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

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HAND DELIVERED

November 5, 2018

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

Re: Protest of the Utah Bureau of Land Management's, Price Field Office, December 2018 Competitive Oil and Gas Lease Sale, Determination of NEPA Adequacy, DOI-BLM-UT-Y020-2018-0057-DNA

Greetings:

In accordance with 43 C.F.R. § 4.450-2 and 3120, the Southern Utah Wilderness Alliance, The Wilderness Society, WildEarth Guardians, Waterkeeper Alliance, Green River Action Network, Living Rivers & Colorado Riverkeeper, Western Watersheds Project, Sierra Club and Center for Biological Diversity (collectively, SUWA) hereby timely protest the December 11, 2018 lease sale offering of the following 3 oil and gas lease sale parcels, referred to collectively as Protest Parcels.[1]

UT1218-014 (UTU93643), UT1218-016 (UTU93644), UT1218-257 (UTU93713)

See generally BLM, December 2018 Competitive Oil and Gas Lease Sale, Price Field Office, December 2018 Competitive Oil and Gas Lease Sale, Determination of NEPA Adequacy, DOI-BLM-UT-Y020-2018-0057-DNA (DNA or Lease Sale DNA). For the reasons discussed in SUWA's scoping comments and the reasons discussed *infra*, BLM's decision to sell and issue the Protest Parcels violates numerous federal laws including the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, *et seq.*; the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101 *et seq.*; the Administrative Procedures Act (APA), 5 U.S.C. §§ 551-59, 701-06, and the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, and the regulations and policies that implement these laws.

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

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

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

This lease sale was conducted pursuant to BLM Instruction Memorandum (IM) 2018-034, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews (Jan 31, 2018). IM 2018-034 replaced IM 2010-117, Oil and Gas Leasing Reform, Land Use Planning and Lease Parcel Reviews (May 17, 2010). IM 2018-034 purports to "streamline the leasing process" by severely limiting opportunities for public involvement. In this lease sale, BLM provided only a 15 day "scoping period" and a 10 day protest period for the parcels at issue in this protest. BLM did not release any draft environmental analyses for public review and comment. This truncated opportunity for public participation is illegal.

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

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

In his Memorandum Decision and Order, Judge Bush held that the plaintiffs are likely to succeed on the merits of both their substantive and procedural challenges to IM 2018-034 under FLPMA, 43 U.S.C. §§ 1712(a) & (h), 1739(e), NEPA 43 U.S.C. § 4332(C), 40 C.F.R. § 1506.6, and the APA, 5 U.S.C. § 706(2). The court reviewed BLM's IM 2018-034 and concluded it constitutes final agency action with respect to several critical elements of the BLM's oil and gas leasing process, including (a) BLM decisions whether or not to permit public involvement, (b) length of public review and comment, and (c) length of public protests of oil and gas lease sales. *W. Watersheds Project*, at 23-34. As the court noted, "the burden of such constraints upon public

participation and compressed protest periods falls most heavily upon members of the public, as those who have nominated potential lease parcels and BLM have had far more time to evaluate and consider the details of such parcels." *Id.* at 25.

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

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

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

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

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

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

> in this case, the record contains significant evidence indicating that BLM made an intentional decision to limit the opportunity for (and even in some circumstances to preclude entirely) any contemporaneous public involvement in decisions

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

Id. at 41 (emphasis added). Because of the court's clear legal conclusion that BLM, through IM 2018-034's procedures, unlawfully eliminated required minimum levels of public involvement in mineral leasing decisions, any subsequent leasing decisions carried out under the procedures of IM 2018-034 are unlawful and any leases issued subject to cancellation. As the court noted, "[i]n not being allowed to participate at the leasing decision stage, or in having to hurriedly clamber to do so because of IM 2018-034's changes because of the limited time frame and other constraints upon public participation, *oil and gas leases have been (and will be) issued without the full benefit of public input*." *Id.* at 42-43 (emphasis added). Although the court, in the balancing the hardships at issue in that case declined to vacate third-quarter oil and gas lease sales that have already taken place, *id.* at 46-49, BLM is now fully on notice of the serious legal deficiencies inherent in the restricted public involvement procedures of IM 2018-034.

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

Because the entire process of identifying, reviewing, and offering oil and gas lease sales for BLM's December 2018 leasing process is fundamentally compromised by the unlawful provisions of IM 2018-034, BLM must defer all parcels in the December 2018 lease sale.

II. Leasing is the Point of Irretrievable Commitment of Resources

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

irretrievable commitment of resources. BLM cannot make such a commitment without adequate analysis:

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

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

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

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

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

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

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

BLM, H – 1624-1 – Planning for Fluid Mineral Resources § I.B.2, at I-2 (Jan. 28, 2013) (emphasis added) (attached); *see also S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006) ("In sum, 'in the fluid minerals program, the point of irretrievable

and irreversible commitment occurs at the point of lease issuance." (quoting *Pennaco*, 377 F.3d at 1160) (internal alterations omitted)).

