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Re: **Comments on BLM Utah's March 2019 Oil and Gas Lease Sale**

To whom it may concern:

Please accept and fully consider these comments on the parcels under consideration for inclusion in BLM Utah's March 2019 oil and gas lease sale in the Vernal, Price, Monticello and Salt Lake field offices, submitted on behalf of The National Wildlife Federation. Our organization and our members are deeply invested in sound stewardship of our public lands, and we appreciate the opportunity to comment at the stage in the lease sale process.

I. Interest of the Party

The National Wildlife Federation (NWF) has a long-standing interest in BLM lands in Utah and engages frequently in the decision-making process for land use planning and project proposals that could potentially affect lands important to fish, wildlife and other important natural resources managed by the BLM in Colorado. The National Wildlife Federation (NWF), America's largest conservation organization, has worked across the country to unite Americans from all walks of life in giving wildlife a voice for over eighty years. NWF has 51 state and territorial affiliates and more than 6 million members and supporters, including hunters, anglers, gardeners, birders, hikers, campers, paddlers, and other outdoor enthusiasts residing in Wyoming, who regularly rely on BLM lands to engage in these activities. NWF programs works to protect the 600 million acres of public lands owned by all Americans and has a longstanding interest in ensuring these lands are managed properly for fish, wildlife, and communities.

Although our organization generally supports the judicious leasing and responsible development of the public's oil and gas resources when done in the right place and after full disclosure of the

environmental impacts that will result from development, we have concluded that with respect to this proposal, none of those basic guiding tenets have been achieved.

II. Statement of Concerns

1. *BLM has failed to take the "hard look" required by NEPA prior to issuing oil and gas leases.*

BLM has not taken the required "hard look" at potential environmental impacts. Under the National Environmental Policy Act (NEPA), BLM must evaluate the "reasonably foreseeable" site-specific impacts of oil and gas leasing, prior to making an "irretrievable commitment of resources." *New Mexico ex rel. Richardson*, *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (agencies are to perform hard look NEPA analysis "before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values"); *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 ([o]n land leased without a No Surface Occupancy Stipulation the Department cannot deny the permit to drill; it can only impose 'reasonable' conditions which are designed to mitigate the environmental impacts of the drilling operations.). Courts have held that BLM makes such a commitment when it issues an oil and gas lease without reserving the right to later prohibit development. *New Mexico ex rel. Richardson*, 565 F.3d at 718.

For the parcels within the Price and Monticello field offices, BLM has not conducted any NEPA analysis to support offering these lease parcels for sale. Instead, BLM is attempting to rely on a Determination of NEPA Adequacy (DNA). DNAs, unlike Environmental Assessments (EAs) and Environmental Impact Statements, are not NEPA documents. They do not analyze impacts, but rather determine the adequacy of existing NEPA documents. *See e.g., S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1261-62 (D. Utah 2006).

The use of DNAs is governed by provisions in the Department of the Interior Departmental Manual and the BLM's NEPA Handbook. Under the Departmental Manual, a DNA can only be used when (1) the proposed action is adequately covered by existing NEPA analysis and (2) there are no new circumstances, information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis. Departmental Manual Part 516 Section 11.6. A DNA "does not itself provide NEPA analysis." *Id.* Under the BLM NEPA Handbook, before a DNA can be used, there must be a determination made that the action is adequately analyzed in existing NEPA documents and the action is in conformance with the land use plan. BLM NEPA Handbook H-1790-1 at 22. Before a DNA can be used, BLM must confirm (based on a checklist of issues that need to be considered) that the existing NEPA analysis is sufficient. *Id.* at 23, 161 (Appendix 8).

BLM has not met these requirements. First, the DNA does not provide sufficient information to assess whether the leases to be offered comply with the governing Resource Management Plans (RMP). Nor do existing NEPA documents adequately analyze the reasonably foreseeable impacts of issuing these leases. Oil and gas leasing involves an irreversible and irretrievable commitment of public resources that must be accompanied by site-specific NEPA analysis. A

"suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid." *Conner v. Burford*, 848 F.2d 1441, 1450-51 (9th Cir. 1988). Without preparation of at least an EA for a lease sale, "the government subverts NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values." *Id.* at 1451.

For example, the underlying RMPs, and the 2015 greater sage-grouse RMP amendment, only considered whether areas should be available for leasing but did not consider actual leasing in specific areas, or the environmental impact of that leasing. The RMPs also did not make any irreversible and irretrievable commitment of resources by selling leases, which BLM is now proposing to do.

