLP FEIS at 4-2. The lack of site-specific information prohibited the MLP from analyzing air quality impacts based on quantitative data, and it recognized the subsequent need to do so prior to lease issuance:

Due to a lack of quantitative data, some impacts can be discussed only in qualitative terms. *Subsequent project-level NEPA documents will provide the opportunity to collect site specific data and analyze these data in quantitative terms.*

Moab MLP FEIS at 4-2 (emphasis added). The MLP likewise did not perform site-specific air quality modeling analysis for similar reasons:

Since the MLP is a planning document, and no specific projects are being proposed or analyzed in the Planning Area, modeling conducted for this analysis is by necessity speculative.

Id. at 4-5. Nor did the Moab MLP contain near-field analysis for site-specific authorizations because

Specific characteristics of the source to be modeled . . . are required to conduct this analysis, and, given the nature of this planning level air quality analysis, that information is not available.

Id. at 4-10. Similarly, neither the Moab and Monticello RMPs nor the Moab MLP analyzed the direct, indirect, or cumulative impacts to human health or the environment from increased GHG emissions and climate change. *See, e.g.*, Moab MLP FEIS at 4-16 (explaining that the MLP did not analyze GHG emissions impacts because “[i]t is not currently possible to calculate an impact from this number, or to assign a significance value to these calculated emissions”).

There is no dispute that BLM did not analyze these impacts. Instead, in response to comments on this point, BLM states that it satisfied NEPA in this regard by attaching air quality stipulations and notices to each of the lease parcels and, in any manner, BLM will conduct site-specific NEPA analysis at the APD stage. *See* Lease Sale DNA, Attachment D at *7-8. BLM’s reasoning is arbitrary and capricious.

It is immaterial with regard to site-specific NEPA impact analysis that “[a]ir quality lease stipulations and notices developed during the EIS were designed to minimize impacts to this resource.” EA, Appendix D at *7. Lease stipulations and notices are developed to mitigate impacts to human health and the environment, pursuant to FLPMA and the MLA, *see, e.g.*, 43 U.S.C. §§ 1701(a)(8), 1712, 43 C.F.R. § 3101.1-3, not to analyze site-specific direct, indirect, and cumulative impacts, as required by NEPA. *See, e.g.*, 40 C.F.R. §§ 1508.7, 1508.8. The fact remains that BLM has never analyzed certain site-specific air quality and GHG emission impacts such as those discussed above from the issuance and development of the Protested Parcels, in violation of NEPA.

Second, BLM cannot unlawfully delay its NEPA analysis to the APD stage. As discussed *supra*, the issuance of an oil and gas lease parcel without non-waivable NSO stipulations is an irretrievable commitment of resources and thus an “assessment of all reasonably foreseeable impacts must occur at the earliest practicable point, and must take place before an irretrievable commitment of resources is made.” *New Mexico ex rel. Richardson*, 565 F.3d at 718. “In the fluid minerals program, this commitment occurs at the point of lease issuance.” BLM Handbook 1624 § B.2. Here, BLM is unlawfully attempting to do the opposite.

ii. BLM Failed to Take a Hard Look at the Direct Impacts to Identified Lands With Wilderness Characteristics

The Moab and Monticello RMP and Moab MLP analyzed only broad-level impacts to wilderness characteristics to serve as a comparison between proposed planning area resource allocations and alternatives. *See generally* Moab MLP FEIS at 4-33 to 4-37; Moab RMP at 4-121 to 4-133; Monticello RMP at 4-196 to 4-217. At no time did these broad-level analyses consider the direct impacts to the Goldbar Canyon, Hatch Point / Hatch Canyon, and Labyrinth Canyon lands with wilderness characteristics (LWC) from the issuance and development of the Protested Parcels.

Direct effects are “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a).

The NEPA documents tiered to by BLM do not analyze numerous direct impacts, including but not limited to:

- Anticipated relevant short- and long-term impacts to naturalness, to opportunities for solitude and primitive and unconfined types of recreation, and to the overall size of the affected LWC unit;
- 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; and
- The duration and magnitude of potential impacts to wilderness characteristics.

BLM, Instruction Memorandum No. UT 2016-027, *Bureau of Land Management (BLM)-Utah Guidance for the Lands with Wilderness Characteristics Resource*, Attachment 2-7 (Sept. 2016) (requiring BLM to answer these questions in its NEPA analysis) (IM 2016-27) (attached).

Furthermore, IM 2016-27 provides BLM with a list of direct impacts to analyze in site-specific NEPA documents – none of which were analyzed in the NEPA documents relied upon by BLM in the present matter. By failing to analyze any of the questions presented in IM 2016-27 BLM failed to take a hard look at the direct impacts of oil and gas leasing and development to the Goldbar Canyon, Hatch Point / Hatch Canyon, and Labyrinth Canyon LWCs. That list includes, but is not limited to, the following questions:

- **“Size:** Would the action impact the unit so that there are no longer 5,000 acres or more of natural (i.e., roadless, primarily undeveloped) BLM lands? If so, would the area still meet the size criteria as defined in BLM Manual 6310, Section .06, Subsection C, 2(a), i(2)?”
 - “Where is the project located within the wilderness characteristics unit? Is the project located in the interior of the unit or near the boundary?”
 - “Would the action bisect a lands with wilderness characteristics unit and segregate the area in multiple sub-units? If so, what would be the size of the sub-units?”
- **“Naturalness:** Does the action affect the unit so that it no longer appears to be affected primarily by forces of nature?”
 - “Document all substantially noticeable human impacts that will be present in the area after implementation of each alternative. Note the expected duration of the impacts (i.e., long-term, short-term, defined period of time, etc).”

- **“Solitude and Primitive and Unconfined Recreation:** Does the action affect the area so that it no longer provides the outstanding opportunities for solitude or primitive and unconfined types of recreation documented in the unit’s permanent documentation file? Note the expected duration of the impacts.”
 - **“Solitude:** Determine whether each alternative affects the area so that it would remove or preclude, outstanding opportunities for solitude. Would the action cause a visitor to be unable to avoid the sights, sounds and evidence of other people in the area?”
 - **“Primitive and Unconfined Recreation:** Determine whether each alternative affects the area in such a way that it prevents or removes outstanding opportunities for primitive and unconfined types of recreation. Would the action impair the qualities of the primitive and unconfined recreation opportunities to the degree that they would no longer be outstanding?”
- **“Supplemental Values:** Does the alternative impact a unit’s supplemental values? Determine and document any potential impacts to the supplemental values documented in the unit’s permanent documentation file.”