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

III. BLM Violated the National Historic Preservation Act

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

To adequately "take into account" the impacts on archeological resources, all federal agencies must comply with binding Section 106 regulations established by the Advisory Council on Historic Preservation (Advisory Council). Under these regulations, the first step in the Section 106 process is for an agency to determine whether the "proposed [f]ederal action is an undertaking as defined in [Section] 800.16(y)." 36 C.F.R. § 800.3(a). Undertakings include any permit or approval authorizing use of federal lands. *Id.* § 800.16(y). If the proposed action is an undertaking, the agency must determine "whether it is a type of activity that has the potential to cause effects on historic properties." *Id.* § 800.3(a). An effect is defined broadly to include direct, indirect and/or cumulative adverse effects that might alter the characteristics that make a cultural site eligible for listing in the National Register of Historic Places. *See id.* § 800.5(a)(1); *id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

The agency next "[d]etermine[s] and document[s] the area of potential effects" and then "[r]eview[s] existing information on historic properties within [that] area." 36 C.F.R. § 800.4(a)(1)-(2). "Based on the information gathered, . . . the agency . . . shall take the steps necessary to identify historic properties within the area of potential effects." *Id.* § 800.4(b). "The agency shall make a reasonable and good faith effort to carry out appropriate identification efforts." *Id.* § 800.4(b)(1). If the undertaking is a type of activity with the potential to affect historic properties then the agency must determine whether in fact those properties "may be affected" by the particular undertaking at hand. *Id.* § 800.4(d)(2).[2] If the agency official concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native American tribes, any consulting parties, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

[2] BLM may also determine that there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them, at which point it consults with the State Historic Preservation Officer and notifies relevant Native American tribes of its conclusion. *Id.* § 800.4(d)(1).

As BLM acknowledges, "[o]nce the lease has been issued, the lessee has the right to use as much of the leased land as necessary to explore for, drill for, extract, remove, and dispose of oil and gas deposits located under the leased lands," subject to limited restrictions. Price EA at 11. Leasing is the point at which BLM makes an irretrievable commitment of resources such that BLM can no longer preclude surface disturbing activities on lease parcels. *See, e.g.*, *Union Oil Co. of Cal et al.*, 102 IBLA at 189. Accordingly, BLM must fully comply with the NHPA at the leasing stage. It has failed to do so here.

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

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

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

First, BLM provides no support for its claim that each parcel within the Price field office can accommodate reasonably foreseeable development.[3] *See* Cultural Report, at 24. The agency simply claims that direct impacts can be avoided by "judicious well placement" and visual and auditory effects can be avoided based on topographic variation and design features such as camouflage. *See, e.g., id.* This ignores the fact that oil and gas drilling is an industrial activity

[3] This claim is especially arbitrary where, as here, a parcel has been subject to minimal survey. Only 1% of Parcel 257 has been surveyed. Cultural Report, at 24. Despite that minimal survey, the parcel contains at least two known sites – prehistoric camps – that are eligible for listing on the NRHP. *Id.*

with the potential for wide ranging adverse effects. Ground clearing for well construction includes use of scrapers, backhoes, excavators, dozers and graders that can permanently damage or otherwise adversely affect archaeological sites. *See, e.g.*, Canyon Country District 2018 Competitive Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA 9-10 (Nov. 2017) (attached). Industrial equipment in a largely pristine setting can adversely affect a site's setting feeling and association. These effects cannot be avoided simply through judicious well placement and flat paint in a topographically complex environment.

Second, BLM's no adverse effect determination entirely ignores indirect effects to historic properties such as "increased rock art exposure to dust resulting from increased traffic on roads … the potential to increase public access, potentially leading to increased vandalism and looting." *See e.g.*, BLM, September 2018 Oil and Gas Lease Sale, DOI-BLM-UT-0000-2018-0001-EA 50 (July 2018) (detailing potential indirect impacts to cultural resources in the lease sale context) (attached). Things like topographic complexity and judicious well placement will not ameliorate these indirect effects. As discussed above, an effect is defined broadly to include potential indirect and cumulative adverse effects. *See* 36 C.F.R. § 800.5(a)(1). BLM must account for these indirect effects. It has failed to do so.

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

IV. BLM Cannot Rely on a Determination of NEPA Adequacy

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

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

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

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

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

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

a. BLM's Past Use of DNAs Demonstrates the Inappropriateness of Its Use of the Lease Sale DNA

Utah BLM's recent, limited use of DNA's in the oil and gas development context demonstrates the inappropriateness of BLM's attempt to rely on a DNA here. In those instances, BLM prepared a DNA to 1) re-authorize the *same* project previously analyzed and authorized in a site-specific NEPA document, 2) authorize a minor modification to the *same* project previously analyzed and authorized in a site-specific NEPA document, or 3) authorize a step-down version of a project previously analyzed and authorized in a site-specific NEPA document. For example:

- In Finley Resources, Inc. Pelican 15-4A-7-20 Oil Well, DOI-BLM-UT-G010-2017-0046-DNA (April 2017) (Finley DNA) (attached), BLM prepared a DNA that tiered to a site-specific EA because the "project ha[d] remained similar to the original proposal with two minimal changes. First, Finley ha[d] requested to move the project 101 feet to the northeast. Second, the 0060-EA analyze[d] a total surface disturbance of 4 acres and the newly proposed project ha[d] reduced the surface disturbance to 2.4 acres." *Id.* at *3.