The RMP-level analysis did not assess of a variety of impacts relevant to BLM's decision whether to offer particular parcels for leasing or whether additional site-specific stipulations should be required. *See* 43 C.F.R. § 3131.3. These include, for example, the depth and quality of groundwater in specific locations, particular wetlands or riparian areas, information about topography, soil conditions and vegetation with a level of specificity that would allow BLM to prevent erosion or soil damage at the site-specific level, and the presence or absence of special status wildlife species in particular locations. The need for a site-specific NEPA analysis is especially apparent with regard to the prioritization objectives in the 2015 sage-grouse RMP amendment. That prioritization requirement expressly contemplates that BLM will conduct additional analysis at the leasing stage to decide which leases should be offered, and which should be deferred. Such an analysis has not been done for this lease sale, as discussed below.

Furthermore, the RMPs necessarily included only a high-level analysis of leasing impacts that identified the category of impact and what stipulations or legal requirements may apply. Such a generic discussion of types of impacts fails to provide many facts necessary for BLM to make an informed decision about leasing individual parcels. For example, the RMPs fail to assess whether and to what extent stipulations will actually be effective in protecting resources on particular parcels, which resources on each parcel will suffer particular damage if an accident occurs, or where additional protective measures may be warranted on particular parcels. Most of the RMPs' discussion of impacts, in fact, could apply to any lease sale and therefore lack site-specific analysis.

This does not satisfy NEPA. Merely describing the "the *category* of impacts anticipated from oil and gas development" isn't sufficient when it is reasonable for BLM to do more. *See New Mexico v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) (emphasis original). "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA's 'twin aims' of informed agency decision-making and public access to information." *Id.* The impacts from development on lease parcels being sold are "reasonably foreseeable." An "effect is reasonably foreseeable if it is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Colo. Env. Coal. v. Salazar*, 877 F. Supp. 2d 1233, 1251 (D. Colo. 2013) (quotation omitted). The fact that no APDs have been filed yet does not excuse BLM from making reasonable predictions about where that development is likely to occur: "reasonable forecasting is implicit in NEPA, and we

must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Salazar*, 877 F. Supp. 2d at 1251 (quoting *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir.1996)). The test is whether an impact can or "cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker." *DuBois*, 102 F.3d at 1286.

It is clear the DNAs for the March 2019 oil and gas lease sale are invalid. The proposed action is not adequately covered in existing NEPA documents and there are new circumstances, information, and unanalyzed alternatives and environmental impacts that have not been considered that require additional NEPA analysis. BLM also has not shown that the proposed action is in conformance with the underlying RMP.

Before proceeding with the proposed lease sale, BLM must prepare a NEPA analysis that considers the environmental impacts of offering these parcels for sale. At a minimum, an EA is required. Even under IM 2018-034, an EIS or EA is still required when existing NEPA analysis has not adequately analyzed the impacts of the lease sale and is not in conformance with the RMP, as is the case here. *See* IM 2018-034 at section III.D (stating "state/field office[s] will determine the appropriate form of NEPA compliance for all lease sale parcels" and "If the authorized officer deems additional analyses to be necessary, then BLM can prepare an Environmental Assessment").

III. BLM has failed to consider a range of alternatives.

NEPA generally requires the lead agency for a given project to conduct an alternatives analysis for "any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The regulations further specify that the agency must "rigorously explore and objectively evaluation all reasonable alternatives" including those "reasonable alternatives not within the jurisdiction of the lead agency," so as to "provid[e] a clear basis for choice among the option." 40 C.F.R. § 1502.14. This requirement applies equally to EAs and EISs. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 122829 (9th Cir. 1988).

The range of alternatives is the heart of a NEPA document because "[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of [a NEPA analysis] to inform agency deliberation and facilitate public involvement would be greatly degraded." *New Mexico ex rel. Richardson*, 565 F.3d at 708. That analysis must cover a reasonable range of alternatives, so that an agency can make an informed choice from the spectrum of reasonable options.

For the parcels in the Monticello and Price field offices, BLM has failed to evaluate any alternatives to the proposed action by authorizing this lease sale through a DNA rather than conducting any NEPA. Agencies violate NEPA when they lease lands for oil and gas development without giving full consideration to a "no-leasing" alternative. *See Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988). Issuing leases opens the door to potentially

harmful post-leasing activity and creates unresolved conflicts concerning alternative uses of available resources. "NEPA therefore requires that alternatives – including the no-leasing option – be given full and meaningful consideration." *Id.* Accordingly, BLM cannot rely on a DNA in situations where the agency has not considered alternatives to energy development, "such as not issuing leases at all." *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004).