IM 2016-27, Attachment 2-7 to 2-8. The NEPA documents relied on by BLM in the Lease Sale DNA do not touch on any of these questions, let alone provide the requisite site-specific analysis. Thus, BLM has never analyzed the direct impacts to identified wilderness-caliber lands from the issuance and development of the Protested Parcels.

In sum, the direct, indirect, and cumulative effects that would result from implementation of the new proposed action (*i.e.*, issuance of the Protested Parcels) are *not* similar either quantitatively or qualitatively to those analyzed in the existing NEPA documents. BLM’s reliance therefore on the Lease Sale DNA violates NEPA.

III. BLM Violated NEPA’s Alternatives Requirement

a. Legal Framework – NEPA Alternatives Analysis

NEPA requires BLM to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved resource conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E); *see* 40 C.F.R. § 1508.9(b); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (“An agency’s obligation to consider reasonable alternatives is ‘operative even if the agency finds no significant environmental impact.’” (quoting *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960 (7th Cir.2003))). Though less detailed than an EIS, an EA must demonstrate that the agency took a “hard look” at alternatives – a “thoughtful and probing reflection of the possible impacts associated with the proposed project” so as to “provide a reviewing court with the necessary factual specificity to conduct its review.” *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006) (quoting *Comm. to Preserve Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d 1543, 1553 (10th Cir.1993)); *see also* 40 C.F.R. § 1508.9(a)(1).

The range of alternatives an agency must analyze in an EA is determined by a “rule of reason and practicality” in light of a project’s objective. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (quoting *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir.1996)). “NEPA ‘does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective[.]’” *New Mexico ex rel. Richardson*, 565 F.3d at 708 (quoting *Colo. Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir.1999)). But the number and nature of alternatives must be “sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned.” *Id.* (quoting *Dombeck*, 185 F.3d at 1174).

In an EA, as in an EIS, the range of alternatives an agency must analyze depends on its purpose and need statement. *See Davis*, 302 F.3d at 1119; *see also* 40 C.F.R. § 1508.9(b) (requiring that EAs include “brief discussions of the need for a proposal” and alternatives to it). “Alternatives that do not accomplish the purpose of an action are not reasonable.” *Custer Cnty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001). Stated differently, “[i]t is the BLM purpose and need for action that will dictate the range of alternatives and provide a basis for the rationale for eventual selection of an alternative in a decision.” BLM Handbook 1790 § 6.2, at 35. After “defining the objectives of an action,” the agency must “provide legitimate consideration to alternatives that fall between the obvious extremes.” *Dombeck*, 185 F.3d at 1175.

Notably, “[t]he broader the purpose and need statement, the broader the range of alternatives that must be analyzed.” BLM Handbook 1790 § 6.2.1; *see also id.* § 6.6.1. “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative.” *Id.* § 6.6.1. Likewise, NEPA’s alternatives analysis requirement is *independent of and broader than* BLM’s obligation under the Act to determine whether oil and gas leasing and development will have a significant impact to the environment:

[C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, . . . the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. . . . Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988) (citations omitted).

b. BLM Has Never Analyzed the No-Action Alternative Relative to this Sale in a NEPA Document and Must do so Prior to Offering the Protested Parcels

The range of alternatives in the existing NEPA documents are inadequate for – or inapplicable to – the issuance of the Protested Parcels. BLM’s unremarkable conclusion that the adoption of the No Action alternative in a land use plan would maintain the status quo overlooks a critical point: the no action alternative in a land use plan and the no action alternative for an oil and gas leasing decision are prepared for entirely different situations and, if adopted, would have very distinct outcomes. For example, BLM prepared the Moab RMP to revise its outdated land use plan and associated management prescriptions for approximately 1,822,562 acres of federal public land in southeast Utah. *See* Moab FEIS at ES-1. The RMP would “replace the Grand Resource Area Resource Management Plan (RMP), which was signed in 1985.” *Id.* In other words, BLM’s adoption of the no action alternative in the RMP would have resulted in “a continuation of existing management under the current Grand Resource Area RMP (1985), as amended.” *Id.* at ES-2. In contrast, the adoption of a no action alternative in the oil and gas leasing context means that “the leasing of the nominated parcels would not take place.” March 2018 Lease Sale EA at 14. These two outcomes are entirely dissimilar and BLM’s failure to consider the no-leasing alternative in the context of the March 2018 sale is fatal to BLM’s lease sale DNA.

BLM’s responses to SUWA’s comments in this matter are non-responsive. Regarding the nature of the alternatives considered in the RMPs and MLP, BLM stated:

[SUWA’s] argument that a proposal to offer parcels for lease cannot be considered a feature of a Land Use Plan NEPA document is untenable. Section .43 of MS-3120 Competitive Leases (P) states: “The Field Manager or District Manager will forward the finalized Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) (or finalized Determination of NEPA Adequacy (DNA) if appropriate) and a recommendation for each parcel reviewed to the State Director” Similar language is found on pages 8 and 9 of Handbook 3120-1 – Competitive Leases. The language in the Manual and Handbook reflects a long-standing precedence that NEPA documents that are not prepared for specific parcels can indeed be considered adequate to do so.

DNA, Appendix D at *6. And regarding the range of alternatives in the RMPs and MLP, BLM stated:

Again, the commenter is trying to refute the long-standing precedent that NEPA documents, specifically those prepared to approve Land Use Plans, are adequate for specific lease parcels, this time by virtue of another long-standing precedent – that the No Action alternative of an LUP NEPA is the status quo.

As is stated on page 2.4 of the Moab MLP EIS, a No Leasing Alternative was considered and dismissed because: “No issues or conflicts have been identified during this land use planning effort which requires the complete elimination of oil and gas leasing within the Planning Area for their resolution.”

