Southern Utah Wilderness Alliance – Center for Biological Diversity – Green River Action Network – Living Rives & Colorado Riverkeeper – Sierra Club – The Wilderness Society – Western Watersheds Project – Waterkeeper Alliance

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Comments submitted via the ePlanning portal and via electronic-mail (swysong@blm.gov; cgiffen@blm.gov) – exhibits sent via USPS First Class Mail

December 17, 2018

Cliff Giffen
Bureau of Land Management
Monticello Field Office
365 North Main
P.O. Box 7
Monticello, UT 84545

RE: March 2019 Oil and Gas Lease Sale, DOI-BLM-UT-Y020-2019-0004-DNA

Dear Mr. Giffen:

The Southern Utah Wilderness Alliance, Center for Biological Diversity, Green River Action Network, Living Rivers & Colorado Riverkeeper, Sierra Club, The Wilderness Society, Western Watersheds Project, and Waterkeeper Alliance (collectively, SUWA) appreciate the opportunity to provide comments on the March 2019 Competitive Oil and Gas Lease Sale, Determination of NEPA Adequacy, DOI-BLM-UT-Y020-2019-0004-DNA (Nov. 2018) (Lease Sale DNA or DNA).

In short, for the reasons discussed herein the Lease Sale DNA violates numerous federal environmental laws including, but not limited to, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706, and National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101 *et seq.*, and the regulations and policies that implement these laws.

I. SUWA Incorporates in its Entirety SUWA's Comments and Protest Submitted for the BLM's March 2018 Lease Sale Environmental Assessment.

The Lease Sale DNA relies on the NEPA analysis in the environmental assessment prepared for BLM's March 2018 competitive oil and gas lease sale (March 2018 Lease Sale EA). *See* Lease Sale DNA at *4. As such, SUWA incorporates in its entirety SUWA's comments (and exhibits thereto) provided to BLM for the March 2018 Lease Sale EA. *See generally* SUWA et al. – Comments re: March 2018 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-Y010-2017-0240-EA (Oct. 23, 2017) (comments and exhibits thereto attached). SUWA also incorporates in its entirety SUWA's protest (and exhibits thereto) provided to BLM for that same sale. *See generally* SUWA et al. – 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 (Jan. 2, 2018) (protest and exhibits thereto attached).

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

A. Lease Issuance Is an Irreversible and Irretrievable Commitment of Resources.

The issuance of an oil and gas lease parcel without non-waivable no surface occupancy (NSO) stipulations is an irretrievable commitment of resources, requiring BLM to conduct site-specific NEPA analysis at the lease sale stage. *See* 42 U.S.C. § 4332(C)(v). "Looking to the standards set out by regulation and statute, assessment of all reasonably foreseeable impacts must occur at the earliest practicable point, and must take place before an irretrievable commitment of resources is made." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009) (quotations and citations omitted)). *See also Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (agencies are to perform hard look NEPA analysis "before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values"). "In the fluid minerals program, this commitment occurs at the point of lease issuance." BLM, H-1624-1 – Planning for Fluid Mineral Resources § B.2 (Jan. 28, 2013) (BLM Handbook 1624) (attached). This is because issuance of a non-NSO lease confers "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold[.]" 43 C.F.R. § 3101.1-2.

B. A Determination of NEPA Adequacy Is not a NEPA Document.

A DNA is not a NEPA document but rather is an administrative convenience which "confirms that an action is adequately analyzed in existing NEPA document(s) and is in conformance with the land use plan." BLM, National Environmental Policy Act Handbook H-1790-1 § 5.1 (Jan. 2008) [hereinafter BLM Handbook 1790] (attached). A DNA "does not itself provide NEPA analysis." Dep't of the Interior, Departmental Manual Part 516, Chapter 11: Managing the NEPA Process Bureau of Land Management § 11.6(b) (May 8, 2008) [hereinafter Manual Part 516] (attached). "In short, [a DNA] prepared to allegedly support [a lease] sale [is] not new NEPA analyses, and the underpinnings of the [BLM's decision] . . . must rise or fall on the contents of the previously issued NEPA documents." *S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1264 (D. Utah 2006).

BLM properly relies on a DNA to authorize a proposed action only if (1) the proposed action is adequately covered by relevant existing analyses, data, and records, *and* (2) there are no new circumstances, new information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis. *See* Manual Part 516 § 11.6(a), (b). If *either* of these factors is not met, then BLM cannot rely on a DNA and must prepare at least an environmental assessment. BLM Handbook 1790 § 5.1.2. BLM cannot meet this high standard here and therefore the agency's reliance on the Lease Sale DNA is unlawful.

