SOUTHERN UTAH WILDERNESS ALLIANCE –
GRAND CANYON TRUST – NATURAL RESOURCES DEFENSE COUNCIL –
SIERRA CLUB – THE WILDERNESS SOCIETY

Comments submitted via e-mail (swysong@blm.gov) and hand-delivered (attachments provided with hand-delivered comment letter only)

July 31, 2018

Bureau of Land Management
Utah State Office
ATTN: Ms. Sheri Wysong, Fluid Mineral Leasing Coordinator
440 West 200 South, Suite 500
Salt Lake City, UT 84101

RE: SUWA et al – Scoping Comments on Utah BLM December 2018 Lease Sale

Greetings:

The Southern Utah Wilderness Alliance, Grand Canyon Trust, Natural Resources Defense Council, Sierra Club, and The Wilderness Society (collectively, SUWA) appreciate the opportunity to submit the following scoping comments for the Utah Bureau of Land Management (BLM) December 2018 competitive oil and gas lease sale. *See generally* December 2018 Utah Oil and Gas Lease Sale, DOI-BLM-UT-0000-2018-0003-OTHER_NEPA (hereafter, December 2018 Lease Sale).[1]

I. NEPA Requires BLM to Conduct Site-Specific Analysis at the Leasing Stage

It is critical that BLM undertake satisfactory comprehensive NEPA analysis before deciding to offer, sell and issue the preliminary parcels as subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. The sale of leases without nonwaiveable 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

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[1] Available at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=110582&dctmId=0b0003e881170478 (last updated July 24, 2018).

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

> 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 – 1624-1 – Planning 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 must analyze all reasonable, foreseeable potential impacts of oil and gas development from the preliminary parcels and cannot delay that analysis to a later date. This includes, but is not limited to, potential impacts to lands with wilderness characteristics, air quality, water quality, climate change, and cultural resources.

II. BLM Cannot Rely on Determinations of NEPA Adequacy to Offer Oil and Gas Leases in These Areas

BLM's existing NEPA analyses do not provide sufficient site-specific information to permit BLM to rely on Determinations of NEPA Adequacy (DNA) to offer the oil and gas leases identified in the preliminary sale list.

A. A Determination of NEPA Adequacy Is Not a NEPA Document

A DNA is not a NEPA document but rather is an administrative convenience which "confirms that an action is adequately analyzed in existing NEPA document(s) and is in conformance with the land use plan." BLM, National Environmental Policy Act Handbook H-1790-1 § 5.1 (Jan. 2008) (BLM Handbook 1790) (attached). A DNA "does not itself provide NEPA analysis." Dep't of the Interior, Departmental Manual Part 516, Chapter 11: Managing the NEPA Process Bureau of Land Management § 11.6(b) (May 8, 2008) (attached). BLM properly relies on a DNA to authorize an activity only if 1) the proposed action is adequately covered by relevant existing analyses, data, and records; and 2) there are no new circumstances, new information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis. *See id.* § 11.6(a), (b). Stated differently, BLM must consider the following questions prior to preparing a DNA:

- Is the new proposed action a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document(s)?

- Is the range of alternatives analyzed in the existing NEPA document(s) appropriate with respect to the new proposed action, given environmental concerns, interests, and resource values?

- Is the existing analysis valid in light of any new information or circumstances?

- Are the direct, indirect, and cumulative effects that would result from implementation of the new proposed action similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document?

BLM Handbook 1790 § 5.1.2. Notably, if the answer to any of these questions is "no" then "a new EA or EIS must be prepared." *Id.* Here, the answer to several of these questions is "no" and thus BLM must prepare a new NEPA analysis to support its leasing proposal.

BLM's 2008 resource management plans, the 2016 Moab Master Leasing Plan (MLP), and their accompanying EISs do not contain the requisite site-specific analysis to offer the oil and gas leases identified in the preliminary sale list. Those broad level, field office wide, management plans were prepared for an entirely different purpose and need and thus did not take a hard look at site-specific impacts of the preliminary parcels or various leasing alternatives for those parcels. *See, e.g.*, BLM, Moab Field Office, Record of Decision and Approved Resource Management Plan 1 (Oct. 2008) ("the purpose of this RMP is to provide a comprehensive framework for public land management with the [Moab field office") (Moab RMP); BLM, Monticello Field Office, Proposed Resource Management Plan and Final Environmental Impact Statement 1-1 (Aug. 2008) (same but for BLM Monticello field office); BLM, Price Field Office, Record of Decision and Approved Resource Management Plan 1-2 (Oct. 2008) (Price RMP) (same but for BLM Price field office); BLM, Vernal Field Office, Record of Decision and Approved Resource Management Plan 1-2 (Oct. 2008) (same but for BLM Vernal field office) (Vernal RMP); BLM, Moab Master Leasing Plan and Proposed Resource Management Plan

Amendments / Final Environmental Impact Statement for the Moab and Monticello Field Offices 1-2 (July 2016) (discussing the purpose and need for that document).

Further, new circumstances, information, and events that post-date these broad level NEPA documents preclude the use of a DNA. Among other things:

- National air quality standards have been strengthened including for ozone, as discussed in more detail *infra*. In fact, the United States Environmental Protection Agency (EPA) recently designated the majority of the Uinta Basin as marginal nonattainment for National Ambient Air Quality Standards (NAAQS) for ozone. *See generally* EPA, Responses to Significant Comments on the State and Tribal Designation Recommendations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS) (April 2018) (attached); EPA, Utah: Northern Wasatch Front, Southern Wasatch Front, and Uinta Basin Intended Area Designations for the 2015 Ozone National Ambient Air Quality Standards Technical Support Document (TSD) (attached); EPA, Fact Sheet – Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015 (attached); Utah, Dept. of Envtl. Quality, Division of Air Quality, Utah Area Designation Recommendations for the 2015 8-Hour Ozone National Ambient Air Quality Standard (Sept. 2016) (attached); Letter from Douglas H. Benevento, EPA, to Governor Herbert, Utah, Re: EPA's Response to Utah's Ozone Nonattainment Designation (Dec. 20, 2017) (attached); Letter from Governor Herbert, Utah, to Shaun McGrath, EPA, re: Utah 2015 8-Hour Ozone Designation Recommendation (Sept. 29, 2016) (attached).

- As discussed *infra*, BLM has identified thousands of acres of new wilderness-caliber lands throughout Utah including, but not limited to, the Badland Cliffs, Big Wash, Dragon Canyon, Sheep Wash, and the White River areas – areas proposed for leasing in this sale.

- Several new species have been listed as threatened or endangered under the Endangered Species Act (ESA) and/or new conservation agreements have been enacted. *See, e.g.*, 79 Fed. Reg. 59991, 60038 (determination of threatened status for the western distinct population segment of the Yellow-billed Cuckoo); *Conservation Agreement and Strategy for Graham's Beardtongue (Penstemon Grahamii) and White River Beardtongue (P. scariosus var. albifluvis)* (2014) (attached).

