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

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HAND DELIVERED

November 5, 2018

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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, Monticello Field Office, December 2018 Competitive Oil and Gas Lease Sale, Determination of NEPA Adequacy, DOI-BLM-UT-Y020-2018-0058-DNA

Greetings:

In accordance with 43 C.F.R. § 4.450-2 and 3120, the Southern Utah Wilderness Alliance, The Wilderness Society, Western Watersheds Project, Center for Biological Diversity, WildEarth Guardians, Waterkeeper Alliance, Green River Action Network, and Living Rivers & Colorado Riverkeeper (collectively, SUWA) hereby timely protest the December 11, 2018 lease sale offering of the following 17 oil and gas lease sale parcels, referred to collectively as Protest Parcels.[1]

> UT1218-299 (UTU87370), UT1218-300 (UTU93721), UT1218-301 (UTU93722), UT1218-302 (UTU93723), UT1218-303 (UTU93724), UT1218-326 (UTU93730), UT1218-327, (UTU93731), UT1218-328 (UTU93732), UT1218-329 (UTU93733), UT1218-330 (UTU93734), UT1218-332 (UTU85259), UT1218-333 (UTU93735), UT1218-361 (UTU93743), UT1218-362 (UTU93744), UT1218-363 (UTU93745), UT1218-364, UT1218-365 (UTU93746)

See generally BLM, December 2018 Competitive Oil and Gas Lease Sale, Monticello Field Office, December 2018 Competitive Oil and Gas Lease Sale, Determination of NEPA Adequacy, DOI-BLM-UT-Y020-2018-0058-DNA (Lease Sale DNA or DNA). For the reasons discussed in SUWA's 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

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

Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, and the regulations and policies that implement these laws.

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 may fall outside designated greater sage-grouse habitat, the court's reasoning applies with equal force to all oil and gas lease sales offered at the December 2018 lease sale under 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 Monticello 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 sale of the Protest Parcels and instead has unlawfully delayed that analysis to a later date, as discussed below. As explained below, this failure may have irreversible negative impacts on numerous values including, but not limited to, air quality, climate change, cultural and historic resources and wilderness-caliber lands.

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 the Color Country District 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 Failed to Make a Reasonable and Good Faith Effort to Identify Cultural Resources.

As discussed above, BLM must "make a reasonable and good faith effort" to identify cultural resources. 36 C.F.R. 800.4(b)(1). To do so, the agency must "take into account past planning, research and studies … the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." *Id.*

The BLM has prepared a cultural resources "records search" to support the December 2018 oil and gas lease sale. *See generally* Cultural Report. That is, BLM staff reviewed previous survey results located in the Monticello Field Office and the SHPO's online database and summarized those records. In this case, the records search is insufficient. As the Advisory Council emphasized in its preamble to the Section 106 regulations, knowing the historic properties at risk from an undertaking is essential: "[i]t is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place." 65 Fed. Reg. 77,698, 77,715 (Dec. 12, 2000); *see also Pueblo of Sandia*, 50 F.3d at 861-62 (holding that U.S. Forest Service failed to make a good faith effort to identify cultural resources when it concluded that a canyon did not contain traditional cultural properties despite having information to the contrary).

To satisfy its reasonable and good faith identification efforts, BLM must – at the very least – analyze all existing cultural resource information that it has on hand. It has not done so here. BLM's Monticello field office recently completed a field-office-wide Class I inventory with

accompanying associated archaeological site predictive models. *See* Cultural Report at 5. While archaeological models are far from perfect, they do provide information about the potential location of undiscovered sites. *Id.* BLM prepared these predictive models to "help facilitate planning efforts; for example, by identifying areas of high probability that could merit special management attention." *See* BLM, Monticello Field Office, A Class I Cultural Resource Inventory Administered by the Bureau of Land Management, Monticello Field Office 8-1 (Sept. 2017) (Monticello Class I inventory). The predictive models for the Monticello field office are actually a series of different models – six site type models and one composite model. *Id.* at 8-2, 8-94. The composite model combines all of the site type models to create a generalized, overall model of archaeological sensitivity. *Id.* at 8-2, 8-28, 8-94.

The Monticello Class I inventory notes that historic resources benefit when "a proponent can site their project away from areas with a high probability for the presence of unknown archaeological localities." Monticello Class I inventory at 8-4. The Monticello Class I inventory also emphasizes that it is important to account for different site types in planning models. *See id.* at 8-1 ("[T]he distribution of different types of cultural resource sites is likely to be influenced by different environmental factors."); *see also id.* at 8-48 – 8-54 (describing the important environmental factors correlated with different site types; e.g., prehistoric open with features sites are correlated with proximity to waterbodies and negatively correlated with elevation and ponderosa pine forests, whereas historic artifact scatters are correlated with Pinyon-Juniper Woodlands and shrublands and areas with high relative elevation).