DNA, Appendix D at *6-7. The point is not whether the relevant land use plan manages the public lands encompassed by the Protested Parcels as open to oil and gas leasing, subject to certain terms and conditions. That is entirely a separate matter governed by FLPMA, not NEPA.³ Instead, relevant to the matter at hand – BLM’s decision to proceed with a DNA – is whether 1) the new proposed action is a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document(s), and 2) the range of alternatives analyzed in the existing NEPA documents is appropriate with respect to the new proposed action, given environmental concerns, interests, and resource values. *See* BLM Handbook 1790 § 5.1.2. As noted, if the answer to either of these questions is “no” then “a new EA or EIS must be prepared.” *Id.* As discussed *supra*, the answer to these questions in the present matter is in fact “no” and thus BLM’s reliance on the Lease Sale DNA is inappropriate.

BLM’s references to MS 3120 and Handbook 3120-1 are likewise unhelpful. Those manual and handbook sections, as highlighted in the quoted text, relate to BLM’s obligation under the Mineral Leasing Act (MLA) – specifically 43 C.F.R. § 3120 – not BLM’s separate and distinct obligations under NEPA including NEPA alternatives analysis. *See* BLM, 3120 – Competitive Leases (P) § .03 (stating that the authority for the manual comes from “the [MLA], as amended and supplemented”) (Feb. 18, 2013) (attached); BLM, H-3120-1 – Competitive Leases (P) at i (Feb. 18, 2013) (“This handbook section provides guidelines for the [BLM] field offices in accordance with the [MLA]”) (attached).

Therefore, BLM cannot rely on the Moab RMP, the Monticello RMP or the Moab MLP and their accompanying EISs to satisfy its NEPA alternatives analysis requirement.

c. BLM did not Consider an Alternative that would Protect the Goldbar Canyon, Hatch Point/Hatch Canyon and Labyrinth Canyon Lands with Wilderness Characteristics

The RMPs and MLP did not resolve the longstanding and ongoing conflict between oil and gas leasing and development and the protection of wilderness-caliber lands and thus BLM needed to analyze a proposed leasing action alternative *as well as* an “alternative[] to the proposed action that may address unresolved resource conflicts.” The broad level field office wide (or planning area wide) decisions made in the RMPs and MLP did not purport to – nor did they – resolve this longstanding conflict because, among other factors, they did not mandate any particular decision with regard to the issuance of oil and gas lease parcels, including the Protested Parcels, as explained in IM 2010-117:

For instance, new information may be available or relevant environmental conditions may have changed (e.g., species habitat and population levels may have decreased or wilderness characteristics may have become evident). In such circumstances, additional review may better inform the decisionmaker. While an RMP may designate land as “open” to possible leasing, *such a designation does not mandate leasing.*

³ *See* 43 C.F.R. § 1732(a) (“The Secretary shall manage the public lands . . . in accordance with the land use plans developed by him”).

IM 2010-117 § I.A (emphasis added). BLM also recognized that the RMPs did not resolve this conflict when it prepared the so-called “Stiles Report,” which recognized the need for additional NEPA analysis prior to leasing in lands with wilderness characteristics, including in southeast Utah, even though the RMPs had been completed at that time. *See generally* BLM, Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah’s December 2008 Lease Sale (Oct. 7, 2009) (attached). Because this conflict remains BLM needed to analyze three NEPA leasing alternatives, at a minimum. Here, however, BLM has failed to analyze even a single alternative.

Therefore, BLM has never analyzed any NEPA alternative to consider whether to lease the Protested Parcels, in violation of NEPA.

d. BLM Never Responded To, or Considered, SUWA’s Recommended Alternatives

NEPA has twin aims, or objectives: 1) NEPA “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,” and 2) “it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations and quotations omitted). The second objective requires BLM to respond to substantive comments provided by members of the public, including SUWA. *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (explaining that under NEPA Federal agencies must “respond to substantive issues raised in comments.”) (citing 40 C.F.R. § 1503.4(a)). This obligation “is more than a technical requirement.” *Id.*

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.”).

In its comments on the DNA SUWA recommended BLM consider two alternatives:

- Defer from leasing parcels in proposed or identified wilderness-caliber lands. This includes Parcel 10 (Labyrinth Canyon), Parcel 12 (Goldbar Canyon), and Parcels 14, 16, 18, 19, 21, and 23 (Hatch Point / Hatch Canyon); or

- Attach non-waivable NSO leasing stipulations to each parcel located in proposed or identified wilderness-caliber lands prior to offering them for leasing and development.

SUWA et al., Comments on the Canyon Country District March 2018 Competitive Oil and Gas Lease Sale – Determination of NEPA Adequacy (DOI-BLM-UT-Y010-2017-0285-DNA) at 10-11 (Oct. 23, 2017) (attached). BLM’s response to comments on this point incorporates its responses to SUWA’s concerns regarding the adequacy (or inadequacy) of BLM’s reliance on a DNA – responses that do not respond to or address SUWA’s recommended alternatives. *See* EA, Appendix D at *13. This is a plain violation of a “fundamental tenet of administrative law.”

Moreover, BLM never disputed that SUWA’s recommended alternatives would accomplish the purpose and need of holding a quarterly lease sale (*e.g.*, to respond to parcel nominations, and to promote oil and gas development on public domain), are technically and economically feasible, and would have a lesser impact to the environment including wilderness-caliber lands. As noted, BLM’s purpose and need for competitive oil and gas lease sales is very broad and thus the range of alternatives that could satisfy such an objective is correspondingly broad. There can be no legitimate dispute that SUWA’s recommended alternatives are technically and economically feasible. BLM defers nominated lease parcels at most – if not all – of its lease sales. *See, e.g.*, BLM Utah State Office – List of Deferred Lands (Sept. 18, 2017) (providing a long list of nominated parcels and the reason(s) for their deferral) (attached).

In addition, because the EISs accompanying the RMPs and MLP already analyzed the NSO stipulation requested by SUWA, it is properly treated as an existing stipulation which can be added to the Protested Parcels through plan maintenance and without a plan amendment. As BLM explained in IM 2010-117:

Resources on the ground change over time . . . Prior to the lease sale, the field office will review its latest inventory information and apply protective lease stipulations to new leases as provided for in the RMP. Applying an existing RMP lease stipulation . . . to the proposed new lease, based on new inventory data . . . is considered to be in conformance with the RMP and is addressed through plan maintenance. *Plan maintenance is the appropriate planning tool even if the land area where the new resource is found . . . had been designated in the RMP as covered by standard lease terms.*

IM 2010-117 § III.C.2 (emphasis added). This further confirms that SUWA’s proposed NSO alternative is feasible and thus should have been considered.