For the parcels in the Vernal and Salt Lake field offices, BLM has also failed to evaluate a range of alternatives by developing EAs that only consider two alternatives: a no action alternative and a proposed action. An EA offering a choice between leasing every proposed parcel, and leasing nothing at all, does not present a reasonable range of alternatives. *See TWS v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider "middle ground compromise between the absolutism of the outright leasing and no action alternatives"); *Muckleshoot Indian Tribe v. US Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (NEPA analysis failed to consider reasonable range of alternatives where it "considered only a no action alternative along with two virtually identical alternatives").

The underlying RMPs never considered alternatives relevant to this lease sale, such as offering some but not all of the parcels considered here. The RMPs also did not consider closing most of these areas to leasing nor did they consider the alternative of deferring all of these particular leases. The RMPs only considered alternatives generally opening or closing to leasing large areas measured in the millions of acres.

We proposed the following reasonable alternatives for this lease sale in our scoping comments, which BLM failed to analyze:

- An alternative to protect wilderness resources from oil and gas impacts, through deferring lease parcels in lands with wilderness characteristics and/or offering those parcels with NSO stipulations.
- An alternative that defers leasing in Priority and/or General Habitat Management Areas, consistent with BLM's obligation under FLPMA and the binding land use plan to "prioritize" oil and gas leasing outside of those habitats.
- An alternative that defers leasing parcels in areas with low potential for oil and gas development, until BLM demonstrates that these are "lands…which are known or believed to contain oil or gas deposits…" 30 U.S.C. § 226(a). The Mineral Leasing Act (MLA) requires that parcels proposed for lease contain oil or gas deposits.
- Alternatives that would minimize and/or mitigate GHG emissions, such as deferring leases, phasing leasing, and requiring technology to mitigate emissions.

Even if lands at issue here are open for leasing under the governing RMPs, it would be entirely reasonable for BLM to consider deferring parcels that have important wilderness values, sage-grouse habitat and/or other resources. Moreover, to the extent certain parcels have only low potential for development, the alternative of deferring them appears even more reasonable. These options have never been analyzed.

Failing to consider alternatives that would protect other public lands resources from oil and gas development also violates FLPMA. Considering only one alternative in which BLM would offer all nominated oil and gas lease parcels for sale, regardless of other values present on these public lands that could be harmed by oil and gas development, would indicate a preference for oil and gas leasing and development over other multiple uses. Such an approach violates the agency's multiple use and sustained yield mandate. *See* 43 U.S.C. § 1732(a).

IV. BLM has failed to consider the cumulative impacts of leasing.

BLM must evaluate the cumulative impacts of Utah's March 2019 oil and gas lease sale in its entirety. BLM is analyzing 217, 968.29 acres across the state of Utah for the March lease sale. However, BLM is addressing these parcels in five separate NEPA documents. In addition to addressing direct, indirect and cumulative impacts of leasing the parcels in each region, BLM must analyze the cumulative impacts of leasing all of the parcels being considered for the March lease sale in Utah.

In order to take the "hard look" required by NEPA, BLM is required to assess impacts and effects that include: "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, *whether direct, indirect, or cumulative*." 40 C.F.R. § 1508.8. (emphasis added). NEPA regulations define "cumulative impact" as:

> the impact on the environment which results from the *incremental impact of the action when added to other past, present, and reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions. *Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time*.

40 C.F.R. § 1508.7 (emphasis added). To satisfy NEPA's hard look requirement, the cumulative impacts assessment must do two things. First, BLM must catalogue the past, present, and reasonably foreseeable projects in the area that might impact the environment. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809–10 (9th Cir. 1999). Second, BLM must analyze these impacts in light of the proposed action. *Id.* If BLM determines that certain actions are not relevant to the cumulative impacts analysis, it must "demonstrat[e] the scientific basis for this assertion." *Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 983 (N.D. Ca. 2002).

