SOUTHERN UTAH WILDERNESS ALLIANCE

Comments submitted via-EPlanning
https://eplanning.blm.gov/epl-front-office/eplanning/comments/commentSubmission.do?commentPeriodId=73516

December 17, 2018

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Re: March 2019 Competitive Oil and Gas Lease Sale, Salt Lake Field Office Area Parcels, Environmental Assessment DOI-BLM-UT-W010-2019-0001-EA

Greetings:

Southern Utah Wilderness Alliance, Western Watersheds Project, Center for Biological Diversity (referred to herein collectively as "SUWA") respectfully submits these comments on the proposed offering of the following 20 oil and gas lease parcels, each of which contains non-no surface occupancy stipulations,[1] at the March 2019 competitive oil and gas lease sale: UT0319-385, UT0319-386, UT0319-387, UT0319-388, UT0319-389, UT0319-390, UT0319-391, UT0319-392, UT0319-393, UT0319-394,

[1] Each proposed lease parcel is subject to certain waivers, modifications or exceptions such that the sale of these leases constitutes an irreversible and irretrievable commitment of resources. *See* Salt Lake Leasing EA, Appendices A & B. Even the four leases subject to Stipulation UT-S-426 are subject to surface disturbing activities outside the 400 foot railroad corridor. *See id.* at 66 (describing UT-S-426).

UT0319-395, UT0319-396, UT0319-397, UT0319-398, UT0319-399, UT0319-400, UT0319-401, UT0319-402, UT0319-403, UT0319-404.

As explained below, the Bureau of Land Management's (BLM's) proposal to sell the 20 parcels at issue in these comments 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.*, 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.

A. Leasing the 20 Parcels at Issue Violates NEPA

1. Inadequate Pre-Leasing NEPA Analysis: Failure to Adequately Consider the No-Leasing Alternative

NEPA requires that the BLM prepare a pre-leasing NEPA document that fully considers and analyzes the no-leasing alternative *before* the agency engages in an irretrievable commitment of resources, i.e., the sale of non-no surface occupancy oil and gas leases. *See S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1262-1264 (D. Utah 2006); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-30 (9th Cir. 1988) (requiring full analysis of no-leasing alternative even if EIS not required); *Mont. Wilderness Ass'n. v. Fry*, 310 F. Supp. 2d 1127, 1145-46 (D. Mont. 2004); *S. Utah Wilderness Alliance*, 164 IBLA 118, 124 (2004) (quoting *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004)). Importantly, BLM's pre-leasing analysis must be contained in its already completed NEPA analyses because, as the Interior Board of Land Appeals recognized in *Southern Utah Wilderness Alliance*, "DNAs are not themselves documents that may be tiered to NEPA documents, but are

used to determine the sufficiency of previously issued NEPA documents." 164 IBLA at 123 (citing *Pennaco*, 377 F.3d at 1162).

The Salt Lake Environmental Analysis Record, relied upon by the Salt Lake field office for analysis of the no-leasing alternative, failed to analyze, consider, and evaluate this alternative as required by NEPA. *See* Salt Lake EA at 4 (citing 1975 Salt Lake District Oil & Gas EAR); *S. Utah Wilderness Alliance*, 457 F. Supp. 2d at 1262-1264. The 1989 Oil and Gas Supplemental EA likewise did not consider or analyze the no-leasing alternative. *See* Salt Lake EA at 4. Rather, it cited to the 1975 Salt Lake EAR which, in fact did not consider a no-leasing alternative. Finally, BLM's perfunctory discussion of the no-leasing alternative in the Salt Lake EA is likewise inadequate. *See* 42 U.S.C. §4332E; 40 C.F.R. §1508.9. Thus, BLM must defer leasing the 20 parcels that are the subject of these comments until the agency prepares an adequate pre-leasing NEPA analysis.

2. BLM Failed to Analyze a Reasonable Range of Alternatives.

NEPA requires agencies to study, develop, and describe appropriate alternatives and their comparative effects in every proposal involving unresolved resource conflicts, regardless of whether it prepares an EA or an EIS. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). While an agency need not select a particular alternative, *Robertson v. Methow Valley Citizens* Council, 490 U.S. 332, 350 (1989), the alternatives requirement ensures that an agency fully consider—and show the public that it considered—less environmentally harmful means to its proposed action that would accomplish the same goal. 40 C.F.R. §§ 1500.1(b); 1500.2(d), (e); *see Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988), *cert. denied sub nom.*, 489 U.S. 1066 (1989) ("NEPA's

requirement that alternatives be studied, developed and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place.").