- BLM has completed (or is the process of completing) field-office-wide cultural resource inventories in the Richfield, Price, Monticello, Moab and Vernal field offices. *See* BLM, A Class I Cultural Resource Inventory of Lands Managed by the Bureau of Land Management, Richfield Field Office (June 2016); BLM, Class I and Site Location Model for the Bureau of Land Management Vernal Field Office Area, Daggett, Duchesne, Uintah, Carbon and Grand Counties, Utah (June 2018); BLM, A Class I Cultural Resource Inventory of Lands Administered by the Bureau of Land Management Price Field Office (July 2017); BLM, A Class I Cultural Resource Inventory of Lands Administered by the Bureau of Land Management, Monticello Field Office (Sept. 2017); BLM, A Class I Cultural Resource Inventory of Lands

Administered by the Bureau of Land Management, Moab Field Office (2017). In the Price Field Office, BLM has also completed a Class I and Class II inventory of the Molen Reef area as well as a Class II inventory of the San Rafael Desert. *See* BLM, Molen Reef Site Location Model and Class II Survey, Emery County, Utah (Sept. 2017); BLM, San Rafael Desert Master Leasing Plan Cultural Resources Sites Location Model and Class II Sample Survey (July 2017).

- The State of Utah has added several river and stream segments to its 303(d) list of impaired waterbodies.

- BLM prepared updated visual resource inventories in 2010-11, after the RMPs were completed.

- Finally, since the majority of the offered parcels are parcels that were deferred as a result of the MLP concept which was in place from 2010 – 2017 the BLM cannot rely on past leasing environmental assessments for the requisite site-specific NEPA analysis. Because BLM did not lease in these areas for almost eight years no applicable site-specific leasing NEPA analyses exist on which BLM can now rely. Further, as explained *infra*, BLM recognized in each MLP designation that the agency lacked sufficient information for resources in those areas to justify a leasing decision and committed to collecting – and analyzing – that information prior to moving forward with new leasing in these areas. BLM's policy changes, including the elimination of the MLP concept, do not excuse BLM from its prior statements and commitments.[2]

These factors individually and/or taken together mean that BLM cannot rely on DNAs to offer the preliminary parcels.

III. Master Leasing Plans

Many of the preliminary parcels are located in previously designated MLP boundaries including the Cisco Desert, San Rafael Desert, San Juan River and Vernal MLP areas. *See* SUWA Map – MLP Boundaries (attached). With the change in presidential administration and accompanying policies BLM has cancelled the MLP concept, concluding that it results in duplicative NEPA analysis. *See generally* BLM, Instruction Memorandum No. 2018-34, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews (Jan. 31, 2018) (attached). However, that change in policy does not excuse BLM's about face from its prior conclusions that more information and analyses are needed before BLM can make an informed leasing decision in these areas. For example:

[2] In addition, the state of the law has changed significantly since BLM released the 2008 RMPs. Among other things (and as discussed in more detail *infra*), courts have required BLM to analyze – and set aside its decisions for failure to do so – the direct, indirect, and cumulative impacts of hydraulic fracturing, climate change, the social cost of carbon and the combustion of oil and gas produced from offered lease parcels. The RMPs and MLP (as well as BLM's prior leasing documents) do not contain the requisite NEPA analyses.

- Parcels 297 and 298 are within the Cisco Desert MLP boundary. *See* SUWA Map – MLP Boundaries. *See also* BLM, Master Leasing Plan (MLP) Assessment Book Cliffs Divide-Grand Valley-Cisco Desert, Utah State Office, Moab Field Office (Nov. 2010) (recognizing that the area met the four criteria for preparation of an MLP) (attached).

- The majority of the parcels proposed for sale in San Juan County are within the San Juan River MLP. *See* SUWA Map – MLP Boundaries. *See also* BLM, Master Leasing Plan (MLP) Assessment, Glen Canyon-San Juan River, Utah State Office, Monticello Field Office (Nov. 2010) (attached); BLM, Master Leasing Plan (MLP) Assessment, Glen Canyon MLP (Revised) (recognizing that the area met the four criteria for preparation of an MLP) (attached); Letter from Juan Palma, Utah BLM State Director, to BLM Assistant Director, Minerals and Realty Management, Re: Glen Canyon – San Juan River Master Leasing Plan (MLP) Revisions (Sept. 23, 2013) (revising the San Juan River MLP boundary) (attached); Letter from Utah BLM State Director, to Assistant Director, Minerals and Realty Management, Re: Revisions to the Glen Canyon – San Juan River Master Leasing Plan (MLP) (May 29, 2015) (San Juan River MLP Revision Letter) (attached).

- Parcel 257 is within the San Rafael Desert MLP. *See* SUWA Map – MLP Boundaries. The arguments and information provided by SUWA with regard to BLM's proposed leasing for September 2018 competitive oil and gas lease sale are directly applicable to Parcel 257 and therefore are incorporated in their entirety as part of SUWA's scoping comments in this matter. *See generally* SUWA et al., Scoping Comments on Utah BLM September 2018 Lease Sale (Price and Richfield field offices) (April 16, 2018) (comments and exhibits thereto attached) (SUWA September 2018 Scoping Comments).

- The majority of the parcels in the Uinta Basin are within the Vernal MLP. *See* SUWA Map – MLP Boundaries. *See also* BLM, Master Leasing Plan (MLP) Assessment, Vernal, Utah State Office, Vernal Field Office (Nov. 2010) (recognizing that the area met the four criteria for preparation of an MLP) (attached); BLM, Vernal MLP Proposal, Attachment 1, Dinosaur Lowlands (Nov. 2010) (attached); BLM, Vernal MLP Proposal, Attachment 2, Eastern Book Cliffs (Nov. 2010) (attached).

BLM previously concluded that each MLP area "warrant[ed] more extensive analysis" before leases could be offered and that such analysis would "greatly improve protections for land, water, and wildlife." Letter from BLM Director, to Utah State Director 1 (Feb. 16, 2011) (attached). Notably, as recognized in each MLP Assessment and Utah BLM's Implementation Plan, these areas satisfy the four requirements for preparation of an MLP including the need for additional analysis:

> *Additional analysis or information is needed* to address likely resource or cumulative impacts if oil and gas development were to occur where there are: [1] multiple-use or natural/cultural resource conflicts; [2] impacts to air quality; [3] impacts on the resources or values of any unit of the National Park system, national wildlife refuge, or National Forest wilderness area, as determined after consultation or coordination with the [National Park Service], the [Fish and

> Wildlife Service], or the [Forest Service]; or [4] impacts to other specially designated areas.

