HAND-DELIVERED

November 22, 2019

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

RE: Protest of the Bureau of Land Management’s Notice of Competitive Oil and Gas Lease Sale to be Held on or Around December 10, 2019.

State Director Roberson:

In accordance with 43 C.F.R. §§ 4.450-2 and 3120, the Southern Utah Wilderness Alliance, Center for Biological Diversity, Living Rivers, Natural Resources Defense Council, National Parks Conservation Association, Waterkeeper Alliance, and The Wilderness Society (collectively, “SUWA”) hereby timely protest the offering of the following sixteen lease parcels proposed for sale at the Bureau of Land Management’s (“BLM”) December 10, 2019 competitive oil and gas lease sale:

UTU-94665 (UT1219-007); UTU-94667 (UT1219-009); UTU-94668 (UT1219-010); UTU-94669 (UT1219-014); UTU-94672 (UT1219-024); UTU-94673 (UT1219-025); UTU-94674 (UT1219-026); UTU-94675 (UT1219-027); UTU-94676 (UT1219-028); UTU-94677 (UT1219-029); UTU-94678 (UT1219-030); UTU-94679 (UT1219-031); UTU-94680 (UT1219-032); UTU-94681 (UT1219-033); UTU-94682 (UT1219-034); and UTU-94683 (UT1219-035).


As explained below, BLM’s decision to offer these parcels for oil and gas leasing and development violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq.; the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701 et seq.; The

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Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-559, 701-706; and the regulations policies that implement these laws.

I. Leasing Is the Point of Irretrievable Commitment of Resources.

BLM must comply with NEPA before deciding to offer, sell and issue oil and gas leases for development; subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. Here, BLM has not fully analyzed and disclosed to the public the potential impacts that could flow from its leasing decision. The sale of leases without no surface occupancy ("NSO") stipulations represents an irretrievable commitment of resources. BLM cannot make such a commitment without adequate NEPA analysis:

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

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

[the courts have held that the Department must prepare an [environmental impact statement ("EIS") before it may decide to issue such "non-NSO" oil and gas leases. The reason . . . is that a "non-NSO" lease "does not reserve to the government the absolute right to prevent all surface disturbing activities" and thus its issuance constitutes "an irretrievable commitment of resources" under section 102 of NEPA.

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

As the Board has recognized, "[i]f BLM has not retained the authority to preclude all surface disturbance activity, then the decision to lease is itself the point of 'irreversible, irretrievable commitment of resources' mandating the preparation of an EIS." Union Oil Co. of Cal., 102 IBLA 187, 189 (1988) (quoting Sierra Club v. Peterson, 717 F.2d 1409, 1412 (D.C. Cir. 1983)); see also S. Utah Wilderness Alliance, 159 IBLA at 241-43 (same); Sierra Club, Or. Chapter, 87 IBLA 1, 11 (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.


In the present case, BLM has failed to analyze all reasonably foreseeable potential impacts of oil and gas leasing and development. Instead, BLM has unlawfully postponed that analysis to an unknown later date, as discussed below. This failure will result in irreversible adverse impacts to a wide array of resource values including, but not limited to, lands with wilderness characteristics, national parks and national monuments, wildlife, and cultural resources.

II. Lease Parcels in or near Greater Sage-Grouse Habitat Must Be Deferred.

Parcels 7 and 14 must be deferred because they are located in or near greater sage-grouse habitat and are inconsistent with BLM’s 2015 Greater Sage-Grouse Plan Amendments for Utah (“2015 GSG LUPA”). BLM is proposing to offer parcels 7 and 14 for leasing and development subject to the 2019 greater sage-grouse plan amendments. See, e.g., EA at 14, tbl. 3 (explaining that BLM’s decision is consistent with the 2019 plan amendments). However, the 2019 plan amendments have been enjoined. See W. Watersheds Project v. Schneider, --- F. Supp. 3d ---, 2019 WL 5225454 (D. Idaho Oct. 16, 2019). As a result, the 2015 GSG LUPA “remain[s] in effect” and BLM’s leasing decision is subject to the procedures and requirements mandated by that plan. Id. at *11. See also 43 U.S.C. § 1732(a) (BLM “shall manage the public lands . . . in accordance with the land use plans developed by” the agency).

Because BLM prepared the Lease Sale EA in reliance on the 2019 plan amendments its proposed leasing decision is inconsistent with the 2015 GSG LUPA, which the 2019 plan had replaced. Thus, BLM must defer parcels 7 and 14 from the upcoming sale.
III. BLM Failed to Take a Hard Look at the Site-Specific Impacts of its Leasing Decision.

NEPA and its implementing regulations are our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. Recognizing that “each person should enjoy a healthful environment,” NEPA ensures that the federal government uses all practicable means to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” among other policies. 42 U.S.C. § 4331(b).

NEPA regulations explain:

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

40 C.F.R. §1500.1(c). Thus, while “NEPA itself does not mandate particular results, but simply prescribes the necessary process,” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989), agency adherence to NEPA’s action-forcing statutory and regulatory mandates helps federal agencies ensure that they are adhering to NEPA’s noble purpose and policies. See 42 U.S.C. §§ 4321, 4331.

NEPA imposes “action-forcing procedures … require[ing] that agencies take a ‘hard look’ at environmental consequences.” Methow Valley Citizens Council, 490 U.S. at 350 (citations omitted). These “environmental consequences” may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. A cumulative impact—particularly important here—is defined 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. In the Tenth Circuit:

A meaningful cumulative impact analysis must identify five things: (1) the area in which the effects of the proposed action will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.
A. The Lease Sale EA Failed to Analyze Site-Specific Impacts.