It is likewise indisputable that SUWA’s recommended alternatives will have lesser impacts to resource values including wilderness-caliber lands. Therefore, BLM’s failure to provide any response to SUWA’s recommended alternatives, or to consider those alternatives in a NEPA document, violated NEPA.

IV. BLM's Treatment of Cultural Resources Violated the NHPA and NEPA

a. BLM Violated the NHPA

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). 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 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. *Id.* § 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 range from the "[p]hysical destruction of or damage to all or part of the property," *id.* § 800.5(a)(2)(i), to "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." *id.* § 800.5(a)(2)(v). If the agency concludes that the undertaking's effects do not

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).

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 throughout the process detailed above, “[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. *Id.* § 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, any consulting parties, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

Leasing is the point at which BLM makes an irretrievable commitment of resources such that BLM can no longer preclude surface disturbing activities on lease parcels. *See, e.g., Union Oil Co. of Cal et al.*, 102 IBLA at 189. Accordingly, BLM must comply with the NHPA at the leasing stage. It has failed to do so here.

SUWA is a consulting party for the March 2018 lease sale. *See* Letter from Lance Porter, District Manager, BLM, to Neal Clark, SUWA (Aug. 2017) (attached). BLM initiated consultation for the March 2018 lease sale in August 2017. *Id.* On September 27, 2017, BLM provided a cultural resources report to consulting parties with a preliminary determination that the proposed lease sale would have “no adverse effect” on cultural resources. *See* BLM, Utah State Office, Cultural Resources Review for the March 2018 Canyon Country District Oil and Gas Lease Sale 7 (Sept. 25, 2017). In October 2017, consulting parties SUWA, National Trust for Historic Preservation, Friends of Cedar Mesa, and Utah Rock Art Research Association submitted separate letters objecting to BLM’s preliminary “no adverse effect” determination. SUWA incorporates by reference protests filed by Friends of Cedar Mesa, National Trust for Historic Preservation and Utah Rock Art Research Association. Although BLM relies on a revised cultural resources report in its final DNA, BLM has not yet completed or sent to consulting parties a final cultural resources report. **SUWA reserves the right to supplement this protest when it receives and reviews BLM’s final cultural resources report.**

i. BLM Failed to Make a Reasonable and Good Faith Effort to Identify Cultural Resources

As discussed above, BLM must “make a reasonable and good faith effort” to identify cultural resources. 36 C.F.R. 800.4(b)(1). To do so, the agency must “take into account past planning, research and studies ... the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.” *Id.*

The BLM has prepared a cultural resources “records search” to support the March 2018 oil and gas lease sale. *See generally* BLM, Utah State Office, Cultural Resources Review for the March 2018 Canyon Country District Oil and Gas Lease Sale (Sept. 25, 2017) (Draft Cultural Report). That is, BLM staff reviewed previous survey results (if any) located in the Moab and Monticello Field Offices and the SHPO’s online database and summarized those records. In this case, the records search is insufficient to meet BLM’s obligations under Section 106. 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); *see also Pueblo of Sandia v. United States*, 50 F.3d at 861-62 (holding that U.S. Forest Service failed to make a good faith effort to identify cultural resources when it concluded that a canyon did not contain traditional cultural properties despite having information to the contrary).

To satisfy its duty to conduct a reasonable and good faith identification effort, BLM must – at the very least for this undertaking – analyze all of its existing cultural resource information. It has not done so here. BLM has recently completed field-office-wide Class I inventories in both the Moab and Monticello field offices and produced associated archaeological site predictive models. *See* Draft Cultural Report at 4-5. While archaeological models are far from perfect, they do provide information about the potential location of undiscovered sites. *Id.*

BLM prepared these predictive models to “help facilitate planning efforts; for example, by identifying areas of high probability that could merit special management attention.” *See* BLM, Monticello Field Office, A Class I Cultural Resource Inventory Administered by the Bureau of Land Management, Monticello Field Office 8-1 (Sept. 2017) (Monticello Class I inventory). The Monticello Class I inventory notes that historic resources benefit when “a proponent can site their project away from areas with a high probability for the presence of unknown archaeological localities.” *Id.* at 8-4. The Monticello Class I inventory also emphasizes that it is important to account for different site types in planning models. *See id.* at 8-1 (“[T]he distribution of different types of cultural resource sites is likely to be influenced by different environmental factors.”); *see also id.* at 8-48 – 8-54 (describing the important environmental factors correlated with different site types; e.g., prehistoric open with features sites are correlated with proximity to waterbodies and negatively correlated with elevation and ponderosa pine forests, whereas historic artifact scatters are correlated with Pinyon-Juniper Woodlands and shrublands and areas with high relative elevation).

The predictive models for each of the field offices include a series of different models – six site type models and one composite model. Monticello Class I inventory at 8-2, 8-94. The

composite model combines all of the site type models to create an overall model of archaeological sensitivity. *Id.* at 8-2, 8-28, 8-94. The individual site type models provide BLM detailed information about the potential resources on the ground, allowing the agency to assess potential adverse effects from the lease sale. *See id.* at 8-59 – 8-74, 8-79. However, rather than utilize the individual site type maps to assess the potential location of undiscovered archaeological sites and potential effects to those sites the BLM arbitrarily relies only on the composite model map for that analysis. *See* EA, Appendix E at 15-16. The Moab and Monticello composite model maps provide a demonstrably incomplete picture about potential cultural site location on the ground. **SUWA has provided BLM cultural resources staff with detailed examples of the problems with using the composite model map as opposed to the individual site type maps. Because of the sensitive nature of this information, it is not included in the public version of the protest. It is incorporated by reference here.**

By deliberately ignoring the individual site type model to evaluate potential effects to cultural resources, BLM has failed to comply with its obligation to “take into account past ... research and studies ... and the likely nature and location of historic properties within the area of potential effect.” 36 C.F.R. § 800.4(b)(1). Accordingly, BLM has failed to make a reasonable and good faith effort to identify cultural resources.

ii. BLM’s No Adverse Effect Determination is Unsupported and Arbitrary

BLM’s conclusion that the sale of the parcels at issue in this protest will result in “no adverse effect” to historic properties is arbitrary and capricious. NHPA regulations provide that BLM must determine whether an undertaking *may* have an adverse effect on historic properties. *See* 36 C.F.R. § 800.4(d)(2); 36 C.F.R. § 800.5(a). Recently, the ACHP reiterated to BLM that “[a]n adverse effect finding does not need to be predicated on a certainty.” *See* Letter from Reid J. Nelson, Director in the Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Ester McCullough, Vernal Field Office Manager, Bureau of Land Management (Dec. 12, 2016) (attached). Furthermore, “adverse effects” are defined broadly and include impacts to a historic property’s “location, design, setting, materials, workmanship, or association.” 36 C.F.R. § 800.5(a)(1). As noted above, adverse effects include “[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” *Id.* § 800.5(a)(2)(v).

