

Southern Utah Wilderness Alliance – Center For Biological Diversity – Conservation Colorado –  
Green River Action Network – Living Rivers – Natural Resources Defense Council –  
Sierra Club – The Wilderness Society

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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, Conservation Colorado<sup>1</sup>, Green River Action Network, Living Rivers, Natural Resources Defense Council, Sierra Club, and The Wilderness Society (collectively, "SUWA") hereby timely protest the March 20, 2018, offering of the following twenty-four (24) oil and gas lease sale parcels in the Bureau of Land Management's Canyon Country District (BLM):

UTU-92994 (Parcel 1); UTU-92996 (Parcel 3); UTU-92997 (Parcel 4);  
UTU-93016 (Parcel 28); UTU-93017 (Parcel 29); UTU-93018 (Parcel 30);  
UTU-93019 (Parcel 31); UTU-93020 (Parcel 32); UTU-93021 (Parcel 33);  
UTU-93022 (Parcel 34); UTU-93023 (Parcel 36); UTU-93024 (Parcel 37);  
UTU-93025 (Parcel 38); UTU-93026 (Parcel 39); UTU-93027 (Parcel 40);  
UTU-93028 (Parcel 41); UTU-93029 (Parcel 42); UTU-93030 (Parcel 43);  
UTU-93031 (Parcel 44); UTU-93032 (Parcel 47); UTU-93033 (Parcel 48);  
UTU-93034 (Parcel 49); UTU-93035 (Parcel 50); UTU-93036 (Parcel 51)  
(Protested Parcels).

*See generally* Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA, March 2018 Competitive Oil and Gas Lease Sale (Nov. 2017) (EA or Lease Sale EA). 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

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<sup>1</sup> Conservation Colorado joins this protest as to only Parcels 50 and 51.

Act (ESA), 16 U.S.C. §§ 1531 *et seq.* and the regulations and policies that implement these laws.<sup>2</sup>

## 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 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 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.*, 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:

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<sup>2</sup> Unless expressly stated otherwise each argument in this protest applies to all Protested Parcels.

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, Hovenweep and Canyons of the Ancients National Monuments, and wilderness-caliber lands.

## **II. BLM’s Treatment of Cultural Resources Violated the NHPA and NEPA .**

### **a. BLM’s Treatment of Cultural Resources 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).<sup>3</sup> 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 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.

As BLM acknowledges, “[o]nce the lease has been issued, the lessee has the right to use as much of the leased land as necessary to explore for, drill for, extract, remove, and dispose of oil and gas deposits located under the leased lands,” subject to limited restrictions. EA at 5. Leasing is

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<sup>3</sup> 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).

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 fully 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 draft 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 commenting on and 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 EA, 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. EA at 21. That is, BLM staff reviewed previous survey results 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. 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*, 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 reasonable and good faith identification efforts, BLM must – at the very least – analyze all existing cultural resource information that it has on hand. It has not done so here. BLM’s Moab and Monticello field offices recently completed field-office-wide Class I inventories with accompanying associated archaeological site predictive models. *See* BLM, Utah State Office, Cultural Resources Review for the March 2018 Canyon Country District Oil and Gas Lease Sale, at 4-5 (Sept. 25, 2017) (Draft Cultural Report). 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 predictive models for each of the field offices are actually a series of different models – six site type models and one composite model. *Id.* 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 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.” Monticello Class I inventory 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 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* Monticello Class I inventory 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, 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 Protested Parcels 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 Protested Parcels are recognized as being incredibly rich in cultural resources, reflecting thousands of years of human history. EA at 21. 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 1346 recorded cultural sites within the proposed lease parcels, 984 of which have been determined eligible for listing on the National Register of Historic Places. *Id.* In parcel 38 alone, there are 206 known sites, 145 of which are eligible for listing under the NRHP. 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.

First, 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.” BLM states: “[w]hile this lease sale has the potential to impact cultural resources, these impacts do not [sic] reach the significant, or adverse effects, threshold.” EA at 38. The agency also states that the existence of an area with high potential for cultural resources “does not mean that an undertaking *will* have an adverse effect.” EA app. E at 16-17 (emphasis added). There is no basis whatsoever in the NHPA or its implementing regulations for this novel interpretation of the term “effects.” NHPA regulations do not contain a significance threshold for adverse effects. *See* 30 C.F.R. § 800.5. Instead, 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.” *Id.* (emphasis added). The broad definition of adverse effects was intended to encompass indirect effects and requires BLM to consider all potential effects on the characteristics that contribute to a historic property’s significance. *See* Protection of Historic Properties, 65 Fed. Reg. 77698, 77720 (Dec. 12, 2000). Either an effect *may* diminish the integrity of a property and must be resolved or it does not. There is no requirement for effects to meet a heightened significance threshold. *Id.* In addition, 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.* BLM has asked and answered the wrong questions.

Second, the EA itself is clear that there are *potential* impacts from leasing the twenty-nine parcels at issue and thus BLM’s no adverse effect determination is without basis. The EA details potential adverse impacts to cultural resources from development that may occur as a result of the sale of a non-NSO lease, including “physical disturbance of a site from the construction of a well pad, associated access roads, or associated infrastructure.” EA at 38. The EA also

describes potential indirect effects to cultural resources, including “changes to the landscape which result in impacts to a site’s setting, feeling, or association; increased rock art exposure to dust resulting from increased traffic on roads; visual impacts to sensitive rock art sites ... and the potential to increase public access, potentially leading to increased vandalism and looting.” *Id.* Finally, with regard to cumulative impacts, the EA explains that “exploration and possible development of the lease parcels may contribute to impacts from the past and present development, impacting the setting and feeling of both the individual sites and landscapes surrounding them.” *Id.* at 68. Thus, BLM’s admission that there may be direct, indirect, and cumulative impacts from leasing means BLM’s assertion that there will 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. §§ 800.5-800.6.

Third, BLM’s analysis does not support its conclusion that there is room for reasonably foreseeable development in all lease parcels without causing adverse effects to historic properties. BLM asserts that topographic complexity and judicious placement of well pads in the individual lease parcels demonstrates that there will be no adverse effect to historic properties. EA at 38-39. This is not accurate. BLM analyzed potential viewshed impacts from leasing and development to several cultural sites – those within Recapture Canyon and the Three Kivas site. EA at 29-30, 51-60. However, the viewshed analysis only examines whether impacts would be visible to *recreation visitors* and affect the experiences of those visitors. *Id.* at 30, 51, 56, 60. This is a different analysis from whether leasing and reasonably foreseeable development may affect the integrity of a historic property. 36 C.F.R. § 800.5. Oil and gas development in the parcels would include the use of bulldozers, scrapers, graders and drilling rigs to construct well pads and maintenance facilities, construct or improve roads, and drill. *See* EA at 9-11. Development would also lead to increased use of roads both by industrial and recreational traffic. EA at 38. Topographic complexity and judicious well pad placement does not account for the potential audible and atmospheric impacts to historic properties from this type of industrial development. *See* 36 C.F.R. § 800.5(a)(2)(v). It also does not account for the potential impact to rock art from exposure to dust and the potential to lead to increased vandalism to and looting of cultural resources. EA at 38.

Finally, the existence of lease stipulations does not 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, 25. BLM does not maintain the authority to preclude all surface disturbance. Furthermore the controlled surface use stipulations – both for Cultural (UT-S-170) and Alkali Ridge ACEC (UT-S-17) – allow exceptions to be granted if BLM determines that avoidance of direct and indirect impacts to historic properties is not feasible. EA, Appendix A at 26, 29. BLM cannot preclude – and may expressly allow – impacts to historic properties. Accordingly, BLM’s determination of no adverse effects is unsupported and arbitrary.

#### **b. BLM Failed to Take a Hard Look at Impacts to 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).

As discussed above, 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, irretrievable 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.

First, BLM did not analyze all of the existing cultural resource information it has on hand to evaluate take a hard look at the impacts of leasing to cultural resources. *See* Draft Cultural Report, at 4. Importantly, BLM did not use the individual site type predictive models that provide more precise information with regard to the potential location of undiscovered cultural sites and the potential impacts to those sites. *Id.* at 204. BLM cannot meaningfully analyze potential impacts without considering the information it has available to it. BLM’s refusal to do so here is a textbook example of the agency failing to take a hard look at a problem.

Second, BLM’s discussion of direct, indirect, and cumulative impacts to cultural resources is insufficient. The EA only contains a cursory discussion of impacts to cultural resources, listing potential direct and indirect impacts and concluding – without data to support its conclusion – that those effects will not be significant. EA at 38. The EA contains no discussion of cumulative impacts. EA at 68. It merely states that exploration and development on the leases may impact the setting and feeling of individual sites and the surrounding landscapes. EA at 68. This does not constitute a “hard look” at impacts to cultural resources.