In the Lease Sale EA, BLM has attempted to analyze the site-specific impacts of its leasing decision to only three resource values: air quality, GHG emissions and climate change, and designated Wilderness lands. See Lease Sale EA at 11, tbl. 2. According to BLM, it did not need to analyze in the EA the site-specific impacts to any other resource value because:

- BLM tiered to the programmatic NEPA analysis in the EISs prepared for the RMPs that encompass the lease parcels at issue, and also tiered to “other NEPA documents.”

- “BLM can determine at any time that existing analysis is sufficient and rely on that analysis to disclose reasonably foreseeable impacts. . . . In [WildEarth Guardians v. Zinke] the court confirmed this by expressly stating: “BLM Need Not Conduct Site-Specific Assessments at the Leasing Stage,” but that it must analyze and disclose “reasonably foreseeable” impacts.”

EA, App. H at 290. NEPA allows BLM to “tier” to existing NEPA analyses. See 40 C.F.R. § 1508.28. However, BLM can do so only when: (1) the analysis actually exists in the relied on documents, and (2) the analysis is sufficiently site-specific to properly inform BLM’s decision. These requirements exist because courts will not—and cannot—“defer to a void.” WildEarth Guardians v. Bernhardt, Case No. 19-cv-001920-RBJ, 2019 WL 5853870, at *4 (D. Colo. Nov. 8, 2019) (quoting Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 625 F.3d 1092, 1121 (9th Cir. 2010)). And because “[a]gencies cannot rely on a general discussion in a programmatic EIS or other document to satisfy its NEPA obligations for a site-specific action.” Protect Our Communities Found. v. LaCounte, 939 F.3d 1029, 1039 (9th Cir. 2019).

In the present case, the Lease Sale EA fails to meet these requirements. First, BLM’s 2008 RMPs are programmatic NEPA documents that do not contain site-specific NEPA analysis—a fact that each RMP makes clear. For example, the Vernal field office RMP states that “one-time decisions” such as oil-gas leasing will be “implemented after additional site-specific analysis is completed.” Vernal RMP at 61. See also Monticello RMP at 52 (same).

Second, contrary to BLM’s claim, the agency has not tiered to site-specific NEPA documents (e.g., past lease sale EAs) previously prepared by the agency to disclose the site-specific impacts of the current leasing proposal. BLM makes this claim for the first time in response to SUWA’s comments on this point but the Lease Sale EA does not support BLM’s defense. See EA, App. H at 290. Instead, in Table 3 of the EA and Appendix D (Interdisciplinary Team Checklist), BLM explains—with minor exception—that site-specific NEPA analysis for the respective resource (e.g., threatened and endangered species, water resources, and wildlife) is not warranted because the agency has attached lease stipulations, notices, and Best Management Practices (“BMPs”) to the lease parcels. See generally EA at 12, tbl. 3; id., App. D. As explained in SUWA’s
comments, such mitigation measures are not substitutes for site-specific NEPA analysis. See SUWA Lease Sale Comments at 3.

If BLM indeed has tiered to other NEPA documents for site-specific analysis in the present instance, the agency never identified those documents or the sections therein being relied on in the Lease Sale EA. See, e.g., EA at 12, tbl. 3 (failing to provide this information); id., App. D (same). Instead, the agency largely has left it up to the public including SUWA to piece together which NEPA document (and what resource and section within that respective document) is being relied on by BLM to justify the offering of the December 2019 lease parcels. It is BLM’s burden—not the public’s—to organize this information and data as part of the agency’s informed decisionmaking. See WildEarth Guardians, 368 F. Supp. 3d at 69 (holding that BLM wrongly placed the burden of analyzing the data on the public and stating, “it did not relieve BLM of its burden to consolidate the available data as part of its ‘informed decisionmaking,’ before issuing the leases and irretrievably committing to drilling on the parcels”).

Finally, contrary to BLM’s claim, the WildEarth Guardians decision does not support the position that BLM can postpone meaningful NEPA analysis to some unknown future date when the agency is fully capable of performing that analysis now. Courts have regularly rejected this approach of “lease now, think later” as a violation of NEPA’s informed decisionmaking mandate. See S. Utah Wilderness All., 457 F. Supp. 2d at 1267. See also New Mexico ex rel. Richardson, 565 F.3d at 718 (“assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.”) (citations omitted). In fact, BLM’s decision to postpone its NEPA analysis—analysis it is capable of performing now—is the precise issue that resulted in the court setting-aside the agency’s leasing decisions at issue in WildEarth Guardians. See 368 F. Supp. 3d at 68-71 (rejecting BLM’s attempt to postpone analysis that the agency could reasonably foresee at the leasing stage).

Thus, BLM’s failure to analyze the site-specific impacts of leasing to resources other than air quality, GHG emissions and climate change, and Wilderness is arbitrary.2

**B. The Lease Sale EA Failed to Analyze Cumulative Impacts.**

In the Lease Sale EA, BLM failed to analyze all reasonably foreseeable impacts to resources encompassed by the proposed leases. To comply with NEPA, BLM must analyze all reasonably foreseeable cumulative impacts. See 40 C.F.R. § 1508.7. Such analysis “must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.” New Mexico ex rel. Richardson, 565 F.3d at 718. That point, “the point of no return,” occurs “at the point of lease issuance.” WildEarth Guardians, 368 F. Supp. 3d at 65, 66.