BLM, Oil and Gas Leasing Reform Implementation Plan, Utah State Office (Sept. 2010) (emphasis added) (attached). BLM has highlighted certain information that is lacking in existing NEPA analyses. For example, the lands encompassed by the San Rafael Desert MLP, which includes Parcel 257, have the "potential that oil and gas development could conflict with the resources and values of Canyonlands National Park." Letter from Utah BLM Acting State Director, to Assistant Director, Energy, Minerals and Realty Management Directorate, Re: Updated Utah Master Leasing Plan (MLP) Strategy 3 (Aug. 14, 2015) (Updated MLP Strategy) (attached). "Possibly affected resources could include visuals, air quality, night skies and recreation." *Id.*

Further, BLM recognized the need to collect additional cultural resource information for lands encompassed by the Cisco Desert MLP, noting, "[c]onducting these cultural resource inventories will help BLM-Utah better understand and characterize the density and distribution of cultural resources within the planning area, which will assist in making well-informed and timely oil and gas leasing decisions both during and after the MLP preparation process." Updated MLP Strategy at 5-6. For the San Juan River MLP – which includes the majority of preliminary parcels in San Juan County – BLM highlighted the need to better analyze impacts to cultural resources, including in the Alkali Ridge Area of Critical Environmental Concern (ACEC): "During recent oil and gas lease sales, BLM-Utah has deferred several proposed lease parcels within the MLP boundary because of determinations *that additional analysis was needed* in order to assess and address the potential impacts of oil and gas leasing on cultural resources." *Id.* at 6 (emphasis added). Therefore, BLM must conduct the analysis deemed necessary in each of the MLP areas prior to issuing any new oil and gas lease parcels in those areas.

IV. The December 2008 Lease Sale, Stiles Report, and IM 2010-117

At least nineteen of the preliminary parcels overlap with parcels included in BLM's highly controversial December 2008 competitive oil and gas lease sale – a sale that was enjoined by a federal court and which led to nationwide changes in BLM's leasing policies and practices. *See* SUWA MAP – Stiles Parcels and 2018 Parcels (attached). The Obama administration and then-Secretary of the Interior Ken Salazar immediately upon taking office cancelled seventy-seven of the parcels sold at the Utah BLM December 2008 lease sale and ordered a review of BLM's lease sale program, which the agency recognized needed significant changes and reforms. *See, e.g.*, Letter from Secretary Salazar, To Selma Sierra, Utah BLM State Director, Re: Withdrawal of 77 parcels from December 19, 2008, Utah Oil and Gas Lease Sale (Feb. 6, 2009) (attached). Secretary Salazar noted that there had been "considerable controversy surrounding this lease sale, including . . . the environmental review and analysis performed in connection with certain parcels as well as the underlying [RMPs]." *Id.* at 1. The referenced RMPs are the very same RMPs at issue here.

Secretary Salazar ordered a review of the seventy-seven parcels, including Utah BLM's leasing program, which was conducted by a multi-disciplinary team of resource experts. *See* BLM, Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah's December 2008 Lease

Sale (Oct. 7, 2009) (Stiles Report) (attached). The Stiles Report led to nationwide leasing reforms for all BLM field offices. *See* BLM, Instruction Memorandum No. 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews (May 17, 2010) (IM 2010-117) (attached).[3] Notably, the Stiles Report recognized that Utah BLM's 2008 RMPs, including those at issue here, did not contain sufficient information or analyses to justify a leasing decision for the lands encompassed by the majority of the seventy-seven parcels, and recommended that those parcels be deferred from leasing pending curative NEPA **and** the inclusion of new leasing stipulations. These steps have not been followed but nonetheless BLM is now arbitrarily proposing to offer leases in these very same areas. For example:

- December 2008 parcels 106, 109, 111, 136, and 137, located in the White River area were recommended for deferral. *See* Stiles Report at 6-7. Deferral was necessary to allow BLM to prepare new analyses and include new stipulations related to cherry-stemmed routes, elk habitat, wilderness characteristics, and visual and riparian resources. *See id.* Here, preliminary parcels 152, 154-56, 179, and 234 are located in or near the same areas previously recommended for deferral by BLM. BLM has not prepared the new analyses or new stipulations it previously identified as necessary. *See* BLM, December 2018 Lease Sale, Attachment A – Parcel List, Stipulations and Notices (Vernal Field Office) at 44, 46-49, 70-71, 125-26 (listing stipulations for UT1218-158) (December 2018 VFO Leasing Stipulations).

- December 2008 parcels 91 and 112, located in the Central Uinta Basin group, were recommended for deferral. *See* Stiles Report at 7-8. Deferral of these parcels was warranted to protect greater sage-grouse and BLM noted, "[i]f leasing is determined to be in the best interest of the public in order to address drainage, NSO stipulations should be extended to all sage-grouse habitat in this parcel through the year." *Id.* at 8. Here, preliminary parcels 133 and 158 are located in or near the same areas previously recommended for deferral by BLM. Further, Parcel 158 encompasses the exact *same* lands as Parcel 112 from the December 2008 lease sale and does *not* include the NSO stipulation for greater sage-grouse that BLM previously determined to be necessary. *See* December 2018 VFO Leasing Stipulations at 50-51.

- December 2008 parcels 93, 96, and 97, located in the Central Uinta Basin group, were recommended for deferral. *See* Stiles Report at 7. Deferral was warranted because of greater sage-grouse concerns, including the need for BLM to require NSO stipulations throughout all sage-grouse habitat. *Id.* Here, preliminary parcels 134-37, and 139-41 are located in these same areas and notably, *none* of these parcels include the necessary NSO stipulation for greater sage-grouse. *See* December 2018 VFO Leasing Stipulations at 34-42 (stipulations for these preliminary parcels).

- December 2008 parcels 98, 115, and 116, located in the Central Uinta Basin group, were recommended for deferral. *See* Stiles Report at 7-8. Parcels 98 and 116 were deferred because of the need for BLM to review the lands encompassed thereby "using the soon-to-be-released new Wilderness Characteristics Inventory Manual [*i.e.*, BLM Manual

[3] BLM rescinded IM 2010-117 in January 2018 with the issuance of IM 2018-34.

> 6310].” *Id.* With regard to Parcel 115 BLM stated: “This parcel should only be offered with an NSO stipulation because of obvious access concerns, including highly erodible soils in the only apparent access corridor, wildlife habitat, and cultural resources, as well as possible wilderness characteristics.” *Id.* at 8. In the present case, preliminary parcels 141, 165, and 167 encompass the same public lands highlighted – and deferred – in the Stiles Report. However, there is no record evidence BLM has analyzed these areas pursuant to Manual 6310 and Parcel 165 – which encompasses all of what was previously Parcel 115 is *not* being offered with a NSO stipulation in its entirety. *See* December 2018 VFO Leasing Stipulations at 57-58.

Parcels recommended for deferral, including those discussed above, encompassed public lands that BLM determined should *not* be leased until “one or more” of several specific criteria was met including “needed analysis is completed and *changes are made to the supporting RMPs and associated lease stipulations*.” Stiles Report at 5 (emphasis added). BLM has never prepared the requisite analysis, nor has BLM attached the NSO stipulations it previously concluded were necessary prior to new oil and gas leasing. A decision to offer these parcels without that analysis and stipulations would be arbitrary and capricious.

V. BLM Properly Deferred Leasing in Areas Now Targeted for Sale, Citing the Need for New Information and Analysis

Over the past several years BLM deferred hundreds (if not thousands) of parcels because the agency recognized that the existing RMPs failed to account for or analyze important resource information, as discussed *supra*. *See also* BLM, Utah State Office – List of Deferred Lands (last updated Sept. 18, 2017) (providing the rationale for parcel deferral) (attached).