- In QEP Energy Company's RW 9C1-16A Pipeline Reroute, DOI-BLM-UT-G010-2015-0170 (DNA) (Sept. 2015) (attached), BLM prepared a DNA to approve slight alterations to the placement of a pipeline in the Uinta Basin. The *same* pipeline had already been analyzed in a site-specific environmental assessment including NEPA alternatives and its direct, indirect, and cumulative impacts. *See id.* at *15.

- In Koch Exploration North Alger 27-31 Multi Well Pad, DOI-BLM-UT-G010-2015-0128-DNA (Oct. 2015) (attached), BLM prepared a DNA to approve a drilling project in which the direct, indirect, and cumulative impacts of that

development had previously been analyzed in an environmental assessment. In other words, the development activities were a step-down of the *exact same* activities analyzed in the environmental assessment.

- In EnCana/Crescent Point-Lease Reinstatement, DOI-BLM-UT-G010-2015-0123-DNA (May 2017) (EnCana DNA) (attached), BLM prepared a DNA to reinstate the *same* oil and gas leases previously analyzed and authorized in the November 2016 competitive oil and gas lease sale environmental assessment. *Id.* at 2.

In each of these scenarios, BLM initially prepared NEPA documents to analyze the site-specific direct, indirect, and cumulative impacts of the exact same (or nearly identical) project authorized in the DNA, and the purpose and need statement for each project was the exact same as envisioned in the DNA. For example, the EA for the Finley Resources Inc. drilling project had the stated objective to decide "whether or not to approve the APDs." Finley Proposes The Pelican 15-3A-7-20, 15-4A-7-20, 15-6A-7-20 Wells, DOI-BLM-UT-G010-2016-0060-EA at 2 (Oct. 2016) (attached). The DNA which relied on that EA modified the decision by allowing the already authorized well to be drilled 101 feet to the northeast in an area with a smaller surface disturbing footprint. *See* Finley DNA at *3. Similarly, the EnCana DNA relied on the environmental assessment prepared for the November 2016 competitive oil and gas lease sale, the stated purpose and need of which was to "respond" to lease nominations and to promote oil and gas development on public lands, respectively. *See* November 2016 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G010-2016-033-EA at 2 (Oct. 2016) (attached). Moreover, the site-specific direct, indirect, and cumulative impacts of the leases to be reinstated in the EnCana DNA – UTU-75675 and UTU-74837 – had been analyzed in that EA. *See* EnCana DNA at 2 (citing to the EA through which the leases were analyzed and subsequently issued).[4]

b. The Price Field Office RMP and Prior Lease Sale Environmental Assessments did not Analyze the Site-Specific Direct, Indirect, and Cumulative Impacts of the Issuance and Development of the Protest Parcels

BLM inappropriately relies on the following NEPA documents to support the sale of the Protest Parcels: Price Field Office Resource Management Plan and Final Environmental Impact Statement and Record of Decision (Oct. 2008) (Price RMP), the Price and Richfield Field Offices September 2018 Lease Sale EA, DOI-BLM-UT-0000-2018-0001-EA (Price Sept. 2018 EA), the Salt Lake Field Office September 2018 Lease Sale EA, DOI-BLM-UT-0018-EA (Salt Lake Sept. 2018 EA), and the Price Field Office November 2015 Lease Sale EA, DOI-BLM-UT-G021-2015-0031-EA (Price Nov. 2015 EA). *See* Lease Sale DNA at 3.

The Price RMP BLM did not analyze site-specific direct, indirect, and cumulative impacts of oil and gas leasing and development for the Protest Parcels. The Price Sept. 2018 EA, the Salt Lake Sept. 2018 EA and Price Nov. 2015 EA similarly did not analyze the Protest Parcels at issue but

[4] SUWA does not concede that BLM's reliance on these DNA's satisfied its NEPA hard look mandate. However, they are illustrative of the narrow nature and scope of projects for which BLM has prepared a DNA.

rather analyzed impacts to entirely different parcels. *See* SUWA MAP_Price FO South Lease Sale Comparison (attached); SUWA Map_Price FO North Lease Sale Comparison (attached).

In the present case, BLM cannot rely on the Price RMP, the Price Sept. 2018 EA, the Salt Lake Sept. 2018 EA, or the Price Nov. 2015 for impact analyses for air quality and GHG emissions, wilderness-caliber lands, cultural resources, recreation, the Labyrinth Canyon SRMA and endemic pollinators because the requisite site-specific analysis was never prepared. Nor can BLM rely upon these documents to fulfill its obligations to analyze cumulative impacts.

NEPA requires BLM to take a hard look at all environmental impacts of a proposed action. This includes direct, indirect, and cumulative impacts. Direct effects are "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* at § 1508.8(b). Cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

i. San Rafael Desert MLP

Parcel 257 falls entirely within the San Rafael Desert Master Leasing Plan (MLP) boundary. *See* SUWA MAP_San Rafael Desert MLP December 2018 Parcels (attached). BLM has itself admitted that existing environmental analyses cannot and do not support future leasing on this parcel without additional environmental analysis. In 2016, BLM initiated the San Rafael Desert MLP process to "provide additional planning and analysis for areas prior to new leasing of oil and gas resources." 81 Fed. Reg. 31252, 31253 (May 18, 2016). The additional analysis was needed to, among other things:

> (1) Resolve long-standing lease protests relating to parcels of land for which BLM received lease offers subject to protest, but for which BLM has not issued leases in the planning area; (2) Determine whether the BLM should cancel, modify, or lift the suspensions on suspended leases in the planning area; (3) Evaluate potential development scenarios; (4) Identify and address potential resource conflicts and environmental impacts from development; (5) Create oil and gas development mitigation strategies; and (6) Consider a range of new conditions, including prohibiting surface occupancy or closing certain areas to leasing.

