Southern Utah Wilderness Alliance ▫ The Wilderness Society ▫ Center for Biological Diversity ▫ Western Watersheds Project ▫ Green River Action Network ▫ Sierra Club ▫ Living Rivers & Colorado Riverkeeper ▫ Waterkeeper Alliance ▫ WildEarth Guardians ▫ Natural Resources Defense Council

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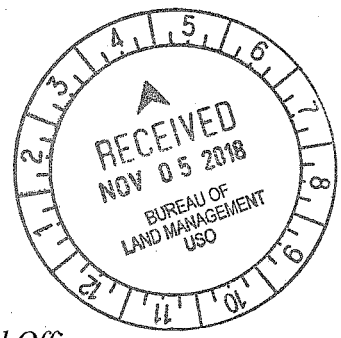
HAND DELIVERED

November 5, 2018



Ed Roberson
Utah State Director
Bureau of Land Management
440 West 200 South, Suite 500
Salt Lake City, UT 84101-1345

Re: Protest of the Utah Bureau of Land Management's, Vernal Field Office, December 2018 Competitive Oil and Gas Lease Sale, Environmental Assessment, DOI-BLM-UT-G010-2018-044-EA

Greetings:

In accordance with 43 C.F.R. § 4.450-2 and 3120, the Southern Utah Wilderness Alliance, The Wilderness Society, Sierra Club, Western Watersheds Project, WildEarth Guardians, Green River Action Network, Living Rivers & Colorado Riverkeeper, Waterkeeper Alliance, Center for Biological Diversity, and Natural Resources Defense Council (collectively, SUWA) hereby timely protest the December 11, 2018 lease sale offering of the following 67 oil and gas lease sale parcels referred to collectively as Protest Parcels.[1]

UT1218-098 (UTU93645), UT1218-105 (UTU93646), UT1218-114 (UTU93647), UT1218-116 (UTU93648), UT1218-120 (UTU93649), UT1218-125 (UTU93650), UT1218-128 (UTU93651), UT1218-137 (UTU93652), UT1218-140 (UTU93653), UT1218-147 (UTU93654), UT1218-150 (UTU93655), UT1218-152 (UTU93656), UT1218-153 (UTU93657), UT1218-154 (UTU93658), UT1218-155 (UTU93659), UT1218-156 (UTU93660), UT1218-157 (UTU93661), UT1218-158 (UTU93662), UT1218-159 (UTU93663), UT1218-160 (UTU93664), UT1218-161 (UTU93665), UT1218-163 (UTU93666), UT1218-166 (UTU93667), UT1218-180 (UTU93668), UT1218-181 (UTU93669), UT1218-182 (UTU93670), UT1218-183 (UTU93671), UT1218-184 (UTU93672), UT1218-185 (UTU93673), UT1218-187 (UTU93674), UT1218-188 (UTU93675), UT1218-189 (UTU93676), UT1218-190 (UTU93677), UT1218-191 (UTU93678), UT1218-192 (UTU93679), UT1218-193 (UTU93680), UT1218-194 (UTU93681), UT1218-195 (UTU93682), UT1218-196 (UTU93683), UT1218-209 (UTU93684), UT1218-210 (UTU96385), UT1218-215 (UTU96386),

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[1] Unless otherwise noted, each argument set forth herein applies to all Protest Parcels.

UT1218-219 (UTU96387), UT1218-220 (UTU96388), UT1218-221(UTU96389), UT1218-222 (UTU96390), UT1218-223 (UTU96391), UT1218-224 (UTU96392), UT1218-225 (UTU96393), UT1218-233 (UTU96394), UT1218-234 (UTU96395), UT1218-235 (UTU96396), UT1218-236 (UTU96397), UT1218-237 (UTU96398), UT1218-238 (UT96399), UT1218-265 (UTU93716), UT1218-267 (UTU93717), UT1218-288 (UTU93718), UT1218-294 (UTU93719), UT1218-297 (UTU93720), UT1218-313 (UTU93725), UT1218-350 (UTU93736), UT1218-352 (UTU93737), UT1218-353 (UTU93738), UT1218-354 (UTU93739), UT1218-355 (UTU93740) , UT1218-357 (UTU93741).

See generally BLM, December 2018 Competitive Oil and Gas Lease Sale, Vernal Field Office, DOI-BLM-UT-G010-2018-0044-EA (Sept. 2018) (EA). For the reasons discussed in SUWA's scoping comments and the reasons discussed *infra*, BLM's decision to sell and issue the Protest Parcels violates numerous federal laws including the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, *et seq.*; the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101 *et seq.*; the Administrative Procedures Act (APA), 5 U.S.C. §§ 551-59, 701-06, and the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, and the regulations and policies that implement these laws.[2]

I. BLM Failed to Provide Meaningful Opportunity for Public Participation Under NEPA and FLPMA.

Public participation in review of agency actions is foundational to NEPA, FLPMA and BLM's oil and gas leasing policy, assisting the agency with conducting more thorough, efficient and effective environmental review. A key, overarching purpose of NEPA is to increase public knowledge and participation in agency decision-making. NEPA requires that agencies make "*diligent efforts* to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a) (emphasis added); *see also id.* § 1500.1(b) ("NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). FLPMA similarly requires public involvement in public land management decisions. *See e.g.*, 43 U.S.C. § 1739(e) ("In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures … to give the … public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, public lands."); *id.* § 1712(a) & (h).

This lease sale was conducted pursuant to BLM Instruction Memorandum (IM) 2018-034, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews (Jan 31, 2018). IM 2018-034 replaced IM 2010-117, Oil and Gas Leasing Reform, Land Use Planning and Lease Parcel Reviews (May 17, 2010). IM 2018-034 purports to "streamline the leasing process" by severely limiting opportunities for public involvement. In this lease sale, BLM provided only a 15 day "scoping period" and a 10 day protest period for the parcels at issue in

[2] SUWA herein incorporates SUWA et al., Scoping Comments on the December 2018 Lease Sale (July 31, 2018) (attached) and CBD et al, Utah December 2018 Scoping Comments (July 31, 2018) (attached).

this protest. BLM did not release any draft environmental analyses for public review and comment. This truncated opportunity for public participation is illegal.

On September 21, 2018, the Chief U.S. Magistrate Judge Bush of the District of Idaho issued a Memorandum Decision and Preliminary Injunction in *Western Watersheds Project v. Zinke*, Case No. 1:18-cv-00187-REB (D. Idaho Sept. 21, 2018) (attached). That decision enjoins and restrains BLM from implementing certain specified provisions of IM 2018-034 for fourth quarter/December 2018 and future lease sales "contained in whole or in part within the Sage-Grouse Plan Amendments' recognized 'Planning Area Boundaries." *W. Watersheds Project*, at 50.

Although the Protest Parcels fall outside designated greater sage-grouse habitat, the court's reasoning applies with equal force to those parcels, including the unlawful requirements of IM 2018-034.

In his Memorandum Decision and Order, Judge Bush held that the plaintiffs are likely to succeed on the merits of both their substantive and procedural challenges to IM 2018-034 under FLPMA, 43 U.S.C. §§ 1712(a) & (h), 1739(e), NEPA 43 U.S.C. § 4332(C), 40 C.F.R. § 1506.6, and theAPA5 U.S.C. § 706(2). The court reviewed BLM's IM 2018-034 and concluded it constitutes final agency action with respect to several critical elements of the BLM's oil and gas leasing process, including (a) BLM decisions whether or not to permit public involvement, (b) length of public review and comment, and (c) length of public protests of oil and gas lease sales. *W. Watersheds Project*, at 23-34. As the court noted, "the burden of such constraints upon public participation and compressed protest periods falls most heavily upon members of the public, as those who have nominated potential lease parcels and BLM have had far more time to evaluate and consider the details of such parcels." *Id.* at 25.

In reviewing the plaintiff's claims, and BLM's defenses, the court determined that the plaintiffs are likely to succeed on the merits of the claim that IM 2018-034's constraints on public participation are (1) procedurally invalid, because BLM imposed binding requirements for oil and gas leasing on BLM-administered lands and minerals without required public notice and comment, *id.* at 33-34, and (2) that IM 2018-034 "improperly constrains public participation in BLM oil and gas leasing decisions," *id.* at 36. The Vernal field office's procedures for the December 2018 oil and gas lease sale, including the Protest Parcels, have followed the very same provisions of IM 2018-034 that the court held to be unlawful.

Judge Bush concluded that the plaintiffs are likely to succeed on the fundamental question of whether BLM's statutory obligations require a minimum level of public involvement in leasing decisions with irrevocable, long-lasting consequences for the lands and minerals BLM manages on behalf of the public, and that the IM 2018-034 procedures fall short of those obligations. The court found:

> It is well-settled that public involvement in oil and gas leasing is required under FLPMA and NEPA. . . . On a very fundamental level, it strains common sense to see how these requirements are fulfilled when just comparing IM 2018-034 to IM 2010-117. That is, how can it be said that IM 2018-034 provides the required public participation 'to the fullest extent possible' and 'to the extent practicable,' when it is dramatically more restrictive (at least on the issue of public participation) than the previously-established IM (IM 2010-117) it only recently replaced?

W. Watersheds Project, at 36-37. The court went on to state:

> IM 2018-034 jettisoned prior processes, practices, and norms in favor of changes that emphasized economic maximization to the detriment if not outright exclusion of pre-decisional opportunities for the public to contribute to the decisionmaking process affecting the management of public lands. That choice was problematic when considering the Congressional directives for public involvement contained in FLPMA and NEPA and the apparent shortcomings of IM 2018-034 in allowing for public participation in BLM oil and gas leasing decisions.