The lands encompassed by the leases at issue are recognized as being incredibly rich in cultural resources, reflecting thousands of years of human history. Draft Cultural Report at 64. Sites within the lease parcels include Ancestral Puebloan habitation sites, structures and artifact scatters; petroglyphs and pictographs; Navajo sweat houses and hogans; and potential segments of the Old Spanish Trail. *Id.* There are 93 recorded cultural sites within the proposed lease parcels identified in the Lease Sale DNA, 59 of which have been determined eligible for listing on the National Register of Historic Places. Despite the density of cultural resources in these parcels, BLM concludes that the lease sale would have no adverse effect on historic properties. That conclusion is arbitrary and capricious. *Cf.* Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA, March 2018 Competitive Oil and Gas Lease Sale 38 (Nov. 2017)

(detailing potential direct and indirect impacts to cultural resources from the Canyon Country lease sale).

BLM bases its determination that there will be “no adverse effect” to cultural resources on an incorrect interpretation of the definition of and criteria for “adverse effects.” The agency states that the existence of an area with high potential for cultural resources “does not mean that an undertaking *will* have an adverse effect.” DNA app. D at 17-18 (emphasis added). However, this statement reflects a misunderstanding of both the NHPA and SUWA’s argument. An adverse effect occurs “when an undertaking *may* alter, directly or indirectly any of the characteristics of historic property that qualify the property for inclusion in the National Register in a manner the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5(a)(1) (emphasis added). Adverse effects include “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.” *Id.* The question is whether an undertaking *may* have an adverse effect on historic properties, not whether an undertaking *will* have an adverse effect on historic properties. *Id.* Leasing a parcel that is predicted to have a high or moderate potential for cultural resources throughout the parcel indeed *may* have an adverse effect on cultural resources that are eligible for listing in the NRHP.

In addition, attaching a lease stipulation to the parcels at issue is not sufficient to support BLM’s determination of no adverse effect. The Standard Cultural Resource Stipulation, H-3120-1 – which is attached to all parcels in the lease sale – only states that leases may contain historic properties and BLM *may* require modification to exploration and development proposals. EA app. A at 1,16. BLM does not maintain the authority to preclude all surface disturbance. Accordingly, BLM must comply with all the requirements of the NHPA at this time. *See, e.g., Mont. Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1152-53 (D. Mont. 2004) (asserting that an agency cannot rely on leasing stipulations to replace its duties under the NHPA).

Finally, concurrence from the State Historic Preservation Office (“SHPO”) does not determine that BLM complied with NHPA Section 106 processes.

While the NEPA requires BLM to consult with the Utah SHPO, its consultation with SHPO merely satisfies the procedural requirement of doing such a consultation. A concurrence from the SHPO *does not satisfy the other procedural requirements of NHPA*. There is nothing in the NHPA or Section 106 that excuses the BLM’s failure to comply with the other procedures based on a concurrence from the SHPO.

S. Utah Wilderness Alliance v. Burke, 981 F.Supp. 2d 1099, 1109 (D. Utah 2013), *vacated* (emphasis added); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 808-09 (9th Cir. 1999) (asserting that SHPO’s concurrence with the U.S. Forest Service’s proposal did not satisfy the agency’s obligation to minimize adverse effects to a historic aboriginal transportation route).

b. BLM Failed to Take a Hard Look at Cultural Resources

In addition to BLM's obligations under the NHPA, NEPA requires BLM to take a "hard look" at the environmental effects of a proposed action. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). An EA must demonstrate "the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project." *Id.* (quoting *Comm. To Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993)). "General statements about 'possible' effects ... do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

BLM must undertake legally sufficient comprehensive NEPA analysis before deciding to offer, sell and issue the Protested Parcels because subsequent approvals by BLM will not be able to completely eliminate potential impacts to cultural resources. "If BLM has not retained the authority to preclude *all* surface disturbing activity, then the decision to lease is itself the point of 'irreversible, ir retrievable commitment of resources.'" *Union of Oil Co. of Cal.*, 102 IBLA at 189. BLM – even with the attached lease stipulations – does not retain the authority to preclude all surface disturbing activity on the lease parcels. Accordingly, it must take a hard look at impacts to cultural resources at the leasing stage. It has not done so here.

BLM's use of a DNA is wholly insufficient to comply with its mandate under NEPA to take a "hard look" at impacts to cultural resources. As discussed above, a DNA is appropriate only where *all* site-specific NEPA analysis has been completed by existing NEPA documents and no new information, data, or circumstances have arisen since the preparation of that NEPA documentation. Here, prior NEPA documents did not analyze site-specific impacts to cultural resources and there is significant new information, indicating that leasing the protested parcels may impact cultural resources.

Existing NEPA documents did not take a hard look at discrete impacts to cultural resources in these lease parcels. The Moab and Monticello RMPs and the Moab MLP analyzed only broad-level impacts to cultural resources to serve as a comparison between proposed planning area management options. *See generally* Moab MLP FEIS at 4-23 to 4-30; Moab MLP 4-33 to 4-57; Monticello RMP 4-37 to 4-63. BLM did not analyze the site-specific impacts to cultural resources from the issuance and development of these specific oil and gas lease sale parcels. *Id.* There is no discussion of direct, indirect, or cumulative impacts. BLM cannot simply rely on broad level NEPA documents that do not evaluate potential site specific impacts to satisfy NEPA's hard look mandate.