Id. BLM identified several resource values that it needed to analyze prior to moving forward with additional leasing in the MLP area including air quality, climate change, cultural resources, paleontological resources, recreation, visual resources, night skies, riparian resources, soil and water resources, vegetation, wildlife resources, special status species, special designations, and wilderness characteristics. *Id.* Additionally, BLM committed to, among other actions: "prepare development scenarios for oil and gas resources based on historical, existing, and projected levels of development," "consider a range of alternatives that focus on mitigating the impacts of development on resources that are of concern," and "use the best available scientific information

and inventory and monitoring information to determine appropriate decisions for oil and gas leasing." *Id.*

It is immaterial that BLM has rescinded the MLP concept. *See* IM 2018-34 § II. Under FLPMA, BLM has an ongoing duty to inventory "public lands and their resource and other values" and to update its land use plans, based on the results of inventories. 43 U.S.C. §§ 1711(a), 1712(a); *see also Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1122 (2010) (recognizing duty to update land use plans to account for new inventories). Similarly, under NEPA, BLM has a duty to update its environmental analysis when "significant new circumstances or information" exists. 40 C.F.R. § 1502.9(c)(1)(ii). Consequently, the rescission of the MLP policy does not change the fact that BLM has repeatedly and unequivocally stated that new information and analysis is necessary prior to issuing oil and gas leases in this area.

Nor does it change the fact that BLM has in its possession significant new information including, but not limited to, cultural reports, updated reasonable development scenarios for oil and gas, wilderness character inventories, and updated air quality modeling. *See*, *e.g.*, Reasonably Foreseeable Development Scenario for Oil and Gas in the San Rafael Desert Master Leasing Plan Area (Sept. 2016) (San Rafael Desert MLP RFD) (attached), "San Rafael Desert Lands with Wilderness Characteristics Inventory" (Nov. 2016) (San Rafael Desert LWC Report) (attached) and "Updated Utah Master Leasing Plan (MLP) Strategy" (Aug. 2015) (attached).There is no record evidence that BLM has used that information to inform its leasing decision. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (an agency action is arbitrary and capricious when the agency "entirely fail[s] to consider an important aspect of the problem").

In addition, SUWA herein incorporates in its entirety SUWA's scoping comments (and exhibits thereto) and SUWA's comments on BLM's preliminary alternatives (and exhibits thereto) for the San Rafael Desert MLP. *See* SUWA et al., Scoping Comments on the Bureau of Land Management's San Rafael Desert Master Leasing Plan and Final Environmental Assessment (July 1, 2016) (attached); SUWA et al., Comments on Preliminary Alternatives for San Rafael Desert Master Leasing Plan (DOI-BLM-UT-G020-2016-0008-EA) (Jan. 20, 2017) (attached). SUWA also incorporates in their entirety comments provided to BLM by the Utah Rock Art Research Association (URARA) and National Parks Conservation Association (NPCA) regarding the same. *See* URARA, Comments on the San Rafael Desert Master Leasing Plan DOI-BLM-UT-G020-2016- 0008-EA (June 30, 2016) (attached); NPCA, Scoping Letter to BLM (July 1, 2016) (attached).

Notably, the Price RMP does not support a decision to offer oil and gas leases on public lands within the San Rafael Desert MLP. BLM expressly acknowledged this fact when it initiated the San Rafael Desert MLP process. *See* BLM, San Rafael Desert Master Leasing Plan, Purpose and Need *1 (stating that the San Rafael Desert MLP is needed to "provide additional planning and analysis prior to new oil and gas leasing within the MLP area"); *id.* at *2 (stating that "additional planning and analysis are warranted before new mineral leasing and development are allowed") (attached). Specifically, the Price and Richfield RMPs do not account for significant new and updated information concerning the reasonably foreseeable development (RFD) scenario, lands with wilderness characteristics and potential impacts to Canyonlands National Park.

First, in the San Rafael Desert MLP RFD, BLM concluded that "the development potential is greater" than previously thought "due to the success of horizontal drilling in the Cane Creek shale in the Paradox Formation in adjacent areas of the Moab Field Office." San Rafael Desert MLP RFD at 3. The Cane Creek Shale is concentrated in the eastern half of the San Rafael Desert MLP area and encompasses or borders numerous sensitive resources, including Canyonlands National Park, Labyrinth Canyon and LWCs. *Id.* at 23. According to the RFD, most of the wells in the Cane Creek Shale would be horizontally drilled, a technique not previously utilized in the planning area. *Id.* at 11. Horizontal drilling requires a "larger pad size . . . to accommodate a larger drill rig and sufficient area for additional equipment such as specialized mud systems, directional tools, drill pipe and casing, and portable storage tanks" than conventional vertical drilling. *Id.* As a consequence, the potential impacts on nearby lands and resources, including Canyonlands National Park, are broader and more severe than conventional types of drilling. It is these impacts, among others, that are not examined in the current RMPs for the San Rafael Desert.