In addition, based on new information generated by BLM or provided by the public and/or changed circumstances and the need to analyze that information pursuant to NEPA, BLM has deferred leasing in areas now considered for sale. For example, BLM deferred all parcels in the Alkali Ridge ACEC proposed for lease at its February 2015 sale. *See* BLM, Errata Sheet for February 2015 Competitive Oil and Gas Lease Sale (Feb. 10, 2015) (deferring thirty-six parcels) (attached). The stated reason for the deferral was the need to better understand cultural resources and potential impacts thereto from oil and gas leasing and development. *See* San Juan River MLP Revision Letter at *2 (explaining that “[s]ince the 2013 revisions to the San Juan MLP, BLM-Utah has been provided with substantial new information from a wide variety of public lands stakeholders related to its oil and gas leasing program”); *id.* at *3 (explaining that the new information received from a wide range of parties including SUWA and the National Park Service has demonstrated that additional analysis was necessary to address the issues described below). BLM recognized that it lacked sufficient information to make an informed leasing decision in this area:

> In 2015, BLM-Utah deferred the leasing of all parcels that were protested within the expanded MLP boundary because it determined additional analysis is necessary to address these cultural resource impact issues.

Id. at *4. Additional unresolved resource issues identified by BLM included impacts to Hovenweep National Monument, the Alkali Ridge and Hovenweep ACECs, and lands with wilderness character. *Id.* at *5. Prior to offering new leases located in areas previously deferred from leasing, including in and near the Alkali Ridge ACEC, BLM must provide record evidence that it has collected the necessary information, taken into account that information pursuant to NEPA and other applicable federal laws and regulations, and provide a non-arbitrary explanation for why leasing is now justified in an area when only a few years ago it was not.

VI. Water Quality

BLM needs to consider, analyze and disclose potential direct, indirect and cumulative impacts to water resources including ground and surface. This includes, but is not limited to, impacts to water quality and quantity from hydraulic fracturing during well drilling activities, and impacts to surface water and riparian areas from the depletion of water as a result of such activities.

A. NEPA Requires BLM Analyze Water Usage; Environmental Impacts From Hydraulic Fracturing

BLM has sufficient information to calculate water usage at this stage. This includes, but is not limited to, information on groundwater aquifers and potential depletion rates. *See, e.g.*, USGS, Utah Water Science Center, Groundwater Information and Data, https://ut.water.usgs.gov/infodata/groundwater.html (page last modified March 9, 2017); USGS, Current Conditions for Utah: Groundwater, https://waterdata.usgs.gov/ut/nwis/current/?type=gw (providing data for San Juan and Uintah Counties, among others) (page last modified July 24, 2018). Further, EPA has prepared significant documentation and analysis regarding the usage of water quality and potential risks of hydraulic fracturing. *See* 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 (Dec. 2016) (attached). As have other scientific-based organizations. *See* Physicians for Social Responsibility, Concerned Health Professionals of NY, Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction), Fifth Edition (March 2018) (attached).

BLM knows that the majority – if not all – of the oil and gas wells on the preliminary parcels will be developed through the use of hydraulic fracturing. *See, e.g.*, BLM, Environmental Assessment, December 2017 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G010-2017-0028-EA at 10 (Jan. 2018) (explaining that "in most cases" oil and gas operators utilize hydraulic fracturing in the well development process) (December 2017 Lease Sale EA) (attached). Moreover, BLM has the capability to analyze potential water usage and environmental impacts related to well development activities, including groundwater impacts from hydraulic fracturing. *See* BLM Map 1, Ground Water Systems, December 2017 Lease Sale (attached); BLM Map 2, Ground Water Systems, December 2017 Lease Sale (attached).

BLM is aware that hydraulic fracturing may adversely affect water resources by among other things contaminating water quality, reducing aquifer levels, and indirectly or cumulatively impacting the environment (including wildlife species dependent thereon). *See, e.g.*, December 2017 Lease Sale EA at 11 ("[hydraulic fracturing] activities are suspected of causing

contamination of fresh water by creating fluid communication between oil and gas reservoirs and aquifers). For example, the National Park Service in comments on Utah BLM's March 2018 competitive oil and gas lease sale highlighted this fact: "We also recommend that BLM consult with the US Geological Survey and State of Utah regarding potential effects of oil and gas exploration and development on groundwater quality." Letter from Superintendent, Southeast Utah Group, National Park Service, to Canyon Country District Manager, Bureau of Land Management 5 (Oct. 23, 2017) (attached). "These are issues of regional and national consequences and the NPS believes that incremental cumulative additional degradation of water resources puts the nation's resources and the public at risk." *Id.* at 5-6. Additionally, NPS noted that it was "concerned about the potential for earthquakes that could result from lubrication of faults, bedding planes, formation contacts, and other subsurface geological structures by injection of water during hydraulic fracturing or injection of produced waters." *Id.* at 7. These factors must all be addressed and analyzed by BLM.

B. Impaired Waters and Riparian Areas

The development of the preliminary parcels has the potential to directly, indirectly, and cumulatively impact impaired waters in Utah, referred to as 303(d) waters, as well as numerous other riparian areas. For example:

- The Price River and its tributaries, which flow through or near Parcels 1-11, 13-16, and 245 are on the state of Utah's list of impaired waters due to exceedances in dissolved oxygen and OE Bioassessment. *See* Utah DEQ, Final 2016 Integrated Report: Rivers, Streams, Springs, Seeps, and Canals 305(b) and 303(d) at 13/49 (Utah 303(d) Report) (attached). These impairments were identified *after* completion of the Price RMP. *Id.* (impairments identified in 2014).

- Ninemile Creek, located in Nine Mile Canyon, is near Parcel 87. This waterbody is impaired due to temperature. *See* Utah 303(d) Report at 37/49.

- The Bitter Creek segment, referred to as Bitter Creek Lower, is on the state of Utah's impaired waters list due to boron, selenium, temperature, and total dissolved solids (TDS). Utah 303(d) Report at 35/49. Parcels 127, 157, 159, 160, and 288, among others, are near this water. These impairments were identified *after* completion of the Vernal RMP. *Id.* (impairments identified in 2014).

- Evacuation Creek is on the state of Utah's impaired waters list due to boron, selenium, temperature, and TDS. *See* Utah 303(d) Report at 36/49. Parcels 181-85, 217-225, and 350 are near this water. The majority of these impairments were identified *after* completion of the Vernal RMP. *Id.* (selenium, temperature, and TDS impairments identified in 2014).

- Willow Creek is on the state of Utah's impaired waters list due to boron. *See* Utah 303(d) Report at 38/49. The Parcels in or near Wolf Point, Sunday School Canyon, and those located in Townships 11-13 south, Ranges 20-21 east, are in or near Willow Creek.

The impairment was identified *after* completion of the Vernal RMP. *Id.* (impairment identified in 2014).

BLM must analyze the direct, indirect, and cumulative impacts to these resource values at the leasing stage because that is the point at which an irretrievable commitment of resources occurs. BLM cannot postpone this analysis until the APD stage because those development activities are reasonably foreseeable and quantifiable now.