In the present case, BLM has attempted to analyze the cumulative impacts associated with only three resource values: air quality, GHG emissions and climate change, and Wilderness lands. See

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2 SUWA does not concede that BLM’s consideration of air quality, GHG emissions and climate, and Wilderness is legally sufficient. Instead, SUWA reaffirms that BLM’s analysis regarding these resources violated federal law for the reasons discussed in our comments. See, e.g., SUWA Comments § II (national parks and monuments); § III (GHG emissions and climate change).
EA at 11, tbl. 2. However, these are not the only three resource values at risk of being impacted by past, present, and reasonably foreseeable actions in Utah. BLM’s failure to analyze the full suite of potential resources affected by its proposed action violated NEPA.

First, the Tenth Circuit Court of Appeals recently held that the preparation of a reasonably foreseeable development scenario ("RFDS") makes it reasonably foreseeable that the number of wells identified therein will be drilled, and NEPA therefore requires BLM to consider the cumulative impacts of those wells in its site-specific NEPA analysis for a project that falls within the same area encompassed by the RFDS. Diné Citizens Against Ruining Our Env’t v. Bernhardt ("Diné CARE"), 923 F.3d 831, 853-54, 856-59 (10th Cir. 2019). As the Tenth Circuit explained, once an RFDS has been issued, the wells predicted in that document become "reasonably foreseeable future actions." Id. at 853 (citing 40 C.F.R. § 1508.7). Thus, for purposes of NEPA, those reasonably foreseeable wells—and associated impacts—must be considered in the agency’s cumulative impact analysis. Id. at 853-54.

In Diné CARE, the plaintiffs challenged BLM’s approval of certain oil and gas drilling permits ("APDs") for public lands in New Mexico. See id. at 835. The plaintiffs argued that BLM violated NEPA by failing to analyze in each site-specific EA the cumulative impact of the 3,960 wells anticipated in BLM’s relevant RFDS. Id. at 852-53. The court agreed:

We conclude that the 3,960 . . . wells predicted in the 2014 RFDS were reasonably foreseeable after the 2014 RFDS issued. The BLM therefore had to consider the cumulative impacts of all 3,960 wells when it conducted its site-specific EAs.

Id. at 854. See also id. at 857 (holding that BLM failed to analyze the cumulative impacts to water resources of the 3,960 wells).

In the present case, BLM makes the same mistake. As SUWA explained in its comments on the EA, BLM has prepared at least one RFDS for each field office at issue in the December 2019 lease sale. See SUWA Lease Sale Comments at 4-5. These RFDSs anticipate certain levels of oil and gas development over a particular timeframe (e.g., 195 wells over a 15-year period in the Monticello field office). The RMPs and other NEPA documents associated with the respective RFDS did not analyze the site-specific cumulative impacts to any resource value from the development of the anticipated wells. BLM does not dispute this point.

In the Lease Sale EA, BLM similarly failed to analyze the cumulative impacts of all the wells anticipated in the RFDSs. Instead, BLM based its analysis on only 22 wells. See EA at 21. Having improperly narrowed the scope of reasonably foreseeable future actions BLM arbitrarily then further narrowed its cumulative impacts analysis to only three resource values (i.e., air quality, climate, and Wilderness). BLM therefore failed to analyze all reasonably foreseeable oil and gas wells and their cumulative impacts to resources including, but not limited to:

- Lands with wilderness characteristics (e.g., Desolation Canyon, Duma Point, and Monument Canyon);
• National Parks and National Monuments (e.g., Capitol Reef National Park, Bears Ears, Hovenweep and Canyons of the Ancients national monuments);

• Areas of Critical Environmental Concern (“ACEC”) (e.g., Alkali Ridge, Nine Mile Canyon);

• Wildlife (e.g., greater sage-grouse, migratory birds);

• Water quantity and quality (including impacts related to hydraulic fracturing); and

• Cultural and archaeological resources.

Second, over the past few years, BLM has pieced it together leasing across Utah. The Lease Sale EA does not analyze the cumulative impacts of these leasing decisions. For example, this is now the fourth time in two years that BLM has offered parcels in the Monticello field office. See SUWA Map – San Juan County Pieced Leasing (attached). The Utah School and Institutional Trust Lands Administration (“SITLA”) has also sold oil and gas leases in this same area. See id. The December 2019 lease sale will add to this mosaic of leases. See id. These leases will add additional cumulative impacts to resource values in the region including the Monument Canyon lands with wilderness characteristics area, Alkali Ridge ACEC, and Bears Ears, Hovenweep, and Canyons of the Ancients national monuments, among others. Id.

The pieced leasing in the Monticello field office will also have a cumulative impact to wildlife. For example, the leases offered and/or sold at the March 2018, December 2018, September 2019, and December 2019 sales encompass crucial winter habitat for mule deer, Gunnison prairie dog, crucial year-long habitat for wild turkey, year-round kit fox habitat, and year-round three-toed woodpecker habitat. See SUWA Map – San Juan County Wildlife 1 (attached); SUWA Map – San Juan County Wildlife 2 (attached). This is not an exhaustive list of wildlife species in this area.