Second, BLM has significant new information regarding wilderness characteristics in the San Rafael Desert. *See* San Rafael Desert LWC Report. This includes, but is not limited to, information for the Labyrinth Canyon unit. *See id*. at 3 (Lands with Wilderness Characteristics Overview Map). The Price and Richfield RMPs pre-date this information. *See, e.g., S. Utah Wilderness Alliance*, 457 F. Supp. 2d at 1264-65 (setting aside BLM's leasing decision for failure to analyze significant new wilderness character information).

Third, since 2008, BLM has obtained significant new information about the potential impacts of oil and gas development on Canyonlands National Park. This information comes from environmental analyses developed during preparation of the Moab MLP and shows that the impacts of oil and gas development on key attributes of the park, including air quality, night skies, scenic viewsheds and recreation resources, are more significant than disclosed in 2008. For example, in the Final EIS for the Moab MLP, BLM disclosed that absent heightened protections, such as NSO stipulations,

> [n]ot all of the visual horizon of the two adjacent National Parks would be protected from visual impacts. . . . Mineral development facilities could exist in places that would disrupt the skyline view as seen from the Colorado and Green Rivers. Light pollution from mineral development could diminish the number of stars visible, thereby reducing the visual quality of the night sky.

Moab MLP FEIS at 4-198;2 see also Analysis of the Management Situation for the Moab MLP and Associated EIS at 2-903 ("The visual quality within the Planning Area is being impacted by development of utility corridors, from minerals exploration and development, from seismic exploration, and from other land-use disturbances."). "Scenic visual resources and values are among the purposes for which Canyonlands and Arches were established." Moab MLP Final EIS at 3-120; *see also id.* at 3-118 (noting Canyonlands National Park's 2015 designation as a "gold-tier" International Dark Sky Park). Similarly, in regard to the park's air quality, BLM stated that "[w]hile long term (1991-2013) trends at Canyonlands show statistically significant improvement . . . , the most recent 10 year period indicates that this improving trend has not been maintained." *Id*. at 3-9. Finally, in the Moab MLP and with the assistance of the U.S. Geological

Survey, BLM developed "analysis of viewsheds most likely affected by recreation and mineral decisions." *Id.* at 3-121. This analysis shows that there are numerous "high and very high recreation sites" both within and outside of Canyonlands National Parks that are within the viewshed of potential oil and gas lease parcels. *Id.* at 3-121-23. In connection with this sale, the National Park Service raised many of the foregoing concerns. *See* Letter from Kate Cannon, Superintendent, Southeast Utah Group – NPS, to Sheri Wysong, BLM (Apr. 20, 2018) ("Issues of concern to us include the potential effects of the project on air quality and air quality related values . . . , visual resources and viewsheds including the quality of night skies, and natural soundscape conditions.") (attached).[5]

In sum, the existing RMPs are insufficient, and thus, as BLM itself has explained: "MLPs are required in areas with sensitive resources, such as the San Rafael Desert, where mostly unleased and undeveloped lands have been proposed for oil and gas leasing and development." BLM, San Rafael Desert Master Leasing Plan Fact Sheet 1 (attached). BLM has likewise determined that "additional planning and analysis are warranted before new mineral leasing and development are allowed," *id.* at 2, and is needed to "resolve long-standing lease protest from the February and May 2006 lease sale, and to complete additional analyses under NEPA for leases that were placed in suspension in 2005 and 2006 because of litigation." *Id.* Because this information is "required" prior to the issuance of new leases, as BLM has recognized, BLM must prepare the above-discussed analyses prior to issuing any proposed parcel in the MLP boundary. 40 C.F.R. § 1502.9(c)(1)(ii) (NEPA requires federal agencies to update their environmental analyses when "significant new circumstances or information" exists).

ii. BLM Failed to Take a Hard Look at Air Quality and Greenhouse Gas Emissions Impacts

BLM cannot rely on the Price RMP, the Price Sept. 2018 EA, the Salt Lake Sept. 2018 EA or the Price Nov. 2015 EA for its analysis of impacts to air quality and greenhouse gas (GHG) emissions. The Price RMP did not analyze site-specific air quality impacts from oil and gas leasing and development but rather analyzed only broad impacts to the greater Price field office planning area. *See* Price FEIS at 4-2. The Price RMP analyzed primarily qualitative as opposed to quantitative data. *Id.* at 4-2 to 4-8. It did not perform site-specific modeling, nor did it contain near-field analysis for site-specific authorizations. *Id.* The Price RMP also did not analyze the direct, indirect or cumulative impacts to human health and the environment from increased GHG emissions and climate change. *See id.* at 4-5 to 4-6 (explaining that BLM did not undertake such analysis because it lacked an established mechanism to undertake that analysis.

It is immaterial with regard to site-specific NEPA impact analysis that BLM has attached air quality and greenhouse gas leasing stipulations to the Protest Parcels. *See* DNA App. C at 1. Lease stipulations and notices are developed to mitigate impacts to human health and the environment, pursuant to FLPMA and the MLA, *see, e.g.*, 43 U.S.C. §§ 1701(a)(8), 1712, 43 C.F.R. § 3101.1-3, not to analyze site-specific direct, indirect, and cumulative impacts, as required by NEPA. *See, e.g.*, 40 C.F.R. §§ 1508.7, 1508.8.