Id. 40-41. Reviewing the record, the court further concluded that:

> in this case, the record contains significant evidence indicating that BLM made an intentional decision to limit the opportunity for (and even in some circumstances to preclude entirely) any contemporaneous public involvement in decisions concerning whether to grant oil and gas leases on federal lands. . . . The evidence illustrates that the intended result of the at-issue decisions was to dramatically reduce and even eliminate public participation in the future decision-making process. Doing so certainly serves to meet the stated "purpose" of IM 2018-034 – that is, reducing or precluding public participation will "streamline the leasing process to alleviate unnecessary impediments and burdens, to expedite the offering of lands for lease . . . ." *Yet, the route chosen by BLM to reach that destination is problematic because the public involvement requirements of FLPMA and NEPA cannot be set aside in the name of expediting oil and gas lease sales. The benefits of public involvement and the mechanism by which public involvement is obtained are not 'unnecessary impediments and burdens*."

Id. at 41 (emphasis added). Because of the court's clear legal conclusion that BLM, through IM 2018-034's procedures, unlawfully eliminated required minimum levels of public involvement in mineral leasing decisions, any subsequent leasing decisions carried out under the procedures of IM 2018-034 are unlawful and any leases issued subject to cancellation. As the court noted, "In not being allowed to participate at the leasing decision stage, or in having to hurriedly clamber to do so because of IM 2018-034's

changes because of the limited time frame and other constraints upon public participation, *oil and gas leases have been (and will be) issued without the full benefit of public input*." *Id.* at 42-43 (emphasis added). Although the court, in the balancing the hardships at issue in that case declined to vacate third-quarter oil and gas lease sales that have already taken place, *id.* at 46-49, BLM is now fully on notice of the serious legal deficiencies inherent in the restricted public involvement procedures of IM 2018-034.

In BLM's haste to implement "energy dominance" policies and to curtain or eliminate public involvement in lease sale decisions, the BLM and Department of Interior ran afoul of NEPA, FLPMA, and the APA in both its promulgation of IM 2018-034, and by unlawfully employing its procedures for this lease sale. Past participation in landscape-scale planning decisions, or the possibility of subsequent participation in permitting decision once irrevocable commitments of development rights have already been conveyed, are no substitute for the legally-required duty on BLM to provide meaningful public participation in leasing decisions.

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.

II. Leasing is the Point of Irretrievable Commitment of Resources

It is critical that BLM undertake satisfactory comprehensive NEPA analysis before deciding to offer, sell and issue the Protest Parcels; subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. Unfortunately, BLM has not fully analyzed potential irreversible and irretrievable impacts that could flow from its leasing decision. The sale of leases without no surface occupancy (NSO) stipulations represents a full and irretrievable commitment of resources. BLM cannot make such a commitment without adequate analysis:

> BLM regulations, the courts and [Interior Board of Land Appeals ("Board")] precedent proceed under the notion that the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease.

S. Utah Wilderness Alliance, 159 IBLA 220, 241 (2003); *see also Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004) ("Agencies are required to satisfy the NEPA 'before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.'" (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988))). Thus, in *Southern Utah Wilderness Alliance*, the IBLA explained that

> [t]he courts have held that the Department must prepare an [environmental impact statement ("EIS")] before it may decide to issue such "non-NSO" oil and gas leases. The reason . . . is that a "non-NSO" lease "does not reserve to the

> government the absolute right to prevent all surface disturbing activities" and thus its issuance constitutes "an irretrievable commitment of resources" under section 102 of NEPA.

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

As the Board has recognized, "[i]f BLM has not retained the authority to preclude *all* surface disturbance activity, then the decision to lease is itself the point of 'irreversible, irretrievable commitment of resources' mandating the preparation of an EIS.'" *Union Oil Co. of Cal.*, 102 IBLA 187, 189 (1988) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983)) (emphasis added); *see also S. Utah Wilderness Alliance*, 159 IBLA at 241-43 (same); *Sierra Club, Or. Chapter*, 87 IBLA 1, 5 (1985) (finding that because issuance of non-NSO oil and gas leases constitutes an irreversible commitment of resources, BLM cannot defer preparation of an EIS unless it either retains authority to preclude development or issues the leases as NSO).

BLM itself identifies lease issuance as the point of irretrievable commitment of resources:

> The BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities. *By law, these impacts must be analyzed before the agency makes an irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance.*

BLM, H-1624-1Planning for Fluid Mineral Resources § I.B.2, at I-2 (Jan. 28, 2013) (emphasis added) (attached); *see also S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006) ("In sum, 'in the fluid minerals program, the point of irretrievable and irreversible commitment occurs at the point of lease issuance." (quoting *Pennaco*, 377 F.3d at 1160) (internal alterations omitted)).

In the present case, BLM has failed to analyze all reasonable, foreseeable potential impacts of oil and gas development from the above-listed leases and instead has unlawfully delayed that analysis to a later date, as discussed below.

III. BLM Violated NEPA

a. NEPA Background

NEPA, 42 U.S.C. § 4321 *et seq.*, is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The statute has two primary aims. First, it "places upon federal agencies the obligation 'to consider every significant aspect of the environmental impact of a proposed action.'" *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1207 (10th Cir. 2002) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983)). Second, it "ensures that an agency will inform the public that it has considered environmental concerns in its decision-making process." *Id.* "Simply by focusing the agency's

attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA does not command a particular result, but instead "prescribes the necessary process by which federal agencies must take a 'hard look' at the environmental consequences of the proposed course of action." *Pennaco*, 377 F.3d at 1150 (internal citations omitted). NEPA requires that an agency prepare a detailed environmental impact statement (EIS) before undertaking any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If an agency is unsure whether it needs to prepare an EIS, it may instead prepare an environmental assessment (EA) to determine whether an action may have significant impacts. 40 C.F.R. §§ 1501.4(b), 1508.9(a)(1). If not, the agency can issue a Finding of No Significant Impact (FONSI) and Decision Record that concludes the EA process.

Regardless of whether an agency prepares an EIS or an EA, it must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved resource conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *see* 40 C.F.R. § 1508.9(b) (an EA "[s]hall include brief discussions … of alternatives as required by section 102(2)(E)"); *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) ("A properly-drafted EA must include a discussion of appropriate alternatives to the proposed project."), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008). The alternatives analysis is a stand-alone requirement of NEPA separate and apart from the question of whether a proposal's effects warrant an EIS or a FONSI. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004).

b. 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, *Methow Valley*, 490 U.S. at 350, 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." *Flowers*, 359 F.3d at 1277. 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*, 302 F.3d at 1122.

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 at1120 (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.*, 305 F.3d at 1172.

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) (attached).

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).

Here, BLM analyzed only the extreme lease-nothing or lease everything alternative. The agency did not sufficiently consider any alternative that fell between those two extremes. *See* EA at 9-10. SUWA recommended reasonable, feasible alternatives that fall within those two extremes, including: (1) leasing only outside of BLM-identified lands with wilderness characteristics (LWC); (2) applying "No-surface occupancy" stipulations on BLM-identified LWC; and (3) requiring phased development ensuring lessees first explore and develop leases on land outside of BLM-identified LWC. *See* SUWA et al., Scoping Comments on Utah BLM December 2018 Lease Sale 20-21 (July 31, 2018) (attached).

BLM's Rejection of SUWA's Proposed Alternatives was Arbitrary and Capricious.

BLM rejected SUWA's proposed alternatives without undertaking any analysis, offering the following rationales: (1) SUWA's leasing outside of BLM-identified LWC alternative is subsumed in a no leasing alternative that was considered and rejected in the 1980 Vernal Environmental Analysis Record; and (2) SUWA's "no-surface occupancy," "phased development-leasing" and no leasing in BLM-identified LWC alternatives are outside the scope of the EA and/or would require a plan amendment. EA at 10-11. BLM's rejection of these proposed alternatives is arbitrary, capricious and not in accordance with the law.

SUWA's No Leasing in BLM-Identified LWC Alternative is Different than the Vernal EAR's No Leasing Alternative

SUWA's no leasing in BLM-identified LWC alternative is neither subsumed within the Vernal EA's no leasing alternative nor was it adequately analyzed in the 1980 Vernal Environmental Analysis Record UT-080-06-28. First, SUWA's proposed alternative is distinct from a no leasing alternative. It would expressly allow the sale of at least 20 parcels within the Vernal field office. *See* SUWA Map_BLM-Identified LWC (attached); *N. M. ex rel Richardson*, 565 F.3d at 711 (consideration of significantly distinguishable alternatives required). It would only preclude leasing in those parcels where BLM has identified wilderness characteristics. Second, SUWA's alternative could not have been properly analyzed in a nearly 40 year old environmental analysis. In 1980, BLM had not identified any of the lands at issue as lands with wilderness characteristics. *See* EA 16-17 (noting that most of the Vernal lands with wilderness characteristics were inventoried in 1999 or later). BLM's 1980 analysis simply did not address the specific wilderness character information it now possesses; that information did not exist at that time. *See, e.g., S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1255 (D. Utah 2006) (explaining that if the existing NEPA analysis does not adequately cover the proposed action BLM cannot offer lease parcels "until additional NEPA documentation is prepared"). Accordingly, BLM cannot rely on that outdated analysis to comply with its duty to analyze a reasonable range of alternatives.

Furthermore, whether a proposed alternative complies with the *governing land use plan* is immaterial. *See N.M. ex rel. Richardson*, 565 F.3d at 709-11 (correct analysis is whether a particular alternative is consistent with FLPMA). An alternative must instead satisfy the "rule of reason and practicality." BLM failed to cite – nor can it – any provision in the RMPs or caselaw to support the assertion that FLPMA somehow restricts BLM's ability to manage the pace and nature of oil and gas development on public lands, including requiring mitigation measures or phased development. To the contrary, FLPMA and the MLA afford BLM broad authority over the management of public lands, as recognized for decades by both the Board and federal courts. *See, e.g., Roy G. Barton*, 188 IBLA 331 (2016); *Hawkwood Energy Agent Corp. Venture Energy, LLC*, 189 IBLA 164 (2017); *N.M. ex rel. Richardson*, 565 F.3d at 709-11.