However, BLM has never analyzed the cumulative impacts of its leasing decisions (on their own or analyzed together with SITLA’s leasing decisions) to these resource values—or any resource value. As noted supra, the Lease Sale EA did not analyze these impacts. In response to comments on this point, BLM stated: “Cumulative impacts analyses were conducted using the RFDSs during preparation of the RMP EIS and prior leasing EAs.” EA, App. H at 290. This is wrong. The RMPs are programmatic NEPA documents that do not contain site-specific cumulative impact NEPA analysis. “Agencies cannot rely on a general discussion in a programmatic EIS or other document to satisfy its NEPA obligations for a site-specific action.” Protect Our Communities Found., 939 F.3d at 1039. Moreover, many of the impacted resource values in San Juan County were identified after completion of the relevant RMP (e.g., Bears Ears National Monument, Monument Canyon wilderness character area) and thus were not considered in that RMP or accompanying RFDS. See, e.g., EA at 15, tbl. 3 (explaining that “the Monument Canyon Unit was found to possess wilderness characteristics subsequent to the RMP”).

In addition, the “prior leasing EAs” prepared for the Monticello field office do not contain this analysis either. The September 2019 lease sale EA analyzed only impacts related to air quality

Thus, the last remaining “prior leasing EA” is the one prepared for the March 2018 lease sale. However, that EA failed to analyze the cumulative impacts of the December 2018, September 2019, and December 2019 sales (or SITLA sales) and failed to consider the RFDS prepared for the Monticello field office. See BLM, March 2018 Competitive Oil and Gas Lease Sale, Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA, at 68-72 (May 2018).

BLM made these same mistakes in its piecemeal leasing in the Moab field office. See generally SUWA Map – Moab Field Office Piecemealed Leasing (attached). On five separate occasions in the past two years, BLM has offered leases in this region of Utah. Id. These leases have cumulative impacts to the Green River, wilderness-caliber lands, Arches National Park, and wildlife, among other resource values. See id. See also SUWA Map – Wildlife in Moab Field Office (attached). BLM never analyzed these cumulative impacts in its prior land use plans (e.g., Moab RMP) or leasing EAs including the Lease Sale EA.

Federal caselaw and BLM’s own policy make clear that if a proposed action will impact the same resources impacted by past, present, or reasonably foreseeable actions then BLM must analyze those cumulative impacts prior to committing an irretrievable comment of resources (i.e., the lease sale stage). BLM’s NEPA Handbook illustrates this principle (italicized emphasis in original):

For example, the BLM proposes to build a campground near a private land where a private utility company proposes to build and operate a power generation structure. . . . If the campground construction would affect sage grouse habitat, but have no effect on air quality, and the power generation structure would affect sage grouse habitat and air quality, your NEPA document for the campground construction must describe the cumulative effects on sage grouse habitat, but not on air quality.

In another example, the BLM is reviewing a proposal to develop a natural gas field that will affect air quality but not affect any sensitive plants. The State is proposing a large prescribed burn, which will affect air quality and a sensitive plant population. The NEPA document needs to discuss the cumulative effects on air quality, but not on sensitive plants.

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BLM, National Environmental Policy Act, Handbook H-1790-1 § 6.8.3.1, pgs. 57-58 (Jan. 2008) (emphasis added) ("BLM NEPA Handbook") (attached). Additionally, courts have rejected similar attempts by BLM to inappropriately limit the scope of its cumulative impacts analysis in this manner. See, e.g., Diné CARE, 923 F.3d at 853-54, 857-59; WildEarth Guardians, 368 F. Supp. 3d at 76-77. See also S. Utah Wilderness All., IBLA No. 2019-94, at *4-7 (Sept. 16, 2019) (holding that BLM violated NEPA when it failed to analyze the cumulative impacts to migratory birds from other projects in Grand Staircase-Escalante National Monument) (attached).

Finally, BLM previously recognized that its existing NEPA analyses, including the Monticello RMP, failed to fully analyze potential impacts thus necessitating additional analysis prior to offering new oil and gas leases in this region of San Juan County. In 2015, BLM explained that it had deferred leasing in 2014 and 2015 of public lands in this region of San Juan County “after determining that additional analysis was necessary” to address certain resource issues. Letter from Utah-BLM State Director to BLM Assistant Director, Minerals and Realty Management at *3 (May 29, 2015) (“BLM MLP Letter”) (attached). This included preparing new NEPA analysis for (1) cultural resources, (2) lands with wilderness characteristics, (3) Hovenweep National Monument, and (4) ACECs including Alkali Ridge, among other resources. Id. at *4-5. To date, BLM has never collected or analyzed this information and data.

Moreover, in the Lease Sale EA BLM explains that it did not analyze impacts (including cumulative) to Hovenweep National Monument because the Cumulative Impact Analysis Area ("CIAA") for that monument “is a six mile buffer from its boundaries.” EA, App. H at 291. There is no record support for a buffer of only six miles. Instead, the only other reference to such a buffer in the EA is with regard to designated Wilderness in Emery County—not Hovenweep National Monument. See id. at 55 (stating that the CIAA for the Lower Last Chance Wilderness Area is the entire Wilderness area “and a six mile ‘buffer’”). BLM has never used or relied on a six mile buffer in its past leasing EAs prepared for the Monticello field office. In fact, as discussed in SUWA’s comments, the National Park Service (“NPS”) has repeatedly requested that BLM defer all leasing within fifteen miles of Hovenweep National Monument. See, e.g., SUWA Comments at 10-11. See also SUWA et al., Protest of the Bureau of Land Management, Monticello Field Office’s Notice of Competitive Oil and Gas Lease Sale to be Held on or Around September 11-13, 2019, at 9-12 (Aug. 26, 2019) (providing more detail on NPS’ repeated concerns regarding oil and gas leasing near Hovenweep National Monument) (attached).