Here, none of BLM's five separate NEPA documents for the March lease sale performs a cumulative impact analysis that takes into account the combined impact of the lease sale. A failure to include a cumulative impact analysis of additional leasing that is already planned in the region renders NEPA analysis insufficient. *See, e.g., Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1078 (9th Cir. 2002) (holding that an EA for a timber sale must analyze the reasonably foreseeable future timber sales within the area). This analysis should have also included an analysis of the extent of past oil and gas leasing in the area, how this past leasing may have contributed to significant environmental impacts such as impacts to sage-grouse habitat, and whether additional leasing may have an "additive and significant relationship to those effects." Council on Environmental Quality, Guidance on the Consideration of Past

Actions in Cumulative Effects Analysis at p. 1 (June 24, 2005); *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005). Since December 2017 through its upcoming March 2019 lease sale, the BLM has offered oil and gas leasing and development in approximately 500 lease parcels, totaling 735,000 acres of public lands in Utah. This large scale leasing must be taken into account in a cumulative impact analysis.

Furthermore, because all of the parcels in BLM Utah's March lease sale will ultimately be consolidated in a single Notice of Competitive Lease Sale, and sold together in a single online auction, these lease parcel reviews are "connected" actions. BLM must describe connected actions in a single environmental review. 40 C.F.R. § 1508.25(a); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 999 (9th Cir. 2004). The purpose of this requirement "is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (internal quotation marks omitted). Where the proposed actions are "similar," the agency also should assess them in the same document when doing so provides "the best way to assess adequately the combined impacts of similar actions." *Klamath-Siskiyou*, 387 F.3d at 999.

V. BLM should protect wilderness, wildlife and recreation values from oil and gas leasing.

It is well within BLM's authority to defer or withdraw nominated parcels from lease sales. Neither the MLA, FLPMA nor any other statutory mandate requires that BLM offer public lands and minerals for oil and gas leasing solely because they are nominated for such use, even if those lands are allocated as available to leasing in the governing land use plan. The 10th Circuit Court of Appeals confirmed this discretion in *New Mexico v. BLM*, 565 F.3d. 683 at 698 (10th Cir. 2009) when it stated, "[i]f the agency wishes to allow oil and gas leasing in the plan area it must undertake additional analysis…but it retains the option of ceasing such proceedings entirely".

BLM should withdraw or defer the following parcels in order to protect valuable wilderness, wildlife and recreation resources.

i. Parcels in Areas of Critical Environmental Concern (ACEC): Parcels 397, 400, 401 and 403 intersect the Central Pacific Railroad Grade ACEC. Two parcels lie within the Nine Mile Canyon and Red Creek ACECs. While we appreciate that some of these parcels are NSO due to other resource conflicts, the NSO stipulation is insufficient to protect wilderness resources because it allows for exceptions, modifications and waiver and does not specifically target ACECs.

ii. Parcels in Lands identified by BLM and citizen groups as having Wilderness Characteristics (LWCs). BLM should defer these parcels until the agency has made management decisions for the lands with wilderness characteristics and can decide whether or how to appropriately move forward with leasing in the area.

iii. Parcels within greater sage grouse priority habitat management areas (PHMAs) and general habitat management areas (GHMA)

iv. Parcels that intersect crucial wildlife habitat ranges and corridors. A number of parcels are within crucial winter and summer habitat for moose, mule deer, elk and pronghorn. BLM should consider deferring leases in these vital habitats. While these parcels are subject to NSO stipulations as priority and general greater sage-grouse habitat and have timing limitation for elk, mule deer and pronghorn, the NSO stipulations do not encompass the entirety of the parcels and timing limitations do not provide for long-term protections.

VI. BLM must demonstrate that the agency is prioritizing leasing outside of greater sage-grouse habitat.

BLM must prioritize leasing outside of sage-grouse habitat, as required by the Record of Decision (ROD) and Approved Resource Management Plan Amendments for Great Basin Region and Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (ARMPA). Under the Great Basin ROD, BLM must:

> [P] rioritize oil and gas leasing and development outside of identified PHMAs and GHMAs to further limit future surface disturbance and to encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and, as such, protect important habitat and reduce the time and cost associated with oil and gas leasing development. It would do this by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

ROD at 1-23.

The Utah Greater Sage Grouse ARMPA echoes this directive, including the following objective:

> Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG.

Utah Sage Grouse ARMPA at 2-26 (emphasis added).

FLPMA requires that lease sale decisions comply with their governing land use plans. *See* FLPMA § 302(a), 43 U.S.C. § 1732(a) ("The Secretary shall manage public lands…in accordance with land use plans developed by him under section 1712 of this title…"); *see also* 43 C.F.R. § 1610.5-3(a) (48 Fed. Reg. 20,368 (May 5, 1983)) ("All future resource management authorizations and actions…shall conform to the approved plan."). Commenting on these provisions, the Supreme Court said,

> The statutory directive that BLM manage "in accordance with" land use plans, and the regulatory requirement that authorizations and actions "conform to" those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan.