Because BLM's rationales for rejecting SUWA's alternatives are unsupported and arbitrary, it must analyze those alternatives that are reasonable and feasible.

Each of SUWA's Proposed Alternatives Satisfy BLM's Stated Purpose and Need for the Lease Sale

"Reasonableness is judged with reference to an agency's objectives for a particular project." *N.M. ex rel. Richardson*, 565 F.3d at 709. An alternative is reasonable if it satisfies the goals of the project as stated in the NEPA document's purpose and need statement. *Id.* at 709 & n. 30; *Davis*, 302 F.3d at 1120. BLM's stated purpose and need for the lease sale is exceedingly broad: "to respond to the nominations or expressions of interest for oil and gas leasing on specific federal mineral estate" and comply with BLM's responsibility under the MLA and FLPMA. EA at 6. Each of SUWA's proposed alternatives would allow BLM to satisfy this broad purpose and need. They would allow BLM to both *respond to* nominations or expressions of interest and comply with the agency's responsibilities under the MLA and FLPMA. Further, each alternative would allow BLM to minimize impacts to sensitive resources like wilderness characteristics. The purpose and need statement does not require that the agency issue specific parcels or even a certain number of parcels. Nor does it preclude BLM from imposing stipulations to protect other resources.

Each of SUWA's Alternatives are Within BLM's Statutory Mandate under FLPMA.

FLPMA grants BLM broad authority and discretion to implement SUWA's proposed alternatives. FLPMA provides that BLM should manage lands "on the basis of multiple use and sustained yield." 43 U.S.C. § 1701(a)(7). "Multiple use requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes without the infliction of permanent damage." *N.M. ex rel. Richardson*, 565 F.3d at 710 (citations omitted). "Development is a *possible* use, which BLM must weigh against other possible uses—including conservation to protect environmental values, which are best assessed though a NEPA process." *Id.* (emphasis in original). SUWA's alternatives, which would allow leasing and development of mineral resources and protect sensitive lands are clearly within BLM's statutory mandate under FLPMA. BLM makes no argument that this is not the case.

Each of SUWA's Proposed Alternatives are Reasonable and Feasible.

Pursuant to the rule of reason and practicality, an agency need not fully analyze a facially reasonable alternative that "it has in good faith rejected as too remote, speculative, or … impractical or ineffective." *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 432 (10th Cir. 1996). BLM does not dispute that SUWA's proposed alternatives are feasible. EA at 10-11. Nor could it. As discussed above, BLM has the flexibility under both FLPMA and the MLA to decide whether to lease and under what conditions. BLM's description of its decision to be made in the EA – "whether to lease the nominated parcels and, if so, under what terms" – underscores both the flexibility and the authority BLM maintains in the lease sale context. EA at 6. It can choose whether to lease certain parcels and condition leasing on more protective terms. *Id.* In addition, BLM routinely conditions its authorizations related to oil and gas exploration and development on public lands through the use of protective measures such as phased development. *See, e.g.*, Ken Kreckel, Feasibility of Utilizing a Phased Development Approach to the Horse Bench Natural Gas Development, Environmental Assessment, DOI-BLM-UT-G020-2015-0011-EA (March 2018) (explaining the feasibility of requiring a phased development

approach and highlighting several instances where BLM required such an approach) (attached). Mr. Kreckel, a professional geoscientist with decades of experience in oil and gas leasing, has prepared a report demonstrating that developing certain BLM-identified LWC with non-surface occupancy is indeed feasible in this lease sale. *See* Ken Kreckel, Feasibility of Developing Tracts in the December 2018 Utah Federal Oil and Gas Lease Sale with No Surface Occupancy (Nov. 2018) (attached). SUWA incorporates Mr. Kreckel's report herein.

BLM failed to analyze a reasonable range of alternatives as required by NEPA and the agency's rationales for failing to do so are arbitrary and capricious.

c. BLM Failed to Take a Hard Look at Direct, Indirect and Cumulative Impacts of the Lease Sale

NEPA requires that BLM take a "hard look" when it analyzes and evaluates the impacts of proposed projects "utilizing public comment and the best available scientific information." *Robertson*, 490 U.S. at 350. Moreover, NEPA requires that federal agencies carefully consider relevant "detailed information concerning significant environmental impacts" and share that information with the pubic in the environmental assessment. *See Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). An environmental assessment's general statements about "possible" effects and "some risk" do not constitute a "hard look" absent a showing of 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). NEPA requires agencies to analyze direct, indirect and cumulative impacts. Indirect impacts are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Indirect impacts may include "related effects on air and water and other natural systems, including ecosystems." *Id.* Cumulative impact is "the impact on past, present, and reasonably foreseeable future actions regardless of what agency … or person undertakes such other actions." *Id.* § 1508.8.

i. BLM Failed to Take a Hard Look at Impacts to Air Quality

SUWA herein submits and incorporates in its entirety, including exhibits referenced therein, the comments prepared on behalf of SUWA by Ms. Megan Williams, an air quality expert. *See generally* Megan Williams, *Comments on the Air Quality Analysis for the December 2018 Competitive Oil and Gas Lease Sale Environmental Assessment (EA) in the Vernal Field Office, Dated September 2018, DOI-BLM-UT-G010-2018-0044-EA* (Nov. 2, 2018) (comments and attachments thereto attached). Ms. Williams explains in detail numerous flaws in BLM's pre-leasing analysis, including but not limited to:

- BLM failed to assess direct and indirect impacts from development of the Protest Parcels;

- BLM failed to provide a comprehensive assessment of the environment and public health impacts from an increase in air pollution;

- High background levels of air pollution in the area mean that even small increases in pollution could have significant impacts on overall air quality in the region;

- The emission inventory in the EA is incomplete and potentially underestimates emissions from the leasing the Protest Parcels;

- BLM relied on impact analysis from the Monument Butte Oil and Gas Development Project Final EIS which may not reflect development scenarios for the Protest Parcels;

- BLM's air quality analysis does not assure the prevention of significant deterioration for air quality;

- The EA does not sufficiently address greenhouse gas emissions and potential climate change impacts.

ii. BLM Failed to Take a Hard Look at GHG Emission Impacts to Climate Change

NEPA requires a more searching analysis than merely disclosing the amount of pollution. Rather, BLM must examine the "ecological[,]… economic, [and] social" impacts of those emissions, including an assessment of their "significance." 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b). Here, BLM failed to take a hard look at and meaningfully analyze potential impacts to climate change, claiming that such analysis is speculative and difficult to analyze. *See* EA at 31-32.

BLM's explanations for why it cannot calculate GHG emissions and/or analyze potential impacts to climate change have been repeatedly rejected by federal courts. *See San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1240-50 (D. N.M. 2018) (BLM's reasoning for not analyzing indirect GHG emissions was "contrary to the reasoning in several persuasive cases that have determined that combustion emissions are an indirect effect"); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, 2018 WL 1475470 *13 (D. Mont. March 26, 2018) ("In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs."); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 2018 WL 5043909 *6 (D. Colo. October 17, 2018) ("BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP. BLM must quantify and reanalyze the indirect effects that emissions resulting from combustion of oil and gas in the plan area may have on GHG emissions."); *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (stating that GHG emissions from the combustion of gas "are an indirect effect of authorizing this [pipeline] project, which [the agency] could reasonably foresee"); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 2017 WL 5047901 *3 (D. Mont. Nov. 3, 2017) (stating that indirect effects from coal trains includes "the effects of the estimated 23.16 million metric tons of [GHG] emissions the Mining Plan EA concluded would

result from combustion of the coal that would be extracted from the mine"); *Dine Citizens Against Ruing Our Env't v. U.S. Office of Surface Mine Reclamation & Enforcement*, 82 F.Supp. 3d 1201, 1213 (D. Colo. 2015) ("find[ing] that the coal combustion-related impacts of [the mine's] proposed expansion are an 'indirect effect' requiring NEPA analysis").

In *San Juan Citizens Alliance*, the court set aside BLM's leasing decision for failing to analyze downstream emissions from oil and gas resources produced from the issued leases. 326 F. Supp. 3d at 1232. The court also found that BLM violated NEPA when it failed to analyze the impacts of GHG emissions to climate change. *Id.* This holding is at direct odds with BLM's assertion in the Vernal EA that it cannot analyze GHG emissions at the leasing stage. EA at 30.

The failure to analyze potential methane emissions is especially concerning in light of its extremely high global warming potential. NEPA requires a "full and fair disclosure of significant environmental impacts," 40 C.F.R. § 1502.1, and federal agencies must rely on "[a]ccurate scientific analysis," which is "essential to implementing NEPA." *Id.* NEPA requires consideration of both short- and long-term effects." *Id.* § 1508.27(a). Here, BLM entirely fails to analyze methane emissions and instead attempts to avoid its "short- and long-term" NEPA analysis obligation by arguing that it is appropriate – at most – to analyze only the 100 year estimated global warming potential. *See* EA at 15. The result is an incomplete analysis of methane's much greater warming potential in the near-term. BLM must analyze methane emission impacts using both the 20- and 100-year time horizons. The 20-year time period has a significantly higher global warming potential, as recognized by the EPA:

> Because all [global warming potentials (GWP)] are calculated relative to CO_2, GWPs based on a shorter timeframe will be larger for gases with lifetimes shorter than that of CO_2, and smaller for gases with lifetimes longer than CO_2. For example, [methane], which has a short lifetime, *the 100-year GWP of 28-36 is much less than the 20-year GWP of 84-87*.