In sum, the Lease Sale EA violates NEPA’s hard look mandate by unlawfully postponing meaningful site-specific cumulative impact analysis to some unknown future date. BLM’s unsupported reliance on its RMPs and other NEPA documents for site-specific analysis—to the extent they are even identified by the agency—also is arbitrary because those documents do not contain the analysis BLM attempts to rely on.
IV. BLM’s Change of Position Regarding the San Juan MLP and Failure to Prepare NEPA Prior to Abandoning that Position Are Arbitrary.

BLM’s decision without explanation to reverse its prior position regarding the need to collect more information and data and to analyze resource impacts prior to offering new leases for oil and gas development in the San Juan Master Leasing Plan ("San Juan MLP") area is unlawful. When an agency, including BLM, reverses its prior position the APA requires the agency, at a minimum, "display awareness that it is changing positions" and provide a "reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009) (emphasis in original).

Coupled with the APA’s requirements is NEPA’s separate obligation that an agency conduct environmental analysis before taking “major Federal action[,] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Once triggered, NEPA requires the preparation of either a categorical exclusion ("CX"), EA, or EIS and accompanying finding that the action will not individually or cumulatively have a significant effect on the human environment. *See, e.g.*, 40 C.F.R. §§ 1508.4, 1508.9, 1508.11.

In the present case, BLM did not provide a reasoned explanation for its changed position with regard to the San Juan MLP and the need to prepare additional NEPA analysis prior to offering new oil and gas leases in that MLP planning area. BLM likewise did not prepare any NEPA analysis prior to reversing its position regarding the San Juan MLP. These failures violated NEPA and the APA.

In response to SUWA’s comment on this issue BLM noted:

> As [SUWA] stated on page 4 of their comments: “BLM . . . (has) in the past eight years . . . analyzed site-specific impacts to these resources (and others) in its NEPA analyses . . .” That comprised extensive additional analysis which determined that no new stipulations were warranted, thus no additional Land Use Planning was needed.

EA, App. H at 295. This explanation is the only one offered in the Lease Sale EA for why the San Juan MLP is no longer necessary. It is arbitrary. It is immaterial whether BLM analyzed some site-specific impacts at its prior lease sales. Instead, the issue is whether BLM has provided a "reasoned explanation" for ignoring its past statements and actions regarding the need to prepare the San Juan MLP prior to offering new leases in this area of San Juan County. On this issue, BLM has not provided any explanation, let alone a reasoned one.6

Likewise, when BLM rescinded the MLP concept, including San Juan MLP, in IM 2018-034, it offered the following explanation: "[t]he BLM . . . determined that [MLPs] have created

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6 The excerpted text on page 4 of SUWA’s comments is related to BLM’s failure to analyze direct and indirect impacts—an entirely different issue. On pages 42-44 of its comments, SUWA explains that BLM has failed to provide a reasoned explanation for its change in position, and failed to prepare NEPA analysis prior to making that change. BLM has provided no response to these arguments.
uplicative layers of NEPA review. This policy, therefore, eliminates the use of MLPs.” BLM, Instruction Memorandum No. 2018-034, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews § II (Jan. 31, 2018) (attached). BLM did not provide evidence or examples of the alleged duplicative layers of NEPA review.

These two short, unsupported, statements are not “reasoned explanations” for why BLM decided to entirely abandon an agency position that had been in place for nearly eight years and resulted in millions of acres of public lands being protected from oil and gas leasing and development including in San Juan County. The San Juan MLP encompassed approximately 765,372 acres. See BLM MLP Letter at *2. With the MLP concept in place “BLM-Utah . . . deferred new leasing proposals submitted for all lands within the pending MLPs in order to preserve potential alternatives for those plans.” Letter from Utah-BLM State Director, to Assistant Director, Energy, Minerals and Realty Management Directorate, RE: Updated Utah Master Leasing Plan (MLP) Strategy at *2 (Aug. 14, 2015) (attached). “As a result, millions of acres of land with oil and gas interest have been removed from availability for oil and gas leasing and development for the last several years.” Id. Specific to the San Juan MLP:

During recent oil and gas leases sales [i.e., in 2014 and 2015], 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. BLM similarly declined to consider expressions of interest, covering approximately 183,874 acres of public lands in San Juan County, for oil and gas leasing. See id. at *3. As noted supra, BLM also determined that additional analysis was necessary for resources other than cultural including dark night skies, lands with wilderness characteristics, the Alkali Ridge ACEC and national monuments. See generally BLM MLP Letter at *3-5. See also BLM, Instruction Memorandum No, 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews § (May 17, 2010) (explaining that an MLP is “required” when, among other things: “[a]dditional analysis or information is needed to address likely resource or cumulative impacts if oil and gas were to occur where there are . . . impacts on the resources or values of any unit of the National Park System”) (attached). To date, BLM has not performed this additional and “necessary” NEPA analysis.


In Friends of Alaska National Wildlife Refuges, the court held that the Department of the Interior (“DOI”) failed to provide a reasoned explanation for reversing its position on whether to allow

7 Hovenweep National Monument is managed by NPS.
construction of a road through the Izembek National Wildlife Refuge. The DOI had previously on several occasions declined to authorize the road construction, citing the potential for irretrievably damaged resources from the construction and operation of the proposed road. 381 F. Supp. 3d at 1136. See also id. at 1130-32 (providing additional background information).