The individual site type models provide BLM detailed information about the potential resources on the ground, allowing the agency to assess potential adverse effects from the lease sale. *See* Monticello Class I inventory at 8-59 – 8-74, 8-79. However, rather than utilize the individual site type maps to assess the potential location of undiscovered archaeological sites and potential effects to those sites, BLM arbitrarily relied only on the composite model map for that analysis. *See* Letter from Kent Hoffman, BLM, to Stephen Bloch, SUWA, Response to SUWA Section 106 Comments 1-2 (2018) (attached). The Monticello composite model map provide a demonstrably incomplete picture about potential cultural site location on the ground. For example, the Monticello planning model (composite) predicts primarily medium site probability in parcels 301 and 306. *See* SUWA Map_Monticello FO Planning Model (attached). However, the site type models for prehistoric open sites with features and prehistoric open sites without features predicts primarily high potential for sites throughout both parcels, indicating that leasing these parcels indeed *may* affect historic properties therein. *See* SUWA Map_Monticello FO Prehistoric Open with Features (attached); SUWA Map_Monticello FO Prehistoric Open without Features (attached). These site type models provide the best available information about potential locations of undiscovered sites, and give BLM more detailed information about the potential for adverse effects from this lease sale.

By deliberately ignoring the individual site type model to evaluate potential effects to cultural resources, BLM has failed to comply with its obligation to "take into account past … research and studies … and the likely nature and location of historic properties within the area of potential effect." 36 C.F.R. § 800.4(b)(1). Accordingly, BLM has failed to make a reasonable and good faith effort to identify cultural resources.

ii. 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); *id.* § 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).

The lands encompassed by the Protest Parcels are recognized as being incredibly rich in cultural resources, reflecting thousands of years of human history. *See, e.g.*, March 2018 EA at 21 (describing the cultural resources in parcels nearby the Protest Parcels). Sites within the Protest Parcels include prehistoric habitation sites, prehistoric pueblos, prehistoric camps, prehistoric kilns, rock art and Pueblo habitations. *See* Cultural Report at 12-22. There are over 500 known sites within the Protest Parcels. *Id.* In Parcel 327 alone, there are 64 known sites, 49 of which are eligible for listing on the NRHP. *Id.* at 17. Despite the density of cultural sites, BLM concludes that the lease sale would have no adverse effect on historic properties. That conclusion is arbitrary and capricious.

First, BLM provides no support for its claim that each parcel within the Monticello field office can accommodate reasonably foreseeable development. *See* Cultural Report at 12-22. 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.* at 17. This ignores the fact that oil and gas drilling is an industrial activity with the potential for wide ranging adverse effects, including direct, indirect and cumulative effects. Ground clearing for well construction includes use of scrapers, backhoes, excavators, dozers and graders that can permanently damage archaeological sites. *See, e.g.*, March 2018 EA at 9-10. 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 8-9. 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

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

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

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

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

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

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

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). This was the same general) purpose and need of the DNA. 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).[3]

In contrast, as discussed *infra*, the Lease Sale DNA relied on broad level NEPA documents and a NEPA document analyzing impacts in a different area. These NEPA documents do not contain the requisite site-specific direct, indirect, and cumulative impact analyses. Thus BLM's reliance on the Lease Sale DNA is inappropriate.

b. The Monticello RMP, Moab MLP and March 2018 EA did not Analyze all of the Site-Specific Direct, Indirect, and Cumulative Impacts of the Issuance and Development of the Protest Parcels

BLM inappropriately relies upon the Moab Master Leasing Plan and Proposed Resource Management Plan Amendments/Final Environmental Impact Statement (MLP/FEIS) and Record of Decision, DOI-BLM-UT-Y010-2012-0108-EIS (Dec. 2016),the Monticello Field Office Proposed Resource Management Plan and Final Environmental Impact Statement (RMP FEIS) and Record of Decision (Nov. 2008), and the Canyon Country District 2018 Competitive Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-Y010-2017-0240-EA (Nov. 2017) (March 2018 EA) to fulfill its NEPA obligations. *See* Lease Sale DNA at 4.

The Monticello RMP did not analyze site-specific direct, indirect, and cumulative impacts of oil and gas leasing and development for the Protest Parcels. The Moab MLP, while more narrowly focused than the RMP, based its impact analysis on broad-level assumptions "for purposes of equitably *comparing the alternatives* . . . based on observations, historic trends and professional judgment." Moab MLP FEIS at 4-2 (emphasis added).[4] For its part, the March 2018 EA analyzed site-specific impacts for entirely different lease parcels with unique resource issues. *See* SUWA Map_March 2018 December 2018 Parcels (attached). Furthermore, the March 2018 EA NEPA analysis was entirely deficient: it failed to take a hard look at impacts to air quality and climate change from increased greenhouse gas emissions, failed to take a hard look at impacts to areas of critical environmental concerns, failed to analyze a reasonable range of alternatives and

[3] 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.