EPA, Greenhouse Gas Emissions, Understanding Global Warming Potentials, https://epa.gov/ghgemissions/understanding-global-warming-potentials (last visited Nov. 5, 2018) (emphasis added). The failure to take this into account undermines the completeness of the global warming potential analysis. 40 C.F.R. § 1500.1(b); *id.* § 1502.24. 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.24. BLM must provide a "full and fair discussion" as required by NEPA. 40 C.F.R. § 1502.1. The inclusion of current GWPs for both the 20- and 100- year time horizons would have allowed members of the public and interested parties to evaluate this information and submit written comments where appropriate, and spur further analysis as needed. *See W. Org. of Res. Councils*, 2018 WL 1475470 at *16. Without all the relevant information, BLM cannot "foster informed decision-making." *Id*. (citing *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

BLM's omission of impacts analysis related to methane is further troubling based on the findings of a recent study which concluded that the federal government, has underestimated the amount of methane emitted by oil and gas operations by nearly sixty percent. *See* Envtl. Defense Fund, *New Study Finds U.S. Oil and Gas Methane Emissions Are 60 Percent Higher Than EPA Report* (June 21, 2018), https://edf.org/media/new-study-finds-us-oil-and-gas-methane-emissions-are-

60-percent-higher-epa-reports-0. The new study estimates that the current methane leak rate from oil and gas operations is 2.3 percent of gross U.S. gas production, compared to EPA's inventory estimate of 1.4 percent. *Id.* The study explains that although the percentages may appear small "the volume represents enough natural gas to fuel 10 million homes – lost gas worth an estimated $2 billion." *Id.* The prior estimate relied on by EPA was based primarily on "data collected in the early 1990s, pre-dating industry's increased use of horizontal drilling and hydraulic fracturing." Envtl. Defense Fund, *Measuring Methane: A Groundbreaking Effort to Quantify Methane Emissions from the Oil and Gas Industry* at *3 (attached). Three research findings came about as a result of this five-year study: (1) methane emissions are significant across the whole supply chain; production of oil and gas accounts for the largest share, (2) inventories systematically underestimate overall emissions, and (3) emissions from unpredictable, widespread sources are responsible for much, but not all, of the discrepancy. *Id.* at * 5. On the first point, the study concluded:

> [P]roduction and gathering emissions were found to be much higher than reported. In particular, gathering stations were found to be a major source of overlooked emissions. For well pads, site-level measurements indicate significant emissions have gone unreported. Upstream emissions are not limited to natural gas wells or hydraulically fractured wells – in fact, emissions from conventional and unconventional oil-producing wells also appear to be high.

Id. *6. Regarding the second finding, the study demonstrated that the typical "bottom-up" approach – which is similar to the approach used by BLM in past leasing documents – when used in isolation from other methods, "can bias the emission estimates low." *Id.* at *7.

> It is difficult to accurately quantify total emissions at a given site based on only equipment-level measurements as sources may be overlooked, unsafe to measure, or exceed the maximum emission rate of the measurement technique.

Id.

In addition, the volume of potential oil and gas from these lease parcels is knowable and calculating quantitative estimates of the direct emissions impact from development of these lease parcels is also possible. Numerous greenhouse gas calculation tools exist to develop lifecycle analyses, particularly for fossil fuel extraction, operations, transport and end-user emissions.[3] For example, one available tool is a peer-reviewed carbon calculator and lifecycle greenhouse gas emissions model developed by EcoShift consulting in 2015.[4] Utilizing this calculator and BLM's own potential volume data for this lease sale, the estimated oil volume of 6.748047 mmbbl represents lifecycle greenhouse gas emissions of up to 2,285,649.58 metric tons of CO2e and the estimated gas volume of 177.418404 Bcf represents lifecycle greenhouse gas emissions of up to 11,199,007.91metric tons of CO2e. By segmenting the total greenhouse gas emissions impact of

[3] *See* Council on Environmental Quality, Revised draft guidance for greenhouse gas emissions and climate change impacts (2014), *available at:* https://ceq.doe.gov/current_developments/GHG-accounting-tools.html.
[4] [1] *See* Ecoshift Consulting, The potential Greenhouse Gas Emissions of U.S. Federal Fossil Fuels, Center for Biological Diversity and Friends of the Earth (2015), *available at:* http://www.ecoshiftconsulting.com/wp-content/uploads/Potential-Greenhouse-Gas-Emissions-U-S-Federal-Fossil-Fuels.pdf.

the state-wide December sale among the various NEPA documents in each field office, the cumulative impact of this lease sale on climate change is short-changed.

BLM fails to meet its obligation to analyze the cumulative impacts on the climate of the past, present, and reasonable foreseeable oil and gas development in the project area. NEPA requires a detailed analysis of "cumulative" effects, which are "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. §§ 1508.7, 1508.25(c). Analysis of cumulative impacts protects against "the tyranny of small decisions," Kern v. BLM, 284 F.3d 1062, 1078 (9th Cir. 2002), by confronting the possibility that agency action may contribute to cumulatively significant effects even where impacts appear insignificant in isolation. 40 C.F.R. §§ 1508.7, 1508.27(b)(2). Here, BLM violated this requirement by failing to consider the reasonable foreseeable incremental and total contribution of greenhouse gas emissions from oil and gas development in the planning area when added to other relevant past, present and reasonably foreseeable BLM-managed fossil-fuel extraction emissions as well as GHG emissions from non-federal sources within the CFO planning area.

In its guidance to federal agencies on how to address GHG emissions and climate change in NEPA reviews, the Council on Environmental Quality tackles the issue of incremental emissions head on.

CEQ recognizes that the totality of climate change impacts is not attributable to any single action, but are exacerbated by a series of actions including actions taken pursuant to decisions of the Federal Government. Therefore, a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA. Moreover, these comparisons are also not an appropriate method for characterizing the potential impacts associated with a proposed action and its alternatives and mitigations because this approach does not reveal anything beyond the nature of the climate change challenge itself: the fact that diverse individual sources of emissions each make a relatively small addition to global atmospheric GHG concentrations that collectively have a large impact. Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 FR 51866, August 5, 2016.

CEQ's description of the nature of climate change makes it clear that framing the analysis as the relationship between project-level emissions and project area climate impacts is nonsensical. What really matters is the incremental contribution of project emissions to cumulative global emissions and that fact that these emissions will leads to a worsening of climate impacts not only globally but also in the project area.

The resources of this area will be increasingly and severely compromised by climate change, and these impacts will compounded by land uses envisioned by the plan. Yet BLM fails to make any connection between the climate impacts that it has identified and the fact that oil and gas development will lead to significant GHG emissions that will drive further climate change. BLM is obligated to consider alternatives that would minimize or halt further leasing of lands for oil and gas extraction to reduce the end-use GHG emissions that threaten our climate.

iii. BLM Failed to Take a Hard Look at Impacts to the White River Natural Area.

BLM completely failed to analyze potential indirect and cumulative impacts to the White River Natural Area. Parcels 152, 153, 154 and 155 are within the White River Natural Area. EA at 29. As BLM notes, the White River Natural Area is managed subject to an NSO stipulation. *Id.* While NSO stipulations would avoid direct impacts to the White River Natural Area, leasing would likely lead to indirect and/or cumulative impacts to the area. For instance, the sights and sounds from reasonably foreseeable development immediately outside the Natural Area would likely impact both naturalness and opportunities for solitude. BLM makes no attempt to analyze either these indirect impacts or cumulative impacts. *Compare* EA at 27 (identifying that environmental impacts include "direct and indirect impacts" *with* EA at 29 (no discussion on indirect impacts to White River Natural Area). *See also* EA at 40 (no substantive discussion of cumulative impacts from reasonably foreseeable oil and gas development outside the Natural Area to resources within it); BLM Brochure, *Floating the White River* (attached) (noting Goblin City hiking trail and stating "[t]his is one of the quiet places, where solitude and a sense of adventure are still very much part of the outdoor experience."). The agency's failure to undertake that basic analysis violates NEPA.

iv. BLM Failed to Take a Hard Look at Impacts to Water Quality

BLM failed to take a hard look at direct, indirect and cumulative impacts to water quality as required by NEPA. *See, e.g.*, *San Juan Citizens Alliance*, 326 F. Supp. 3d at 1252-55. BLM acknowledges that at least some of the wells resulting from this lease sale will be developed via hydraulic fracturing (fracking). *See* EA App. F, at 2. BLM further explains that hydraulic fracturing has "resulted in a dramatic increase in domestic oil and gas production nationally" but "along with production increase, [fracking] activities are suspected of causing contamination of fresh water by creating fluid communication between oil and gas reservoirs and aquifers." *Id.* App. F, at 3. Despite this recognized and reasonably foreseeable threat to water resources, BLM does not analyze potential impacts to water quality. *See* EA App. E at 10-13 (identifying water resources as present but not impacted to a degree warranting analysis in the text of the EA). BLM attempts to avoid its hard look responsibilities under NEPA by stating that it cannot analyze potential impacts until the agency receives applications for exploration or development. EA App. F at 10, 13.

"Taking a hard look includes considering all foreseeable direct and indirect impacts . . . [and] involve a discussion of adverse impacts that does not improperly minimize negative side effects." *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012) (citing *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006)) (internal quotations omitted). NEPA requires "reasonable forecasting," which includes the consideration of "reasonably foreseeable future actions . . . even if they are not specific proposals" *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (citation omitted). "Because speculation is . . . implicit in NEPA," agencies may

not "shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *Id*.

Here, the EA contains no information on the reasonably foreseeable impacts from fracking to either groundwater or surface water quality. With regard to groundwater, BLM does not provide any information about the baseline groundwater quality within the parcels available for lease. EA App. F. at 10. Nor does it acknowledge that there could be potential direct, indirect or cumulative effects to that groundwater quality or discuss mitigation measures or plans to monitor groundwater quality. *See id.*; *see also San Juan Citizens Alliance*, 326 F. Supp. 3d. at 1255 (upholding BLM's water quality analysis only because it conducted basic analysis regarding the current state of the groundwater, potential risks from leasing and mitigation measures). BLM fails to provide even the most basic analysis, and in fact failed to analyze *any* potential impacts to groundwater quality despite that information on potential impacts is available. *See, e.g.*, EPA, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States, EPA-600-R-16-236Fa ES-32 (Dec. 2016) (attached) (acknowledging potential impacts to water quality from hydraulic fracturing).

