# United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Utah State Office
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Salt Lake City, UT 84101-1345
http://www.blm.gov/utah

In Reply Refer To:
3100 (UT922000)

February 8, 2019

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DECISION

| | | |
|---|---|---|
| Stephen H. M. Bloch | : | |
| Laura Peterson | : | |
| Landon Newell | : | Protest to the Inclusion of five |
| Southern Utah Wilderness Alliance et. al. | : | Parcels in the December 11, 2018 |
| 425 East 100 South | : | Competitive Oil and Gas Lease Sale |
| Salt Lake City, UT 84111 | : | |

Protest Dismissed

On October 25, 2018, the Bureau of Land Management (BLM) Utah State Office posted a Notice of Competitive Oil and Gas Lease Sale (NCLS) that identified 105 parcels the BLM intended to offer for oil and gas leasing at a competitive lease sale to be held on December 11, 2018 (December 2018 Lease Sale).[1] The NCLS also provided formal notice of a 10-day public protest period for the December 2018 Lease Sale, which ended on November 5, 2018. By letter received on November 5, 2018, the Southern Utah Wilderness Alliance, The Wilderness Society, Western Watersheds Project, Center for Biological Diversity, WildEarth Guardians, Waterkeeper Alliance, Green River Action Network, and Living Rivers & Colorado River Keeper (collectively SUWA) jointly submitted a timely protest to the inclusion in the sale of the following five parcels[2] located on public lands administered by the BLM's Moab Field Office:

[1] Fifteen of the 105 parcels were located within the Moab Field Office

[2] SUWA also included in its list of parcels protested "Parcel 277", serialized as UTU76585. This was not a parcel included on the NCLS, but a suspended lease included in the DNA as having been found to have been adequately analyzed in the referenced NEPA documents and potentially, after an official decision to that effect is signed, the suspension could be lifted. Since this lease was not included in the NCLS and was not part of the lease sale, it cannot be protested. SUWA's last protest point, that "Parcel 277" cannot be issued because it is partially within the original Bears Ears National Monument boundary, is therefore summarily dismissed.

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| UTU93702 (UT1218-246) | UTU93714 (UT1218-256) | UTU93715 (UT1218-259) |
| UTU93711 (UT1218-255) | UTU93714 (UT1218-258) | |

For the reasons set forth below, the protest is dismissed.

**Protest Contention 1: BLM Failed to Provide Meaningful Opportunity for Public Participation Under NEPA and FLPMA…Because the entire process of identifying, reviewing, and offering oil and gas lease sales for BLM's December 2018 leasing process is fundamentally compromised by the unlawful provisions of IM 2018-034, BLM must defer all parcels in the December 2018 lease sale.**

**Protest Response 1:** BLM acknowledges the District of Idaho's preliminary injunction (PI) of portions of BLM IM 2018-034 as it applies to all potential lease parcels in sage grouse habitat management areas. However, since the PI is not a final order and the parcels at issue in the protest are outside of such areas, the public comment period associated with the NCLS remains unchanged under IM 2018-034 and, thus, there was no need to defer the remaining parcels[3] from the December 2018 Lease Sale.

**Protest Contention 2: BLM Cannot Rely on a Determination of NEPA Adequacy (DNA). The BLM's past use of DNAs Demonstrates the Inappropriateness of Its Use of the Lease Sale DNA.**

**Protest Response 2**: SUWA relies on four recent uses of DNAs in contending that BLM may only rely on DNAs to re-authorize or slightly modify the same action analyzed in the existing documentation. SUWA contends the use of DNAs for the December 2018 Lease Sale is inappropriate to "authorize a step-down version of a project previously analyzed and authorized in a site-specific NEPA document." *See* SUWA at 7. However, BLM disagrees with SUWA's interpretation of how and when BLM may rely on a DNA (BLM NEPA Handbook H-1790-1, Section 5.1.1). Here, BLM determined through this DNA (DOI-BLM-UT-Y010-2018-0232-DNA) that the December 2018 Lease Sale involves elements similar to both the geography and resource conditions analyzed in the NEPA review underlying the Record of Decision (ROD) for the 2008 Moab RMP EIS (BLM-UT-PL-07-004-1610), 2016 Moab Master Leasing Plan (MLP) (DOI-BLM-UT-Y010-2012-0107-EIS), and the Canyon Country District (Moab and Monticello Field Offices) March 2018 Lease Sale EA (DOI-BLM-UT-Y010-2017-0240-EA) and that further NEPA analysis is unwarranted (BLM Manual Part 516 Chapter 11.6).