[5] *Available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/103243/152463/186680/2018-04-20_-_2018_Oil_and_Gas_Lease_Sale_-_NPS_Scoping_Comments.pdf.

BLM similarly cannot rely on the Price Sept. 2018 EA or Salt Lake Sept. 2018 EA for its air quality analysis because that analysis itself violated NEPA. *See* SUWA et al., Protest of the Utah Bureau of Land Management's Notice of Competitive Oil and Gas Lease Sale to be held on or around September 11, 2018 17-21 (Aug. 2018) (SUWA Sept. 2018 Protest) (attached). SUWA incorporates that Protest herein. Specifically, BLM failed to present a representative assessment of the potential air quality impacts, failed to identify adequate mitigation measures to address the adverse impacts, underestimated emissions from leasing, and did not sufficiently address GHG emissions, among other issues. *See* SUWA Sept. 2018 Protest at 17. In addition, BLM failed to take a hard look at GHG emission impacts to climate change. *Id.* at 18. BLM cannot rely on deficient air quality analysis to support its decision to lease the Protest Parcels.

Finally, BLM cannot unlawfully delay its NEPA analysis to the APD stage. Critical to NEPA's hard look mandate is the fact that BLM must analyze the direct, indirect, and cumulative impacts "at the earliest possible time" – which in the oil and gas lease sale context is undoubtedly prior to the point of irretrievable commitment of resources. 40 C.F.R. § 1501.2; *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (recognizing NEPA analysis "permits the public and other governmental agencies to react to the effects of a proposed action at a meaningful time"); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) ("All environmental analyses required by NEPA must be conducted at the earliest possible time.") (citation and quotation omitted); BLM Handbook 1624 § B.2 ("In the fluid minerals program, this commitment occurs at the point of lease issuance.").

iii. BLM Failed to Take a Hard Look at Impacts to Lands with Wilderness Characteristics.

BLM has not analyzed potential impacts from oil and gas leasing to BLM-identified lands with wilderness characteristics (LWC). Parcel 257 includes about 500 acres of BLM-identified LWC in the Labyrinth Canyon unit. Lease Sale DNA App. C at 4. The Labyrinth Canyon LWC unit encompasses a desert landscape with diverse geological formations, including deep canyons and rugged terrain. *See* San Rafael Desert LWC Report at L-12. The remote nature and rugged landscape of the unit provides outstanding opportunities for solitude as well as outstanding opportunities for primitive and unconfined recreation. *Id.* at L-13.

BLM identified the Labyrinth Canyon LWC after it completed the 2008 Price RMP. Lease Sale DNA App. C at 4. BLM has not analyzed potential impacts to the Labyrinth Canyon LWC unit from oil and gas leasing, nor has BLM considered protective management for Labyrinth Canyon LWC in a land use planning process. *Id.* Because the Labyrinth Canyon LWC has not been analyzed in a NEPA document, BLM must conduct NEPA analysis before offering Parcel 257 for sale. *See* BLM Manual 6320-Considering Lands with Characteristics in the BLM Land Use Planning Process .04.C.2. (March 2012) (attached) ("District Managers and Field Managers shall: … Ensure that wilderness characteristics inventories are considered and that, as warranted, lands with wilderness characteristics are protected in a manner consistent with this manual in BLM planning processes."). BLM must analyze whether and how oil and gas exploration and development would impact the wilderness characteristics within the Labyrinth Canyon LWC unit, including impacts to naturalness and outstanding opportunities for solitude and primitive

recreation. The Price DNA does not do this work and thus the sale of Parcel 257 must be deferred.

iv. BLM Failed to Take a Hard Look at Impacts to Cultural Resources.

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

First, BLM makes no attempt to discuss or assess potential impacts to cultural resources in the Cultural Report. The Cultural Report simply states that judicious well placement and design features would mitigate any potential adverse effects – without ever discussing what the potential impacts to cultural resources may be. *See generally* Cultural Report at 24. Rather than evaluate and explain potential effects, the Cultural Report only asserts – without support – that potential effects will be limited by the temporary nature of drilling activities and camouflaging permanent structures. *Id.* at 3-4. This does not satisfy NEPA's hard look requirements.

In addition, pursuant to NEPA, BLM must analyze potential impacts to *all cultural resources*, not just historic properties. *See* BLM Manual 8100, The Foundations For Managing Cultural Resources (2004) (attached) ("Cultural Resources need not be determined eligible for the National Register of Historic Places … to receive consideration under the National Environmental Policy Act."). BLM has not done so here. Instead, it focused its discussion on only those cultural resources that are eligible for listing in the National Register of Historic Places. *See generally* Cultural Report. The Cultural Report does not contain a discussion of impacts to cultural resources – regardless of whether those cultural resources are eligible for listing on the national register. Neither does it contain even a cursory discussion of potential direct, indirect and cumulative impacts to resources.

Finally, BLM wholly failed to take a hard look at the cumulative impacts to cultural resources as required by both the NHPA and NEPA. As the Lease Sale DNA notes, Parcel 257 is in in a similar geographic area to certain parcels in the Price September 2018 lease sale. BLM has not analyzed the cumulative impact of both these lease sales on cultural resources.

v. BLM Failed to Take a Hard Look at Impacts to Recreation in the Labyrinth Canyon Special Recreation Management Area.