BLM similarly fails to analyze potential impacts to surface water quality despite that there are several lease parcels near and within the watersheds of waters the state of Utah has designated as impaired. Bitter Creek Lower, which is near parcels 157, 158, 160, and 288 is on the Utah's impaired water list due to boron, selenium, temperature, and total dissolved solids (TDS). *See* Utah DEQ, Final 2016 Integrated Report: Rivers, Streams, Seeps, and Canals 305(b) and 303(d) 36/49 (Utah 303(d) Report) (attached). These impairments were identified in 2014, after the completion of the Vernal RMP. *Id.* In addition, Parcels 219 to 225 and 250 are near and may be hydrologically connected to Evacuation Creek which is on Utah's impaired waters list due to boron, selenium, temperature and TDS. *Id.* The majority of these impairments were identified in 2014, after the completion of the Vernal RMP. BLM makes no attempt to analyze the impacts that leasing and reasonably foreseeable development would have on these already impaired waters. EA App. E at 12. In fact, it does not even acknowledge any impairment.

Because Bitter Creek Lower and most of these impairments in Evacuation Creek were identified after the Vernal RMP, BLM cannot rely on its existing knowledge – which it notes is based upon the analysis in the 2008 Vernal RMP – to support its conclusion that there will be no significant impacts beyond those addressed in the Vernal RMP. EA App. E at 12.

IV. 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 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 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.

a. BLM's Treatment of Cultural Resources Violated the NHPA

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. *See* 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal "undertaking" unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 54 U.S.C. §§ 306108, 300320; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is a "stop, look, and listen provision" that requires federal agencies to consider the effects of their actions and programs on historic properties and sacred sites before implementation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

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).[5] If the agency official concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native American tribes, any consulting parties, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

As BLM acknowledges, "[o]nce the lease has been issued, the lessee has the right to use as much of the leased land as necessary to explore for, drill for, extract, remove, and dispose of oil and gas deposits located under the leased lands," subject to limited restrictions. Vernal EA at 11. Leasing is the point at which BLM makes an irretrievable commitment of resources such that

[5] BLM 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).

BLM can no longer preclude surface disturbing activities on lease parcels. *See, e.g.*, *Union Oil Co. of Cal et al.*, 102 IBLA at 189. Accordingly, BLM must fully comply with the NHPA at the leasing stage. It has failed to do so here.

SUWA is a consulting party for the December 2018 lease sale. *See* Letter from Edwin Roberson, State Director, BLM, to Laura Peterson, SUWA (July 10, 2018) (attached). BLM provided SUWA and others with a cultural resources report which included a determination that the proposed lease sale would have "no adverse effect" on cultural resources. *See* BLM, December 2018 Lease Sale Cultural Report 32 (Sept. 2018) (Cultural Report) (attached). On October 2, 2018, SUWA submitted comments on BLM's determination of no adverse effect and disagreed with that determination. *See* SUWA, Comments on the Determination of No Adverse Effect for the December 2018 Oil and Gas Lease Sale (Oct. 2018) (attached). On October 17, 2018, BLM responded to SUWA's comments and indicated that portions of the report had been revised. *See* Letter from Kent Hoffman, BLM to Stephen Bloch, SUWA (Oct. 2018) (attached). SUWA has not been provided with a revised report. Accordingly, **SUWA reserves the right to supplement this protest when it receives and reviews BLM's final cultural resources report.**

i. BLM's No Adverse Effect Determination is Unsupported and Arbitrary.

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

First, BLM provides no support for its claim that each parcel within the Vernal field office can accommodate reasonably foreseeable development. *See* Cultural Report, at 27-32. 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 such as camouflage. *Id.* at 29. This ignores the fact that oil and gas drilling is an industrial activity with the potential for wide ranging adverse effects. Ground clearing for well construction includes use of scrapers, backhoes, excavators, dozers and graders that can permanently damage archaeological sites. EA App. F, at 1. Industrial equipment in a largely pristine setting can adversely affect a sites setting feeling and association. These effects cannot be avoided simply through judicial well placement and flat paint in a topographically complex environment.

Second, BLM's no adverse effect determination entirely ignores indirect effects to historic properties such as "increased rock art exposure to dust resulting from increased traffic on roads

… the potential to increase public access, potentially leading to increased vandalism and looting." *See* BLM, September 2018 Oil and Gas Lease Sale, DOI-BLM-UT-0000-2018-0001-EA 50 (July 2018) (detailing potential indirect impacts to cultural resources in the lease sale context) (attached). Things like topographic complexity and judicious well placement will not ameliorate these indirect effects. As discussed above, an effect is defined broadly to include potential indirect and cumulative adverse effects. *See* 36 C.F.R. § 800.5(a)(1). BLM must account for these indirect effects. It has failed to do so.

Finally, BLM improperly premised its no adverse effect determination on discretionary lease stipulations. While BLM can, in some circumstances use conditions – like stipulations – to support its no adverse effect determination, those conditions must "avoid adverse effects." 36 C.F.R. § 800.5(b). The stipulations BLM relies upon here provide no such assurance. The Standard Cultural Resources Stipulation, H-3120-1 – which is attached to all parcels in the lease sale – only states that leases may contain historic properties and BLM *may* require modification to exploration and development proposals. Cultural Report, at 9-10. BLM thus expressly retains the discretion to approve development that will result in adverse effects. Furthermore, by its plain terms this stipulation does not protect historic properties within BLM's identified APE; it only protects those historic properties within a given parcel's boundaries. The stipulation applies only to "historic properties and/or resources" found on "[t]his lease." Furthermore, BLM does not maintain the authority to preclude all surface disturbance.

b. BLM Failed to take a Hard Look at Impacts to Cultural Resources

In addition to BLM's obligations under the NHPA, NEPA requires BLM to take a "hard look" at the environmental effects of a proposed action. *Silverton Snowmobile Club*, 433 F.3d at 781. That "hard look" requires a "thoughtful and probing reflection of the possible impacts associated with the proposed project." *Id.* (internal quotation omitted). "General statements about 'possible' effects" are not sufficient. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

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

First, BLM makes no attempt to discuss or assess potential impacts to cultural resources either in the EA or the Cultural Report. The EA did not even bring cultural resources forward for detailed analysis. *See* EA App. E. The EA simply stated that topographic complexity would mitigate any potential adverse effects – without ever discussing what the potential impacts to cultural resources may be. *Id.* The Cultural Report similarly fails to discuss the potential impacts from leasing and subsequent development. *See generally* Cultural Report. Rather than evaluate and explain potential effects, the Cultural Report only asserts – without support – that potential

effects will be limited by the temporary nature of drilling activities and camouflaging permanent structures. *Id.* at 304. This does not satisfy NEPA's hard look requirements.

Further, pursuant to NEPA, BLM must analyze potential impacts to *all cultural resources*, not just historic properties. *See* BLM Manual 8100, The Foundations For Managing Cultural Resources (2004) (attached) ("Cultural Resources need not be determined eligible for the National Register of Historic Places … to receive consideration under the National Environmental Policy Act."). BLM has not done so here. Instead, it focused its discussion on only those cultural resources that are eligible for listing in the National Register of Historic Places. *See generally* Cultural Report. Neither the Cultural Report nor the EA contains a discussion of impacts to cultural resources – regardless of whether those cultural resources are eligible for listing on the national register. Neither contains even a cursory discussion of potential direct, indirectly and cumulative impacts to resources. BLM simply concludes – without support – in the ID team checklist that despite the presence at least 130 known sites within the lease parcels there will be no adverse effects on cultural resources. EA App. E.

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.

V. BLM has not Completed the Necessary Analysis to Support Leasing Within the Vernal and Cisco Desert MLP Areas.

Numerous parcels are located in areas that BLM previously identified for preparation of the Vernal and Cisco Desert master leasing plans (MLPs). As such, the information and reports BLM (or its contractors) generated, received from the public, and/or has in its possession concerning those MLPs must be incorporated into BLM's leasing analyses and cannot be overlooked. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins*. Co., 463 U.S. 29, 43 (1983) (an agency action is arbitrary and capricious when the agency "entirely fail[s] to consider an important aspect of the problem"); *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1237 (10th Cir. 2017) (setting aside the agency's decision because it had failed to consider all relevant factors); *N.M. ex rel. Richardson v. BLM*, 565 F.3d at 713 ("In order for a factual determination to survive review under the arbitrary and capricious standard, an agency must 'examine the relevant data and articulate a rational connection between the facts found and the decision made.'") (internal alterations and citation omitted). This includes, but is not limited to, the "Updated Utah Master Leasing Plan (MLP) Strategy" (Aug. 2015) (attached) and "reasonable foreseeable development scenarios" (RFDs), LWC inventories and related reports, and cultural resources analyses and reports as part of MLP planning processes.