C. An EA or EIS Is Required.

BLM relies on the Monticello RMP and the March 2018 Lease Sale EA to support the March 2019 lease sale. That reliance is inappropriate. The Monticello RMP is not a site-specific NEPA document but instead is a broad-level programmatic NEPA land use plan that analyzed various field office wide management prescriptions and, notably, does not mandate the leasing of any parcel, including those at issue here. Further, as discussed *infra*, the March 2018 Lease Sale EA did not, among other impacts, analyze cumulative effects of oil and gas leasing and development in light of several past and future lease sales and thus cannot be relied on by BLM in the present case.

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

In the present case, BLM cannot rely on the Monticello RMP or March 2018 Lease Sale EA for impact analyses for air quality, GHG emissions, wilderness-caliber lands, cultural resources or areas of critical environmental concern (ACEC) for the reasons discussed in SUWA's protests of the Monticello field office March and December 2018 lease sales – which, for the December 2018 sale, BLM similarly relied on a DNA to offer lease parcels in this same region. *See* SUWA et al – Protest of the Utah BLM's, Monticello Field Office, December 2018 Competitive Oil and Gas Lease Sale, Determination of NEPA Adequacy, DOI-BLM-UT-Y020-2018-0058-DNA at 12-20 (Nov. 5, 2018) (attached). SUWA incorporates in its entirety its protest (and exhibits thereto) of the December 2018 Lease Sale as part of these comments.

Finally, BLM's failure to analyze cumulative effects in the March 2018 Lease Sale EA or Monticello RMP for the reasons discussed *infra* also prohibits the agency from using a DNA to offer lease parcels in the present case.

III. BLM Failed to Analyze Cumulative Impacts of Past, Present, and Reasonably Foreseeable Future Oil and Gas Lease Sales.

The BLM has failed to analyze cumulative impacts to a wide array of resource values from its piecemeal approach to oil and gas leasing in the Monticello field office. 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." 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.* BLM's NEPA Handbook provides the following guidance for cumulative impact analysis:

> In some circumstances, past actions may need to be described in greater detail when they bear some relation to the proposed action. For example, past actions that are similar to the proposed action might have some bearing on what effects might be anticipated from the proposed action or alternatives. You should clearly distinguish analysis of direct and indirect effects based on information about past actions from a cumulative effects analysis of past actions.

BLM NEPA Handbook 1790-1 § 6.8.3.4, pgs 58-59. It further states:

> For each cumulative effect issue, analyze the direct and indirect effects of the proposed action and alternatives together with the effects of the other actions that have a cumulative effect. Cumulative effects analysis will usually need to be addressed separately for each alternative, because each alternative will have different direct and indirect effects.

Id. § 6.8.3.5, pg. 59. Further, BLM must define a cumulative effects boundary for *each* cumulative effect analyzed in its NEPA document. *Id.* § 6.8.3.1; *see also id.* § 6.8.3.2 ("We recommended that you establish and describe the geographic scope for each cumulative effects issue"). That cumulative effects boundary "is generally based on the natural boundaries of the resource affected, rather than jurisdictional boundaries." *Id.* § 6.8.3.2.

> The geographic scope will often be different for each cumulative effects issue. The geographic scope of cumulative effects will often extend beyond the scope of the direct effects, but *not* beyond the scope of the direct and indirect effects of the proposed action and alternatives.

Id. (emphasis added). BLM must consider past, present, and cumulative actions within the geographic scope to provide context for the cumulative effects analysis. *Id.* § 6.8.3.4

Notably, if the proposed action would impact the same resources impacted by past, present, or reasonably foreseeable future actions then BLM *must* analyze that cumulative effect in its NEPA analysis, as illustrated by the "examples" provided in the NEPA Handbook (italicized emphasis in original):

> For example, *the BLM proposes to build a campground near a private land where a private utility company proposes to build and operate a power generation structure. . . . If the campground construction would affect sage grouse habitat, but have no effect on air quality, and the power generation structure would affect sage grouse habitat and air quality, your NEPA document for the campground construction must describe the cumulative effects on sage grouse habitat, but not on air quality*.
>
> In another example, *the BLM is reviewing a proposal to develop a natural gas field that will affect air quality but not affect any sensitive plants. The State is proposing a large prescribed burn, which will affect air quality and a sensitive*

> *plant population. The NEPA document <u>needs</u> to discuss the cumulative effects on air quality, but not on sensitive plants.*

BLM NEPA Handbook § 6.8.3.1; *see also id.* § 6.8.3.5 ("For each cumulative effect issue, analyze the direct and indirect effects of the proposed action and alternatives together with the effects of the other actions that have a cumulative effect.").