BLM attempts to get around its “hard look” obligation by asserting that lease stipulations allow it to control future development on the lease. As discussed above, this is not accurate. BLM cannot preclude all surface disturbance on the leases, a lessee “has the right to use as much of the leased land as necessary to explore for drill for, extract, remove, and dispose of oil and gas deposits located under the leased land,” subject to some restrictions. EA at 5. The Standard Cultural Resource Stipulations only states that BLM *may* require modification to exploration and development proposals. EA app. A at 1, 25. The controlled surface use stipulations – for Cultural (UT-S-170) and UT-S-17 – allow BLM to grant exceptions to be granted if avoidance of direct and indirect impacts is not feasible. EA app. A at 26, 29. Precisely because BLM cannot preclude – and may allow – impacts to cultural resources, it must take a “hard look” at impacts to cultural resources *before* leasing. It has not done so here.

### **III. BLM Failed to Take a Hard Look at Impacts to Air Quality and Climate Change From Increased GHG Emissions**

#### **a. NEPA Requires BLM to Take a “Hard Look” at Potential Environmental Impacts, Including GHG Emissions, and to do so at the Earliest Possible Time**

NEPA’s hard look mandate requires BLM to analyze direct, indirect, and cumulative impacts that may result from BLM’s approval of an action. 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.* § 1508.5(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.

Critical to NEPA’s hard look mandate is the fact that BLM must analyze the direct, indirect, and cumulative impacts “at the earliest possible time” – which in the oil and gas lease sale context is undoubtedly prior to the point of irretrievable commitment of resources. 40 C.F.R. § 1501.2; *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (recognizing NEPA analysis “permits the public and other governmental agencies to react to the effects of a proposed action at a meaningful time”); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) (“All environmental analyses required by NEPA must be conducted at the earliest possible time.”) (citation and quotation omitted).

Federal courts have long rejected the idea of deferring site-specific analysis of oil and gas impacts to the permitting stage. *See, e.g., Sierra Club*, 717 F.2d at 1415 (holding that when a federal agency charged with administering oil and gas leasing no longer “retain[s] the authority to preclude all surface disturbing activities” subsequent to issuing an oil and gas lease, “an EIS assessing the full environmental consequences of leasing must be prepared” before “commitment to any actions which might affect the quality of the human environment.”); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) (same); *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009) (same); *New Mexico ex rel. Richardson*, 565 F.3d at 718 (holding where “BLM could not prevent the impacts resulting from surface use after a lease issued, it was required to analyze any foreseeable impacts of such use before committing the resources” and that “NEPA require[s] an analysis of the site-specific impacts of [a lease sale] prior to its issuance, and BLM act[s] arbitrarily and capriciously by failing to conduct one.”); *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) (holding “unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-[no surface occupancy] leases”).

Consistent with case law, BLM’s own fluid minerals planning handbook specifically states that “[b]y law, [direct, indirect, and cumulative] 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 Handbook 1624 § B.2, at I-2.

With regard to air quality and GHG emissions, NEPA’s mandate requires BLM to not only disclose the volume of projected direct, indirect, and cumulative emissions, but also that the agency must analyze the significance and severity of those emissions so that decisionmakers and the public can determine whether and how those emissions should influence BLM’s leasing decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (recognizing that NEPA analysis must discuss “adverse environmental effects which cannot be avoided[,]” which is necessary to “properly evaluate the severity of the adverse effects”). The need to evaluate the extent of and impacts from GHG emissions through NEPA is bolstered by the fact that “[t]he harms associated with climate change are serious and well recognized,” and environmental changes caused by climate change “have already inflicted significant harms” to many resources around the world. *Mass. v. EPA*, 549 U.S. 497, 521 (2007); *see also id.* at 525 (recognizing “the enormity of the potential consequences associated with manmade climate change”).

BLM cannot hide behind the guise of uncertainty to avoid its NEPA obligations to analyze the direct, indirect, and cumulative impacts of a proposed action at the earliest possible time. “Speculation is recognized as being ‘implicit’ in NEPA, and judges ‘must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussions of future environmental effects as crystal ball inquiry.’” *Sierra Club v. U.S. Forest Serv.*, 857 F. Supp. 2d 1167, 1177 (D. Utah 2012) (citations omitted).

NEPA also requires that relevant information be made available to the public so that they “may also play a role in both the decision making process and the implementation of that decision.” *Robertson*, 490 U.S. at 349. *Cf. Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9<sup>th</sup> Cir. 2008) (remanding for new NEPA analysis).

#### **b. BLM Unlawfully Postponed Its Direct and Cumulative Impact Analysis of GHG Emissions, Air Quality, and Climate Change**

BLM failed to analyze the direct and cumulative impacts to climate change from increased GHG emissions from the issuance and development of the Protested Parcels, let alone analyze such impacts at the earliest possible stage. The EA acknowledges that the climate is changing, that these changes will have severe consequences, and that human emissions – in particular, emissions from fossil fuel combustion – are the primary driver of these changes. *See EA* at 23-25, 41-45.

Despite BLM’s acknowledgement of the mechanisms of climate change, the agency universally disavows any responsibility for taking a hard look at the impacts of GHG emissions in the Lease Sale EA because, according to BLM, leasing is only a paper transaction with no real world impact. *See, e.g.*, EA at 41 (describing the issuance of oil and gas lease parcels as an action “which is administrative in nature”). To the extent the EA contains any meaningful discussion of GHG and climate change at all, it does so for only potential *indirect* impacts. *See EA* at 42-43. The EA contains no analysis regarding direct or cumulative GHG emissions or climate change impacts. *See id.* at 41 (“There would be no GHG emissions as a direct result of the Proposed Action, which is administrative in nature – i.e., issuance of leases for Federal mineral

resources.”); *id.* at 69 (“the analysis presented above about the direct and indirect effects of GHG emissions from the Proposed Action is also an analysis of the cumulative effects of the Proposed Action.”). And BLM’s indirect impacts analysis consists of nothing more than performing basic calculations that are completely untethered from any explanation as to their on-the-ground effects on human health and the environment. *See id.* at 42-43. Stated differently, the GHG emissions and climate change impact analysis in the EA is nothing more than a lengthy explanation by BLM for why it failed to take a hard look.

**i. BLM Failed to Quantify and Account for Direct GHG Emissions from Oil and Gas Leasing, and Failed to Analyze the Effect of those Emissions**

BLM has failed to quantify direct GHG emissions associated with the Lease Sale EA, and similarly failed to analyze the effect of those emissions, in violation of NEPA. “Direct effects . . . are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Here, BLM refused to provide this required analysis, rationalizing its decision by arguing that “NEPA analysis would be conducted at the APD stage, when specific development details with which to analyze potential GHG emissions are likely to be known.” EA at 43. Because the Protested Parcels are not offered subject to NSO stipulations in their entirety BLM must perform this analysis now.

BLM admits that oil and gas drilling is the foreseeable result of issuing oil and gas leases. *See, e.g.*, EA at 41. And that the act of leasing parcels for oil and gas development may contribute to the effects of climate change through GHG emissions. *Id.* BLM also has the information necessary to quantify direct emissions from lease development. For example, BLM estimates that 11 wells may be drilled on the lease parcels. *Id.* at 34, 42. BLM identifies a per well emission factor and quantifies the potential GHG emissions per well. *Id.* BLM then makes a couple of basic calculations: a typical well will emit 1,192 tons per year of CO<sub>2</sub>, a drill rig will emit 2,305 tons per year of CO<sub>2</sub>, and indirect downstream emissions over the life of a producing well will be approximately 30,887 metric tons of CO<sub>2</sub>. *Id.* at 42. Nevertheless, BLM refuses to take the critical next step and connect the dots: it does not provide any meaningful context for what these emissions estimates mean or, more importantly, whether predicted emissions will have a significant impact to the environment including air quality, visibility, and public health. For example, the EA does not:

- Include air quality dispersion modeling assessments of the direct impacts of the proposed action alternative on compliance with NAAQS, on whether there will be significant deterioration of air quality in the region and on whether there will be significant visibility impacts;
- Recognize (or analyze) that GHG emissions can be harmful at levels below the established legal threshold; or

- Analyze potential visibility impacts from GHG emissions to Hovenweep and Canyons of the Ancients National Monuments.<sup>4</sup>

There is no record evidence in the EA that BLM analyzed this or similar information. *See Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010) (courts will not “defer to a void”).

Furthermore, BLM’s contention that accurate assessments of the direct effects of GHG emissions is not possible at this time is contradicted by statements in the EA that BLM *can* analyze such impacts but *does not want to do so now because future development is uncertain and, in any event, BLM considers leasing to be only a paper transaction*. *See, e.g.*, EA at 9 (“site-specific analysis of individual wells and roads would occur when a lease holder submits an Application for Permit to Drill (APD)”); *id.* at 41 (describing the issuance of oil and gas lease parcels as an action “which is administrative in nature”).

In fact, as the Tenth Circuit recently held when it overturned BLM’s issuance of several coal lease for inadequate climate change analysis:

We do not owe the BLM any greater deference on the question at issue here because it does not involve “the frontiers of science.” The BLM acknowledged that climate change is a scientifically verified reality. . . . Moreover, *the climate modeling technology exists: the [National Energy Modeling System] is available for the BLM to use*.