VII. Lands with Wilderness Characteristics

BLM must comply with Utah BLM Instruction Memorandum 2016-27, Change 1 and BLM Manuals 6310 and 6320 in its review of direct, indirect, and cumulative impacts to BLM-identified LWC. *See also* BLM, Instruction Memorandum No. UT 2016-027, Bureau of Land Management (BLM)-Utah Guidance for the Lands with Wilderness Characteristics Resource (Sept. 30, 2016) (attached)[4]; BLM, Manual 6310 – Conducting Wilderness Characteristics Inventory on BLM Lands (Public) (March 15, 2012) (attached); BLM, Manual 6320 – Considering Lands with Wilderness Characteristics in the BLM Land Use Planning Process (Public) (March 15, 2012) (attached).

Moreover, as noted *supra*, BLM cannot rely on DNAs to offer parcels in many, if not all, of these areas because BLM identified the wilderness characteristics resource *after* the applicable RMP was finalized. *See, e.g.*, BLM, Dripping Springs Wilderness Characteristics Inventory Area (Oct. 2014) (attached); BLM, Monument Canyon – 17,200 acres (updated with Map Oct. 26, 2017) (attached); BLM, Badland Cliffs Addition (March 17, 2017) (attached); BLM, Big Wash Wilderness Characteristics Inventory (March 17, 2017) (attached); BLM, Sheep Wash Wilderness Characteristics Inventory (March 17, 2017) (attached); BLM, Dragon Canyon Wilderness Characteristics Inventory (Nov. 15, 2017) (attached); BLM, White River Additions (January 21, 2016) (attached). These newly identified wilderness characteristics resource values and potential impacts thereto must be analyzed in BLM's NEPA document.

BLM should remove each parcel in BLM-identified lands with wilderness character. This includes, but is not limited to, parcels in the Badland Cliffs, Big and Sheep Wash, Dripping Springs, Dragon Canyon, Bitter Creek, Harts Point, Monument Canyon, Tin Cup Mesa, and Wolf Point LWC areas.

VIII. Air Quality

BLM has not considered the effects of leasing and development on the proposed lease parcels to air quality or how air quality in the areas proposed for leasing is being impacted by ongoing, planned, and reasonably foreseeable development activities. BLM must conduct comprehensive air quality modeling prior to issuance of the parcels. There are several new issues BLM must address:

[4] Attachment 2 of IM 2016-27 was rescinded by BLM on April 16, 2018. *See* BLM, Instruction Memorandum No. UT 2016-027, Change 1, Bureau of Land Management (BLM)-Utah Guidance for the Lands with Wilderness Characteristics Resource (April 16, 2018) (attached).

- The Uinta Basin has been designated by the EPA as marginal nonattainment for NAAQS for ozone. *See* EPA, Final Rule, Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards (April 30, 2018) (attached). As recognized by EPA and the state of Utah's Division of Air Quality, the ozone problem is a direct result of oil and gas development in the Uinta Basin. *See* EPA, Response to Significant Comments on the State and Tribal Designation Recommendations for the 2015 Ozone Ambient Air Quality Standards (NAAQS) 62 (April 2018) (recognizing that oil and gas exploration and development is directly related to the ozone nonattainment designation). In other words, BLM as the primary land management agency with jurisdiction over oil and gas permitting in the Uinta Basin is largely to blame for this public health crisis. More importantly, BLM's air quality stipulations and notices prepared in the Vernal RMP to "mitigate" air quality impacts have failed to prevent the crisis from getting to this point and are ineffective and outdated. Despite the failings of its existing lease stipulations and unenforceable lease notices and the complete lack of review as to what steps the agency needs to take to fix the problem it created, BLM is proposing to offer 159 parcels in the Vernal field office with the *same* ineffective stipulations and notices – the majority of which are in or near the nonattainment area. *See generally* December 2018 VFO Leasing Stipulations. BLM has never taken a hard look at this issue, as required by NEPA.

- FLPMA requires BLM to manage the public lands "in a manner that will protect . . . air and atmospheric . . . values." 43 U.S.C. § 1701(a)(8). It also requires BLM to manage public lands in accordance with its land use plans (*i.e.*, the Vernal RMP), which provides that BLM will: "Ensure that authorizations granted to use public lands . . . comply with and support applicable local, state, and federal laws, regulations, and implementation plans pertaining to air quality." Vernal RMP at 70. BLM cannot do so here because its proposed stipulations have – objectively – failed to protect air quality. Moreover, BLM cannot provide the necessary air quality protection assurance because (1) BLM has never studied or documented the effectiveness (or lack thereof) of stipulations adopted in the Vernal RMP, including for air quality, and (2) *assuming arguendo* that BLM had prepared those studies, the agency has never considered them in light of the recent ozone nonattainment designation. Therefore, BLM's issuance of any parcel in the ozone nonattainment area would violate FLPMA.

- BLM must ensure that its leasing decision complies with the Clean Air Act in light of the ozone nonattainment designation. *See, e.g.*, 42 U.S.C. § 7506(c)(1) ("No department, agency, or instrumentality of the Federal Government shall engage in, support in any way . . . license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated."); *see also id.* § 7506(c)(1)(B); 40 C.F.R. §§ 93.153, 93.158. Further, regardless of whether a state or federal air quality implementation plan is in place, BLM must ensure that its authorizations include "enforceable measure[s] that effect[] emissions reductions so that there is no net increase in emissions of that pollutant," and do not "[c]ause or contribute to any new violation of any standard in any area." *Id.* §§ 93.158(a)(2), (b)(2)(i). The sale of the proposed lease parcels would not comply with the Clean Air Act.

- BLM's analysis must account for its updated 2018 Air Resource Management Strategy. *See* BLM, Utah Bureau of Land Management, Air Resource Management Strategy (ARMS) (June 2018) (attached).

Additionally, BLM must analyze and take a hard look at the reasonable and foreseeable indirect downstream emission impacts of its leasing decision. NEPA requires that this work be done at the earliest stage feasible and include the combustion of oil and gas likely to be produced on the proposed leases.

IX. Climate Change

NEPA requires BLM to address climate change and its potential costs in its pre-leasing analysis for the December 2018 sale, including the direct, indirect, and cumulative impacts to climate change from the proposed oil and gas leasing and development and including the social cost of carbon. Notably, the Tenth Circuit has held that climate change "is a scientifically verified reality" and does not involve "the frontiers of science," meaning that BLM is *not* owed any greater deference in its climate change analysis. *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1237 (10th Cir. 2017). Moreover, BLM's analysis must separately consider the direct, indirect, and cumulative impacts of oil and gas exploration and development on the proposed parcels. BLM cannot – as it has unlawfully done in past sales – conclude that its cumulative impact analysis satisfied its direct and indirect impacts analyses. *See, e.g.*, BLM, December 2017 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G010-2017-0028-EA 75 (June 2017) (excerpts attached).

Recent federal court decisions have made clear that BLM must consider and analyze the greenhouse gas emissions from consumption of the oil and gas produced by wells developed on the leases. *San Juan Citizens Alliance v BLM*, 2018 WL 2994406 *9, *11 (D.N.M.) (June 14, 2018).