In the present case, BLM has failed to analyze cumulative effects, as required by NEPA and the agency's NEPA Handbook. Over the past year, BLM has piecemealed its leasing decisions for public lands in the Monticello field office and done so without acknowledging that fact to the public or, more importantly, analyzing the cumulative effects of those decisions. For example, at its March 2018 lease sale, BLM sold twenty-nine parcels, the majority of which were located in southeastern San Juan County near Hovenweep and Canyons of the Ancients National Monuments. *See* SUWA MAP – BLM's Piecemeal Leasing Decisions in Monticello Field Office (attached). In similar fashion, BLM offered fourteen parcels at the December 2018 lease sale, including in the same area and *immediately adjacent* to those offered at the March 2018 sale. *Id.* BLM is now proposing to offer nineteen parcels in the same region including *immediately adjacent* to parcels offered at the two proceeding Monticello field office lease sales. *See id.* In total, over this short timeframe BLM has offered or is planning to offer approximately sixty-two parcels, consisting of nearly 112,000 acres of public lands – the majority of which is in the same region of the Monticello field office, including immediately adjacent to each other – but the agency has done so without ever analyzing the cumulative effects of that piecemeal leasing decision to resource values including, but not limited to:

- Bears Ears, Hovenweep, and Canyons of the Ancients National Monuments;
- Air quality;
- Climate change and greenhouse gas emissions;
- Lands with wilderness characteristics;
- Cultural and archaeological resources;
- Areas of critical environmental concern (ACEC), including the Alkali Ridge ACEC;
- Dark night skies;
- Water quality and quantity, including impacts related to hydraulic fracturing; and
- Visual resources.

See generally March 2018 Lease Sale EA 68-72 (failing to consider these cumulative effects in light of past, present, and reasonably foreseeable lease sales); *see also* SUWA MAP – Viewshed Analysis for Hovenweep and Canyons of the Ancients National Monuments (depicting visual impacts to lease parcels offered at the March 2018, December 2018, and March 2019 sales – using the same KOPs used by BLM in the March 2018 Lease Sale EA) (attached)[1]; SUWA MAP – Cumulative Auditory Impacts to LWC and Canyons of the Ancients National Monument (depicting the auditory impacts to Canyons of the Ancients National Monument—impacts never

[1] Compare this map with the BLM map on page 66 of the March 2018 Lease Sale EA – which did not analyze the cumulative visual impacts of BLM's December 2018 or March 2019 lease sale decisions.

analyzed by BLM) (attached)[2]; SUWA MAP – Cumulative Auditory Impacts to Alkali Ridge ACEC (attached).

Further, over that same timeframe the Utah School and Institutional Trust Lands Administration (SITLA) also has offered parcels, including thirteen at its October 2017 competitive sale and two at its April 2018 competitive sale in this same region of San Juan County. *See* SITLA, EnergyNet October 2017 SITLA Competitive Offering Tract List, Oil, Gas & Associated Hydrocarbon (Updated Oct. 10, 2017) (attached); SITLA, EnergyNet April 2018 SITLA Competitive Offering Tract List, Oil, Gas & Associated Hydrocarbon (Updated April 5, 2018) (attached). However, at no time, has BLM recognized that fact, or more importantly, analyzed the cumulative effect of SITLA's leasing decisions when viewed with BLM's own leasing decisions which occurred over the same timeframe and for lands in the same areas. *See* March 2018 Lease Sale EA at 68-72 (failing to consider past, present, or future SITLA lease sales); *but see* 40 C.F.R. § 1508.7 (requiring BLM to analyze "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) . . . undertakes such other actions").

BLM has never determined whether the March 2019 lease sale parcels will have a cumulative effect when viewed with other past, present, or reasonably foreseeable future actions. BLM never determined the geographic scope or timing of the cumulative effects analysis nor did the agency consider the past present, and reasonably foreseeable future actions discussed *supra*. Therefore, BLM failed to analyze cumulative effects of its leasing decision as required by NEPA.

IV. BLM's Leasing Decisions are Cumulative Actions and Similar Actions with Cumulatively Significant Impacts that Must be Analyzed in a Single NEPA Document.

The March 2018, December 2018, and March 2019 lease sales are "cumulative" and "similar" actions that pursuant to NEPA must be analyzed in a single environmental assessment or impact statement. "Cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). "Similar actions" are those "which when viewed with other reasonably foreseeable or proposed actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id.* § 1508.25(a)(3).

For cumulative actions, BLM's NEPA Handbook explains:

> If you do not include the cumulative action with the proposed action as aspects of a broader proposal analyzed in a single NEPA document, you must, at a minimum, demonstrate that you have considered the cumulative action in the NEPA document for the proposed action.