However, shortly after the 2016 Presidential election, the DOI reversed that position by entering into a two-page exchange agreement with local officials in Alaska to facilitate construction of the road. Id. at 1133.

The court held that this change in position, without a reasoned explanation, violated the law. The exchange agreement failed to acknowledge (1) the agency’s prior position, or (2) the agency’s prior contrary findings. Id. at 1140. As a result, “[the agency] impossibly discarded prior factual findings without a reasoned explanation.” Id. (internal citations and alterations omitted).

The Exchange Agreement does not contain any acknowledgment that the [DOI’s] decision to enter into that agreement constitutes a fundamental change in agency policy. Instead, in entering into the Exchange Agreement, the [DOI] reverses the previous policy of the DOI without any reasoned explanation for the change of course with respect to the existence of viable alternatives to a road. And, in entering into the agreement, the [DOI] ignores the agency's prior determinations concerning a road's environmental impact on Izembek without providing any reasoned explanation for this change. The Court therefore finds that the [DOI’s] decision to enter into the Exchange Agreement constitutes an unlawful agency action as it is arbitrary and capricious under the APA.

Id. at 1143. BLM made similar mistakes in this Lease Sale EA. As noted, for nearly eight years, BLM followed a well-established and well-documented position (i.e., no leasing in the San Juan MLP planning area); a position supported by facts and data, but following the 2016 Presidential election the agency jettisoned its prior position without any explanation, let alone a reasoned one.

Second, BLM failed to prepare any NEPA analysis to support its change in position – a decision that in effect re-opened hundreds of thousands of acres of public lands in San Juan County (and millions of BLM-managed lands in Utah and the West) to destructive oil and gas leasing and development. In Citizens for Clean Energy v. U.S. Dep’t of the Interior, the court held that DOI’s decision to re-open thousands of acres of public lands to coal leasing and development without any analysis violated NEPA. 384 F. Supp. 3d 1264, 1278-79 (D. Mont. 2019). The court explained that DOI’s decision to lift the moratorium on new coal leasing on public lands was a NEPA triggering event; it did so because it “changed the status quo.” Id. at 1278. Specifically, the decision to lift the moratorium “served to re-open public land to coal leasing and to expedite lease applications.” Id. at 1279.

The moratorium, while in place, had resulted in “increased protection for nearly fifteen months of approximately 65,000 acres of public land that were subject to pending leasing applications.” Id. The lifting of the moratorium removed these protections. By so doing, DOI’s decision met “the ‘relatively low’ threshold standard for a NEPA triggering event.” Id. Thus, the failure by DOI to prepare any NEPA prior to lifting the leasing moratorium violated NEPA. Id.
In this Lease Sale EA, BLM made similar mistakes. The decision to rescind the MLP concept generally and San Juan MLP process more specifically was a “NEPA triggering event.” For more than seven years, millions of acres in Utah and across the West were deferred from new oil and gas leasing. This resulted in protections of countless resource values including cultural resources, lands with wilderness characteristics, and national monuments, including those at issue in the December 2019 lease sale. The decision to abandon the MLP concept “served to re-open public land to [oil and gas] leasing and to expedite [that leasing].” Therefore, BLM’s failure to prepare any NEPA analysis prior to making that decision violated NEPA.

In sum, BLM’s decision to proceed with new oil and gas leasing in the San Juan MLP planning area violated NEPA and the APA, for the reasons discussed above.

V. BLM’s Consideration of Alternatives Violated NEPA.

BLM failed to analyze alternatives including those recommended by SUWA through the proper lens of the Tenth Circuit Court of Appeals’ “rule of reason” standard.

A. NEPA Alternatives—Legal Standard.

An EA must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved resource conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E); see 40 C.F.R. § 1508.9(b); 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.’” (quoting Highway J Citizens Grp. v. Mineta, 349 F.3d 938, 960 (7th Cir.2003)). 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 v. U.S. Forest Serv., 433 F.3d 772, 781 (10th Cir. 2006) (quoting Comm. to Preserve Boomer Lake Park v. Dept’ of Transp., 4 F.3d 1543, 1553 (10th Cir.1993)); see also 40 C.F.R. § 1508.9(a)(1).

The range of alternatives an agency must analyze in an EA 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) (quoting Airport Neighbors All., Inc. v. United States, 90 F.3d 426, 432 (10th Cir. 1996)). “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 (quoting Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999)). 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. (quoting Dombeck, 185 F.3d at 1174).

As in an EIS, the range of alternatives an agency must analyze in an EA 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 Cty. 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 NEPA Handbook § 6.2, pg. 36. 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 NEPA Handbook § 6.2.1 at 36; see also id. § 6.6.1 at 49-50. “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 NEPA 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 All. v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988) (citations omitted).