[3] BLM deferred 116 parcels from the December 2018 to the March 2019 Lease Sale to comply with the Preliminary Injunction.

**Protest Contention 3: The Moab RMP, Moab Master Leasing Plan (MLP) and Canyon Country March 2018 Lease Sale EA Did Not Analyze all of the Site-Specific Direct, Indirect, and Cumulative Impacts of the Issuance and Development of the Protested Parcels, in Particular the Air Quality and GHG Emissions Impacts.**

**Protest Response 3:** SUWA contends that the analysis in the documents upon which a DNA relies must be site specific. However, SUWA fails to contend that the December 2018 Lease Sale's (DOI-BLM-UT-Y010-2018-0232-DNA) geography or resource conditions are sufficiently different from the geography and resource conditions analyzed in previous NEPA documents included in Section "C" of the DNA (p. 4) which would warrant additional new NEPA analysis.

Prior to determining whether new air quality and GHG emissions impacts analysis are necessary, BLM resource specialists review each lease parcel to determine any resource conflicts that may occur if a particular parcel is developed. This review includes calculating potential emissions (including GHG emissions) based on the location of the parcels. Based on this review, BLM's air specialist properly determined that the analyses in the Moab RMP FEIS and Moab MLP ROD (Appendix C) and FEIS adequately disclosed cumulative impacts from the level of development projected over the entire filed office in the Reasonable Foreseeable Development Scenarios prepared for both the RMP and MLP, and the analysis of direct and indirect impacts from the development projected in the Canyon County District March 2018 Lease Sale EA would not differ in any meaningful way from new analysis for the new proposal, and, as a result, BLM properly used a DNA rather than preparing a new EA.[4]

SUWA also states that BLM cannot delay its NEPA analysis to the APD stage, since BLM must analyze impacts prior to the irretrievable commitment of resources, i.e. lease issuance. BLM has provided adequate analysis to offer the lease parcels. Regardless of the perception of "irretrievable commitment" the current, standard lease terms included on every lease plainly require that any action on the lease parcel must be in compliance with the law, including the Clean Air Act. Should the more accurate or up-to-date analysis at the APD stage reveal that violation of the Clean Air Act would occur, approval of development would be withheld until the conflict is rectified.

**Protest Contention 4: The BLM Violated NEPA's Alternatives Requirement…the Lease Sale is Neither a Feature of, Nor Similar to an Alternative Analyzed in the NEPA Documents Upon which the BLM relies and …The Range of Alternatives BLM Considered in the Moab RMP, Moab MLP and March 2018 Lease Sale EA are inapposite with Respect to the proposed Lease Sale…BLM did not consider SUWA's Suggested Alternative.**

**Protest Response 4:** SUWA contends that "the alternatives analyzed in a land use plan and the alternatives analyzed in an oil and gas lease sale are fundamentally different. The alternatives

[4] SUWA also contends that the verbiage in Appendix C of the DNA implies that BLM is not relying on the air quality and greenhouse gas analysis in March 2018 Lease Sale EA listed in Section "C" of the DNA for a "hard look" at Air Quality and GHG impacts from the December 2018 lease sale. That is incorrect. The language in the ID checklist "There is no change from the analysis competed for the 2008 RMP or the 2016 Moab MLP" simply reflects that there is no change in the National Ambient Air Quality Standards since those documents were prepared.

developed for the Moab RMP informed BLM's decision regarding how to allocate resources across 1.8 million acres of federal public land. *See* Moab FEIS at ES-1. It is a 30,000 foot level of analysis offering no insight into specific resource conflicts at the lease sale stage." *See* SUWA at 11. SUWA's contention is incorrect. In preparing a Resource Management Plan, the BLM does not randomly assign oil and gas stipulations, instead, as exemplified by Map 12 the Moab RMP, six categories of leasing stipulations were designated during the planning process: (1) Standard; (2) Closed; (3) No Surface Occupancy; (4) Timing; (5) Controlled Surface Use (CSU); and (6) CSU/Timing. The categories were determined by site-specific analysis in the underlying FEIS. The decision to lease parcels in any of the areas designated as open to leasing under the RMP is based on one or more alternatives in the RMP FEIS.

Second, SUWA contends that the DNA cannot rely on the RMP FEIS's alternatives analysis because the RMP's purpose and need statement is broader than the decision to make certain parcels available for a lease sale. SUWA's contention is flawed because BLM's earlier decision that these parcels are suitable for leasing encapsulates the later decision to offer those parcels for leasing.