*WildEarth Guardians v. BLM*, 870 F.3d 1222, 1236-37 (10th Cir. 2017) (emphasis added; citations omitted). This ruling closes the door on BLM’s claim that it cannot analyze the direct effects and impacts of increased GHG emissions from leasing and development at the lease sale stage. It plainly can and must do so.

**ii. BLM Failed to Take a Hard Look at the Cumulative Impact of GHG Emissions to Climate Change, Air Quality, and the Environment**

**1. BLM Admits That the EA Did Not Analyze Cumulative Impacts from Increased GHG Emissions**

The Lease Sale EA does not analyze the cumulative GHG emissions and climate change impacts despite NEPA’s requirement that BLM do so. Cumulative impacts are “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.” 40 C.F.R. § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* Cumulative impact analysis is a critical part of an agency’s NEPA analysis because

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<sup>4</sup> The EA’s analysis of visual resources does not include consideration of reduced visibility from increased VOC and NO<sub>x</sub> or other pollutants from oil and gas development activities that by themselves or combined together create haze or ozone. *See generally* EA at 50-61.

“[t]he analysis in the EA . . . cannot treat the identified environmental concern in a vacuum.”  
*Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 346 (D.C. Cir. 2002).

BLM admits that it failed to analyze the cumulative impact to climate change from increased GHG emissions but argues that such failure is justified because its analysis for direct and indirect impacts was sufficient for purposes of cumulative impact analysis:

Since climate change and global warming are global phenomena, for purposes of this NEPA analysis, *the analysis presented [in the EA] about direct and indirect effects of GHG emissions from the Proposed Action is also an analysis of the cumulative effects of the Proposed Action.* The BLM has determined that this analysis adequately addresses the cumulative impacts for climate change from the Proposed Action, and therefore *a separate cumulative effects analysis for GHG emissions is not needed.*

EA at 69 (emphases added). This justification is wrong as a matter of law.

Cumulative impact analysis, by regulation, is broader than direct and indirect impact analysis and thus consideration of the latter does not encompass the former. Cumulative impact analysis requires BLM to consider past, present, and reasonably foreseeable future actions, including individually minor actions that collectively result in significant impacts. 40 C.F.R. § 1508.7. In contrast, direct and indirect effects are much narrower in focus. As noted *supra*, direct impact analysis is for immediate impacts while indirect impact analysis looks at reasonable foreseeable future impacts but neither consider past impacts or the impact of the proposed action when added to other past, present, or future actions.

BLM’s position is all the more arbitrary when, as is the case here, the agency acknowledges that it did *not* analyze the direct effect of increased GHG emissions and in fact postponed that analysis until the agency receives a site-specific development proposal. EA at 41, 43. Similarly, the indirect impact analysis in the EA for GHG emissions and climate change does not consider past impacts or the proposed action in context with other past, present or future actions. *Id.* at 42-43. Instead, it only analyzes *future* impacts *resulting from the proposed action* such as end uses. *Id.* at 43.

Despite the recognized significance of the climate change problem, BLM has failed to analyze how the issuance and subsequent development of the Protested Parcels fits into the ongoing and worsening climate change problem. By failing to analyze the cumulative impact of GHG emissions from the development of the proposed leases combined with past, ongoing, and future fossil fuel development activities BLM does not know if/how:

- Increased NO<sub>x</sub> and VOC emissions will threaten the region’s compliance with NAAQS; or
- Increased GHG emissions will impair visibility at Hovenweep or Canyons of the Ancients National Monuments.

EPA has repeatedly stated that BLM must consider the cumulative impacts of a proposed action including to air quality and climate change. *See, e.g.*, Letter from Robert E. Roberts, EPA, to Selma Sierra, BLM 9 (May 23, 2008) (EPA recommending to BLM must revise its NEPA analysis to include a cumulative impacts analysis of the annual projected GHG emissions from the proposed project) (attached); Letter from Larry Svoboda, EPA, to Bill Stringer, BLM 6 (Oct. 16, 2009) (EPA stating that BLM’s NEPA analysis must “include the cumulative impact of reasonably foreseeable energy development, energy-related activities and other activities that may affect air quality[.]”) (attached).

The record evidence does not support BLM’s assertion that the direct and indirect impact analysis in the EA is broad enough and detailed enough to satisfy BLM’s separate and distinct NEPA obligation to analyze cumulative impacts from the issuance and development of the Protested Parcels.

## **2. Cumulative Air Quality and GHG Emissions Impacts Analyses Are Needed to Understand Information Presented in the EA**

BLM must perform cumulative air quality analysis to provide context for information provided in the EA – information which is currently meaningless without such analysis. Cumulative impact analysis, as envisioned by NEPA, requires BLM to connect the dots. BLM must do more than merely present information to the public for their review. It must also take a hard look at that information to determine the significance or lack of significance thereof:

NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA’s “twin aims” of informed agency decisionmaking and public access to information.

*New Mexico ex rel. Richardson*, 565 F.3d at 707. BLM’s failure to do so here is arbitrary and capricious.

For example, Table 3.2 in the EA contains a “summary of regional trends” for areas throughout Utah and the Southwest. *See* EA at 18, tbl. 3.2. Included are Arches and Canyonlands National Parks in Utah and Mesa Verde National Park in Colorado. *Id.* Visibility and ozone are identified as “moderate” concerns for these parks. *Id.* And nitrogen deposition is identified as a “significant concern” in Arches National Park and a “moderate” concern in Canyonlands and Mesa Verde. *Id.* However, the EA is silent with regard to whether the issuance and development of the Protested Parcels, which will result in increased VOC and NO<sub>x</sub>, will directly, indirectly, or cumulatively impact and degrade these air quality conditions.

In addition, Figure 1 in the EA depicts an increasing trend in monitored ozone levels at Canyonlands National Park. *See* EA at 19, Fig. 1. However, the depicted trend is only for the

years of 1990 – 2007. *Id.*<sup>5</sup> Notably, Figure 1 depicts that the NAAQS for ozone is being exceeded and based on the visible trend will continue to be exceeded. *Id.*<sup>6</sup> As noted *supra*, BLM anticipates that additional ozone precursor pollutants will most likely be emitted as a result of the lease sale decision but entirely failed in the EA to consider how that decision, when viewed with other past, present, and reasonably foreseeable development activities, will impact the worsening ozone trend. Relevant here, BLM states that Figure 1 “demonstrates that the area encompassing the March 2018 lease sale is approaching the current 8-hr NAAQS of 75 ppb for ozone.” EA at 18. The current NAAQS for ozone is 70 ppm, not 75 ppb. BLM explains further that

Figure 1 shows ozone trends at the Canyonlands monitoring site expressed in terms of the 4<sup>th</sup> maximum 8-hr value, the primary health-based standard, as well as the W-126 values, which represent a weighted average that is biologically relevant for evaluating impacts to sensitive vegetation. Studies show that some types of vegetation are more sensitive to the deleterious effects of ozone than humans are, and can exhibit injury or harm at ozone concentrations lower than the current primary ozone standard.

EA at 18. Aside from the fact that BLM relied on the incorrect NAAQS for ozone – meaning that the EA understates the potential harms of increased ozone precursor emissions, to the extent it addresses them at all – the EA entirely failed to analyze the cumulative impact of increased GHG emissions to sensitive vegetation which are identified by BLM as being more susceptible to harm. *See* EA at 32 (acknowledging that the EA does not analyze direct and indirect impacts because, allegedly, variations in emission control technologies prevented such analysis). BLM has information that the agency itself has deemed “biologically relevant for evaluating impacts” and thus, at a minimum, it must use that information to analyze such impacts.

In sum, BLM cannot rely on its direct and indirect impact analysis for GHG emissions and climate change to satisfy its separate and broader NEPA requirement to analyze the cumulative impact of oil and gas leasing and development.

#### **IV. BLM Failed to Update Its Air Quality Analysis in Violation of NEPA**

The EA relies on air quality models conducted for areas more than forty miles (and as far as ninety miles) away from the leases at issue but failed to adequately explain how or why those models are representative of the topography and geological conditions found in and around the Protested Parcels.

For air quality modeling, BLM relies primarily on the “Cane Creek Modeling Report” and the Moab MLP. *See, e.g.*, EA at 19-20. BLM explains that the Cane Creek Modeling Report was prepared for “a project with similar likely *development* characteristics as would be expected from

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<sup>5</sup> The only explanation provided by BLM for why it relied on this outdated information which is more than ten years old rather than provide more recent and relevant information is that “[t]he date in Figure 1 . . . is information displayed in support of the statement ‘Regional ozone concentrations are of concern in the lease area.’” EA, Appendix E at \*27.