In an EA, the agency must include a brief discussion of both alternatives and the environmental impacts of those alternatives. 40 C.F.R. § 1508.9(b). Though a "concise" document, *id.* § 1508.9(a), an EA's alternatives analysis must still present "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004). Moreover, agencies cannot dismiss alternatives "in a conclusory and perfunctory manner that do[es] not support a conclusion that it was unreasonable to consider them as viable alternatives in an EA." *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002).

The range of alternatives an agency must analyze is dictated by a "rule of reason and practicality" based on the agency's stated purpose and need for the project. *Davis*, 302 F.3d at 1120 (citation omitted). The reasonableness of an alternative is measured in two ways. First, it must accomplish the purpose and need of the proposed action. *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 709 (10th Cir. 2009). Second, it must fall within the agency's statutory mandate. *Id.* An alternative that is reasonable on its face must also be practical—"non-speculative … and bounded by some notion of feasibility." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002).

An agency has broad discretion to define its objectives for a project proposal. However, after "defining the objectives of an action," the agency must "provide legitimate consideration to alternatives that fall between the obvious extremes." *Colo.*

Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999). Stated differently, a broadly defined objective demands that a broader range of alternatives be analyzed by the agency:

> It 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. . . .
> ….
> … *The broader the purpose and need statement, the broader the range of alternatives that must be analyzed.*

BLM, National Environmental Policy Act, Handbook H-1790-1 §§ 6.2, 6.2.1, pgs. 35-26 (Jan. 2008) (emphasis added) [hereinafter BLM NEPA Handbook] (attached).[2]

At all times, the analyzed range of alternatives must be "sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *N.M. ex rel. Richardson*, 565 F.3d at 708 (citation omitted). 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); *see also* 40 C.F.R. § 1508.9(a)(1). Courts will not defer to a void and thus the administrative record must contain evidence – not merely conclusory statements by the agency – that the agency did in fact take a hard look at a broad range of NEPA alternatives. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1186 (D. Colo. 2014).

In the present case, BLM's NEPA alternatives "analysis" states that "[o]ther alternatives were not considered because the issues identified during scoping did not

[2] The notation "attached" refers to electronic materials that have been compiled and provided to Sheri Wysong at BLM-Utah's state office on a CD.

indicate a need for additional alternatives or protective measures beyond those contained in the Proposed Action." Salt Lake EA at 7. *See also id.* at 13 (asserting that "[n]o other alternatives to the Proposed Action were identified that would meet the purpose and need of agency action. . . . The alternatives carried forward represent those necessary for a reasoned choice (40 CFR 1502.14) and are based on the issues that were identified by the interdisciplinary team."). These statements cannot be taken seriously, particularly with the EA's explanation of the many direct, indirect and cumulative effects and impacts anticipated by the sale and development of parcels 392 through 404 to the Central Pacific Railroad Grade (the ACEC as well as historical and cultural resources associated with it), recreation & travel and transportation, and visual resources. *See* Salt Lake EA at 35-38, 46-48.

Furthermore, the stated purpose and need for the EA are set forth in sweeping terms and thus, pursuant to the rule of reason, could be satisfied by a broad range of alternatives including those proposed herein by SUWA. *See* Salt Lake EA at 3 (describing the purpose and need and decision to be made). As such, SUWA recommends the following alternative for BLM's detailed analysis and consideration:

- Attaching non-waivable no-surface occupancy stipulations to the following 13 parcels: UT0319-392, UT0319-393, UT0319-394, UT0319-395, UT0319-396, UT0319-397, UT0319-398, UT0319-399, UT0319-400, UT0319-401, UT0319-402, UT0319-403, UT0319-404.