Third, SUWA contends that the alternatives analysis in the March 2018 Lease Sale EA was not sufficient because BLM analyzed only the "lease all parcels" and "lease no parcels" alternatives, but failed to analyze any other alternatives between those two supposed extremes. SUWA has raised similar comments in several previous protests involving: the Vernal Field Office December 2017 lease sale (DOI-BLM-UT-G010-2017-0028-EA), the Price Field Office December 2017 lease sale (DOI-BLM-UT-G020-2017-0030-EA), the Canyon County District March 2018 lease sale (DOI-BLM-UT-Y010-2017-0240-EA), as well as the Salt Lake Field Office September 2018 lease sale (DOI-BLM-UT-W010-2018-0018-EA) and the Price/Richfield September 2018 lease sale (DOI-BLM-UT-0000-2018-0001-EA). BLM's response to this contention in all these protests is: because each parcel is an independent, though similar, action the BLM at the end of the EA process could choose to either lease or defer any parcel in the EA's decision record – the BLM is not limited to selecting only the Proposed Action or only the No Action Alternatives because of the independent utility of each parcel. As such the Interior Board of Land Appeals ruled in *Biodiversity Conservation Alliance et al.*, 183 IBLA 97, 124 (2013), that an intermediary alternative is not necessary.

SUWA also asserts that BLM did not respond to the proposed "mitigation leasing" alternative in SUWA's scoping comments, and the failure to respond is a violation of NEPA. SUWA argues that such an alternative is consistent with the lease sale's purpose and need statement, technically and economically feasible, and less impactful to resources than the two alternatives BLM did analyze in the March 2018 Lease Sale EA. The BLM is not required to respond to scoping comments. BLM prepares a scoping report and determines if the comments raise issues that would determine what level of NEPA compliance document is required. SUWA's advocated alternative was not considered because it had previously been dismissed because it would require additional stipulations that are not currently allowed under the governing RMP.

**Protest Contention 5: BLM's Treatment of Cultural Resources Violated the National Historic Preservation Act (NHPA) … BLM's No Adverse Effect Determination is**

**Unsupported and Arbitrary …BLM Stipulations Provides No Assurance to Avoid Adverse Effects.**

**Protest Response 5:** In this protest contention, SUWA quotes and paraphrases Section 106 of the NHPA and its implementing regulations found at 36 C.F.R. Part 800. The copying of these references is informative to the reader; however, the reference to these regulations appears intended to imply that they were not followed. This implication is factually incorrect. BLM's compliance with these regulations is shown in detail in BLM's cultural resource report and listed in the NEPA documentation. As described in BLM's cultural resource report, BLM met the NHPA requirements through:

1. Completion of the consultation process outlined in 36 C.F.R. § 800.2 – *Participants in the Section 106 Process*. Which included consultation with Tribes, local governments, federal agencies, the State Historic Preservation Officer (SHPO), and numerous environmental groups (including SUWA),
2. BLM's declaration of the undertaking in 36 C.F.R. § 800.3 *Initiation of the section 106 process,* as listed in BLM's cultural resource report,
3. Completing consultation for the Area of Potential Effect found in 36 C.F.R. § 800.4 *Identification of historic properties,* which is formally documented in BLM's cultural resource report,
4. Completion of good faith and reasonable identification effort which meets the parameters listed in 36 C.F.R. § 800.4 *Identification of historic properties and* which follows the guidance within the Advisory Council on Historic Preservation's document titled *Meeting the "Reasonable and Good Faith" Identification Standards in Section 106 Review,* all of which is found in BLM's cultural resource report,
5. The application of 36 C.F.R. § 800.5 – *Assessment of adverse effects* to the undertaking by analyzing each oil and gas lease parcel through a reasonably foreseeable development scenario, which is documented in BLM's cultural resource report and,
6. After completing the consultation process and analyzing the known cultural resource information, development and use potential, environmental setting, and protective oil and gas lease stipulations for cultural resources, the BLM found that each of the subject oil and gas lease parcels could be leased without adverse effects to historic properties. The BLM then wrote a letter to the Utah State Historic Preservation Office (SHPO) with BLM's finding of "no adverse effect". The SHPO concurred with BLM's finding on October 25, 2018.

In summary, BLM fully complied with Section 106 of the National Historic Preservation Act with respect to the protest parcels.