<sup>6</sup> The clear trend upward in monitored ozone levels contradicts the information in Table 3.2 which indicates no trend in ozone for Canyonlands National Park and Mesa Verde National Park.



these lease [parcels].” EA at 19 (emphasis added). And BLM explains that the Moab MLP contained “[f]ar-field modeling . . . to evaluate multiple source impacts over the entire MLP on NAAQS and AQRVs.” *Id.* at 20. BLM explains further that “[t]he proposed action would not include oil and gas *development activities* in excess of those modeled in these two studies.” *Id.*, Appendix E at \*23 (emphasis added). BLM concludes that these two air quality models demonstrate that “the proposed action is not likely to violate, or otherwise contribute to any violation of any applicable air quality standards, and may only contribute a small amount to any projected future potential exceedance of any applicable air quality standards.” EA at 36. The EA lacks critical information to support this conclusion.

The EA does not address a critical question: the appropriateness (or limitations) of the Cane Creek Modeling Report or Moab MLP air quality model due to differences in topography, airflow, or other environmental factors. For example, the Cane Creek Modeling Report does *not* address topography, wind, or emissions dispersions range. Instead, it provides site-specific emission estimates of various well development scenarios within that analysis area. *See generally* Proposed Cane Creek Unit Expansion, Air Emission Estimates, Prepared by Golder Associates Inc. (Oct. 2009) (attached). Similarly, the Moab MLP model relied on by BLM, referred to as the Moab Master Leasing Plan Calpuff Far-Field Air Quality Analysis Technical Support Document, limited its applicability to BLM managed lands inside and “near” the MLP planning area. *See* Moab MLP DEIS, Appendix F (Moab MLP Air Quality Model) (attached). This report unlike the Cane Creek Modeling Report included “terrain” data as part of its analysis. *See id.* at F-5. However, the Moab MLP Air Quality Model, contrary to BLM’s assertion in the EA, did *not* conclude that no exceedances of NAAQS would occur. Rather, it contains no conclusions at all but instead provides various emissions estimates under three different development scenarios (*i.e.*, high, medium, and low). *Id.* at F-2. These emissions estimates are provided in cryptic tables for years 2006-2008 and taken from unidentifiable source points. *Id.* at F-6 to F-15. Notably, neither the Cane Creek Modeling Report nor the Moab MLP Air Quality Model encompass the lease parcels in the EA or explain that the topography and related environmental factors in those areas are similar to those existing in and around the lease parcels.

In *Southern Utah Wilderness Alliance v. DOI*, the court held that BLM had acted arbitrarily and capriciously in making its FONSI without considering whether to analyze more accurate data from a more proximate location. 2016 WL 6909036 at \*4-6 (D. Utah 2016). In that case, BLM had relied on weather data from Canyonlands National Park to analyze site-specific impacts of a 16-well drilling project in the Uinta Basin, which is located nearly one hundred miles to the north. Despite comments from EPA and SUWA that BLM needed to consider more representative data such as from the air quality stations in the Uinta Basin, BLM approved the project without updating its air quality analysis. *Id.* at \*5. The court rejected BLM’s approach, holding that “the law in this area should have informed the BLM’s decision to update the air quality model at this stage.” *Id.* The court explained further that “[e]ach time new, site specific data becomes available, and a new project is proposed, the BLM must take a hard look at it, determine its significance, and explain its decision regarding the data’s significance.” *Id.* at \*6.

Moreover, the court held that BLM also violated NEPA by failing to take a hard look at the cumulative impacts of the 16-well project on ozone pollution. 2016 WL 6909036 at \*7-8. Specifically, BLM had relied on an outdated NEPA document for cumulative air quality impact

analysis to conclude that air quality impacts would be minimal and within NAAQS. *Id.* at \*7. In so doing, BLM’s analysis overlooked a more recent air quality study which called into question development scenarios and analyses in the former NEPA document. *Id.* at \*8. BLM’s approach violated NEPA because the agency provided no rationale for not including the latter study in its NEPA analysis. *Id.* at \*9. “Because the BLM made its finding of no significant impact without utilizing the [updated analysis] its own experts produced . . . or explaining why it chose not to rely on [that information], the Court concludes the BLM acted arbitrarily and capriciously.” *Id.* at \*10.

BLM has made all of the same mistakes here. BLM is relying on two air quality reports that do not encompass the Protested Parcels but were instead prepared for regions located as far as ninety miles to the north. The Cane Creek Modeling Report is objectively outdated since BLM prepared that document in 2009 *prior* to EPA’s 2015 revision of NAAQS including for ozone and does not contain the analysis BLM purports to rely on. And BLM provided no explanation regarding whether those reports are representative of the region encompassed by the Protested Parcels including topography, airflow, and other environmental factors. *See* 2016 WL 6909036 at \*6 (holding unlawful BLM’s action because the agency gave “no explanation of why the more localized data is not now ripe for analysis . . . [or] why the BLM chose not to update its model with the more site specific data”). At most, the EA explains that the *development activities* (*i.e.*, construction and drilling activities) expected on the lease parcels will be similar to those analyzed in the Cane Creek Modeling Report and Moab MLP Air Quality Model. Also, as discussed *supra*, the EA did not analyze cumulative GHG emission impacts, which is required by NEPA. *S. Utah Wilderness Alliance*, 2016 WL 6909036 at \*11 (“NEPA regulations require the BLM to perform a cumulative impacts analysis that accurately accounts for the environmental impact of all reasonably foreseeable actions, not merely the incremental impact from the Sixteen-Well Project.”).

Furthermore, the Colorado BLM has recently prepared comprehensive air quality modeling analysis for the Tres Rios, Uncompahgre, and Grand Junction field offices – field offices with boundaries within only a few miles of the Protested Parcel.<sup>7</sup> *See generally* BLM, 2015 Annual Report (May 2015), <https://www.co.blm.gov/nepa/airreports/AR2015.html> (Colorado BLM Air Quality Model). That air quality modeling report is significantly more detailed than either the Cane Creek Modeling Report or the Moab MLP Air Quality Model. Among other attributes, the Colorado BLM Air Quality Model can be used to measure “incremental contributions to regional ozone formation and other criteria pollutants, as well as air quality related values . . . to better understand the potential impacts of such temporal and spatial projections.” *Id.* The information is “useful for making qualitative and quantitative comparisons with emissions levels at the current pace of development[.]” *Id.* It also contains numerous options to view, compare, and manipulate air quality related information including, but not limited to, pollutant monitoring data, national emissions inventory data, high emissions scenarios, emissions vs. concentration responses, and field office specific data and analysis. *Id.*

Notably, the Colorado BLM Air Quality Model provides detailed statistics, data, and analysis for air quality related values in the Tres Rios field office – the field office immediately adjacent to Parcel 50 and only a few miles from parcels 38, 47, 48, 49, and 51. This includes annual

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<sup>7</sup> Parcels 50 and 51, for example, are located less than a mile from the Colorado boundary.

emission data, oil and gas statistics, and an interactive “emissions tracking” program which presents detailed information for oil and gas related pollutants such as VOC, NO<sub>x</sub>, and CO<sub>2</sub>. *Id.* BLM cannot ignore that this information exists, especially when it is more current, detailed, and proximate to the Protested Parcels than either the Cane Creek Modeling Report or Moab MLP Air Quality Report. Instead, NEPA requires BLM to defer leasing the Protested Parcels to take a hard look at the new air quality information – information prepared more than two years prior to the EA – and make a determination as to its significance, and explain its decision regarding the data’s significance. *S. Utah Wilderness Alliance*, 2016 WL 6909036 at \*6. *See also id.* at 10 (“Because the BLM made its finding of no significant impact without utilizing the [updated analysis] its own experts produced . . . or explaining why it chose not to rely on [that information], the Court concludes the BLM acted arbitrarily and capriciously.”).

#### **V. BLM Failed to Take a Hard Look at the Air Quality Impacts of the Lease Sale, Which Necessitated Preparation of an EIS**

NEPA requires BLM to take a “hard look” at the environmental impacts of proposed actions. 42 U.S.C. § 4332(c). A federal agency may prepare an EA to determine whether to prepare an EIS or FONSI. 40 C.F.R. § 1508.9(a); 42 U.S.C. § 4332(C). If the EA concludes that the proposed action will have no significant impact on the human environment, the agency may prepare a FONSI. 40 C.F.R. § 1508.13. “If an agency decides not to prepare an EIS, it must supply a ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal citations omitted). “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Id.* If the agency concludes that there may be significant impacts, an EIS is required. 42 U.S.C. § 4332(C).

When evaluating significance, BLM must consider impacts to public health, proximity to national parks and monuments, cumulative impacts, and whether the action threatens a violation of laws or other requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b). With respect to cumulative impacts, BLM must consider the impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. *See id.* §§ 1508.7, 1508.25(c)(3). It must also consider the indirect impacts to the human environment which are “later in time or farther removed in distance but still reasonably foreseeable.” *Id.* § 1508.8(b).