Much of Parcel 257 is within the Labyrinth Canyon Special Recreation Management Area. *See* SUWA MAP_Labyrinth Canyon SRMA (attached). The Price field office designated the Labyrinth Canyon SRMA in 2008 and established goals for its management, including maintaining the natural character of the canyon and protecting the scientific value of cultural resources. *Id* Price RMP at 108, App. R-9 at 5. BLM also identified the primary activities within the SRMA to be backcountry hiking, cultural site visitation, and wilderness education, among

other activities. *Id.* at App. R-9. BLM further designated certain areas within that SRMA as "Primitive" and "Semi primitive motorized." *Id.* Map R-14; *see also* SUWA Map_Labyrinth Canyon SRMA. Parcel 257 overlaps with areas designated as both primitive and semi primitive motorized. *See* SUWA Map_Parcel 257 SRMA. Under the Price RMP, no facilities can be constructed within the designated "Primitive" area and only minimal facilities can be used in the "Semi Primitive Motorized" areas of the SRMA and then only to protect critical resources. Price RMP at 109.

BLM has not at any point analyzed the potential direct, indirect and cumulative impacts that leasing parcel 257 would have on recreation within the Labyrinth Canyon SRMA. *See* Lease Sale DNA App. C at 6. In fact the Lease Sale DNA ID Team Checklist does not even acknowledge that Parcel 257 overlaps with the Labyrinth Canyon SRMA. *Id.*; *see also id.* App. A at 2-3 (lacking any lease stipulations or notices related to the Labyrinth Canyon SRMA). Nor did BLM analyze the direct, indirect or cumulative impacts on river recreation within the Labyrinth Canyon SRMA. Furthermore, BLM has not developed an activity plan that it committed to prepare. Price RMP at 108.

vi. BLM Failed to Analyze Cumulative Impacts of this Lease Sale.

The proximity of the Protest Parcels to those oil and gas parcels analyzed in the Price, Richfield, and Salt Lake September 2018 EAs does not obviate the need for BLM to complete comprehensive NEPA analysis. Instead, BLM must analyze the reasonable foreseeable impacts of this lease sale in combination with those impacts from the September 2018 lease sale. Agencies must analyze the cumulative impacts of a proposed action and cannot artificially segment actions into piecemeal components. *See* 40 C.F.R. § 1508.7. Cumulative impacts are "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions … [and] can result from individually minor but collectively significant actions taking place over a period of time." *Id.*; *see also American Rivers v. Federal Energy Regulatory Comm'n*, 895 F.3d 32, 54-55 (D.C. Cir. 2018) (noting NEPA's requirement that agencies account for past and future impacts to the environment in its NEPA cumulative impacts analysis). BLM has entirely failed to analyze the cumulative impacts of these two lease sales taken together.

c. BLM's Prior NEPA Alternatives Analysis is Not Sufficient

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

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

The range of alternatives an agency must analyze is dictated by a "rule of reason and practicality" based on the agency's stated purpose and need for the project. *Davis*, 302 F.3d at1120 (citation omitted). The reasonableness of an alternative is measured in two ways. First, it must accomplish the purpose and need of the proposed action. *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 709 (10th Cir. 2009). Second, it must fall within the agency's statutory mandate. *Id.* An alternative that is reasonable on its face must also be practical—"non-speculative … and bounded by some notion of feasibility." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002).

An agency has broad discretion to define its objectives for a project proposal. However, after "defining the objectives of an action," the agency must "provide legitimate consideration to alternatives that fall between the obvious extremes." *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999). Stated differently, a broadly defined objective demands that a broader range of alternatives be analyzed by the agency:

> It is the BLM purpose and need for action that will dictate the range of alternatives and provide a basis for the rationale for eventual selection of an alternative in a decision. . . .
> ….
> … *The broader the purpose and need statement, the broader the range of alternatives that must be analyzed*.

BLM Handbook 1790-1 §§ 6.2, 6.2.1, pgs. 35-26 (emphasis added).

At all times, the analyzed range of alternatives must be "sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *N.M. ex rel. Richardson*, 565 F.3d at 708 (citation omitted). An EA must demonstrate that the agency took a "hard look" at alternatives – a "thoughtful and probing reflection of the possible impacts associated with the proposed project" so as to "provide a reviewing court with the necessary factual specificity to conduct its review." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006); *see also* 40 C.F.R. § 1508.9(a)(1). Courts will not defer to a void and thus the administrative record must contain evidence – not merely conclusory statements by the agency – that the agency did in fact take consider a broad range of NEPA alternatives. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1186 (D. Colo. 2014).

i. The Lease Sale is Neither a Feature of, Nor Similar to an Alternative Analyzed in the NEPA Documents Upon Which BLM Relies

BLM has never analyzed leasing the Protest Parcels in a NEPA document. BLM asserts that the sale of the Protest Parcels was a feature of the alternatives included in the Price RMP FEIS which specifically analyzed the impacts associated with oil and gas leasing. Lease Sale DNA at 3. Not so. The alternatives analyzed in a land use plan and the alternatives analyzed in an oil and gas lease sale are fundamentally different. The alternatives analyzed and developed for the Price RMP informed BLM's decision regarding how to allocate resources on nearly 2.5 million acres of federal public land. Price RMP at ES-1. It is a 30,000 foot level of analysis offering no insight into specific resource conflicts at the lease sale stage. BLM has not analyzed the site specific direct, indirect and cumulative impacts of leasing the Protest Parcels.