Regarding BLM's finding of "no adverse effect", SUWA argues that the "BLM provides no support for its claim that each parcel within the Moab Field Office can accommodate reasonably foreseeable development…The agency simply claims that direct impacts can be avoided by 'judicious well placement' and visual and auditory effects can be avoided based on topographic variation and design features…This ignores the fact that oil and gas drilling is

an industrial activity with [g]round clearing [and] industrial equipment in a largely pristine setting [that] can adversely affect a sites setting feeling and association." SUWA at 16.

BLM's incorporation of the Reasonably Foreseeable Development (RFD) scenario for oil and gas development listed in the *Moab Master Leasing Plan Area, Canyon Country District, Moab Master Leasing Plan Record of Decision and Final Environmental Impact Statement (2012)* for every single parcel, illustrates BLM analysis and understanding that the leasing of these parcels may, although not guaranteed, lead to oil and gas development and use. The RFD for the Moab Field Office is a total of 122 acres for both the March 2018 and December 2018 lease sales. This RFD includes the industrial nature and use of oil and gas development including the construction of well pads, access roads and ancillary facilities. In addition to the use of the RFD in the 2018 cultural resource report for the December 2018 Lease Sale, BLM's finding of no adverse effect was supported through:

1. The knowledge of qualified federal archaeologists who meet the Office of Personnel and Management Standards for GS-0193 series archaeologist. BLM's archaeologists who worked on this analysis and cultural resource report have years of experience in the region and years of experience redesigning federal undertakings including oil and gas projects to avoid adverse effects to historic properties.
2. A thorough analysis of impacts and effects that took into account parcel size, topography, surface use restrictions, and location, along with potential cultural resource site density, and existing site locations and survey information from Class III – Intensive Pedestrian Survey (Class III) reports. The information from hundreds of Class III survey reports was included in the 2018 Cultural Resources Report for the December 2018 Lease Sale.. In addition to this information and analysis, the BLM consulted with and sought additional information from thirteen Native American Tribes, the SHPO, and consulting parties.
3. Incorporation of the recently completed existing Class I – Existing Information Inventory for the Moab Field Office. This document is a summary and analysis of all recorded cultural resources within the Moab Field Office, and information gathered through consultation with Tribes and other entities.
4. Following the Advisory Council on Historic Preservation's (ACHP) *Section 106 Regulations Section-by-Section Questions and Answers Synopsis* which states that only in rare circumstances will "reasonably foreseeable" will not have the same meaning in NHPA and NEPA.

Based this comprehensive identification effort, the BLM determined that disturbance associated with one well pad could occur within each of the parcels with no adverse effects or adverse impacts to historic properties and cultural resources.

BLM's finding of no-adverse effect is neither arbitrary nor capricious. In a letter dated July 26, 2017 regarding the December 2017 Lease Sale involving lands managed by Price Field Office, the Utah State Historic Preservation Office stated:

> As a final point: in the experience of the UT-SHPO oil and gas development in Utah has led to relatively few adverse effects. Since 1997 the UT-SHPO has reviewed over 400 adverse effect determinations from dozens of agencies.
>
> During this period, the UT-SHPO has not concurred with any adverse effect call from oil and gas leasing activity, and only five from specific federal oil and gas development projects (excluding transmission pipelines). Oil and gas development represents less than 1.5% of all adverse effects in the last 20 years.
>
> In this same period there are records of 9,533 oil and gas wells developed on federal lands, which is illustrative that even with an impressive number of wells and other improvements (roads, staging areas, etc.) the number of adverse effects from development are dramatically low (less than 0.01%).
>
> To put these numbers into perspective, over 1 million acres of federal, state, tribal, and private lands have been archaeologically inventoried and nearly 14,000 archaeological sites have been documented within Utah's oil fields, as defined by the Utah Division of Oil, Gas, and Mining. With these significant numbers of sites and acres inventoried, the incredibly low number of adverse effects to historic properties is equally notable.

The Utah State Historic Preservation Office's letter, which documents the few adverse effects related to oil and gas development in Utah for 20 years, indirectly supports BLM's finding of no-adverse effect, including the consideration of setting and cumulative effects.