Finally, a recent study regarding methane emissions from oil and gas operations concluded that the federal government, including BLM, 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 leak rate from the oil and gas operations is 2.3 percent, 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. The study recommends that state and federal agencies couple the bottom-up approach with a "top-down" approach in which the agency "uses methane concentration data collected across an entire basin from surface, aircraft, tower, or satellite observations in combination with atmospheric transport models to estimate site or regional emissions." *Id.* "These techniques have developed rapidly and are effective at both quantify overall emissions as well as attributing emissions to thermogenic versus biogenic . . . sources." *Id.* BLM's December 2018 lease sale climate change analysis must take into account this new information because methane emissions are a particularly strong driver of climate change.

X. Viewsheds

BLM must take a hard look at and analyze impacts to viewsheds and viewshed-related values, including impacts to wilderness-caliber lands, recreation (such as along the Green River) and general aesthetics, from oil and gas leasing and development. Among other things, BLM should analyze potential direct, indirect, and cumulative impacts to viewsheds that may affect the following resources and visitors:

- Recreational users on the Green and White Rivers;
- Cultural landscapes including Nine Mile Canyon and the Alkali Ridge ACEC;
- The Badland Cliffs, Big and Sheep Wash, Bitter Creek, Monument Canyon, and White River LWCs, among others;
- Areas within prior-BLM designated MLP boundaries including the Cisco Desert, San Rafael Desert, San Juan, and Vernal MLP areas; and
- Bears Ears and Hovenweep National Monuments.

These viewshed analyses are necessary because, as acknowledged by BLM (and discussed *supra*), the areas within MLP boundaries – which include the majority of the preliminary parcels – have been identified by BLM as needing additional viewshed analyses to better understand potential impacts from oil and gas leasing and development. Further, visual impacts can degrade (or destroy) wilderness-caliber lands and cultural landscapes such as the Alkali Ridge ACEC.

Finally, as noted *supra*, BLM must consider the most current visual resource inventory information, prepared *after* the RMPs were finalized, in its NEPA analyses.

XI. Parcel 257 and the September 2018 Competitive Oil and Gas Lease Sale

Parcel 257 is located in the San Rafael Desert – the same area to be auctioned-off at Utah BLM's September 2018 competitive oil and gas lease sale. *See* BLM, September 2018 Oil and Gas Lease Sale, DOI-BLM-UT-0000-2018-0001-EA, https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=103243&dctmId=0b0003e8810c3ec2 (last updated July 26, 2018). Therefore, SUWA incorporates in its entirety SUWA's comments and activity plan proposal provided with regard to that sale because both sales involve the same issues. *See generally* SUWA September 2018 Scoping Comments.

XII. Cultural Resources

As BLM is aware, much of the land implicated in this lease sale is rich in cultural resources. BLM has dual obligations when considering the impacts of its undertakings on cultural resources. Pursuant to Section 106 of the National Historic Preservation Act ("NHPA"), BLM must "make a reasonable and food faith effort" to identify cultural resources that may be affected by an undertaking. 36 C.F.R. § 800.4(b)(1). Pursuant to NEPA, BLM must take a "hard look" at the effects of the proposed action. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). BLM must comply with both statutes at the leasing stage.

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]

Reasonable and Good Faith Effort

BLM must "make a reasonable and good faith effort" to identify cultural resources. 36 C.F.R. 800.4(b)(1). To do so, the agency must "take into account past planning, research and studies … the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." *Id.* To satisfy its reasonable and good faith identification efforts, BLM must – at the very least – analyze all cultural resource information maintained by the agency, SHPO, and provided to BLM whether by project-proponents or members of the public.

BLM recently completed Class I inventories for the Vernal, Price, Monticello and Moab field offices with associated archaeological site predictive models. *See* BLM, A Class I Cultural Resource Inventory of Lands Managed by the Bureau of Land Management, Richfield Field Office (June 2016); BLM, Class I and Site Location Model for the Bureau of Land Management Vernal Field Office Area, Daggett, Duchesne, Uintah, Carbon and Grand Counties, Utah (June 2018); BLM, A Class I Cultural Resource Inventory of Lands Administered by the Bureau of Land Management Price Field Office (July 2017) (PFO Class I Inventory); BLM, A Class I Cultural Resource Inventory of Lands Administered by the Bureau of Land Management, Monticello Field Office (Sept. 2017); BLM, A Class I Cultural Resource Inventory of Lands Administered by the Bureau of Land Management, Moab Field Office (2017). While archaeological models are far from perfect, they do provide information about the potential location of undiscovered sites. *See, e.g.*, PFO Class I Inventory, at 8-9. The predictive models in these field offices are actually series of different models, individual site type models and a composite model.

To comply with NHPA requirements to make a reasonable and good faith effort to identify cultural resources, BLM must at least take into account all of its existing information about potential resources. Accordingly, BLM must analyze impacts to cultural resources using the various individual site type models. These models provide BLM with the best information about the potential resources on the ground and allow the agency to better assess potential adverse effects from the lease sale. In contrast, BLM's reliance on composite or generalized models which may produce *false negatives* (that leasing may not adversely affect historic properties) does not comply with the NHPA's reasonable and good faith identification requirement.

[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 Must Consider Adverse Impacts of its Undertakings on Cultural Resources

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

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

Hard Look

In addition to BLM's obligations under the NHPA, NEPA requires it to take a "hard look" at the environmental effects of a proposed action. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). "General statements about 'possible' effects … do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). BLM must analyze all potential direct, indirect, and cumulative impacts to cultural resources.

XIII. NEPA Alternatives

A. Legal Background

NEPA requires BLM to analyze a range of alternatives to any proposed action. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) ("An agency's obligation to consider reasonable alternatives is 'operative even if the agency finds no significant environmental impact.'") (citation omitted). Though less detailed than an EIS, an EA must demonstrate that the agency took a "hard look" at alternatives – a "thoughtful and probing reflection of the possible impacts associated with the proposed project" so as to "provide a reviewing court with the necessary factual specificity to conduct its review." *Silverton Snowmobile Club*, 433 F.3d at 781 (citation omitted); *see also* 40 C.F.R. § 1508.9(a)(1).

The range of alternatives an agency must analyze in an EA or EIS is determined by a "rule of reason and practicality" in light of a project's objective. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (citation omitted). "NEPA 'does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective[.]'" *New Mexico ex rel. Richardson*, 565 F.3d at 708

(citation omitted). But the number and nature of alternatives must be "sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Id.* (citation omitted).

In an EA, as in an EIS, the range of alternatives an agency must analyze depends on its purpose and need statement. *See Davis*, 302 F.3d at 1119; *see also* 40 C.F.R. § 1508.9(b) (requiring that EAs include "brief discussions of the need for a proposal" and alternatives to it). "Alternatives that do not accomplish the purpose of an action are not reasonable." *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001). Stated differently, "[i]t is the BLM purpose and need for action that will dictate the range of alternatives and provide a basis for the rationale for eventual selection of an alternative in a decision." BLM Handbook 1790 § 6.2. After "defining the objectives of an action," the agency must "provide legitimate consideration to alternatives that fall between the obvious extremes." *Dombeck*, 185 F.3d at 1175.

Notably, "[t]he broader the purpose and need statement, the broader the range of alternatives that must be analyzed." BLM Handbook 1790 § 6.2.1; *see also id.* § 6.6.1. "In determining the alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative." *Id.* § 6.6.1, at 50. Likewise, NEPA's alternatives analysis requirement is *independent of and broader than* BLM's obligation under the Act to determine whether oil and gas leasing and development will have a significant impact to the environment:

> [C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, . . . the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. . . . Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988) (citations omitted).