[2] This map compares the auditory impacts of BLM's March 2018 lease sale parcels to wilderness-caliber lands and Canyons of the Ancients National Monument – an impact *not* analyzed by BLM in that EA – with the cumulative auditory impact of the agency's piecemeal leasing decisions to those areas.

BLM NEPA Handbook § 6.5.2.2. To demonstrate that it considered the cumulative action, even if the actions are not analyzed in a single NEPA document, BLM must still "describe the cumulative action," and "include analysis of the effects of the cumulative action in the cumulative effects analysis of the proposed action." *Id.* Additionally, "[n]on-Federal actions which potentially have a cumulatively significant impact together with the proposed action *must* be considered in the same NEPA document." *Id.* (emphasis added).

Similar actions are "those with commonalities 'that provide a basis for evaluating their environmental consequences together.'" *San Juan Citizens' Alliance v. Salazar*, 2009 WL 824410 at *11 (D. Colo. March 30, 2009) (citing 40 C.F.R. § 1508.25(a)(3)). The Tenth Circuit has held that similar actions "should be discussed in the same [environmental analysis] . . . to assess adequately the combined impacts of the similar actions or reasonable alternatives." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1182 (10th Cir. 2002). Determining whether projects qualify as similar actions requires the weighing of a number of relevant factors, "including the extent of the interrelationship among proposed actions and practical considerations of feasibility." *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 411 (1976)). The BLM NEPA Handbook explains further that "[s]imilarities are not limited to type of action; such similarities include, for instance, common timing or geography." *Id.* § 6.5.2.3.

In the present case, as discussed *supra*, BLM has piecemealed its leasing decisions in this area without analyzing the impacts of those decisions when properly viewed together. BLM never demonstrated that it considered, let alone analyzed, these cumulative actions. In fact, BLM only analyzed the impacts of one of those leasing decisions (*i.e.*, the March 2018 Lease Sale EA) and then proceeded to rely on that same analysis for both the December 2018 and March 2019 lease sales but did so without even recognizing its past leasing decisions or SITLA's leasing decisions for lands immediately adjacent to those offered at these sales. *See* SUWA MAPS – BLM's Piecemeal Leasing Decisions in the Monticello Field Office. Therefore, BLM's leasing decision in the present case violates NEPA.

V. BLM Must Reevaluate its Finding of No Significant Impact and Decision Record Prepared for the March 2018 Lease Sale EA.

BLM's determination of whether the proposed action will have a significant impact to the environment is based on the Finding of No Significant Impact (FONSI) prepared for a different action – the March 2018 Lease Sale EA – which objectively did *not* analyze the impacts of the proposed action in the present case (or for other leasing decisions involving lands in the same area). As such, BLM must reevaluate its FONSI to determine whether an EIS must be prepared.

A significance determination, to support its FONSI or Decision Record, requires BLM to analyze "both context and intensity." 40 C.F.R. § 1508.27. "Context" means "the significance of an action must be analyzed in several contexts such as society as a whole . . . the affected region, the affected interests, and the locality." *Id.* § 1508.27(a). "Both short- and long-term effects are relevant." *Id.* "Intensity" refers to "the severity of impact . . . [and] [r]esponsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action." *Id.* § 1508.27(b). For intensity, BLM must analyze, among other things: "[w]hether the action is related to other actions with individually insignificant but cumulatively significant

impacts." *Id.* § 1508.27(b)(7). This regulation provides further that "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment" and cautions that "[s]ignificance cannot be avoided by . . . breaking [an action] down into small component parts." *Id.* If any of the intensity factors in 40 C.F.R. § 1508.27(b) are present then BLM must prepare an EIS. *See Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340 (D.C. Cir. 2002) ("If *any* 'significant' environmental impacts might result from the proposed action then an EIS must be prepared *before* agency action is taken.") (emphasis in original).

In the present case, BLM has analyzed, at most, the context and intensity of selling only the parcels at issue in the March 2018 Lease Sale EA. *See* BLM, Finding of No Significant Impact, Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA (Canyon Country District March 2018 Lease Sale) (May 2018) ("I have determined that issuing oil and gas leases *for the 29 parcels analyzed in Alternative A of the EA* . . . does not constitute a major federal action that will have a significant effect on the quality of the human environment") (emphasis added) (attached).[3] BLM has never analyzed the context and intensity of issuing the March 2018 lease parcels in conjunction with BLM's other lease sales for this area, including the December 2018 and March 2019 lease sales, and the aforementioned SITLA lease sales. BLM has never determined whether its piecemeal approach to oil and gas leasing, coupled with SITLA's leasing decisions, will significantly impact, among other things:

- Public health or safety;
- Unique characteristics of the geographic area;
- Objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources; or
- Endangered or threatened species or their habitats.