Although prior to offering a parcel for lease, the BLM evaluates whether resource conflicts would preclude *any* development of the parcel. Through lease stipulations and notices, the BLM informs a potential lessee of potential conflicts that may constrain, possibly majorly constrain, development. The Cultural Resource Protection Stipulation, informs lessees that cultural resources are protected by federal statute, and there is a risk that development of any lease would be highly constrained if warranted. SUWA contends that the wording of the stipulation "BLM *may* require modification to exploration and development proposals" means that it is optional to protect historic properties. (SUWA p. 10) This is a misapprehension of the stipulation, which is meant to be interpreted as BLM *will* require modification to exploration and development proposals *if* historic properties requiring protection may be affected. SUWA also contends this stipulation only protects resources on the lease surface to which it is attached, and not off-lease resources within the APE of cultural resources off the lease. However, the cultural resource stipulation (as well as the Threatened and Endangered Species stipulation) is not derived from the RMP but from statute. It is not an RMP decision that protects cultural resources, it is the NHPA and other statutes listed in the stipulation. Compliance with the statutes is not discretionary, regardless of whether the historic properties affected are located on or off the surface of the lease.

**Protest Contention 6: BLM's Treatment of Cultural Resources Violated NEPA because it Failed to Take a Hard Look at Impacts to Cultural Resources.**

**Protest Response 6:** SUWA points to a perceived deficiency in the Cultural Resources report,[5] then states that it "does not satisfy NEPA's hard look requirement. SUWA at 17. The Cultural Resources report is not meant to satisfy NEPA's requirement, but those of the NHPA. To determine if NEPA's hard look requirement has been met, one must review the NEPA documents listed in Section C. of the DNA. After reviewing the relevant NEPA documents, BLM determined that it previously took the "hard look" at potential impacts to cultural resources from the December 2018 Lease Sale.

SUWA asserts in its protest that BLM only analyzed impacts to cultural resources eligible for listing in the National Register of Historic Places (SUWA at 17). However, Section 3.3.2 of the March 2018 Lease Sale EA states:

> From the records review, *a total of 1346 sites have been recorded within these parcels*. A total of 984 have been determined to be eligible to the National Register of Historic Places. The parcels analyzed here include such archaeologically rich areas as Recapture Canyon, Mustang Mesa, Alkali Ridge, and Montezuma Creek. The types of eligible and non-eligible prehistoric sites that are present include Ancestral Puebloan habitation sites, structures (habitation, field houses, granaries, etc.), storage features, rubble features, and artifact scatters; short term camps; limited activity areas; petroglyphs and pictographs; and artifact scatters. The types of eligible and non-eligible historic sites include structures, roads and trails, potential segments of the Old Spanish Trail, Navajo sweat houses and hogans, and artifact scatters (emphasis added.)

The EA in Section 4.2.2 goes on to say:

> Reasonably foreseeable development resulting from leasing within the proposed area has the potential to impact cultural resources, both directly and indirectly. Potential direct effects are physical disturbance of a site from the construction of a well pad, associated access roads, or associated infrastructure (e.g., pipelines).
>
> Given the types of cultural resources known and expected in the area, potential indirect effects include 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 or to elements of the Old Spanish Trail; and the potential to increase public access, potentially leading to increased vandalism and looting.

BLM resource specialists determined that the scope of impacts to cultural resources in and adjacent to the parcels included in the December 2018 Lease Sale DNA is within those impacts disclosed in the March 2018 Lease Sale EA, and the analysis in that EA is adequate to support leasing the protested parcels.

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[5] SUWA asserts that "BLM makes no attempt to discuss or assess potential impacts to cultural resources in the Cultural Report. The Cultural Report simply states that judicious well placement and design features would mitigate any potential adverse effects – without ever discussing what the potential impacts to cultural resources may be."

For the reasons set forth above, I have determined that offering the five protested parcels at the December 2018 Lease Sale was in compliance with all applicable laws, regulations, and policies. Accordingly, SUWA's protest to the inclusion of the five parcels in the December 2018 Lease Sale is dismissed.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and the enclosed Form 1842-1. If an appeal is taken, the notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay, pursuant to 43 C.F.R. § 4.21, during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied,
2. The likelihood of the appellant's success on the merits,
3. The likelihood of immediate and irreparable harm if the stay is not granted, and
4. Whether the public interest favors granting the stay.

Copies of the notice of appeal, petition for stay, and statement of reasons also must be submitted to the other parties named in this decision and to the Office of the Solicitor, Intermountain Region, 125 South State Street, Suite 6201, Salt Lake City, Utah 84138, at the same time the original documents are filed in this office.

If you have any further questions, please contact Sheri Wysong of this office at (801) 539-4067.

Sincerely,

/S/ Kent Hoffman

Kent Hoffman
Deputy State Director,
Division of Lands and Minerals

Enclosure

cc:
Office of the Solicitor, Intermountain Region,
BLM Moab Field Office (UTY01)