BLM must also analyze and disclose the GHG emissions associated with each alternative, so it can meaningfully consider a reasonable range of alternatives that would decrease the emissions resulting from its actions. Two recent cases are instructive. In Western Organization of Resource Councils v. BLM, the court invalidated BLM’s EISs for the Buffalo and Miles City resource management plans because the agency failed to consider a reasonable alternative that reduced the amount of coal made available under the plans. 2018 WL 1475470 at *9 (D. Mont. March 26, 2018). The court found that “BLM’s failure to consider any alternative that would decrease the amount of extractable coal available for leasing rendered inadequate the Buffalo EIS and Miles City EIS in violation of NEPA.” Id. at *9. The court explained, “BLM cannot acknowledge that climate change concerns defined, in part, the scope of the RMP revision while simultaneously foreclosing consideration of alternatives that would reduce the amount of available coal based upon deference to an earlier coal screening that failed to consider climate change.” Id. at *17. Similarly, in Wilderness Workshop, the court found that BLM failed to consider reasonable alternatives by omitting any option that would meaningfully limit leasing and development within the planning area. 342 F. Supp. 3d at 1167.
B. BLM Established an Exceedingly Broad Purpose and Need for the Lease Sale EA.

BLM’s stated purpose and need, and “decision to be made,” for the December 2019 lease sale are exceedingly broad. See Lease Sale EA at 4. These sweeping objectives govern BLM’s range of alternatives and dictate the reasonableness of recommended alternatives including those proposed by SUWA.

C. SUWA’s Recommended “Cultural Resource Preservation Alternative” and BLM’s Arbitrary Rejection Thereof.

SUWA recommended the following alternative in its comments on the Lease Sale EA:

A “cultural resource preservation alternative.” Under this alternative, BLM would not offer leases in areas where any of BLM’s Class I site type models predict a high probability for cultural resources. BLM could achieve this objective by adjusting lease boundaries to avoid such areas.

See SUWA Comments at 41. This alternative satisfies the “rule of reason.” For example, it would allow BLM to “respond” to expressions of interest and would still allow leasing to proceed (i.e., would “promote” oil and gas development). Thus, SUWA’s recommended alternative should have been considered by BLM in the EA.

However, BLM summarily rejected SUWA’s alternative without analysis because, according to the agency, it was “substantially the same as the no action alternative of the EA.” EA, App. H at 295. This rationale is arbitrary. It is unclear how an alternative that would allow BLM to offer all nominated lease parcels (albeit with modified boundaries) is “substantially the same” as an alternative wherein BLM would not offer any parcel. In New Mexico ex rel. Richardson, the Tenth Circuit rejected a similar argument. There, the court explained that an alternative that closed only a portion of land to oil and gas leasing and development “differs significantly from full closure.” 565 F.3d at 711. In other words, “[t]he court reasoned that having considered an option of no development . . . did not relieve the [agency] of the duty to consider any other alternative along the spectrum between complete closure and the studied alternative which provided for the greatest closure.” Wilderness Workshop, 342 F. Supp. 3d at 1166 (citing New Mexico ex rel. Richardson, 565 F.3d at 711, n.32).

Similarly, in Wilderness Workshop, the court rejected BLM’s argument “that there is no substantive difference between an alternative that opens low and medium potential areas for leasing and one that does not.” 342 F. Supp. 3d at 1166. On this point, the court explained “it seems a reasonable alternative would be to consider what else may be done with the low and medium potential lands if they are not held open for leasing.” Id. at 1167. Thus, “BLM’s failure to consider reasonable alternatives violated NEPA.” Id.

In the present case, BLM has made the same mistakes. Like in New Mexico ex rel. Richardson, SUWA’s recommended alternative would remove only a portion of land from oil and gas leasing—an alternative that “differs significantly from full [parcel deferral].” And like in
Wilderness Workshop, BLM’s rejection of SUWA’s alternative is based on the false premise that there is no substantive difference between an alternative of leasing lands with high probability for cultural resources and “one that does not.”

Thus, BLM’s rejection of SUWA’s cultural resource preservation alternative was arbitrary.

VI. BLM Failed to Take a Hard Look at Impacts to Cultural Resources in Violation of NEPA.

NEPA requires BLM to take a “hard look” at the environmental effects of a proposed action. Silverton Snowmobile Club, 433 F.3d at 781. To comply with NEPA’s procedural requirements BLM must analyze all potential direct, indirect, and cumulative impacts to cultural resources, regardless of whether those cultural resources are eligible for listing in the National Register. See BLM Manual 8100 – The Foundations for Managing Cultural Resources (Public) § .03.F (Dec. 3, 2004) (“Cultural resources need not be determined eligible for the National Register of Historic Places . . . to receive consideration under [NEPA].”) (attached). Though NHPA analysis is related to NEPA analysis, they are not one and the same; the analysis of potential impacts to cultural resources under NEPA is broader than that under the NHPA.

Here, BLM has failed to undertake any NEPA analysis for cultural resources. Instead, the agency discussed cultural resources only in its ID Team Checklist and relies solely on its NHPA analysis and various stipulations. See, e.g., EA at 16-17, tbl. 3; id., App. D at 196-97 (brief discussion of cultural resources in the Monticello field office IDT Team Checklist—the other field office’s provided similar explanations). As noted supra, lease stipulations and notices are not substitutes for NEPA analysis.

Moreover, in response to SUWA’s comments on this point, the agency stated: “These are comments on the NHPA process which has a separate comment period. The commenter was not a consulting party under NHPA for the December 2019 Lease Sale Cultural Resources report.” Id., App. H at 295. This response is arbitrary. The Lease Sale EA is the point at which BLM must comply with NEPA (as well as the NHPA). See New Mexico ex rel. Richardson, 565 F.3d at 718 (“assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.”) (citations omitted). Thus, SUWA’s comments regarding BLM’s failure to properly analyze cultural resource impacts pursuant to NEPA are properly raised in this context. BLM’s failure to respond to these comments and, more importantly, its failure take a “hard look” at potential impacts to cultural resources violated NEPA.