Here, BLM failed to take a hard look at the impacts of the lease sale, including direct, indirect, and cumulative impacts from GHG emissions to climate change, on Hovenweep and Canyons of the Ancient National Monuments, public health, and other resources. Indeed, the EA contains no discussion of the significance factors. Moreover, as noted *supra*, the EA acknowledges that it did *not* analyze cumulative impacts to air quality or climate change because BLM concluded – incorrectly – that its direct and indirect air quality analysis satisfied that requirement.<sup>8</sup>

Further, despite acknowledging the existing and likely future violations of NAAQS for ozone, the EA fails to discuss the serious health impacts of the region’s poor air quality. These health

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<sup>8</sup> As noted *supra*, BLM did not analyze direct GHG emissions impacts in the EA, delaying that analysis until receipt of an APD.

impacts include, but are not limited to, respiratory health problems such as shortness of breath, asthma, chest pains and coughing, decreased lung function and even long-term lung damage. *See* Megan Williams, Comments on the Air Quality Analysis for the December 2017 Competitive Oil and Gas Lease Sale Environmental Assessment (EA) in the Vernal Field Office, Dated June 2017, DOI-BLM-UT-G010-2017-0028-EA 5-18 (July 23, 2017) (highlighting the severity of the threats to public health and the environment posed by elevated levels of ozone and GHG emissions) (comments and exhibits thereto attached).<sup>9</sup> And also “short-term exposure to current levels of ozone in many areas is likely to contribute to premature deaths.” *Id.* at 6 (citation omitted).

Similarly, although BLM acknowledges that some of these parcels are near Hovenweep and Canyons of the Ancients National Monuments, there is no discussion of the cumulative impacts of oil and gas leasing and development on air quality within the Monument or other national parks in the region. NPS identified this issue in its comments on the EA and asked that BLM defer leasing parcels located within fifteen miles of Hovenweep. *See* Letter from Superintendent, Southeast Utah Group, National Park Service, to Canyon Country District Manager, BLM at 1 (Oct. 23, 2017) (attached). Specifically, NPS stated:

The visiting public expects high quality experiences across federal land, and we are concerned that continuing to offer parcels for oil and gas exploration and development in proximity to our parks will be detrimental to the experiences of the visiting public.

*Id.* at 1. With regard to air quality issues, NPS stated that their concerns “were not fully evaluated” in the EA. *Id.* at 2. NPS explained further that the leasing and development of the parcels could have significant impacts on ozone, current monitored levels of which “are very close to the [NAAQS] standard,” and that ozone is a “concern” at Hovenweep. *Id.* at 3. NPS also stated that it was “disappointed” with BLM’s inadequate analysis regarding dark night skies and soundscapes. *See id.* at 4-5. In its response to these criticisms, BLM made only minor modifications to the EA (*e.g.*, typographical corrections, added a brief discussion of soundscapes) but otherwise postponed its NEPA analysis to some unknown future date to be considered, if at all, once BLM had received a proposal to develop the leases. *See generally* EA, Appendix E at \*1-8. As noted *supra*, BLM’s deferral of NEPA analysis in such a manner is unlawful.

Moreover, the EA does not contain sufficient analysis with regard to air quality, GHG emissions, and climate change to support a FONSI. Notably, BLM cannot make a FONSI without first taking into account the context and intensity of the proposed action including “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). Because BLM failed to analyze cumulative GHG

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<sup>9</sup> Ms. Williams, an air quality expert, prepared these comments in response to the Utah BLM Vernal field office December 2017 competitive oil and gas lease sale, however, her comments are equally applicable in the present matter and thus SUWA incorporates them in their entirety. *See also* Megan Williams, Supplemental Comments on December 2017 Competitive Oil and Gas Lease Sale Final Environmental Assessment (EA) in the Vernal Field Office, Dated August 2017, DOI-BLM-UT-G010-2017-0028-EA (Oct. 2, 2017) (providing supplemental comments on the Utah BLM Vernal field office December 2017 lease sale EA) (attached).

emissions and climate change impacts it cannot make this significance determination. The arbitrariness of BLM's reasoning is compounded by the significant and immediate threat posed by climate change to the environment and public health and safety. As acknowledged in the EA:

- Warming of the climate system is unequivocal;
- The warming climate has caused and will continue to have a significant impact to public health and safety and to the environment;
- The warming is “very likely due to the observed increase in anthropogenic GHG concentrations”;
- Oil and gas development is a leading source of increased anthropogenic GHG emissions;
- Numerous exceedances of NAAQS for ozone have been record in Grand and San Juan counties; and
- Development of the Protested Parcels will contribute to the ongoing climate change problem.

See EA at 22-25, 41-44. The impacts of climate change are and will continue to be significant. BLM cannot avoid this reality by postponing its NEPA analysis to some unknown future date.

Given the tremendous impacts on public health and national monuments, as well as the fact that the cumulative impacts will exacerbate federal and state air quality standards, BLM's conclusion that the impacts are not significant is arbitrary. Because the cumulative impacts will be significant, BLM was required to prepare an EIS.

## **VI. BLM's Interpretation of the Purpose and Need of the EA Violates NEPA**

BLM has made a critical error in its NEPA analysis: it has taken the unsupported and unlawful position that BLM is *required* to satisfy the *proponents'* purpose and need for the EA:

[BLM] is limited as to how much it can change an externally proposed action before it no longer meets the goals and objectives of the proponents.

EA, Appendix E at \*8. See also *id.* at \*10 (“It is not possible to respond to the nominator's request, thus meet the purpose of the proposal by not offering parcels requested.”); *id.* at \*12 (“It is not the purpose and need of the EA, it is the purpose and need of the *proposed action*. The EA simply documents the analysis that supports the Decision to lease the parcels the BLM has decided is appropriate to lease.”) (emphases in original). BLM's position is wrong as a matter of law.

The Council on Environmental Quality (CEQ) has explained that

In determining the scope of 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 carrying out a particular alternative*. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, *rather than simply desirable from the standpoint of the applicant*.

CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (March 23, 1981) (emphases added). BLM's NEPA guidance has this same requirement:

In determining the alternative 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*.

BLM, National Environmental Policy Act, Handbook H-1790-1 § 6.6.1 (Jan. 2008) (emphasis added) (BLM Handbook 1790) (attached).

In *National Parks & Conservation Ass'n v. Bureau of Land Management*, the Ninth Circuit held that BLM violated NEPA by interpreting the purpose and need of a proposed action so narrowly that "only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the [NEPA document] would become a foreordained formality." 606 F.3d 1058, 1070 (9th Cir. 2010) (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998)). BLM may consider the private goals of the project proponent; however, "[r]equiring agencies to *consider* private objectives . . . is a far cry from *mandating* that those private interests define the scope of the proposed project." *Id.* (emphases added). Notably, "the Department of the Interior has promulgated no regulations emphasizing the primacy of private interests." *Id.* at 1071, *see also id.* at 1072 ("As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives.").<sup>10</sup>

The D.C. Circuit has likewise explained that "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the [NEPA document] would become a foreordained formality." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). And the Tenth Circuit has explained that while BLM is permitted to consider a project proponent's goals and objectives "[w]e do not perceive these authorities as mutually exclusive or conflicting." *Dombeck*, 185 F.3d at 1175. "They simply instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes." *Id.* *See also Environmental Law and Policy Center v. U.S. Nuclear Regulatory Com'n*, 470 F.3d 676, 683 (7th Cir. 2006) ("NEPA requires an agency to exercise a degree of

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<sup>10</sup> As noted *infra*, the stated purpose and need of the EA is exceedingly broad. However, despite that fact, BLM has unreasonably defined that stated objective to narrowly accomplish only the proponents' objectives. Although much broader than the stated purpose and need for the project in *NPCA*, BLM's interpretation of the objective of the Lease Sale EA brings the same result: private interests are unlawfully favored.

skepticism in dealing with self-serving statements from a prime beneficiary of the project and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own goals.”) (citation and quotations omitted).

Therefore, BLM’s interpretation of the purpose and need of the EA as necessarily requiring the sale of all nominated leases – including all the Protested Parcels – violates NEPA.

## **VII. BLM Violated NEPA’s Alternatives Requirement**

### **a. Legal Framework – NEPA Alternatives Analysis**

An EA must “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. 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, at 50. 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 Analyzed Only the Extreme Lease-Nothing or Lease-Everything Alternatives**

BLM’s stated “purpose” for the March 2018 lease sale is exceedingly broad:

The purpose of the Proposed Action is to *respond* to the nominations or expressions of interest for oil and gas leasing on specific federal mineral estate through a competitive lease sale to take place in the first quarter of 2018.

EA at 3 (emphasis added). BLM’s stated “need” for the sale is correspondingly broad:

The need for the Proposed Action is . . . to promote the development of oil and gas on public domain.

EA at 3-4. These two sweeping objectives govern BLM’s range of alternatives as well as dictate the reasonableness of alternatives including those proposed by SUWA. However, BLM in the present case considered an inappropriately narrow range of possibilities to achieve its exceedingly broad objective by analyzing only the lease-nothing (no action) and lease-everything (proposed action) alternatives. *See id.* at 15 (“No other alternatives to the Proposed Action were identified that would meet the purpose and need of the Proposed Action.”). BLM provided three explanations to justify its approach, none of which are persuasive:

- BLM is *required* to offer *all* nominated parcels to satisfy the purpose and need of the EA;



- BLM completed all outstanding wilderness characteristics inventories prior to release of the draft EA so no unresolved resource conflict exists; and
- No other alternatives are needed because BLM may still defer parcels in the Decision Record for the EA.