It is legally irrelevant that these NSO stipulations may be inconsistent with BLM's land use plan. Rather, because such stipulations are consistent with and fall within BLM's authority under FLPMA they are reasonable. *See N.M. ex rel. Richardson*, 565 F.3d at 709. This alternative is technically and economically feasible, would have a lesser impact to the environment, and would accomplish the BLM's broad objectives. First, the

alternatives are technically and economically feasible. *See* Salt Lake EA at 36 (acknowledging that directional drilling is plausible). Second, SUWA's alternatives will clearly have less or no impact on the environment. The adjusted parcels would open less sensitive public lands to oil and gas development particularly in areas with more fragile resource values such as the Central Pacific Railroad Grade, historic and cultural resources, recreation and visual resources. Finally, SUWA's alternatives would satisfy BLM's broad objectives for the lease sale by allowing the agency to "respond" to the nominated parcels while including heightened resource protection measures to safeguard important resource values. BLM has broad discretion to lease – or not lease – federal public land for oil and gas development including making modifications to or electing not to lease nominated lease parcels. *See, e.g.*, *Roy G. Barton*, 188 IBLA 331, 334 (2016) ("Under the MLA, BLM has discretion to issue, or not issue, a lease for any given parcel of Federal land available for oil and gas leasing."); *Hawkwood Energy Agent Corp. Venture Energy, LLC*, 189 IBLA 164, 165 (2017) ("BLM's discretion allows it to choose not to lease lands for oil and gas purposes if other considerations, including aesthetic or scenic values, favor other uses.").

3. 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 from recent Utah School and Institutional Trust Lands Administration (SITLA) oil and gas leasing. A 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 (emphases added). "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. 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 from the proposed action, a recent and nearby oil and gas lease sale, and 2008 applications for permit to drill on T10N R13W Section 27 (Hunsaker Wells 1 & 2), as required by NEPA and the agency's NEPA Handbook. At its October 2018 Competitive Mineral Lease Offering, SITLA offered and sold six oil and gas leases on its lands that are interspersed with the two clusters of parcels proposed for lease in the Salt Lake EA. *See* SITLA Competitive Offering – Bid Opening Results (October 29, 2018) (attached). Specifically, six leases (Units 40-45) were sold to Fiik Exploration, LLC in T10N R13W, T9N R13W, T8N R12W, and T8N R11W. With the exception of unit 44 (which has a special greater sage grouse stipulation), none of the leases have any special stipulations to protect the Central Pacific Railroad Grade and its cultural and historic resources, recreation, or visual resources. *See* Competitive Lease Offering, EnergyNet October 2018 SITLA Competitive Offering Tract List, Oil, Gas, & Associated Hydrocarbon (Oct. 2018) (attached). BLM must prepare this cumulative impacts analysis before it finalizes the EA. In addition, and as BLM is aware, in 2008 applications for permit to drill two wells were approved – and surface locations cleared – though the permits were later abandoned in T10N R13W Section 27, the so-called Hunsaker #27-1 and 27-2 wells.

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

SITLA's October 2018 and BLM's March 2019 lease sales are "cumulative" and "similar" actions that pursuant to NEPA must be – but were not – 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.

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, "Non-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).

For similar actions, the Tenth Circuit has held that they "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.,* 305 F.3d at 1182.

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)). Moreover, to determine 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.

Here, as discussed above, BLM has not considered or analyzed the cumulative impacts of SITLA's recent lease sale with the impacts from BLM's March 2019 sale. These leasing decisions will have significant cumulative impacts to the Central Pacific Railroad Grade and its cultural and historic resources, recreation, and visual resources. There may also be significant impacts to greater sage grouse. Further, these leasing decisions share common timing and geography including offering parcels immediately adjacent to each other. *Compare* Salt Lake EA Appendix A (parcel list) *with* Competitive Lease Offering, EnergyNet October 2018 SITLA Competitive Offering Tract List, Oil, Gas, & Associated Hydrocarbon (Oct. 2018). BLM must undertake this required analysis before offering any of the proposed 20 parcels for sale.

4. BLM Must Prepare an Environmental Impact Statement

By BLM's own admission, the sale of the northern block of thirteen leases along and near the Central Pacific Railroad Grade ACEC and cultural and historic resources associated with it may result in significant if not catastrophic adverse effects. *See* Salt

Lake EA at 35-38. *See also id.* at 16-19 (describing the Central Pacific Railroad Grade and the particular section at issue here: "The Promontory Branch … encompasses approximately 90 miles (4.7% of the original grade) *and is the longest contiguous section of the original Transcontinental railroad that remains in existence*.") (citation omitted); *id*. at 36 (acknowledging that impacts from oil and gas development may take decades to reclaim). An environmental impact statement must be prepared before BLM undertakes an irreversible commitment of resources (e.g. the sale of the thirteen non-no surface occupancy leases, parcels 392 through 403). Though the Salt Lake EA contains several references to lease notices (as opposed to lease stipulations), by definition lease notices do not modify the terms of the lease and as such are unenforceable. *See* 43 C.F.R. § 3101.1-3 ("An information notice has no legal consequences, except to give notice of existing requirements, and may be attached to a lease by the authorized officer at the time of lease issuance to convey certain operational, procedural or administrative requirements relative to lease management within the terms and conditions of the standard lease form. Information notices shall not be a basis for denial of lease operations.").