It is immaterial that BLM has rescinded the MLP concept. *See* BLM, Instruction Memorandum No. 2018-034, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews § II. (Jan. 31, 2018) (attached). Under FLPMA, BLM has an ongoing duty to inventory "public lands and their resource and other values" and to update its land use plans, based on the results of inventories. 43 U.S.C. §§ 1711(a), 1712(a); see also *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1122 (9th Cir. 2010) (recognizing duty to update land use plans to account for

new inventories). Similarly, under NEPA, BLM has a duty to update its environmental analysis when "significant new circumstances or information" exists. 40 C.F.R. § 1502.9(c)(1)(ii). Consequently, the rescission of the MLP policy does not change the fact that BLM has repeatedly and unequivocally stated that new information and analysis is necessary prior to issuing oil and gas leases in each of these areas. In some instances, BLM now possesses this information, which includes new cultural resources and wilderness inventories, but has failed to incorporate it into the NEPA analysis for the proposed parcels.

a. Proposed Parcels in the Cisco Desert MLP Area

The proposed lease sale includes at least one parcel in the Cisco Desert MLP area.[6] BLM identified the need for this MLP in 2011 in order to address unresolved conflicts between oil and gas development and several other important resources, including citizens proposed wilderness areas, river running, mountain biking, and other recreational opportunities, and big game habitat. MLP Assessment Book Cliffs Divide-Grand Valley-Cisco Desert 1 (Nov. 2010) (attached).[7] Cisco Desert encompasses roughly 320,000 acres of land, about half of which are not currently leased.

In 2015, BLM once again committed to preparing the Cisco Desert MLP. BLM stated that "conditions for a particular resource(s) within the Cisco Desert MLP may have changed in the time since the issuance of the Moab RMP such that the resource(s) could benefit from reconsideration through the MLP process." Utah MLP Strategy at 5. BLM further noted the opportunity to resolve outstanding issues with Protest/"sold-but-not-issued" leases, as well as several suspended leases, through the MLP process. *Id*. Importantly, BLM also initiated a broad cultural resources analysis for Cisco Desert and the surrounding area:

> In order to facilitate its timely and efficient completion, BLM-Utah will initiate preparation efforts for the Cisco Desert MLP by obligation fiscal year (FY) 2015 funds for conducting "Class I" and "Class II" cultural resources inventories within the MLP planning area. Conducting these cultural inventories will help BLM-Utah better understand and characterize the density and disturbance of cultural resources within the planning area, which will assist in the making well-informed and timely oil and gas leasing decision both during and after the MLP preparation process.
>
> The cultural resources inventories that will be completed within the Cisco Desert MLP are one component of a larger landscape-level cultural resources inventory and mitigation strategy, which BLM-Utah recently developed for eastern Utah that encompasses, in addition to the Cisco Desert MLP, the planning area for the San Juan MLP. . . . The BLM-Utah will initiate these BLM-funded cultural resources inventories in the late summer of 2015.

[6] Parcel 297.
[7] Later renamed the Cisco Desert MLP.

Id. at 5-6. This is the very sort of "significant new information" that requires consideration through the NEPA process. Yet, BLM has not done so here. Even if the DNA prepared by BLM for proposed parcels in the Moab Field Office could satisfy the requirements of NEPA, which it cannot, there is no reference to these cultural resources inventories or mitigation strategy, let alone a searching and thoughtful discussion, as required by NEPA. Therefore, BLM has failed to address significant new information that bears directly on the decision to offer leases within Cisco Desert.

b. Proposed Parcels in the Vernal MLP Area

There are numerous proposed parcels within the Vernal MLP area.[8] BLM committed to preparing this MLP in 2011 in order to address unresolved conflicts between oil and gas development and several other important resources, including citizens proposed wilderness areas, big game habitat, and hunting opportunities. MLP Assessment Vernal Att. 2-1 (Eastern Book Cliffs) (Nov. 2010) (attached). Vernal encompasses roughly 650,000 acres of land, a "substantial portion" of which remains unleased. *Id*. at 2.

In 2015, BLM once again committed to preparing an MLP analysis for the Vernal MLP area. Utah MLP Strategy at 4. BLM noted the "potential benefits of utilizing the Vernal MLP to codify certain conservation measures contained within a recently executed conservation agreement for the Graham's and White River beardtongues, two sensitive plant species with substantial areas of protected habitat within the boundaries of the Vernal MLP. . . ." *Id*. While BLM suggested that the MLP analysis could be conducted as part a broader planning effort, BLM continued to recognize "deficiencies" with the oil and gas leasing analysis set forth in the Vernal RMP/EIS. *Id*.

Yet, BLM continues to rely on that analysis here. BLM has not evaluated any additional alternatives to address the "deficiencies" with the Vernal RMP, such as deferring leases that would create the very resource conflicts identified in the Vernal MLP assessment. Nor has BLM developed any new stipulations or other measures to correct those "deficiencies." In short, BLM continues to rely on the Vernal RMP's flawed analysis and decision-making, in spite of the information developed in preparation for the Vernal MLP.

VI. BLM Failed to Address Impacts to Listed, Candidate and Sensitive Species[9]

Congress enacted the Endangered Species Act ("ESA") to provide "a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their

[8] Parcels 114, 116, 137, 140, 158, 159, 160, 161, 163, 166, 182, 183, 184, 185, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 215, 219, 220, 222, 223, 224, 225, 237, 238, 353, 354, 355, 357.
[9] Arguments related to the Colorado Pikeminnow and Razorback Sucker (Endangered) apply to Parcels 152, 233, 153, 154, 155, 210, 234. Arguments related to the Graham's and/or White River Penstemon (Candidate) apply to Parcels 114, 116, 137, 140, 182, 183, 184, 185, 209, 215, 219, 220, 221, 222, 223, 235.

authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3). Section 7(a)(1) of the ESA explicitly directs that all federal agencies "utilize their authorities in furtherance of the [aforesaid] purposes" of the ESA. 16 U.S.C. § 1536(a)(1).

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

If BLM determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide BLM with a "biological opinion" explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If FWS concludes that the proposed action will jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, the biological opinion must outline "reasonable and prudent alternatives." 16 U.S.C. § 1536(b)(3)(A).

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

Because there are listed and candidate species and designated and proposed critical habitat in the action area, the ESA requires preparation of a biological assessment. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. BLM's Vernal EA acknowledges the necessity of conference for the Graham's and White River penstemons:

> In addition the BLM is conferencing on penstemon with the USFWS for this lease sale. That conferencing and consultation is ongoing. When or if disturbance is proposed for parcels (APD stage) that contain or affect ESA species, further evaluation and Section 7 consultation of those ESA species with the USFWS will occur as necessary.

Vernal EA at 46. For listed species other than the two candidate beardtongues, the BLM appears to contend that impacts are covered by the 2004 State-wide programmatic Biological Opinion for

oil and gas leasing, and the Biological Opinion accompanying the 2008 Vernal and Price RMP revisions. Vernal EA at 46. BLM states:

> Consultation on Oil and Gas leasing occurred in a State-wide programmatic BO in 2004 and 2008 as part of the RMP process. The BLM is coordinating with the FWS to ensure the previous consultations are still adequate. The BLM provided the USFWS with a notice that requested agreement from the USFWS that the proposed action (leasing): 1) does not exceed the impacts analyzed in the PRMP and BA/BO and 2) would not exceed the effects determination in the BO (LAA) and our effects determination for this project (NLAA).

Vernal EA at 46. No indication is given whether USFWS has concurred with these assertions. As discussed in detail below, the 2004 Programmatic Biological Opinion and 2008 Vernal RMP Biological Opinion do not contemplate or allow BLM to forego consultation at the lease sale stage.

The EA reveals the presence of multiple listed and candidate and their critical habitat within the areas proposed for leasing, but fails to provide any meaningful information regarding potential effects. BLM must not only evaluate the indirect and cumulative effects on special status species under NEPA, it must also (a) consult (and/or confer in the case of Graham's and White River penstemon) with the Fish and Wildlife Service under Section 7 regarding the effects of oil and gas development and water use on listed species and critical habitat.

The Fish and Wildlife Service's 2008 Biological Opinion for the BLM Vernal Field Office's Resource Management plan considers at a field office-wide level the general impacts of oil and gas leasing on listed species within the planning area.[10] It explicitly conditions its findings of no jeopardy, however, on the requirement that "[a]ll site-specific projects designed under the proposed BLM Resource Management Plan would be subject to consultation requirements under Section 7 of the Endangered Species Act."[11]

Although Protestors raised the necessity of ESA consultation in scoping comments, the EA improperly defers consideration of impacts, and mitigation measures, to a subsequent stage, asserting, without analysis or support, that "[t]he application of appropriate general and species-specific lease notices and stipulations would be adequate for the leasing stage to disclose potential restrictions against future authorizations." Vernal EA at 37.

This piecemeal approach to analysis and consultation is foreclosed by *Conner v. Burford*, 848 F.2d 1441, 1454-57 (9th Cir. 2012), where the court found that it was improper to exclude the potential effects of future lessee activity when reviewing the leasing phase for oil and gas permits on public lands. Moreover, BLM cannot rely on "Incremental Step Consultation" under BLM Manual 6840 to circumvent this requirement. That policy allows BLM to conduct

[10] U.S. Fish and Wildlife Service, Biological Opinion for the Vernal BLM Resource Management Plan 12-13 (2008) ("Vernal RMP BiOp").
[11] Vernal RMP BiOp 58 (Ute ladies'-tresses), 68 (Uinta basin hookless cactus), 115 (bonytail, Colorado pikeminnow, humpback chub, and razorback sucker).