VII. BLM Failed to Take a Hard Look at Impacts to Climate Change from GHG Emissions.

BLM’s cumulative impact analysis for GHG emissions and climate lacks necessary information and data. In WildEarth Guardians, the court stated:

[NEPA] does . . . require that BLM quantify the emissions from each leasing decision—past, present, or reasonably foreseeable—and compare those emissions
to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the leasing decisions at issue. To the extent other BLM actions in the region—such as other lease sales—are reasonably foreseeable when an EA is issued, BLM must discuss them as well... Although BLM may determine that each lease sale individually has a de minimis impact on climate change, the agency must also consider the cumulative impact of GHG emissions generated by past, present, or reasonably foreseeable BLM lease sales in the region and nation.

368 F. Supp. 3d at 77 (internal citations omitted). The Lease Sale EA does not meet this standard.

Here, BLM’s designated CiAA for climate analysis in the Lease Sale EA is limited to only “the field offices where lease parcels are located and the State of Utah.” EA at 46. This CiAA is arbitrary. BLM knows that climate impacts will result outside of Utah from development of the proposed leases. See, e.g., EA at 50, fig. 3 (showing potential climate change impacts for the Colorado Plateau—impacts that are depicted to extend outside of Utah); id. at 54 (“The proposed action may result in GHG emissions that contribute to statewide, regional, and national GHG emissions totals.”). For this reason, in past leasing EAs BLM has properly established its CiAA for climate analysis as “the State of Utah, the United States, and the globe.” BLM, Environmental Assessment, December 2018 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G010-2018-0044-EA at 41 (Sept. 2018) (excerpts attached). Such a broad CiAA is consistent with BLM’s guidance which states that the CiAA “is generally based on the natural boundaries of the resource affected, rather than jurisdictional boundaries.” NEPA Handbook § 6.8.3.2, pg. 58.

In response to SUWA’s comments on this point, BLM stated:

The EA [analyzes cumulative impacts] for oil and gas lease sales within Utah which is the CiAA... but emissions generated from BLM’s actions in other states (outside the CiAA) are accounted for in those states’ analyses. The BLM considers the “region” to be the state in which the lease sale is conducted.

EA, App. H at 292 (emphases added). These statements are arbitrary. It is BLM’s burden—not the public’s—to “consolidate the available data as part of its ‘informed decisionmaking,’ before issuing the leases and irretrievably committing to drilling on the parcels.” WildEarth Guardians, 368 F. Supp. 3d at 69. Here, BLM has inappropriately put this burden on the public by requiring the public to scour ePlanning for any and all NEPA documents that may—or may not—contain the emissions quantifications for lease sales outside of Utah that BLM has allegedly relied on in the Lease Sale EA.

Further, there is no record support for BLM’s conclusion that “region” is properly limited to only the state of Utah. At any extent, in WildEarth Guardians, the court held that BLM’s NEPA analysis had to “consider the cumulative impact of GHG emissions generated by past, present, or reasonably foreseeable BLM lease sales in the region and nation.” 368 F. Supp. 3d at 77
(emphasis added). BLM failed to do so here. At most, BLM has considered the cumulative impact of only three recent lease sales in Utah. See EA at 47.

Finally, BLM’s cumulative impact analysis has overlooked additional—but necessary—factors. For example, the estimated GHG emissions from past and present oil and gas wells, and comparison of estimated annual GHG emissions, are limited to only five of the field offices in Utah. See, e.g., EA at 46, tbls. 19 and 20 (quantifying emissions for Moab, Monticello, Price, Richfield, and Vernal field offices). These estimates fail to include BLM’s recent lease sales (i.e., March 2019 and June 2019) and accompanying emissions for leases located in Box Elder, Rich, and Utah Counties—areas managed by the Salt Lake Field Office.

BLM also relied on the outdated Vernal RMP RFDS rather than the RFDS prepared in 2012, which expressly replaced the prior RFDS. See EA at 48, tbls. 22, 23 (relying on the RFDS of 6,530 oil and gas wells). As explained in SUWA’s comments, in 2012 BLM updated its RFDS for the Vernal field office to include 28,417 new oil and gas wells. See SUWA Lease Sale Comments at 5. See also BLM, Greater Uinta Basin Oil and Gas Cumulative Impacts Technical Support Document, at 10, tbl. 3-2 (March 2012). BLM has provided no explanation for why it has not relied on the most current RFDS for this field office. This lack of explanation and reliance on outdated data and information is arbitrary.

In sum, for the foregoing reasons BLM failed to analyze all cumulative impacts to climate change from offering the December 2019 leases for development.

REQUEST FOR RELIEF

SUWA respectfully requests the withdrawal of the protested parcels from the December 10, 2019 competitive oil and gas lease sale until such time as BLM resolves the failures discussed herein.

This protest is brought by and through the undersigned on behalf of the Southern Utah Wilderness Alliance, Center for Biological Diversity, Living Rivers, Natural Resources Defense Council, National Parks Conservation Association, Waterkeeper Alliance, and The Wilderness Society. The members of each of these organizations reside, work, and recreate, or regularly visit the areas to be impacted by the proposed lease sale and have an interest in, and will be adversely affected by, the proposed action.

DATED: November 22, 2019.

/s/ Landon Newell
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