A significance determination 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).

Here, BLM has never analyzed the context and intensity of issuing the March 2019 lease sale parcels when viewed with SITLA recent leasing decision and upcoming lease sales. BLM has not determined whether the impacts from these leasing decisions will significantly impact including, among other things

- 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.

40 C.F.R. § 1508.27(b)(3), (8). *See also* 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.") (attached).

As BLM explains in the Salt Lake EA, the Promontory Branch of the Central Pacific Railroad Grade "is the longest contiguous section of the original Transcontinental railroad that remains in existence." Salt Lake EA at 16. The views from the railroad grade stretch in every direction and on clear days "views across distances exceeding 50

miles are common." *Id.* at 19. The Central Pacific Railroad Grade is listed on the National Register of Historic Places and BLM has designated approximately 90 miles of the Grade as an area of critical environmental concern with the stated goal of providing "overall protection, development a level of public utilization compatible with the resource." *Id*. at 16-17 (citing Management Plan for the Central Pacific Railroad Grade Area of Critical Environmental Concern (1988)). BLM further explains that

> While the CPRR retains all seven aspects of integrity, setting, feeling, and association are particularly important for retaining eligibility (Dodge 1986). Current conditions in the vicinity of the CPRR replicate the conditions prevalent at the time of construction. This provides critical insight for the researcher and casual observer into the challenges and decision-making processes associated with building the railroad. Visitors to the CPRR today can essentially experience the area as it was in 1869.
>
> …
>
> The project lies within the central portion of the Transcontinental Railroad Grade Backcountry Byway approximately from Peplin Mountain to the Terrace townsite. Within this central portion, scenic values and undisturbed quality of the recreational setting are particularly valuable for providing visitors with a vicarious experience of viewing the railroad grade the way it most probably looked in 1869 when first constructed. With the exception of a few small structures on a private parcel in Township 10 North, Range 12 West, Section 7, there are no other human developments such as powerlines, structures, fences, water tanks, troughs, pipelines, towers, or other modern intrusions that are noticeable to visitors on the railroad grade. . . . **In short, the proposed project area lies within the least disturbed and most intact portion of the recreational setting associated with the 1869 Transcontinental Railroad Grade**

Id. at 17-18 (emphasis added). The State of Utah similarly recognizes the undisturbed nature of the Transcontinental Railroad Back County Byway and encourages visitors to experience it for themselves: "The Transcontinental Railroad Back Country Byway represents an epic achievement in American history, linking East to West in the new nation. Today the landscape looks much the same as it did in 1869, but the rails, the towns, and even the lonely rail sidings are gone. Now the visitor can only imagine the

vision and effort of those who struggled to build the nation's first transcontinental railroad." *Available online*: https://utah.com/transcontinental-railroad (last viewed Dec. 17, 2018) (attached).

5. BLM Has Failed to Take a Hard Look at Impacts to Cultural and Historic 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 (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 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].").

As discussed above, 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 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.

BLM's discussion of direct, indirect impacts and cumulative impacts to cultural resources is insufficient. The EA contains only a generalized discussion of potential impacts to cultural resources, noting that "indirect impacts on the CPRR would likely occur. Potential impacts include physical damage to the historic railroad grade and visual and atmospheric, and audible effects to the area around the grade." Salt Lake EA at 35. The EA does not provide any more detail on potential impacts, instead stating that future undertakings will be subject to project-specific NEPA. For instance, BLM does not discuss potential impacts from road construction or improvement affiliated with oil and gas development or increased visitation and attendant impacts resulting from those new or improved roads. BLM also does not discuss, other than in very generalized terms, potential visual or audible impacts to cultural sites. *See id.* at 35-36. The EA does not quantify the area's baseline natural quiet (soundscape) and compare it to the auditory intrusions oil and gas drilling and production may bring, though such quantification is wholly reasonable. *See e.g.*, Kolano and Saha Engineers, *Review of Environmental Assessment UT0808-05-309 Enduring Resources' Rock House Gas Well Proposal* (Nov. 20, 2006) (discussing noise impact analysis study methodology) (attached); Kolano and Saha Engineers, *Review of Environmental Impact Statement UT-070-05-055, West Tavaputs Plateau Natural Gas Full Field Development Plan, DEIS* (May 1, 2008) (describing proper noise impact analysis methodology) (attached). In sum, the EA