EA, Appendix E at \*10 (BLM response to comment 15). BLM's refusal to consider additional alternatives is arbitrary and capricious.

As a preliminary matter, BLM's justifications ignore the fact that NEPA and BLM's own guidance on oil and gas leasing *require* BLM to analyze a broader range of alternatives than it has done in the EA. BLM considered only the two extreme options: lease-everything or lease-nothing. In so doing, BLM has entirely failed to "provide legitimate consideration to alternatives *that fall between the obvious extremes.*" *Dombeck*, 185 F.3d at 1175 (emphasis added). Moreover, as discussed *infra*, BLM has not resolved the ongoing conflict between oil and gas leasing and development and the protection of wilderness-caliber lands and thus the EA must analyze three alternatives, at a minimum:

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

BLM, Instruction Memorandum No. 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews § III.E (May 17, 2010) (emphases added) (IM 2010-117) (attached). BLM's response ignores this elephant in the room.

Second, BLM is not required by law or policy to offer all – or any – of the nominated lease parcels for oil and gas leasing and development: "Under the MLA, BLM has discretion to issue, or not to issue, a lease for any given parcel of Federal land available for oil and gas leasing." *Roy G. Barton*, 188 IBLA 311, 334 (2016). Despite this well-established legal precedent, coupled with BLM's own exceedingly broad purpose for the EA, BLM contends that it is *required* to offer *all* nominated lease parcels to satisfy the EA's stated purpose. *See* EA, Appendix E at \*10 ("It is not possible to respond to the nominator's request, thus meet the purpose of the proposal by not offering parcels requested."). As such, BLM argues it cannot consider an alternative to modify lease terms and stipulations to protect resource values, including wilderness characteristics, even though BLM's own instruction memorandum states that the agency can – and must – do so. *See id.* (arguing that because it is "not possible" to defer parcels BLM does not need to consider an alternative to the Proposed Action that is modified by appropriate protections and stipulations to protect wilderness-caliber lands, as otherwise required by IM 2016-27). SUWA is aware of no law – and BLM cites none – that supports BLM's position. As noted *supra*, by taking the position that it *must* offer all nominated parcels to satisfy the *proponents'* purpose and need for the EA BLM has unlawfully favored private interests over the protection of human health and the environment and restricted the range of analyzed alternatives.

The stated purpose of the EA is to “respond” to each nominated lease parcel. Notably, the purpose is not to issue any, or all, of the parcels. Indisputably, BLM in the present case could respond to the lease nominations by offering each parcel, offering some but not all of the parcels, or declining to offer any of the parcels. BLM itself has recognized that each of these scenarios would satisfy the purpose of the EA. *See, e.g.*, EA, Appendix E at \*10 (“The BLM has the ability to select part of each considered alternative in the Decision Record (lease all, portions, or none of the nominated parcels).”). Moreover, BLM expressly stated that the “decision to be made” in the EA is “whether to lease any or all of the nominated parcels and, if so, *under what terms.*” *Id.* at 4 (emphasis added). BLM explained further that

This EA is also used to determine if the stipulations and lease notices attached to the parcels as part of the Proposed Action would be sufficient to protect resources and inform potential lessees of special conditions and restrictions that may constrain development. Additional lease notices may be developed during analysis, if warranted.

EA at 3. It is therefore without question *possible* for BLM to “[i]nclude an alternative to the Proposed Action that is modified by appropriate protections, relocations, or design features to eliminate or considerably reduce the effects on wilderness characteristics.” And BLM’s reason for failing to do so is arbitrary and capricious.

Third, BLM’s completion of the wilderness characteristics inventories for the Monument Canyon and Tin Cup Mesa units did not resolve the ongoing conflict between oil and gas leasing and development and the protection of wilderness characteristics in those areas. The recently identified wilderness characteristics resource in each area has never been analyzed in a land use planning process and thus BLM’s management of those resources remains unresolved. *See, e.g.*, EA at 26 (explaining that Parcels 37, 47, 48, and 51 are in areas identified by BLM as possessing wilderness characteristics but “the unit[s] ha[ve] not been analyzed through a land use planning process”). For wilderness-caliber lands *not* evaluated in a RMP such as Parcels 37, 47, 48, and 51 BLM must “[i]nclude an alternative to the Proposed Action that is modified by appropriate protections, relocations, or design features to eliminate or considerably reduce the effects on wilderness characteristics[.]” BLM, Instruction Memorandum No. UT 2016-027, Bureau of Land Management (BLM)-Utah Guidance for the Lands with Wilderness Characteristics Resource, Attachment 2-5 (Sept. 30, 2016) (IM 2016-27) (attached).<sup>11</sup> BLM failed to do so here.

Fourth, it is immaterial that the State Director may elect in the Decision Record – at his discretion – to defer all or some of the nominated lease parcels. Deferral (or adjustment) of parcels in the Decision Record is not NEPA analysis – let alone NEPA alternatives analysis. Rather, in that context BLM is acting pursuant to its broad authority to manage federal public lands under FLPMA and the Mineral Leasing Act (MLA). *See, e.g., Hawkwood Energy Agent Corp. Venture Energy, LLC*, 189 IBLA 164, 170 (2017) (“The MLA’s grant of broad discretion to the [BLM] to decide whether to issue oil and gas leases up until the point of lease issuance is supported by [Interior Board of Land Appeal] and Federal precedent.”); *Roy G. Barton*, 188

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<sup>11</sup> IM 2016-27 explains that “[i]n some instances, the No Action alternative may satisfy this criterion.” Attachment 2-5. This is not such an instance because, as noted *infra*, IM 2010-117 requires BLM to consider three alternatives, at a minimum, in the oil and gas leasing context when there are unresolved resource conflicts.

IBLA at 334 (“Under the MLA, BLM has discretion to issue, or not to issue, a lease for any given parcel of Federal land available for oil and gas leasing.”).

A “Decision Record” is the agency’s “decision-making document,” BLM Handbook 1790 § 8.5, used to adopt an alternative *analyzed in the EA*. BLM must complete its NEPA analysis including alternatives analysis *prior* to approving its decision (*i.e.*, signing the Decision Record). BLM’s NEPA Handbook makes this point abundantly clear:

You must finish all of the steps necessary for completing the NEPA process *prior to issuance of a formal decision*, to enable you to make a well-informed decision.

*Id.* § 1.4 (emphasis added) (citations omitted). The “NEPA process” BLM must follow prior to issuing its Decision Record (or Record of Decision) is described as follows:

- Identify the purpose and need for action and describe the proposed action to the extent known;
- Scoping;
- Identify issues for analysis;
- Refine proposed action;
- *Develop alternatives to the proposed action*;
- *Gather data and analyze the reasonable alternatives*;
- *Describe the environmental effects of the alternatives*;
- Identify mitigation measures; and finally
- Implement [*i.e.*, sign the Decision Record] and monitor.

*Id.* Fig. 6.1 (emphases added); *see also id.* § 6.1. BLM’s remarkable assertion that parcel deferral equates to NEPA alternatives analysis is unsupported by law or policy.<sup>12</sup>

### **c. SUWA’s Recommended Alternatives**

BLM never disputed – nor could it – that SUWA’s recommended alternatives (1) would accomplish the purpose and need of the lease sale, (2) are technically and economically feasible, and (3) will have a lesser impact to cultural and/or wilderness resources. *See Mary Byrne, d/b/a Hat Butte Ranch*, 174 IBLA 223, 237 (2008) (explaining reasonable alternatives are ones that “will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser or no impact”). In comments on the EA, SUWA recommended three alternatives:

- Defer from leasing parcels in proposed and/or identified wilderness-caliber lands and in designated Areas of Critical Environmental Concern. This includes, but is not limited to, parcels 28, 30, 32, 33, 36, 37, 38, 39, 40, 47, 48, 49, 50 and 51;

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<sup>12</sup> Notably, Utah BLM does *not* release its FONSI/DR for lease sale EAs until months *after* the scheduled lease sale has occurred at which time BLM has already received bids for the nominated parcels. *See, e.g.*, Decision Record, December 2016 Oil and Gas Lease Sale (Vernal Field Office Parcels), Environmental Assessment, DOI-BLM-UT-G010-2016-0033 (Feb. 2017) (DR signed in February 2017, nearly two months after the December 13, 2016 lease sale) (attached).

- Attach non-waivable NSO leasing stipulations to each parcel located in proposed or identified LWC and ACEC prior to offering them for leasing and development; and
- Defer from leasing parcels in the viewshed, airshed, and soundscape of Hovenweep National Monument to protect important values including dark night skies.

In response to SUWA’s recommended alternatives, BLM cited to its responses to SUWA’s NEPA alternatives arguments, discussed *supra*, and argued further that the “No Action alternative satisfies the suggestion to consider an alternative that eliminates effects for the identified resources.” EA, Appendix E at \*13. BLM’s conclusion is wrong for the reasons discussed *supra* as well as for the following reasons.