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 68 (2004). Thus, it is clear that BLM must abide by the ROD and ARMPA in this lease sale. BLM's leasing decisions, not just its development decisions, must comply with the ROD and ARMPA ("Priority will be given to leasing . . . of fluid mineral resources . . . outside of PHMA and GHMA.").

Therefore, BLM clearly must apply the prioritization objective from the ROD and ARMPA to this lease sale when parcels are proposed in or near PHMA and GHMA, and explain how its leasing decision complies with that mandate.

Leasing constitutes an irreversible and irretrievable commitment of resources, and in addition a lease gives a lessee the right to develop oil and gas. Form 3100-11 and 43 C.F.R. § 3101.1-2. Thus, it is clear that leasing has tangible aspects that cannot be ignored if BLM is to meet the commitment to prioritize leasing outside of sage-grouse habitats.

Further, the U.S. Fish & Wildlife Service (FWS) specifically identified the prioritization requirement as one of the new "regulatory mechanisms" that allowed it to determine that sage-grouse did not warrant an ESA listing. *See* Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (Centrocercus urophasianus) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858 59,981 (Oct. 2, 2015) ("The Federal Plans prioritize the future leasing and development of nonrenewable-energy resources outside of sage-grouse habitats."). By ignoring this requirement in the context of this and other oil and gas lease sales, BLM would be undermining FWS's determination and moving greater sage-grouse closer to a listing.

VII. Prioritizing oil and gas leasing is inconsistent with FLPMA's multiple-use mandate.

Under FLPMA, BLM is subject to a multiple-use and sustained yield mandate, which prohibits the Department of the Interior (DOI) from managing public lands primarily for energy development or in a manner that unduly or unnecessarily degrades other uses. *See* 43 U.S.C. § 1732(a). Instead, the multiple-use mandate directs DOI to achieve "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations." 43 U.S.C. § 1702(c). Further, as co-equal, principal uses of public lands, outdoor recreation, fish and wildlife, grazing, and rights-of-way must receive the same consideration as energy development. 43 U.S.C. § 1702(l).

DOI appears to be pursuing an approach to oil and gas management that prioritizes this use above others in violation of the multiple use mandate established in FLPMA. For example, a March 28, 2017 Executive Order and ensuing March 29, 2017 Interior Secretarial Order #3349 seek to eliminate regulations and policies that ensure energy development is balanced with other multiple uses. Similarly, BLM Colorado frequently begins its press releases announcing oil and gas lease sales by stating: "In keeping with the Administration's goal of promoting America's

energy independence…"[1] This rhetoric seems to indicate that BLM is prioritizing oil and gas leasing and development above other multiple uses.

None of the overarching legal mandates under which BLM operates – be it multiple-use or non-impairment – authorizes DOI to establish energy development as the dominant use of public lands. On our public lands, energy development is an allowable use that must be carefully balanced with other uses. Thus, any action that attempts to enshrine energy development as the dominant use of public lands is invalid on its face and inconsistent with the foundational statutes that govern the management of public lands.

Federal courts have consistently rejected efforts to affirmatively elevate energy development over other uses of public lands. In the seminal case, *N.M. ex rel. Richardson v. BLM*, the Tenth Circuit put to rest the notion that BLM can manage chiefly for energy development, declaring that "[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." 565 F.3d 683, 710 (10th Cir. 2009); *see also S. Utah Wilderness Alliance v. Norton*, 542 U.S. 52, 58 (2004) (defining "multiple use management" as "striking a balance among the many competing uses to which land can be put"). Other federal courts have agreed. *See, e.g., Colo. Envtl. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1249 (D. Colo. 2012) (rejecting oil and gas leasing plan that failed to adequately consider other uses of public lands). Thus, any action by BLM that seeks to prioritize oil and gas leasing and development as the dominant use of public lands would violate FLPMA. BLM must therefore consider a reasonable range of alternatives for this lease sale that considers and balances the multiple uses of our public lands, consistent with NEPA and FLPMA.

Additionally, leasing lands with low potential for oil and gas development in particular violates FLPMA's multiple use mandate. Leasing in low potential areas gives preference to oil and gas development at the expense of other uses because the presence of leases can limit BLM's ability to manage for other resources, in violation of FLPMA's multiple use mandate.