Additionally, there is significant new information that has arisen since BLM prepared the Moab and Monticello RMPs and the Moab MLP. *But see* DNA at 7 (contending that no such information exists). As discussed above, BLM recently completed field-office-wide Class I inventories with associated archaeological site predictive models in both the Moab and Monticello Field Offices. *See* Draft Cultural Report at 4-5. Those models provide new information about the potential location of undiscovered cultural sites and were not available when BLM considered – at a landscape level – potential impacts to cultural resources in the Moab and Monticello RMPs and Moab MLP. Rather than confront this information and conclude that additional analysis is necessary, BLM blithely concludes that development will be

feasible without impacts to cultural resources. DNA at 7. BLM must fully analyze the potential impacts to cultural resources – based on this new information – in a NEPA document to comply with NEPA.

V. BLM Failed to Address Impacts to Endangered and Sensitive Species in the Lease Sale DNA, In violation of NEPA and the ESA

a. ESA-Listed Species: Colorado River endangered fish (Colorado pikeminnow, razorback sucker, humpback chub, and bonytail); Mexican spotted owl

According to data from the U.S. Fish and Wildlife Service (FWS) and the Utah Department of Wildlife Resources, multiple species listed under the ESA occur and/or have critical habitat within the proposed lease sales. The DNA contains no site-specific analysis whatsoever of what the direct, indirect and cumulative impacts of drilling will be on endangered species, both from direct mortality and habitat loss from drilling activity, and from water use associated with oil and gas development, and resulting depletions to the San Juan and/or Green River systems.

Furthermore, the presence of endangered species and their critical habitat requires consultation (or, in the case of black-footed ferrets, conference) jeopardizing the species' continued existence or adversely modifying their critical habitat. Congress enacted the ESA to provide "a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3). Section 7(a)(1) of the ESA explicitly directs that all federal agencies "utilize their authorities in furtherance of the [aforesaid] purposes" of the ESA. 16 U.S.C. § 1536(a)(1).

Section 7 of the ESA requires BLM, in consultation with FWS, to insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species, or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). For each proposed federal action, BLM requests from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present in such area, BLM must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action. *Id.*

If BLM determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide BLM with a "biological opinion" explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If FWS concludes that the proposed action will jeopardize the continued existence of a listed species, or

result in the destruction or adverse modification of critical habitat, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A).

BLM’s oil and gas leasing proposal for these parcels is an agency action under the ESA. Action is broadly defined under the ESA to include all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies, including the granting of leases, and actions that will directly or indirectly cause modifications to the land, water, or air. 50 C.F.R. § 402.02. BLM, however, failed to request from FWS whether any listed or proposed species may be present in the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

Because there are listed species in the action area, the ESA requires preparation of, at a minimum, a biological assessment. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. There are threatened, endangered, and sensitive species present and their critical habitat within the areas proposed for leasing, but BLM failed to provide any information regarding whatsoever regarding potential effects, including the nature of fish habitat, population, and water usage and stream flow in the affected reaches of the Green and San Juan Rivers. BLM must not only evaluate the indirect and cumulative effects on special status species under NEPA, it must also (a) consult with FWS under Section 7 regarding the effects of oil and gas development and water use on listed species and critical habitat, and (b) evaluate the effects on sensitive species under its own sensitive species policy.

BLM’s response to SUWA’s earlier comments regarding the necessity of analyzing, and consulting with FWS, regarding impacts to endangered species, is simply to cite to the programmatic EIS for the Moab and Monticello RMP, *see* DNA, Appendix D at 24, and to defer consultation to a later stage. BLM states that it “will conduct a site-specific analysis and consultation with USFWS if appropriate when the lessee applies for a permit to drill and supplies site-specific information about locations and methods of development and extraction.” *Id.*, Appendix D at 24-25. However, contrary to BLM’s assertions, the MLP FEIS and two RMP FEISs do not contain site-specific analysis of impacts of oil and gas on particular endangered and threatened species and their habitats. And BLM cannot defer its analysis to the APD stage. The DNA in turn contains no site-specific analysis whatsoever of what the indirect and cumulative impacts of drilling will be on endangered species, both from direct mortality and habitat loss from drilling activity, and from water use associated with oil and gas development, and resulting depletions to the San Juan and/or Green River systems.

The BLM’s proposed approach in the DNA is plainly illegal under the ESA. Deferring analysis of endangered species impacts to the drilling permit stage, under the standard stipulation, is prohibited by the ruling in *Conner v. Burford*, 848 F.2d 1441, 1454-57 (9th Cir. 1988). In *Conner*, the court found that that BLM violated the ESA where, as here, it excluded the potential effects of future lessee activity when reviewing the leasing phase for oil and gas permits on public lands. Nor can BLM ignore the site-specific indirect and cumulative effects of development at the leasing stage simply because it has mentioned the issue generally in RMP-level consultation that does not address the site-specific impacts of particular leases. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d at 718.

Moreover, BLM cannot rely on “Incremental Step Consultation” under BLM Manual 6840 to circumvent this requirement. *See generally* BLM, 6840 – Special Status Species Management (Dec. 12, 2008) (BLM Manual 6840) (attached). That policy allows BLM to conduct consultation in “incremental steps,” but only if BLM undertakes an initial formal consultation on the entire action, and the resulting biological opinion must include the FWS and/or NMFS views “on the entire action (50 CFR Part 402.14(k)).” This requires an analysis of not only the impacts of leasing these parcels, but the interrelated actions associated with exploiting the oil and gas on these parcels. Furthermore, BLM may only proceed with the incremental step analysis “provided that the FWS and/or NMFS finding for the incremental step is not a jeopardy opinion; the BLM continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step; *the BLM fulfills its obligation to obtain sufficient data upon which to base the final biological opinion on the entire action*; the incremental step does not result in the irreversible or irretrievable commitment of resources; and *there is reasonable likelihood that the entire action will not result in jeopardizing the continued existence of a listed species or destruction or adverse modification of designated critical habitat.*” *See* BLM Manual 6840 § .1F5i(1) (emphasis added). BLM has not adhered to these requirements, since they have not initiated formal consultation regarding this lease sale, and have failed to provide sufficient data, nor properly determined with a reasonable likelihood that the “entire action” would not jeopardize listed species or adversely modify critical habitat.

b. BLM Sensitive Species Policy

Pursuant to BLM Manual 6840, “[a]ll Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.” BLM Manual 6840 § .01. The objective of that Manual is “[t]o initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.” *Id.* § .02. BLM Manual 6840 further states that it is the BLM’s Policy to promote the “conservation and to minimize the likelihood and need for listing” Bureau sensitive species. *Id.* § .01.