First, because it articulated a broad objective for the lease sale, BLM must correspondingly consider a broad range of alternatives. BLM Handbook 1790 § 6.2.1, at 36 (“The broader the purpose and need statement, the broader the range of alternatives that must be analyzed.”).

Second, the no action alternative is required by law and does not excuse BLM from analyzing other alternatives that it may 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 334, 338 (1992) (citations omitted). As previously noted, IM 2010-117 requires BLM, at a minimum, to consider three alternatives:

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

IM 2010-117 § III.E.

Finally, BLM does not dispute that deferring parcels to address unresolved conflicts (*e.g.*, the impacts of leasing on BLM-identified lands with wilderness characteristics) or to protect viewsheds, airsheds, and soundscapes of national monuments would accomplish BLM’s broad objective in the present matter.<sup>13</sup> Moreover, BLM does not contend that deferring the parcels highlighted in SUWA’s recommended alternatives is 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

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<sup>13</sup> Lease parcel deferral, as recommended by SUWA, would allow BLM to accomplish its stated “need” for the lease sale because other parcels would remain available for lease and/or all of the parcels could be offered for lease, subject to lease stipulation modifications (*e.g.*, NSO stipulations).

and the reason(s) for their deferral) (attached). It is likewise indisputable that SUWA's recommended alternatives will have lesser impacts to resource values, including Hovenweep National Monument, designated ACECs, and wilderness characteristics.

Therefore, BLM failed to analyze a reasonable range of alternatives, as required by NEPA, and its justifications for doing so are arbitrary and capricious.

### **VIII. The EA Failed to Give Priority to the Protection of the Alkali Ridge and San Juan River ACEC and has Failed to Take a Hard Look at Impacts to Each ACEC**

BLM's treatment in the EA of the Alkali Ridge ACEC and San Juan River ACEC violates FLPMA and NEPA. BLM designated the Alkali Ridge ACEC to protect its relevant and important cultural values. *See* Monticello FEIS at 3-142. And BLM designated the San Juan River ACEC to protect its relevant and important scenic, cultural, wildlife and natural system values. *Id.* Alkali Ridge is "one of the best-known and influential examples of scientific archeological investigation in the southwestern U.S" and contains cultural resources that "are regionally and nationally significant." *Id.* at 3-143. The San Juan River ACEC, among other values, contains "unsurpassed" rock art and "unique endemic fish populations and designated habitat for the endangered Colorado pikeminnow and the razorback sucker." *Id.* at 3-146.

#### **a. The EA Failed to Give Priority to the Protection of the Alkali Ridge and San Juan River ACEC**

FLPMA requires BLM to "give priority to the designation *and* protection of areas of critical environmental concern." 43 C.F.R. § 1712(c)(3) (emphasis added). BLM gives priority to the designation of an ACEC by officially designating it as such in the land use plan (*e.g.*, Monticello RMP). BLM, however, has a separate and distinct obligation to give priority on a continuing basis to the *protection* of the designated ACEC. *See id.* IM 2010-117 amplifies this point:

the field office will evaluate whether oil and gas management decisions identified in the RMP (including lease stipulations) are still appropriate and provide adequate protection of resource values. . . . If the lease stipulations do not provide adequate resource protection, it may be necessary to develop new lease stipulations or revise existing ones.

IM 2010-117 § III.C.2. Taken together, FLPMA requires BLM to review management decisions in the applicable RMP for *all* resources but to prioritize the protection of the identified relevant and important values in the Alkali Ridge ACEC and San Juan ACEC.

BLM has recognized that decisions made in the Monticello RMP, including lease stipulations, may not adequately protect the relevant and important values in the designated ACECs and that those management decisions need to be revisited prior to issuance of new oil and gas leases such as the Protested Parcels. *See* Memorandum from State Director, Utah, to Assistant Director, Minerals and Realty Management, *Revisions to the Glen Canyon – San Juan River Master Leasing Plan (MLP)* at 5 (May 29, 2015) ("the development of the San Juan MLP would provide

an opportunity to ensure that oil and gas leasing decisions and associated limitations are properly protecting the ACECs' values.") (May 2015 MLP Memo) (attached). In fact, BLM has expressly stated that

During recent oil and gas lease sales [in the Canyon Country District], BLM-Utah has deferred several proposed lease parcels within the [San Juan] MLP boundary [including parcels in and near Alkali Ridge and the San Juan River ACECs] because of determinations that *additional analyses was needed* in order to assess and address the potential impacts of oil and gas leasing on cultural resources.

Memorandum from Acting State Director, Utah, to Assistant Director, Energy, Minerals and Realty Management Directorate, *Updated Utah Master Leasing Plan (MLP) Strategy* at 6 (Aug. 14, 2015) (emphasis added) (August 2015 MLP Memo) (attached). Despite its legal and policy obligations and own statements that more analysis is needed prior to leasing in the Alkali Ridge and San Juan River ACECs, BLM provided no record evidence in the EA that it reviewed management decisions in Moab or Monticello RMP for *any* resource, let alone has given priority to its review of such decisions for ACECs. In fact, BLM's response to SUWA's comment on this point is entirely nonresponsive:

The commenter fails to support the implication that the BLM is mandated to "Give Priority to the Protection of the Alkali Ridge and San Juan River ACEC" beyond those protections provided in the decision in the [Monticello] RMP.

EA, Appendix E at \*34. SUWA did not argue – nor does SUWA now argue – for *additional* protections for the Alkali Ridge ACEC and San Juan River ACEC. Instead, SUWA has repeatedly explained that FLPMA's requirement to give priority to the protection of a designated ACEC requires BLM, at a minimum, to ensure that its site-specific authorizations such as the March 2018 lease sale do not impair the relevant and important values for which the ACEC was designated.<sup>14</sup> BLM has provided no response to this point.

As further evidence of the negligible amount of consideration given by BLM to the Alkali Ridge and San Juan River ACEC, the EA identifies ACECs as a resource that is "not present in the area impacted by the proposed or alternative actions" and explains further that "*none* of the parcels are within an ACEC." EA, Appendix D at \*1 (emphasis added). This conclusion is demonstrably false. *See* EA at 39 (explaining that there are lease parcels within both the Alkali Ridge and San Juan River ACEC).

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<sup>14</sup> As noted in SUWA's comments on the EA, it is immaterial with regard to each ACEC that BLM performed a visual resource analysis in the EA because that analysis analyzed impacts to *recreational* visitors, which is not the value for which the Alkali Ridge or San Juan River ACEC were designated. *See* SUWA Comments at 27-28 (noting that BLM designated the Alkali Ridge ACEC and San Juan River ACEC to protect their relevant and important cultural, and scenic, cultural, fish and wildlife, and natural systems values, respectively). Notably, BLM provided no response to this point. *See* EA, Appendix E at \*34-35.

**b. The EA Failed to Take a Hard Look at Potential Impacts to the Alkali Ridge and San Juan River ACEC**

BLM's treatment of ACECs in the EA also violated NEPA's hard look requirement. BLM admits that the EA did not analyze impacts to the Alkali Ridge or San Juan River ACEC asserting that that analysis instead was performed in the Monticello RMP:

The 2008 [Monticello FEIS] devoted pages 4-485 to 4-489 specifically to impact analysis, including oil and gas development, of the Alkali Ridge ACEC and pages 4-504 to 4-506 specifically to impact analysis, including oil and gas development, of the Jan Juan ACEC.

EA, Appendix E at \*35. Not so. The Monticello RMP is a programmatic field office wide NEPA document. It made no decision with regard to the issuance of the Protested Parcels, and did not analyze the potential site-specific impacts from the issuance of those parcels. Instead, the Monticello RMP contains only broad level statements about potential impacts and lacks the specificity required by NEPA. *See, e.g.*, Monticello FEIS at 4-485 to 4-489, 4-504 to 4-506. BLM cannot tier to NEPA analysis that does not exist. *See* 40 C.F.R. § 1508.28. More importantly, aside from tiering to a programmatic NEPA document for nonexistent site-specific NEPA analysis, BLM concluded arbitrarily that no additional analysis is warranted at this time since "none of the parcels are within an ACEC." EA, Appendix D at \*1.

BLM's position is all the more arbitrary when, as is the case here, it has expressly admitted that the Monticello RMP did *not* adequately analyze impacts to cultural resources in the Alkali Ridge and San Juan River ACECs and that *more analysis is needed* prior to issuance of new oil and gas leases in these areas. *See, e.g.*, May 2015 MLP Memo at 5; August 2015 MLP Memo at 6.

Nowhere in the EA does BLM analyze potential direct, indirect, or cumulative impacts to the identified relevant and important values in the Alkali Ridge and San Juan River ACEC. BLM did not analyze potential impacts to cultural resources in the Alkali Ridge ACEC. *See supra* Section II (discussing BLM's failure to take a hard look at cultural resources). Likewise, BLM did not analyze impacts to the relevant and important scenic, cultural, wildlife and natural system values in the San Juan River ACEC. Instead, BLM analyzed only the potential visual impacts to *recreational* values in each ACEC. *See* EA at 55-60.