B. BLM Cannot Lawfully Analyze Only the Proposed Action and No Action Alternatives

BLM must analyze a broad range of NEPA alternatives because the purpose and need of an oil and gas sale is exceedingly broad (*i.e.*, to respond to lease parcel nominations). BLM's stated objectives govern its range of alternatives and dictate the reasonableness of alternatives including those proposed *infra* by SUWA. Once BLM establishes its purpose and need statement the agency must "provide legitimate consideration to alternatives that fall between the obvious extremes." *Dombeck*, 185 F.3d at 1175.

In the present case, in adopting the MLPs discussed *supra*, BLM repeatedly acknowledged that the agency lacked sufficient information to make an informed leasing decision in these areas, including developing new leasing alternatives and stipulations. For example, for the San Rafael Desert MLP – which encompasses Parcel 257 – BLM explained that a primary purpose of that analysis was to "[c]onsider a range of new conditions, including prohibiting surface occupancy or closing certain areas to leasing." 81 Fed. Reg. 31252, 31253 (May 18, 2016). Specifically, BLM needed to "consider a range of alternatives that focus on mitigating the impacts of development on resources that are of concern." *Id.* Moreover, BLM started its NEPA analysis for the San Rafael Desert MLP, including *four* leasing alternatives. *See, e.g.*, BLM, San Rafael Desert Master Leasing Plan Preliminary Alternatives 7 (attached) (noting that "BLM has developed four preliminary alternatives"); BLM, San Rafael Desert Master Leasing Plan, Chapter 2 – Alternatives (describing the four alternatives for managing oil and gas leasing and development in the San Rafael Desert MLP) (MLP Alternatives) (attached). These alternatives (and associated leasing stipulations, notices, and leasing decisions) must be incorporated into BLM's NEPA analysis in the leasing EA. *See also* BLM, San Rafael Desert Master Leasing Plan, Appendix B – Oil and Gas Stipulations and Lease Notices (describing each oil and gas leasing stipulation and notice associated with each alternative) (attached). Notably, BLM has stated that these alternatives need to be analyzed "prior to new leasing of oil and gas resources" in the San Rafael Desert region. 81 Fed. Reg. at 31253.

C. SUWA's Recommended Alternatives

SUWA recommends that BLM analyze the following alternatives pursuant to NEPA:

- A "leasing outside of wilderness-caliber lands" alternative. Under this alternative, BLM would not offer for lease any parcels in BLM-identified non-WSA lands with wilderness characteristics.

- A "no-surface occupancy" alternative. Under this alternative, BLM would only offer BLM-identified non-WSA lands with wilderness characteristics for lease with non-waiveable NSO stipulations.

    - BLM already has recognized the need to consider alternatives such as these, stating that a primary purpose of the San Rafael Desert MLP was to "[c]onsider a range of new conditions, including prohibiting surface occupancy or closing certain areas to leasing." 81 Fed. Reg. at 31253. Further, as discussed *supra*, BLM recognized the need for NSO stipulations for lands proposed for leasing in the Stiles Report – NSO stipulations that BLM has not attached to the preliminary parcels encompassing those same lands. This alternative is feasible at the leasing stage as evidenced by BLM's full consideration of similar alternatives in prior NEPA analyses. *See, e.g.*, West Tavaputs Plateau Natural Gas Full Field Development Plan, Record of Decision at 3-4 (2010) (discussing Alternative D which involved additional NSO stipulations). Moreover, *BLM* in the Stiles Report recommended that new NSO stipulations be attached to many of the parcels included on the preliminary parcels list, as discussed *supra*.

- A "phased development-leasing" alternative. Under this alternative, BLM would require lessees and operators to first explore and develop land outside of BLM-identified non-WSA lands with wilderness characteristics – and to prove that such areas are capable of production in paying quantities – prior to developing in BLM-identified non-WSA lands with wilderness characteristics.

    - BLM has the authority to require this approach and, notably, has already recognized the need to do so in the San Rafael Desert, stating that a primary purpose of the MLP was to "[e]valuate potential development scenarios." 81 Fed. Reg. at 31253.

- A "mitigation leasing" alternative. Under this alternative, BLM would attach additional mitigation measures and best management practices (BMP) to each lease. This would include controlled surface use and NSO stipulations to protect sensitive resources including cultural resources and BLM-identified non-WSA lands with wilderness characteristics.

    - As discussed *supra*, BLM recognized the need to require such measures and that the RMPs were deficient in this regard in the Stiles Report. Moreover, BLM explained that for the MLPs, including the San Rafael Desert MLP, two primary purposes were to "[c]reate oil and gas development mitigation strategies," and "[c]onsider a range of new conditions, including prohibiting surface occupancy or closing certain areas to leasing." 81 Fed. Reg. at 31253.

Each of SUWA's recommended alternatives are reasonable, non-speculative, technically feasible, and without question would accomplish BLM's stated purpose and need for its pre-leasing NEPA analyses. Moreover, each of these alternatives are well within BLM's statutory mandate and authority under FLPMA. As such, BLM much analyze and consider each alternative.

XIV. Wild and Scenic Rivers

Dozens of the preliminary parcels are located adjacent to or near segments of streams or rivers identified by BLM as suitable or eligible for inclusion in the National Wild and Scenic Rivers System. This includes, but is not limited to:

- Parcels 246, 247, and 257 are located near the suitable Green River segment. *See* Vernal FEIS, Map 2-15-B Wild and Scenic Rivers – Alternative B; Moab MLP, Map 49 Suitable Wild and Scenic River Segments along the Colorado and Green Rivers (NSO). BLM determined that this stretch of water contains outstandingly remarkable scenic, recreational, wildlife, fish, cultural, and ecological values. *See* Moab MLP FEIS at 3-100, tbl. 3-27 (Suitable Rivers / Segments in the Planning Area). It is proposed for designation as "scenic." *Id.* BLM must manage this segment of river to "[m]aintain and enhance the free flowing character, preserve and enhance the outstandingly remarkable values, and allow no activities within the river corridor that will alter [its] classification as suitable for congressional designation in the [WRS] System." Moab MLP at 30. Parcel 257 also is

located near the Keg Spring Canyon and Barrier Creek segments determined by BLM to be eligible for inclusion in the WSR System. *See* Price RMP 3-95, tbl. 3-38. Keg Spring Canyon contains outstandingly remarkable scenic and cultural values while Barrier Creek contains recreational, cultural, and ecological values. *Id.*

- Parcels 152-56, 177-79, 209-11, and 233-34 are located near the eligible White River segment. *See* Vernal FEIS, EIS – Fig. 32, Special Designations – Alternatives C and E. BLM determined that the White River contains outstandingly remarkable scenic, fish, wildlife/habitat, recreational, and historic values. *See* Vernal FEIS at 3-92 to 3-93, tbl. 3.16.3. Similarly, Parcels 178, 211-15, and 217 are near the eligible Evacuation Creek segment, which has outstandingly remarkable historic values. *Id.* at 3-92, tbl. 3.16.3. Parcels 190-96, 237-38, and 353-58 are near the eligible Bitter Creek segment in the southern Uinta Basin. *Id.* For this stream, BLM has identified outstandingly remarkable fish, wildlife/habitat, cultural, historic, and recreational values. *Id.* Finally, Nine Mile Creek, near Parcel 87, is an eligible stream due to outstandingly remarkable scenic and cultural values. *Id.*

- Parcels 1, 10, 11, 13, 14, 15, 16, and 245 are located near the Price River segment determined by BLM to be "suitable" for inclusion in the WSR System. *See* Price FEIS at Map 2-67 Suitable Wild and Scenic Rivers Alternative E. BLM has determined that the Price River contains outstandingly remarkable fish, cultural, historic, geological, and wildlife values. Price RMP at 3-95, tbl. 3.38.