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

a. BLM Sensitive Species (Greater sage-grouse, clay reed-mustard, shrubby reed-mustard, Uinta Basin hookless cactus, Pariette cactus, Ute ladies'-tresses, Graham's beardtongue, White River beardtongue)

Pursuant to Manual 6840, "[a]ll Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species."[12] The Objective of Manual 6840 is "[t]o initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA."[13] Manual 6840 further states that it is the BLM's Policy to promote the "conservation and to minimize the likelihood and need for listing" Bureau sensitive species.[14]

Pursuant to Manual 6840 it is the responsibility of State Directors to not only inventory BLM lands to determine the occurrence of BLM special status species, but also to determine "the condition of the populations and their habitats, and how discretionary BLM actions affect those species and their habitats."[15] The leasing of federal lands for oil and gas extraction is a discretionary BLM action that has the potential to adversely affect sensitive species including but not limited to the Graham's beardtongue (*penstemon grahamii*), White River beardtongue (*penstemon scariosus var. albifluvis*), golden eagle, and bald eagle.[16] Deferring an analysis of the potential effects of selling oil and gas leases to the APD stage is entirely inconsistent with the requirements of Manual 6840. If a lease is sold, the lessee acquires certain contractual rights constraining BLM authority. For example, according to 43 C.F.R. § 3101.1-2, once a lease is issued to its owner, that owner has the "right to use as much of the lease lands as is necessary to explore for, drill for, mine, extract, remove and dispose of the leased resource in the leasehold"

[12] Manual 6840 at § .01.
[13] *Id*. at § .02 (emphasis added).
[14] *Id*. at § .06.
[15] *Id*. at § .04.
[16] EA at 24 Table 3.4, 29-30 Table 3.10

subject to specific nondiscretionary statutes and lease stipulations. Therefore, once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species from the cumulative impacts of extraction-related activities.

Furthermore, pursuant to Manual 6840 Bureau sensitive species are considered BLM special status species, and Section 2 of the Manual provides specific measures that BLM is required to undertake in order to "conserve these species and their habitats."[17] To implement this section, BLM "*shall*... minimize or eliminate threats" affecting Bureau sensitive species, by determining their current threats and habitat needs, and ensuring that BLM activities "are carried out in a way that is consistent with its objectives for managing those species and their habitats at the *appropriate spatial scale*."[18] Due to the potential harms from habitat loss and fragmentation, the appropriate spatial scale for determining threats to sensitive plants and animals from oil and gas development is the entire area subject to lease sales, rather than the piecemeal, limited APD-specific review that BLM is attempting to employ.

The need for a broader analysis to assess the threats to this species from the lease sale itself is further supported by Manual 6840's requirement that BLM work with partners and stakeholders to "develop species-specific or ecosystem-based conservation strategies," and in the absence of such strategies, to incorporate standard operating procedures and other conservation measures "to mitigate specific threats to Bureau sensitive species *during the planning of activities and projects*."[19] Postponing any analysis of impacts to sensitive plants and raptors until the later APD stage forecloses the implementation of standard procedures and conservation measures necessary to mitigate threats to the species during exploration or other actions that might take place prior to an APD being filed, since as noted above once a lease is issued, the owner has the "right to use as much of the lease lands as is necessary to explore for, drill for, mine, extract, remove and dispose of the leased resource in the leasehold."[20]

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

Where activities have the potential to adversely impact species of concern, the general practice is to consider those impacts and address them "at the earliest possible time," in order to avoid delay, ensure that impacts are avoided and opportunities for mitigation are not overlooked.[21] This is likewise true in the context of even more general environmental review, such as under

[17] *Id.* at § .2 ("All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species.").
[18] *Id*. at § .2(C) (emphasis added).
[19] *Id.* (emphasis added).
[20] 43 C.F.R. § 3101.1-2.
[21] *See i.e.* 50 C.F.R. §§ 402.14(a), (g)(8).

NEPA.[22] Furthermore, it is general practice to evaluate the impacts of several related projects with cumulative impacts proposed or reasonably foreseeable in the same geographic region in a single, comprehensive, analysis.[23] Likewise, under the ESA an analysis of the effects of an action must consider actions that are interrelated or interdependent.[24] This suggests that BLM should consider the effects of oil and gas extraction activities at the lease sale stage, since those actions are inherent in leasing land for such purposes. It is therefore evident that in order to effectuate the policy of protecting Bureau sensitive species set forth in Manual 6840,[25] and consistent with the established practice of early, comprehensive review of potential impacts to sensitive species, BLM must consider impacts to the Graham's and White River penstemon and other sensitive species at the lease sale, rather than waiting until the APD stage for project specific review.

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

b. Listed and Candidate Plants[26]

The Vernal EA fails to take a hard look at impacts to the candidate Graham's and White River penstemons. The EA, and proposed stipulations, fail to either adequately disclose or mitigate impacts to these five listed species from oil and gas leasing and development. BLM must take a hard look at listed plant impacts in an EIS, and must consult with the Fish and Wildlife Service under ESA Section 7(a)(2) to ensure its action will not cause jeopardy to these species or adverse modification of their critical habitat. Lease Notices 90 and 134 provide notice to operators that they will be requested to comply with measures in the 2014 Conservation Agreement for Graham's Beardtongue and White River Beardtongue. They do not, however, retain BLM's authority to prohibit surface occupancy, nor do they address or acknowledge substantial new information regarding the status of those species and the inadequacy of the Conservation Agreement.

[22] *See* 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.").
[23] *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) ("when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.").
[24] 50 C.F.R. §§ 402.14 and 402.02.
[25] *See* BLM Manual 6840 at .06 ("Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA.").
[26] This Argument applies to parcels 114, 116, 137, 140, 182, 183, 184, 185, 209, 219, 220.

As of July 2014, 27% and 13% of all known Graham's and White River beardtongue habitat, respectively, occurred on lands that already had been leased by BLM or the States of Colorado and Utah for oil and gas development.[27] Given rapidly increasing oil and gas production in the region over the past two decades and current exploration occurring in beardtongue habitat, FWS expects oil and gas activity to pose an increasing threat.[28] Although the Fish and Wildlife Service withdrew these beardtongues from proposed ESA listing largely in reliance on a conservation agreement, the BLM still has the duty under its Manual and sensitive species policy to conserve the species.

The Fish and Wildlife Service previously proposed these two beardtongues for listing under the Endangered Species Act, then withdrew the proposed leasing largely in reliance on a conservation agreement among various state and federal entities. The U.S. District Court for the District of Colorado has since vacated the Service's decision to withdraw listing, based on improper reliance on uncertain and/or ineffective conservation measures. Therefore, the BLM should defer from all parcels overlapping Graham's beardtongue and/or White River beardtongue proposed critical habitat. The Conservation Agreement for those species relied on in the Lease Sale EA was invalidated by the United States District Court for the District of Colorado. *See Rocky Mountain Wild, et al. v. Walsh, et al.*, Case 1:15-cv-00615-WJM (Oct. 25, 2016), which held that the United States Fish and Wildlife Service ("FWS") violated the Endangered Species Act by:

> 1) "[C]oncluding that yet-to-be-enacted regulatory and non-regulatory measures mandated by the Conservation Agreement were 'existing regulatory mechanisms';
>
> 2) "[F]ailing to account for the [Conservation] Agreement's expiration when determining whether the beardtongues face material threats in the 'foreseeable future'"; and
>
> 3) Failing to take "into account economic considerations when imposing a 300-foot buffer zone around each beardtongue."

Rocky Mountain Wild, Case 1:15-cv-00615-WJM at *2-3. The Utah Fourth Quarter 2018 lease sale improperly continues to rely on the measures in the Conservation Agreement that the court found insufficient to justify a decision not to list the two species under the ESA. *See* Vernal EA App. B at 40-41, 46. Therefore, BLM should defer from leasing all parcels in Graham's and White River beardtongue habitat until either a modified Conservation Agreement is prepared or FWS reexamines whether the species should be listed as threatened or endangered under the ESA.

[27] 79 Fed. Reg. at 46,077.
[28] 79 Fed. Reg. at 46,077 ("substantial numbers of Graham's and White River beardtongue individuals (and their habitat) occur in areas that are leased for oil and gas development (Tables 5 and 6), and thus it is reasonable to conclude that the impacts of oil and gas activity will increase in the future as additional areas are developed.")

The existing Conservation Agreement seeks "to identify, avoid, minimize, and mitigate potential threats to Graham's and White River beardtongues and their habitats, and to promote the species' long-term persistence, thereby preventing the need for listing either species." Conservation Agreement at 1. To achieve this goal, the Conservation Agreement establishes the following objectives:

- Minimize and mitigate direct, indirect, and cumulative threats to both species.
- Establish conservation areas that protect occupied and unoccupied habitat.
- Promote stable or increasing populations within identified conservation areas and across the range of the two species.
- Investigate and demonstrate successful ecological restoration methods for transplanting and repopulating self-sustaining Graham's and White River beardtongue plant populations and community associates . . . and pollinators following surface disturbance. [29]

The EA fails to take a hard look at any of these four objectives. The management strategy for these conservation areas is set forth in twenty-nine "conservation actions" including the following:

- A maximum of 5% new surface disturbance for Graham's beardtongue and 2.5% new surface disturbance for White River beardtongue will be allowed per conservation unit from the date this Agreement is signed.
- Ground-disturbing activities will avoid Graham's and White River plants by 300 feet both inside and outside designated conservation areas.[30]

The EA makes cursory acknowledgment that parcels contain Graham's and White River beardtongues, Vernal EA at 37-38, but does not meet the Agreement's management strategy. It does not minimize or mitigate the direct, indirect, and cumulative impacts to the species. Instead, it postpones any and all meaningful analysis to some unknown date and applies questionably-enforceable Lease Notices to lease parcels which are found to contain either species' habitat.[31]

BLM cannot assure that the leasing of additional land in beardtongue habitat will not violate the 5% or 2.5% maximum new surface disturbance threshold. Moreover, leasing these parcels is a

[29] U.S. Fish and Wildlife Service et al., Conservation agreement and strategy for Graham's beardtongue (*Penstemon grahamii*) and White River Beardtongue (*P. scariosus* var. *albifluvis*) 2 (July 2014) https://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/Penstemon_Conservation_Agreement_2014Jul22_final_signed.pdf.
[30] Conservation Agreement at 18; *see also id.* at 19-25.
[31] *See Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983) (federal agencies cannot "foreshorten[] [their] view of the impacts which could result from the act of *leasing*"); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 717-19 (issuing leases without Non-Surface Occupancy stipulations constitutes an irretrievable commitment of resources).

direct violation of the Conservation Agreement's stated objective to "[p]romote stable or increasing populations within identified conservation areas and across the range of the two species." In proposing both species' for listing under the ESA, FWS stated that "Graham's and White River beardtongues are particularly vulnerable to the effects of energy development because their ranges overlap almost entirely with oil shale and tar sands development areas, as well as ongoing traditional oil and gas drilling."[32]

The Conservation Agreement also identified oil and gas exploration and development as a serious threat to Graham's and White River beardtongue habitat and long-term viability.[33] Moreover, road construction and maintenance, invasive weeds, off-road vehicles, habitat fragmentation, and climate change – all factors exacerbated by the leasing of parcels in these areas – also threaten both species' habitat and ability to survive in the long-term. *Id.* The EA does not discuss or analyze any of these issues, and thus fails either to take a hard look at impacts under NEPA or to meet BLM's conservation obligations under the Sensitive Species Policy and the Conservation Agreement.

c. Colorado River Endangered Fish

All proposed sale parcels have the potential to impact the four Colorado River endangered fish species (bonytail chub, Colorado pikeminnow, humpback chub, and razorback sucker) through water depletions resulting from oil and gas development. In particular, Parcels 152, 233, 153, 154, 155, 210 and 234 also contain or immediately abut designated critical habitat for the Colorado pikeminnow and razorback sucker.