ii. The Range of Alternatives BLM Considered in the Price RMP, is not Appropriate with Respect to the Proposed Lease Sale

BLM relies on its alternatives analysis in the Price RMP to support the Lease Sale DNA. DNA at 3. The range of alternatives an agency must analyze depends upon the purpose and need of a proposed action. *Davis*, 302 F.3d at1120 (citation omitted). The alternatives analyzed in the Price RMP were *not* oil and gas leasing alternatives and thus cannot be relied on to satisfy BLM's NEPA alternatives obligations in the present matter. Instead, those alternatives considered only broad level resource allocations for the entire field office, such as designating federal public lands as open or closed to oil and gas leasing and development. Notably the Price RMP did not make site-specific leasing decisions or mandate that any particular parcels be offered for lease.

BLM's stated purpose and need for the Price RMP was "to provide a comprehensive framework for public land management within the [Price field office] and its allocation of resources pursuant to the multiple-use and sustained yield mandate of FLPMA." Price FEIS at 1-3. The Lease Sale DNA does not contain a purpose and need statement, but the lease sale EA's cited and relied upon by the DNA have stated their purpose and need as "to respond to nominations or expressions of interest for oil and gas leasing on *specific* mineral estate through a competitive leasing process." *See, e.g.*, Price Sept. 2018 EA at 7 (emphasis added).

There is no similarity between the purpose and need of the Price RMP and the purpose for which BLM has prepared the Lease Sale DNA – to consider offering certain specified parcels for lease. As noted *supra*, an RMP is a programmatic field-office-wide NEPA document that made broad level management decisions regarding resource values under BLM's management, not site-specific leasing decisions. Likewise, the Price RMP did not analyze the site-specific direct, indirect, and cumulative impacts of leasing the Protest Parcels. Accordingly, BLM cannot rely on the alternatives analysis contained therein to support its NEPA analysis in the Proposed Action.

d. BLM Failed to Respond to or Consider SUWA's Recommended Alternatives.

NEPA has twin aims, or objectives: 1) NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," and 2) "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations and quotations omitted). The second objective requires BLM to respond to substantive comments provided by members of the public, including SUWA. *Utahns for Better Transp.* 305 F.3d at 1165 (explaining that under NEPA Federal agencies must "respond to substantive issues raised in comments.") (citing 40 C.F.R. § 1503.4(a)). This obligation "is more than a technical requirement." *Id.*

Furthermore, under the APA it is a "fundamental tenet of administrative law" that federal agencies respond to all significant comments. *See Natural Res. Def. Council v. EPA*, 859 F.2d 156, 188 (D.C. Cir. 1988). "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979)). A comment is "significant" when "if true, [it] raise[s] points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed [action]." *Home Box Office v. FCC*, 567 F.2d 9, 35, n.58 (D.C. Cir. 1977). An agency's failure to respond to comments "demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Sierra Club v. EPA*, 353 F.3d 976, 986 (D.C. Cir. 2004); *see also Natural Res. Def. Council v. EPA*, 859 F.2d at 188 ("The fundamental purpose of the response requirement is, of course, to show that the agency has indeed considered all significant points articulated by the public.").

In its scoping comments on the DNA, SUWA recommended BLM consider at least one alternative from the options set forth below:

- A "leasing outside of wilderness-caliber lands" alternatives, deferring any parcels in BLM-identified non-WSA lands with wilderness characteristics; or

- A "no-surface occupancy" alternative, requiring non-waivable NSO stipulations on BLM-identified lands with wilderness characteristics; or

- A "phased development-leasing" alternative, requiring lessees and operators to first explore and develop land outside BLM-identified lands with wilderness characteristics.

SUWA et al., Scoping Comments on Utah BLM December 2018 Lease Sale 20- 21 (July 31, 2018) (attached). BLM has never responded to SUWA's proposed alternatives

Moreover, BLM never disputed that SUWA's recommended alternatives would accomplish the purpose and need of holding a quarterly lease sale (*e.g.*, to respond to parcel nominations, and to promote oil and gas development on public domain), are technically and economically feasible, and would have a lesser impact to the environment. BLM's purpose and need for a competitive

oil and gas lease sale is very broad and thus the range of alternatives that could satisfy such an objective is correspondingly broad. There can be no legitimate dispute that SUWA's recommended alternatives are technically and economically feasible.

It is likewise indisputable that SUWA's recommended alternative will have lesser impacts to resource values including cultural resources. Therefore, BLM's failure to provide any response to SUWA's recommended alternatives, or to consider those alternatives in a NEPA document, violated NEPA.[6]

Because BLM has not analyzed all site specific impacts under NEPA and has not considered the Protest Parcels in an existing NEPA document, it cannot rely on a DNA to support its leasing decision.

REQUEST FOR RELIEF

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

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

DATED: November 5, 2018

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[6] BLM must 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. See, e.g., *N.M. ex rel. Richardson*, 565 F.3d at 710; ("[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses"); *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"); *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).