merely states that there may be direct and indirect impacts to cultural resources without specifying or quantifying what those impacts may be. These general statements hardly reflect BLM's "thoughtful and probing reflection of possible impacts" associated with oil and gas development.

Further, BLM cannot avoid its "hard look" obligation by referencing future NEPA and lease notices. First, 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, extract, remove, and dispose of oil and gas deposits located under the leased lands," subject to some restrictions. Salt Lake EA at 3. The EA references UT-LN-159 (Central Pacific Railroad Grade Access) which is not enforceable. *See* 43 C.F.R. § 3101.1-3. Second, attaching lease stipulations does not supplant BLM's duty under NEPA to analyze potential impacts to cultural resources. *Cf. Mont. Wilderness Ass'n*, 310 F. Supp. 2d at 1152 ("[L]ike NEPA, NHPA is a procedural statute. . . . Lease stipulations do not accomplish the same goal [as the NHPA], and cannot replace BLM's duties under NHPA."). 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.

B. Leasing the Contested Parcels Violates the NHPA[3]

As BLM is aware, the Central Pacific Railroad Grade – including the proposed lease parcels – is rich in cultural and historic resources. BLM has dual obligations when considering the impacts of its undertakings on cultural and historic resources. Pursuant to Section 106 of the National Historic Preservation Act (NHPA), BLM must "make a reasonable and food faith effort" to identify cultural resources that may be affected by an undertaking. 36 C.F.R. § 800.4(b)(1). Pursuant to NEPA, and as set forth above, 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*, 433 F.3d at 781. BLM must comply with both statutes at the leasing stage.

1. BLM Must Consider Adverse Impacts of its Undertakings on Cultural Resources

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. *See* 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal "undertaking" unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 54 U.S.C. §§ 306108, 300320; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is

[3] By letter dated December 11, 2018, SUWA requested Section 106 (NHPA) consulting party status for the March 2019 oil and gas lease sale, Salt Lake field office. Letter from Laura Peterson, SUWA to Kent Hoffman, BLM Re: *Southern Utah Wilderness Alliance request for Section 106 consulting party status for March 2019 oil and gas lease sale* (Dec. 11, 2018) (attached).

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).

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.

2. Reasonable and Good Faith Effort

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." To satisfy its reasonable and good faith identification efforts, BLM must – at the very least – analyze all of its existing cultural resource information.

[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).

3. Adverse Effects

BLM correctly acknowledges the leasing and development of all 20 parcels is an undertaking that will likely result in adverse effects to the Central Pacific Railroad Grade and historic district. Salt Lake EA at 35-36 ("If development of proposed lease parcels occurs, indirect impacts on the CPRR *would likely occur*.") (emphasis added); *id.* at 35 (explaining that access to lease parcels in the Hogup Mountains – parcels 385 through 391 – may result in adverse effects to the CPRR). Unfortunately, the EA does not identify the area of potential effects, detail the historic properties known to occur within the APE, and make a reasonable and good faith effort to identify presently unknown properties that may be adversely affected. *See* 36 C.F.R. §800.4. BLM also correctly acknowledges that there will likely be adverse effects from leasing and development but does not quantify these effects; rather, the EA only offers generalized statements that setting will be compromised, auditory intrusions may occur, and atmospheric disturbances may take place. *See* Salt Lake EA at 35-36. Though the Section 106 regulations interpret the term "adverse effects" broadly and to include direct, indirect, and *cumulative* effects, BLM makes no serious effort to assess let alone quantify cumulative adverse effects from past, present and reasonably foreseeable oil and gas leasing and development. *See* 36 C.F.R. §800.5(a)(1). As explained above, BLM's repeated invocation of unenforceable lease notices to bolster its inadequate analysis does not demonstrate that the agency has complied with the Section 106 regulations. *See, e.g.*, Salt Lake EA at 35-36 (citing UT-LN-159 and UT-LN-160).