Pursuant to BLM Manual 6840 it is the responsibility of State Directors to not only inventory BLM lands to determine the occurrence of BLM special status species, but also to determine “the condition of the populations and their habitats, and how discretionary BLM actions affect those species and their habitats.” BLM Manual 6840 § .04. Deferring an analysis of the potential effects of selling oil and gas leases to the APD stage is entirely inconsistent with the requirements of Manual 6840. If a lease is sold, the lessee acquires certain contractual rights constraining BLM authority. For example, according to 43 C.F.R. § 3101.1-2, once a lease is issued to its owner, that owner has the “right to use as much of the lease lands as is necessary to explore for, drill for, mine, extract, remove and dispose of the leased resource in the leasehold” subject to specific nondiscretionary statutes and lease stipulations. Therefore, once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species from the cumulative impacts of extraction-related activities.

Furthermore, pursuant to BLM Manual 6840 Bureau sensitive species are considered BLM special status species, and Section 2 of the Manual provides specific measures that BLM is required to undertake in order to “conserve these species and their habitats.” BLM Manual 6840

§ .2. To implement this section, BLM “shall... minimize or eliminate threats” affecting Bureau sensitive species, by determining their current threats and habitat needs, and ensuring that BLM activities “are carried out in a way that is consistent with its objectives for managing those species and their habitats at the appropriate spatial scale.” *Id.* § .2(C). Due to the potential harms from habitat loss and fragmentation, the appropriate spatial scale for determining threats to sensitive plants and animals from oil and gas development is the entire area subject to lease sales, rather than the piecemeal, limited APD-specific review that BLM is attempting to employ.

The need for a broader analysis to assess the threats to this species from the lease sale itself is further supported by BLM Manual 6840’s requirement that BLM work with partners and stakeholders to “develop species-specific or ecosystem-based conservation strategies,” and in the absence of such strategies, to incorporate standard operating procedures and other conservation measures “to mitigate specific threats to Bureau sensitive species during the planning of activities and projects.” Manual 6840 § 2(C). Postponing any analysis of impacts to sensitive plants and raptors until the later APD stage forecloses the implementation of standard procedures and conservation measures necessary to mitigate threats to the species during exploration or other actions that might take place prior to an APD being filed, since as noted above once a lease is issued, the owner has the “right to use as much of the lease lands as is necessary to explore for, drill for, mine, extract, remove and dispose of the leased resource in the leasehold.” 43 C.F.R. § 3101.1-2.

Moreover, the development of species-specific and ecosystem-based conservation strategies implicitly necessitates a more holistic review of the cumulative impacts of the proposed lease sale, which cannot be accomplished through site-specific APD-stage analysis alone. And, piecemeal analyses of individual lease sales do not provide the appropriate perspective for examining the cumulative effects of hydraulic fracturing and climate change impacts at the regional and landscape scale and for making land management decisions.

Where activities have the potential to adversely impact species of concern, the general practice is to consider those impacts and address them “at the earliest possible time,” in order to avoid delay, ensure that impacts are avoided and opportunities for mitigation are not overlooked. 50 C.F.R. §§ 402.14(a), (g)(8). This is likewise true in the context of even more general environmental review, such as under NEPA. *See* 40 C.F.R. § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”). Furthermore, it is general practice to evaluate the impacts of several related projects with cumulative impacts proposed or reasonably foreseeable in the same geographic region in a single, comprehensive, analysis. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (“when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.”). Likewise, under the ESA an analysis of the effects of an action must consider actions that are interrelated or interdependent. 50 C.F.R. §§ 402.14 and 402.02. This suggests that BLM should consider the effects of oil and gas extraction activities at the lease sale stage, since those actions are inherent in leasing land for such purposes. It is therefore evident that in order to effectuate the policy of protecting Bureau sensitive species set forth in BLM Manual 6840, and consistent with the established practice of

early, comprehensive review of potential impacts to sensitive species, BLM must consider impacts to sensitive species at the lease sale, rather than waiting until the APD stage for project specific review. *See* BLM Manual 6840 at .06 (“Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA.”).

In sum, BLM has issued regulations in BLM Manual 6840 that require the agency to undertake actions to protect candidate species, much like they protect proposed and listed species. Delaying an analysis of impacts to the greater sage-grouse and sensitive plant species until the APD stage risks harm to an at-risk species that could otherwise be avoided. A failure to address the impacts to sensitive species at the lease sale stage violates BLM’s own regulations set forth in Manual 6840, is entirely inconsistent with established practice and policies regarding species protection, and is therefore arbitrary and capricious agency action under the APA.

c. Colorado River Endangered Fish

All Protested Parcels have the potential to impact the four Colorado River endangered fish species (bonytail chub, Colorado pikeminnow, humpback chub, and razorback sucker) through water depletions resulting from oil and gas development.

Oil and gas drilling and hydraulic fracturing, the reasonably certain indirect consequence of leasing the proposed parcels for oil and gas development, will result in additional withdrawals of water from the Green River and San Juan River Basins, with adverse effects on the listed fish and their critical habitat. Upon review of the lease sale notice and DNA, BLM appears to have omitted any stipulation dealing with the effects of water withdrawals on the endangered fish.

The FWS has repeatedly re-confirmed its long-standing opinion that all depletions from the Upper Colorado Basin, including the Green River sub-basin, will jeopardize the continued existence of the four listed fish:

Water depletions from the Upper Colorado River Basin are a major factor in the decline of the threatened and endangered Colorado River fish. The USFWS determined that any depletion will jeopardize their continued existence and will likely contribute to the destruction or adverse modification of their critical habitat (USDI, Fish and Wildlife Service, Region 6 Memorandum, dated July 8, 1997). However, the Recovery Program was established specifically to offset the negative effects of water depletions to the endangered fish populations, and to act as the Reasonable and Prudent Alternative for these depletions. Actual water depletions will be determined, and Section 7 consultation reinitiated on a project-specific basis.

Biological Opinion for BLM Resource Management Plan (RMP), Vernal Field Office (VFO), 113 (Oct. 23, 2008) (attached).