40 C.F.R. § 1508.27(b)(2), (3), (8), (9). And BLM has never determined whether "the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.* § 1508.27(b)(7). Instead, BLM has unlawfully broken its leasing decisions "down into small component parts." *Id.* It is precisely these types of cumulative impacts, from cumulative and similar actions, for which NEPA requires analysis in a single EIS. *See, e.g.*, CEQ, *Considering Cumulative Effects Under The National Environmental Policy Act* (1997) ("the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individual minor effects of multiple actions over time."). Therefore, BLM's reliance on the Lease Sale DNA rather than having prepared a new environmental assessment or impact statement is unlawful to support a FONSI in the particular case.

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

BLM has dual obligations when considering the impacts of its undertakings on cultural resources. Pursuant to Section 106 of the NHPA, BLM must "make a reasonable and food faith

[3] SUWA does not concede that BLM's analysis and subsequent FONSI/DR for the March 2018 lease sale is legally sufficient.

effort" to identify cultural resources that may be affected by an undertaking. 36 C.F.R. § 800.4(b)(1). Pursuant to NEPA, BLM "must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b), and must take a "hard look" at the effects of the proposed action. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). BLM must comply with both statutes at the leasing stage.

A. National Historic Preservation Act.

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). The procedural nature of Section 106 reinforces the importance of strict adherence to the binding process set out in the NHPA regulations: "While [the NHPA] may seem to be no more than a 'command to consider,' … the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d 299, 302 (5th Cir. 1981).

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.* § 800.5(a)(1); *id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

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

If the undertaking is a type of activity with the potential to affect historic properties then the agency must determine whether in fact those properties "may be affected" by the particular

undertaking at hand. *Id.* § 800.4(d)(2).[4] Having identified the historic properties that may be affected, the agency considers whether the effect will be adverse, using the broad criteria and examples set forth in section 800.5(a)(1). Adverse effects include the "[p]hysical destruction of or damage to all or part of the property," as well as "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's historic significant historic features." *Id.* § 800.5(a)(2)(i) & (2)(v). If the agency concludes that the undertaking's effects do not meet the "adverse effects" criteria – that is, the agency concludes that there *may* not be an adverse effect from the undertaking – it is to document that conclusion and propose a finding of "no adverse effects." *Id.* § 800.5(b), 800.5(d)(1).

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, consulting parties, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

On December 11, 2018, SUWA requested to be a consulting party for the March 2019 oil and gas lease sale. *See* Letter from Laura Peterson, Staff Attorney, SUWA to Kent Hoffman, Deputy State Director, Lands and Minerals, BLM (Dec. 11, 2018) (attached). **SUWA reserves the right to supplement these comments when it has received and reviewed the Cultural Resources Report documenting BLM's compliance with the NHPA's binding Section 106 regulations**.

B. BLM Failed to Take a Hard Look at Impacts to Cultural Resources Pursuant to NEPA.

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*, 433 F.3d at 781. 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 Tramsp.*, 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). Pursuant to NEPA, BLM must analyze all potential direct, indirect, and cumulative impacts to *cultural resources*, regardless of whether those cultural resources are eligible for listing in the National Register. *See* BLM Manual 8100 – The Foundations for Managing Cultural Resources (Public) .03.F (Dec. 3, 2004) ("Cultural resources need not be determined eligible for the National Register of Historic Places . . . to receive consideration under [NEPA].") (attached).

BLM must undertake legally sufficient comprehensive NEPA analysis before deciding to offer, sell and issue the leases 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

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

189. BLM – even with attached lease stipulations and notices – 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.

As discussed in SUWA's Comments on the March 2018 Lease Sale, the March 2018 Lease Sale EA failed to take the requisite hard look at impacts to cultural resources. First, the March 2018 EA focused on impacts to historic properties and did not discuss potential impacts to those cultural resources not eligible for listing on the National Register. *See* EA at 40-43. Second, BLM did not engage in the requisite thoughtful and probing reflection of possible direct, indirect and cumulative impacts to cultural resources. *Id.* Instead, BLM merely listed some potential impacts from development on the lease sale parcels and argued that the impacts would not be significant. *Id.* That did not constitute a "hard look" at impacts to cultural resources. Accordingly, BLM cannot rely on that deficient NEPA analysis to justify leasing the parcels at issue here.

SUWA appreciates BLM's consideration of these comments and prompt attention to the matters discussed herein.

Sincerely,

Landon Newell
Laura Peterson