BLM must account for these known resource values in its leasing analysis, regardless of whether BLM elected in the relevant RMP to manage for the protection of such values. Because BLM knows that these values exist it must consider the direct, indirect, and cumulative impacts of its leasing decision to those identified values. *See, e.g.*, 40 C.F.R. §§ 1508.7, 1508.8. It must comply with the relevant management prescriptions in each RMP as well as BLM's applicable handbooks and manuals.

XV. BLM Must Prepare an Environmental Impact Statement

An EIS must be prepared for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *see also Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1124 (9th Cir. 2004) ("[A]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factors.'") (emphasis in the original); *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1430 (D.C. Cir. 1985) (agency must make a "convincing case that [the impacts of its action are] insignificant").

The context of this particular sale requires an EIS. For example, coupled with its September 2018 lease sale, BLM is proposing to offer more than 330 parcels and more than half a *million* acres of public land for oil and gas leasing and development. Further, the September 2018 Lease Sale includes parcels in Utah County, adjacent to the Price River, that are bookended by parcels offered at the December 2018 sale in the *same* area on the Carbon County boundary. *See* SUWA MAP – September / December 2018 Lease Sale, Price River Suitable Wild & Scenic (attached).

BLM also is bookending parcels offered at the March 2018 Lease Sale with parcels in the exact same area (*i.e.*, the Alkali Ridge ACEC) – proposals that individually and collectively threaten significant cultural and archeological resources in that area. *See generally* Canyon Country District March 2018 Competitive Oil and Gas Lease Sale – Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA.[6] All of this requires BLM to prepare an EIS. *See* 40 C.F.R. § 1508.27(a).

Several of the so-called intensity factors are implicated in the present case, requiring BLM to prepare an EIS. Specifically, the leasing proposal is one which "affects public health or safety." 40 C.F.R. § 1508.27(b)(2). Additionally, it involves "[u]nique characteristics . . . such as proximity to historic or cultural resources, park lands . . . wild and scenic rivers, [and] ecologically critical areas," including Bears Ears National Monument. *Id.* § 1508.27(b)(3). Likewise, BLM's leasing proposal and its associated environmental impacts are "highly controversial," *id.* § 1508.27(b)(4), that is – the impacts to climate change, air quality, cultural resources, etc. are not fully in dispute and not fully understood. Further, as discussed *supra*, in each MLP designated by BLM the agency recognized the need for significantly more information and analyses prior to being able to make an informed leasing decision in these areas.

Finally, the change in presidential administration and BLM leadership and associated priorities, including the ill-conceived push for "energy dominance" do not alleviate or excuse BLM from its prior statements and commitments regarding the areas encompassed by the aforementioned MLPs. Those prior statements and commitments, coupled with the controversial nature of the leasing proposal, require BLM to prepare an EIS.

XVI. "Parcel" 277 Is Partially in Bears Ears National Monument

Approximately 30 acres of federal public land encompassed in "parcel" 277 are located in Bears Ears National Monument and excluded from mineral leasing by former President Obama's monument proclamation. *See* 82 Fed. Reg. 1139, Establishment of the Bears Ears National Monument (Dec. 28, 2016). "Parcel" 277 was a longstanding noncompetitive offer to lease, serialized as UTU-76858 – an offer dating back to 1997, which BLM "accepted" (*i.e.*, BLM issued the lease) in the spring of 2018. *See* Southern Utah Wilderness Alliance, Notice of Appeal Re: Issuance of Oil and Gas Lease UTU-76858 (explaining the prior history with regard to this lease) (notice of appeal and exhibits thereto attached). BLM suspended UTU-76858 following the filing of SUWA's notice of appeal in that matter. *See* Letter from BLM to Liberty Petroleum Corp. (April 20, 2018) (suspending the lease in order to prepare curative NEPA analysis); IBLA No. 2018-101, Unopposed Motion to Dismiss (May 23, 2018) (stating that the lease had been suspended as a result of SUWA's appeal) (attached).

BLM's issuance of UTU-76858 with regard to the portion thereof that overlaps with Bears Ears National Monument was unlawful and contrary to the monument proclamation. 82 Fed. Reg. at 1143 ("All Federal lands . . . within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public

[6] Available at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=122745 (last updated May 21, 2018).

land laws"). The December 28, 2016, monument designation pre-dated BLM's issuance of UTU-76858 in 2018 and therefore was an unequivocal and express rejection of the 1997 offer to lease, making BLM's issuance thereof unlawful. Moreover, President Trump's unlawful reduction of the Bears Ears National Monument boundary has no impact on this result. *See* 2017 WL 5988611 (Dec. 4, 2017), Presidential Proclamation Modifying the Bears Ears National Monument. BLM's prior attempt to issue UTU-76858 (for the portions in Bears Ears National Monument) was unlawful as is any subsequent attempt to prepare "curative" NEPA analysis to justify that prior leasing decision.

XVII. BLM Must Ensure Conformance with the Greater Sage-Grouse Land Use Plan Amendments

BLM is proposing to lease many parcels in greater sage-grouse habitat including General Habitat Management Areas (GHMA) and Priority Habitat Management Areas (PHMA). *See* SUWA MAP – Greater Sage-Grouse Habitat (attached). BLM's leasing decision must conform to its governing land use plans, as amended by the agency's sage-grouse land use plan amendments. *See* 43 U.S.C. § 1732(a) (BLM "shall manage the public lands . . . in accordance with the land use plans developed by" the agency); BLM, Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (Sept. 2015) (Greater Sage-Grouse LUPA). This includes, but is not limited to, compliance with the Greater Sage-Grouse LUPA's obligation to prioritize leasing *outside* of GHMA and PHMA and to demonstrate through record evidence how BLM has done so. Greater Sage-Grouse LUPA at 2-25 (Objective MR-1).

XVIII. Must Make NEPA Documents Available for Public Comment

"Federal agencies *shall to the fullest extent possible* . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2 (emphasis added). SUWA requests that BLM make available the leasing EA or EIS to the public for review and comment. Specifically, SUWA requests that BLM provide a 30 day comment period due to the fact that this leasing proposal will have ongoing and irretrievable impacts to public lands and resources including wilderness-caliber lands, air and water quality, cultural resources, and Bears Ears and Hovenweep National Monuments, among other resource values.

SUWA appreciates your consideration of these scoping comments and reserves the right to supplement these comments as necessary.

Sincerely,

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