SUWA looks forward to reviewing BLM's cultural resources report as a consulting party and reserves its right to submit additional comments once that report has been provided.

C. Leasing Violates FLPMA's Consistency Requirement

FLPMA requires that BLM conform its authorizations to approved or amended land use plans. *See* 43 C.F.R. §1610.5-3; 43 U.S.C. §1732. "If a proposed action is not in conformance [with existing plans], and warrants further consideration before a plan revision if scheduled, such consideration shall be through a plan amendment in accordance with the provisions of [43 C.F.R.] §1610.5-5." 43 C.F.R. §1610.5-3(c). The Box Elder Resource Management Plan designated the Central Pacific Railroad Grade Area of Critical Concern and BLM has prepared a "Management Plan for the Central Pacific Railroad Grade Area of Critical Environmental Concern" (1988) and the Box Elder Plan Amendment, Bear River Resource Area, Decision Record and Environmental Assessment No. UT-020-94-07 (1998), to guide the management of the Central Pacific Railroad Grade. *See generally* 43 U.S.C. §1712(c)(3) ("In development and revision of land use plans, the Secretary shall give priority to the designation and protection of [ACECs].").

The ACEC Management Plan "establishes management direction for the 90 mile section of discontinued railroad line from Lucin to the western extension of the Golden Spike National Historic Site … By prescribing a comprehensive set of management actions, this plan will provide the grade with the overall resource protection, development, and level of public utilization compatible with the resource." ACEC

Management Plan at 1.[5] "The CPRR grade shall be managed in a manner that will promote: 1. The preservation and protection of the cultural and historic resources." *Id.* at 57. The Plan lists several *management constraints* "which, because of law, policy, regulation or circumstance, influence the development of the management program" set for in the document. *Id.* at 58. Notably, neither oil and gas leasing nor mineral development are identified as a management constraint. *See id.* at 58-60. The Plan further notes that the CPRR grade "is a designated ACEC, on the National Register of Historic Places, and nominated for study as a National Historic Trail," and explains that certain activities – including oil and gas leasing and development – "will seriously hinder management efforts if allowed to continue or develop." *Id.* at 64; *see id.* ("With such special recognition come certain land use constraints and limitations, because not all uses, either existing or potential, are compatible with the purposes for which the listed designations were established or recommended."); *see id.* at 65 (noting Box Elder RMP minerals management decisions). However, the Plan states that BLM's own designation of the CPRR as an ACEC in the Box Elder RMP "is clearly in direct conflict with [visual resource management] class IV designation. *See id.* at 50. "An ACEC designation calls for the maintenance of the existing environment which is compatible with a class II VRM management designation. *See id. See also id*. at 50-51 ("In an attempt to provide and protect existing cultural and historical character along the grade, class II management provides for a retention of the existing character of the landscape."). This conflict is

[5] The 1998 Box Elder Plan Amendment explains that it amended the Box Elder Resource Management Plan to include decisions related to the proper management of past, present, and future land acquisitions. This amendment includes decisions for each resource program in the Box Elder Planning Unit on 47,088 surface acres and 16,326 subsurface acres of acquired lands." Amendment at 1.

evident in the Salt Lake EA which states in no uncertain terms that "the proposed action would result in both long- and short-term visual impacts;" impacts that could last for "a period of many years and possibly decades." Salt Lake EA at 37. In addition, though surface disturbance from oil and gas development would occur outside the ACEC, the Salt Lake EA makes clear that there would be unacceptable, adverse indirect impacts to the ACEC from the proposed action. *See id.* at 35-38.

The bottom line is this: BLM is required by law to prioritize the protection of the Central Pacific Railroad Grade ACEC. However, the oil and gas leasing and visual resource management prescriptions in the 1985 Box Elder RMP conflict with that obligation as evidenced by the Salt Lake EA's candid assessment that this lease sale can reasonably be expected to lead to significant, lasting damage to the ACEC and its resources. The ACEC Management Plan acknowledged that such an outcome was possible and inconsistent with management of the Central Pacific Railroad Grade as an ACEC. A decision by BLM to proceed with the sale of any of the 20 proposed oil and gas lease parcels violates its duty to manage according to its plans and to prioritize the protection of ACECs. BLM should instead defer leasing until it can prepare a plan amendment that would resolve this discrepancy.

SUWA appreciate BLM's consideration of these comments and would be happy to meet and discuss any of the matters discussed herein.

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