BLM must initiate consultation on the proposed lease sale on a project-specific basis. Significant new information regarding progress under the Recovery Program and climate change effects on Green and Colorado River flows requires independent reevaluation of the effects of water depletions on the four endangered fish. The Recovery Program's 2015 Assessment of Sufficient Progress under the Upper Colorado River Endangered Fish Recovery Program indicates that Colorado pikeminnow are in decline and failing to meet recovery goals in the Green River Subbasin that will be affected by the proposed action:

Data from the third round (2011–2013) of population estimates for the Green River Subbasin are still being analyzed (thus no confidence intervals are shown for the 2011–2013 estimates in Figure 4). Preliminary results from this analysis indicate adults and sub-adults are in decline throughout the entire Green River Subbasin.

Fish and Wildlife Service, Final 2014--2015 Assessment of "Sufficient Progress" Under the Upper Colorado River Endangered Fish Recovery Program in the Upper Colorado River Basin 7-8 (Oct. 7, 2015) (2015 Sufficient Progress Assessment) (attached). Another demographic requirement in the 2002 Recovery Goals is that recruitment of age-6, naturally-produced fish must equal or exceed mean annual adult mortality. Estimates of recruitment age fish have averaged 1,455 since 2001, but have varied widely (Figure 5). Recruitment exceeded annual adult mortality only during the 2006 – 2008 period. *Id.* at 8.

Pikeminnow within the Green River subbasin are also being adversely affected by mercury concentrations, which are exacerbated by water withdrawals:

Although a good portion of the recovery factor criteria (USFWS 2002a) are being addressed, nonnative fish species continue to be problematic and researchers now speculate that mercury may pose a more significant threat to Colorado pikeminnow populations of the upper Colorado River basin than previously recognized. Osmundson and Lusk (2012) recently reported elevated mercury concentrations in Colorado pikeminnow muscle tissue; the highest concentrations were from the largest adults collected from the Green and Colorado river subbasins. Mercury exposure has been reported to impair reproduction in fish (Batchelar et al. 2013; J. Lusk, U.S. Fish and Wildlife Service, personal communication). Laboratory experiments have shown diminished reproduction and endocrine impairment in fish exposed to dietary methyl mercury at environmentally relevant concentrations, with documented effects on production of sex hormones, gonadal development, egg production, spawning behavior, and spawning success.

2015 Sufficient Progress Memo at 10. Adverse effects from oil and gas development are not limited to the Green River water depletions addressed by the Upper Colorado Endangered Fish Recovery Program. BLM must also consider, and consult on, foreseeable water quality impacts from oil and gas development and the resulting wells, pipelines, pits, and soil disturbance. The Fish and Wildlife Service's recent Biological Opinion for the GasCo Energy Inc. Field Development Project EIS found that, in addition to water depletions, oil and gas development

has a significant potential for impacts to Colorado River endangered fish resulting from the highly foreseeable probability of spills and contamination:

There is a greater potential for impacts from pollutants, if a pipeline, well pit, or other source were to inadvertently release contaminated fluids into waterways at points near the Green and White Rivers. Through direct or indirect discharge, these pollutants could reach the Green River and negatively impact water quality to the point of affecting native fish populations. Direct impacts will result from a discharge from a pipeline or well pit reaching the Green River in its original form or within a single release event. Indirect effects occur when discharges are released to the ground and are later released to the river after being carried by an erosion event or carried by rain or snowmelt runoff. As more well and pipeline development occurs in the project area the chance of pollutants reaching the Green River increases, thus increasing the potential of harm to native fish populations.

Approximately 744 pipeline crossings (61.9 miles) of intermittent/ephemeral drainages that are tributary to the Green River will be required, though no wells, roads, or pipelines are proposed within the 100 year floodplain for the Green River. In addition, no wells or pipelines are proposed within 100-year floodplains of Green River tributaries within 5 miles of the river.

While applicant-committed measures will reduce the chance for spills or leaks of contaminants, accidental releases can and do still occur. According to the National Response Center, there have been at least 219 spills and releases within Carbon, Duchesne, and Uintah Counties from January 1991 through August, 2011 due to oil and gas development and related activities affecting water, land and air.

Spill incidences reviewed in Utah include corrosion and leakage of surface and buried pipelines, broken well rods, valve and gasket failures, wellhead pressure buildups, shutoff alarm malfunctions, leakage of trace systems, loss of formation water to the surface during drilling, and vehicular related traffic accidents. Releases have included crude oil, natural gas, hydrochloric acid, condensate, salt water, ethylene glycol, and produced water in various quantities.

Releases of harmful agents into floodplain habitats could result in significant adverse impacts to the endangered fish and their designated critical habitat. One of the constituent elements of the designated critical habitat for the four Colorado River fish is contaminant-free water. Any release of contaminants into the floodplain will result in degradation of critical habitat and could result in take of individual fish, including downstream impacts to larvae and juveniles.

Biological Opinion for the Gasco Energy Inc. Field Development Project EIS 26 (2011) (attached). The DNA contains no analysis whatsoever of the potential water demands of the proposed leases and resulting development on flows within the Green and San Juan Rivers. Nor has it considered the impacts of climate change on these water resources, such as the decline in

stream flows. This is a significant omission, as numerous climate change models show anthropogenic climate change is profoundly impacting the Colorado River in ways that are altering temperature, streamflow, and the hydrologic cycle. Changes observed to date include rising temperatures, earlier snowmelt and streamflow, decreasing snowpack, and declining runoff and streamflow. Modeling studies project that these changes will only worsen, including continued declines in streamflow and intensification of drought. Climate change is likely to have significant effects on the endangered fish and the Colorado River ecosystem, and the effect of climate change on future flow regimes and water temperatures must be taken into account in the consultation process and considering the sufficiency of the existing Recovery Program.

REQUEST FOR RELIEF

SUWA respectfully requests that BLM withdraw the Protested Parcels from the March 20, 2018, competitive oil and gas lease sale until such time as BLM resolves the above-discussed violations. Alternatively, BLM could attach non-waivable no-surface occupancy stipulations to each of the leases and offer them for sale.

This protest is brought by and through the undersigned on behalf of the Southern Utah Wilderness Alliance, Center for Biological Diversity, Green River Action Network, Living Rivers, Natural Resources Defense Council, and Sierra Club. The members and staff of these organizations 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: January 2, 2018

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