Oil and gas drilling and hydraulic fracturing, the reasonably certain indirect consequence of leasing the proposed parcels for oil and gas development, will result in additional withdrawals of water from the Green River Basin, with adverse effects on the listed fish and their critical habitat. BLM's proposed lease stipulation requires consultation on and reporting of, but does not prohibit, such water depletions:

> Water depletions from *any* portion of the Upper Colorado River drainage basin above Lake Powell are considered to adversely affect or adversely modify the critical habitat of the four resident endangered fish species, and must be evaluated with regard to the criteria described in the Upper Colorado River Endangered Fish Recovery Program. Formal consultation with USFWS is required for all depletions. All depletion amounts must be reported to BLM.

In its 2008 Biological Opinion for the Vernal Resource Management Plan, the Fish and Wildlife Service re-confirmed its long-standing opinion that all depletions from the Upper Colorado will jeopardize the continued existence of the four listed fish:

[32] 78 Fed. Reg. at 47598; *see also id.* at 47600 ("The impacts of traditional oil and gas development on Graham's and White River beardtongues are expected to be high.").
[33] *See* Conservation Agreement at 19.

> Water depletions from the Upper Colorado River Basin are a major factor in the decline of the threatened and endangered Colorado River fish. The USFWS determined that any depletion will jeopardize their continued existence and will likely contribute to the destruction or adverse modification of their critical habitat (USDI, Fish and Wildlife Service, Region 6 Memorandum, dated July 8, 1997). However, the Recovery Program was established specifically to offset the negative effects of water depletions to the endangered fish populations, and to act as the Reasonable and Prudent Alternative for these depletions. Actual water depletions will be determined, and Section 7 consultation reinitiated on a project-specific basis. [34]

As specified in the Vernal RMP BiOp, BLM must initiate consultation on the proposed lease sale on a project-specific basis. Significant new information regarding progress under the Recovery Program and climate change effects on Green and Colorado River flows requires independent reevaluation of the effects of water depletions on the four endangered fish.The Recovery Program's 2015 Assessment of Sufficient Progress under the Upper Colorado River Endangered Fish Recovery Program indicates that Colorado pikeminnow are in decline and failing to meet recovery goals in the Green River Subbasin that will be affected by the proposed action:[35]

> Data from the third round (2011–2013) of population estimates for the Green River Subbasin are still being analyzed (thus no confidence intervals are shown for the 2011–2013 estimates in Figure 4). Preliminary results from this analysis indicate adults and sub-adults are in decline throughout the entire Green River Subbasin.[36]

Another demographic requirement in the 2002 Recovery Goals is that recruitment of age-6, naturally-produced fish must equal or exceed mean annual adult mortality. Estimates of recruitment age fish have averaged 1,455 since 2001, but have varied widely (Figure 5). Recruitment exceeded annual adult mortality only during the 2006 – 2008 period.[37]

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

> Although a good portion of the recovery factor criteria (USFWS 2002a) are being addressed, nonnative fish species continue to be problematic and researchers now

[34] Biological Opinion for BLM Resource Management Plan (RMP), Vernal Field Office (VFO), 113 (Oct. 23, 2008), available at http://www.blm.gov/style/medialib/blm/ut/vernal_fo/planning/rod_approved_rmp.Par.4719.File.dat/VernalBiologicalOpinion.pdfhttp://www.blm.gov/style/medialib/blm/ut/vernal_fo/planning/rod_approved_rmp.Par.4719.File.dat/VernalBiologicalOpinion.pdf

[35] Fish and Wildlife Service, Final 2014--2015 Assessment of "Sufficient Progress" Under the Upper Colorado River Endangered Fish Recovery Program in the Upper Colorado River Basin 7-8(Oct. 7, 2015) ("Sufficient Progress Assessment"), *available at* http://www.coloradoriverrecovery.org/documents-publications/section-7-consultation/sufficientprogress/2015_Suff_Progress_Memo.pdf.

[36] 2015 Sufficient Progress Memo at 7.

[37] Sufficient Progress Memo at 8.

> speculate that mercury may pose a more significant threat to Colorado pikeminnow populations of the upper Colorado River basin than previously recognized. Osmundson and Lusk (2012) recently reported elevated mercury concentrations in Colorado pikeminnow muscle tissue; the highest concentrations were from the largest adults collected from the Green and Colorado river subbasins. Mercury exposure has been reported to impair reproduction in fish (Batchelar et al. 2013; J. Lusk, U.S. Fish and Wildlife Service, personal communication). Laboratory experiments have shown diminished reproduction and endocrine impairment in fish exposed to dietary methyl mercury at environmentally relevant concentrations, with documented effects on production of sex hormones, gonadal development, egg production, spawning behavior, and spawning success.[38]

Adverse effects from oil and gas development are not limited to the Green River water depletions addressed by the Upper Colorado Endangered Fish Recovery Program. BLM must also consider, and consult on, foreseeable water quality impacts from oil and gas development and the resulting wells, pipelines, pits, and soil disturbance. The Fish and Wildlife Service's recent Biological Opinion for the GasCo Energy Inc. Field Development Project EIS found that, in addition to water depletions, oil and gas development in the Uinta Basin has a significant potential for impacts to Colorado River endangered fish resulting from the highly foreseeable probability of spills and contamination:

> There is a greater potential for impacts from pollutants, if a pipeline, well pit, or other source were to inadvertently release contaminated fluids into waterways at points near the Green and White Rivers. Through direct or indirect discharge, these pollutants could reach the Green River and negatively impact water quality to the point of affecting native fish populations. Direct impacts will result from a discharge from a pipeline or well pit reaching the Green River in its original form or within a single·release event. Indirect effects occur when discharges are released to the .ground and are later released to the river after being carried by an erosion event or carried by rain or snowmelt runoff. As more well and pipeline development occurs in the project area the chance of pollutants reaching the Green River increases, thus increasing the potential of harm to native fish populations.
>
> Approximately 744 pipeline crossings (61.9 miles) of intermittent/ephemeral drainages that are tributary to the Green River will be required, though no wells, roads, or pipelines are proposed within the 100year floodplain for the Green River. In addition, no wells or pipelines are proposed within 1 00-year floodplains of Green River tributaries within 5 miles of the river.
> While applicant-committed measures will reduce the chance for spills or leaks of contaminants, accidental releases can and do still occur. According to the National Response Center, there have been at least 219 spills and releases within

[38] Sufficient Progress Memo at 10.

> Carbon, Duchesne, and Uintah Counties from January 1991 through August, 2011 due to oil and gas development and related activities affecting water, land and air.
>
> Spill incidences reviewed in Utah include corrosion and leakage of surface and buried pipelines, broken well rods, valve and gasket failures, wellhead pressure buildups, shutoff alarm malfunctions, leakage of trace systems, loss of formation water to the surface during drilling, and vehicular related traffic accidents. Releases have included crude oil, natural gas, hydrochloric acid, condensate, salt water, ethylene glycol, and produced water in various quantities.
>
> Releases of harmful agents into floodplain habitats could result in significant adverse impacts to the endangered fish and their designated critical habitat. One of the constituent elements of the designated. critical habitat for the four Colorado River fish is contaminant-free water. Any release of contaminants into the floodplain will result in degradation of critical habitat and could result in take of individual fish, including downstream impacts to larvae and juveniles.[39]

In addition, neither the 2008 VFO RMP nor the Final EAs have considered the impacts of climate change on these water resources, such as the decline in stream flows. This is a significant omission, as numerous climate change models show anthropogenic climate change is profoundly impacting the Colorado River in ways that are altering temperature, streamflow, and the hydrologic cycle, which we discussed in our previous comment letter. Changes observed to date include rising temperatures, earlier snowmelt and streamflow, decreasing snowpack, and declining runoff and streamflow. Modeling studies project that these changes will only worsen, including continued declines in streamflow and intensification of drought. Climate change is likely to have significant effects on the endangered fish and the Colorado River ecosystem, and the effect of climate change on future flow regimes and water temperatures must be taken into account in the consultation process and considering the sufficiency of the existing Recovery Program.

[39] Biological Opinion for the GasCo Energy Inc. Field Development Project EIS 26 (2011).

REQUEST FOR RELIEF

SUWA respectfully requests the withdrawal of the Protest Parcels from the December 11, 2018 competitive oil and gas lease sale until such time as BLM resolves the above-discussed violations.

This protest is brought by and through the undersigned on behalf of SUWA. The members and staff of SUWA reside, work, recreate, or regularly visit the areas to be impacted by the proposed lease sale and therefore have an interest in, and will be adversely affected by, the proposed action.

DATED: November 5, 2018

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