In sum, the BLM violated FLPMA by failing to give priority to the protection of identified relevant and important values in the Alkali Ridge and San Juan River ACEC. BLM also violated NEPA by failing to take the requisite hard look at the site-specific direct, indirect, and cumulative impacts to those two ACECs and their identified relevant and important values.

**IX. Under Applicable Law and Policy, BLM Cannot Offer Oil & Gas Leases in the Vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument Prior to Conducting Further Planning and Analysis.**

The Monticello RMP, issued in 2008, cannot and does not support a decision to offer oil and gas leases on public lands included in the Proposed Action. This includes lease parcels 29 through 51.

In 2010 and 2015, BLM determined that additional land use planning and environmental analysis was needed in order to support future leasing on a substantial swath of public lands in the Monticello field office, including lands east of Highway 191 and specifically, in the vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument. BLM based this determination on findings that the Monticello RMP inadequately evaluated oil and gas-related impacts on national park, cultural and wilderness values. Further, since 2008, “BLM-Utah has been provided substantial new information from a wide variety of public lands stakeholders. The new information necessitates” further planning and analysis. *See* May 2015 MLP Memo at 2; *see also* August 2015 MLP Memo at 6 (“During recent oil and gas lease sales, BLM-Utah has deferred several lease parcels [east of Highway 191] . . . because of determinations that additional analysis was needed in order to assess and address the potential impacts of oil and gas leasing on cultural resources.”). Finally, BLM has acknowledged that Monticello RMP failed to account for resources, including cultural resources and dark night skies, which could be harmed by the Proposed Action. *See, e.g.*, May 2015 MLP Memo at 4-5; August 2015 MLP Memo at 6.

Accordingly, under FLPMA and NEPA, BLM cannot proceed with leasing in the vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument without completing the additional land use planning and analysis it deemed necessary in 2010 and 2015. This requirement is reinforced by current policy. *See generally* BLM Handbook H-1624 § V.A.

**a. BLM must undertake additional land use planning and analysis, in order to comply with FLPMA and NEPA.**

In order to comply with FLPMA and NEPA, BLM must undertake further land use planning and analysis prior to leasing public lands east of Highway 191. Under FLPMA, BLM has an ongoing duty to inventory “public lands and their resource and other values” and to update its land use plans, based on the results of inventories. 43 U.S.C. §§ 1711(a), 1712(a); *see also Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1122 (9th Cir. 2010) (recognizing duty to update land use plans to account for new inventories). Similarly, under NEPA, BLM has a duty to update its environmental analysis when “significant new circumstances or information” exists. 40 C.F.R. § 1502.9(c)(1)(ii). *See also Dine Citizens Against Ruining our Environment v. Klein*, 747 F.Supp.2d 1234, 1263 (D. Colo. 2010) (“In evaluating an agency’s decision not to prepare a[] . . . supplemental EA, courts . . . look to see if the agency took the requisite ‘hard look’ at the new information to determine whether supplemental analysis is necessary.”).

For the past several years, BLM has repeatedly confirmed that in regard to public lands in the culturally-rich areas of Alkali Ridge, Montezuma Canyon and the BLM-managed lands near Hovenweep National Monument, its plan-level oil and gas decisions and environmental analysis



were inadequate to support leasing. First, in 2010, BLM issued a determination that “[a]dditional analysis or information is needed to address likely resource or cumulative impacts” prior to the resumption of leasing east of Highway 191. BLM, Master Leasing Plan (MLP) Assessment Glen Canyon-San Juan River 5 (Nov. 2010) (attached). The resources identified in that determination included the Alkali Ridge National Historic Landmark (NHL) and wilderness resources. *Id.* at 2.

Second, in May 2015, BLM provided additional information to bolster its 2010 determination. BLM explained that, in response to recent leasing proposals for public lands in the vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument, it had obtained “substantial new information” concerning the potential impact of oil and gas leasing on national park, cultural and wilderness resources. This information included the following:

- **Cultural Resources:** The public identified “several cultural resource sites and landscapes . . . that would be impacted by oil and gas development, including those located in or near Alkali Ridge, the Montezuma Creek watershed, and the San Juan River” that required additional analysis. May 2015 MLP Memo at 4-5. BLM concurred and deferred the proposed leases. “Since that time, BLM-Utah has been developing a landscape-level cultural resource inventory strategy to increase its capacity to make better-informed leasing decisions in a timely manner. This strategy would include the development of a Class I inventory, completing Class II inventories, as well as a corresponding regional mitigation strategy for cultural resources within the . . . planning area.” *Id.* at 5. BLM has yet to complete those actions, however, which, again, it identified as being a necessary prerequisite to future leasing east of Highway 191.
- **Lands with Wilderness Characteristics:** In response to these leasing proposals, BLM also received “new wilderness characteristics inventory information for two inventory units totaling 33,147 acres” and stated that, in order to comply with BLM Manual 6310, it would need to evaluate and consider this information “to determine whether possible direct, indirect, and cumulative impacts form potential fluid mineral development warrant” new planning decisions. *Id.* at 5-6. While BLM completed these inventories and determined approximately 28,296 acres have wilderness characteristics, the agency refused to fully consider an alternatives that would defer leasing these lands.
- **Hovenweep National Monument:** In response to lease sale protests from the National Park Service and others, BLM stated that it needed to further evaluate “potential impacts to night sky resources from fluid mineral development. Southeastern Utah currently maintains world famous night sky viewing opportunities, *a resource that was not addressed* in the 2008 Monticello Field Office Resource Management Plan.” *Id.* at 6 (emphasis added); *see also Or. Natural Desert Ass’n*, 625 F.3d at 1122 (recognizing that BLM has a duty under NEPA and FLPMA to determine whether legitimate values of the public lands “are now present in the planning area . . . and, if so, how the Plan should treat land with such values.”).
- **Alkali Ridge NHL and Alkali Ridge and San Juan River ACECs:** BLM also stated that it needed to reconsider leasing allocations and stipulations for the Alkali Ridge

ACEC and NHL “to ensure that potential impacts to the Landmark’s broader cultural resource landscape are properly considered.” May 2015 MLP Memo at 5. BLM made a similar determination for the San Juan River ACEC. *Id.*

Third, in August 2015, BLM again confirmed that the ongoing cultural resources inventory and mitigation strategy efforts were necessary in order to make “well-informed and timely oil and gas leasing decisions in the future” and “that additional analysis was needed in order to assess the impacts of oil and gas leasing on cultural resources.” August 2015 MLP Memo at 6. This work has not been completed.

In the Lease Sale EA, BLM completely disregarded these prior statements and the recognized need to update the Monticello RMP based on “substantial new information.” BLM wrongly claims that the EA evaluates and addresses this information. EA, Appendix E at \*20. In fact, the EA addresses none of the issues identified above.

- BLM has not developed or implemented “a landscape-level cultural resource inventory strategy” for the Montezuma Creek watershed or any of the surrounding areas.
- BLM has also not evaluated impacts of the proposed leases on Hovenweep National Monument’s night skies, and now makes the novel claim that such an evaluation is no longer necessary. *Id.* at \*4.
- There is no consideration in the EA of additional lease stipulations or other measures to address potential impacts on the Alkali Ridge and San Juan River ACECs.

There is no reasoned explanation provided for this sudden reversal of opinion, and no discussion of the potential impacts of the proposed leases in conjunction with other reasonably foreseeable activities. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (“an [u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”).

To summarize, BLM has determined that (1) “[a]dditional analysis or information is needed to address likely resource or cumulative impacts” prior to the resumption of leasing in the vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument; (2) it has received “substantial new information” relevant to the impacts of oil and gas leasing on public lands and resources east of Highway 191; and (3) resources within the area proposed for leasing, including night skies and a “broader cultural landscape” surrounding Alkali Ridge”, were “not addressed” or “properly considered” in the Monticello RMP. The EA addresses none of those legally-required issues. Consequently, BLM must defer parcels 029 through 051 from the March 2018 lease sale and conduct further planning and analysis for public lands east of Highway 191.

**X. BLM Failed to Address Impacts to Endangered and Sensitive Species in the Lease Sale EA, 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 EA's discussion of endangered species, however, is limited to inclusion of its standard endangered species lease notice, EA at 15, and a statement that "BLM mailed a memo with information and the preliminary list on May 5, 2017," EA at 64. The EA 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.

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 request 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. The EA reveals the presence of threatened, endangered, and sensitive species present and their critical habitat within the areas proposed for leasing, but fails 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, EA Appendix E at 21, 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." EA, Appendix E at 2. 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. The EA 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 EA 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. *Cf. 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 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.” BLM 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 BLM 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. In particular, Parcels 1 and 36 contain critical habitat for the Colorado pikeminnow and bonytail respectively.

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 EA, 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 EA 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, Conservation Colorado, Green River Action Network, Living Rivers, Natural Resources Defense Council, Sierra Club, and The Wilderness Society. 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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