In offering the leases involved in this sale, BLM runs the risk of precluding uses and protection of other public lands resources. As discussed in our scoping comments, the proposed leases in low potential lands in the Grand Junction field office overlap with lands that have valuable wilderness and recreation values, and those lands would be better put to use for conservation, recreation and other multiple uses than put at risk to wildcat oil and gas exploration. In prioritizing leasing of low potential lands, BLM would be violating FLPMA's multiple use mandate and improperly elevating oil and gas leasing above other multiple uses.

VIII. IM 2018-034 is invalid.

BLM is currently implementing its oil and gas leasing program under Instruction Memorandum (IM) 2018-034, which directs BLM to expedite the oil and gas lease sale process and encourages the agency to minimize environmental review and public participation. Such an approach impedes informed decision-making, increases public controversy and prioritizes energy development above other resources and uses in violation of the multiple use mandate established in FLPMA.

[1] See for example, https://www.blm.gov/press-release/blm-colorado-oil-and-gas-lease-sale-nets-3364526.

In September 2018, the U.S. District Court for the District of Idaho issued a Memorandum Decision and Preliminary Injunction enjoining and restraining BLM from implementing certain provisions of IM 2018-034, for lease sales within the planning area of the greater sage-grouse conservation plans. The Preliminary Injunction requires that BLM offer meaningful opportunities for the public to participate in lease sales affecting sage-grouse habitat, in accordance with the agency's obligations under NEPA and FLPMA. The express requirements are that BLM must provide for a 30-day public comment period on the Environmental Assessment and/or Determination of NEPA Adequacy for lease sales, as well as provide a 30-day public protest period. *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB at 55-56 (D. Idaho Sept. 21, 2018).

Beyond the specific public comment periods for lease parcels within the planning area of the greater sage-grouse plans required by the Preliminary Injunction, the court's decision is a broader indictment of BLM's attempts to cut the public out of oil and gas leasing decisions affecting our public lands. Stating that, "It is well-settled that public involvement in oil and gas leasing is required under FLPMA and NEPA," the court found 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, and that the IM 2018-034 procedures fall short of those obligations. *Id.* at 36-37, 40-41.

The court further concluded that:

> 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. . . . 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).

While BLM is providing 30-day comment periods on the NEPA documents for the Utah March 2019 lease sale in accordance with the Preliminary Injunction, and will presumably be providing a 30-day protest period as well, other elements of IM 2018-034 which are being applied here are likewise unlawful. For example, IM 2018-034 creates a one-sided burden on requests that BLM defer lease parcels: it requires consultation with BLM's Washington, DC headquarters to defer parcels, but not to dismiss protests and proceed with a lease sale. IM 2018-034 also requires that BLM complete lease parcel reviews within a 6-month timeline, which severely restricts the agency's ability to conduct thorough NEPA reviews and solicit and respond to public input on lease parcels.

Additionally, BLM has not formally withdrawn IM 2018-034 or rescinded the portions pertaining to public participation that were enjoined in the Preliminary Injunction. Nor has BLM officially committed to providing 30-day comment and protest periods for lease parcels outside of sage-grouse habitat. By allowing BLM to drastically reduce or virtually eliminate the opportunity for public participation, and reducing the protest period to 10 days, IM 2018-034 effectively alters the substantive rights and interests of our organizations and the public, and thus represents a substantive rule subject to the notice-and-comment requirements of the Administrative Procedure Act (APA). The IM was issued in violation of the notice-and-comment requirements of the APA and is thus invalid. Similarly, IM 2018-034 is inconsistent with FLPMA's public participation requirements for the reasons described in the *Western Watersheds Project v. Zinke* order.

Prior to issuance of IM 2018-034, BLM was required to undertake an inter-disciplinary review, to visit proposed parcels, and to provide for public participation in the leasing process, all of which provided the opportunity for BLM to understand the values at stake and to understand and address public concerns. After an opportunity for public comment, BLM also provided the public with 30 days to evaluate, and if necessary file, a protest. BLM had 60 days prior to a lease sale to resolve protests. That process, which was set forth in IM 2010-117, did not impair our rights or impose significant new burdens on our ability to engage in the leasing of public lands and minerals. By contrast, IM 2018-034 imposes significant burdens on our participation in the leasing process, as described above. BLM's abrupt issuance of new guidance did not provide a sufficient, reasoned explanation for the significant reversals in process and rights, which we and other stakeholders have relied upon since 2010.

Thank you again for the opportunity to comment.

Sincerely,

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