[4] While it may be appropriate for BLM to rely on the Moab MLP to support the sale of certain site-specific NEPA analyses in the two Protest Parcels that fall within the boundaries of the Moab MLP (Parcels 299 and 300), but BLM cannot rely on the Moab MLP (or any NEPA document) for analysis that was not prepared.

failed to take a hard look at cumulative impacts, among other issues. *See* SUWA et al., Protest of the BLM, Canyon Country District's Notice of Competitive Oil and Gas Lease Sale to be Held on or around March 20, 2018 (Jan. 2018) (SUWA March 2018 EA Protest) (attached). SUWA's protest of the March 2018 lease sale is incorporated herein. BLM cannot rely on inadequate NEPA analysis to support leasing the Protest Parcels.

In the present case, BLM cannot rely on the Monticello RMP, Moab MLP or March 2018 EA for impact analyses for air quality and GHG emissions, wilderness-caliber lands, cultural resources or areas of critical environmental concern (ACEC) 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 Juan Master Leasing Plan

BLM itself has admitted that existing environmental analysis cannot and does not support a decision to offer the parcels located in areas that BLM previously identified for preparation of the San Juan Master Leasing Plan (MLP). *See* SUWA Map_San Juan MLP (attached). As such, the information and reports BLM (or its contractors) generated, received from the public, and/or has in its possession concerning those MLPs must be incorporated into BLM's leasing analyses and cannot be overlooked. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins*. Co., 463 U.S. 29, 43 (1983) (an agency action is arbitrary and capricious when the agency "entirely fail[s] to consider an important aspect of the problem"); *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1237 (10th Cir. 2017) (setting aside the agency's decision because it had failed to consider all relevant factors); *N. M. ex rel. Richardson v. BLM*, 565 F.3d 683, 713 (10th Cir. 2009) ("In order for a factual determination to survive review under the arbitrary and capricious standard, an agency must 'examine the relevant data and articulate a rational connection between the facts found and the decision made.'") (internal alterations and citation omitted). This includes, but is not limited to, the "Updated Utah Master Leasing Plan (MLP) Strategy" (Aug. 2015) (attached) and "reasonable foreseeable development scenarios" (RFDs), LWC inventories and related reports, and cultural resources analyses and reports as part of MLP planning processes.

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

625 F.3d 1092, 1122 (9th Cir. 2010) (recognizing duty to update land use plans to account for new inventories). Similarly, under NEPA, BLM has a duty to update its environmental analysis when "significant new circumstances or information" exists. 40 C.F.R. § 1502.9(c)(1)(ii). Consequently, the rescission of the MLP policy does not change the fact that BLM has repeatedly and unequivocally stated that new information and analysis is necessary prior to issuing oil and gas leases in each of these areas. In some instances, BLM now possesses this information, which includes new cultural resources and wilderness inventories, but has failed to incorporate it into the NEPA analysis for the proposed parcels.

The proposed lease sale includes fourteen parcels inside of the San Juan MLP area.[5] In 2010 and 2015, BLM determined that additional land use planning and environmental analysis was needed in order to support future leasing on public lands east of Highway 191 – specifically, in in the vicinity of Alkali Ridge, Montezuma Canyon, and Hovenweep National Monument (i.e., the San Juan MLP area). BLM based this determination on findings that the Monticello RMP inadequately evaluated oil and gas-related impacts on national park, cultural and wilderness values. Further, since 2008, "BLM-Utah has been provided substantial new information from a wide variety of public lands stakeholders. The new information necessitates" further planning and analysis. Memorandum from State Director, Utah, to Assistant Director, Minerals and Realty Management 2 (May 29, 2015) (May 2015 Memo); *see also* Utah MLP Strategy at 6("During recent oil and gas lease sales, BLM-Utah has deferred several lease parcels [east of Highway 191] . . . 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."). Finally, BLM has acknowledged that Monticello RMP failed to account for resources, including night skies that could be harmed by the proposed leases. Accordingly, under FLPMA and NEPA, BLM cannot proceed with leasing in the vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument without completing the additional land use planning and analysis it deemed necessary in 2010 and 2015.

For the past several years, BLM has repeatedly confirmed that in regard to public lands in the culturally-rich areas of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument, its plan-level oil and gas decisions and environmental analysis were inadequate to support leasing. First, in 2010, BLM issued a determination that "[a]dditional analysis or information is needed to address likely resource or cumulative impacts" prior to the resumption of leasing east of Highway 191. BLM, Master Leasing Plan (MLP) Assessment Glen Canyon-San Juan River 5 (Nov. 2010) (attached). The resources identified in that determination included the Alkali Ridge National Historic Landmark (NHL) and wilderness resources. *Id*. at 2.

Second, in May 2015, BLM provided additional information to bolster its 2010 determination. BLM explained that, in response to recent leasing proposals for public lands in the vicinity of Alkali Ridge, Montezuma Canyon and Hovenweep National Monument, it had obtained

[5] UTU93722, UTU93730, UTU93743, UTU93744, UTU93745, UTU93731, UTU93732, UTU93723, UTU93724, UTU93735, UTU93734, UTU93733, UTU93746, UTU93747

"substantial new information" concerning the potential impact of oil and gas leasing on national park, cultural and wilderness resources. This information included the following:

- **Cultural Resources:** The public identified "several cultural resource sites and landscapes . . . that would be impacted by oil and gas development, including those located in or near Alkali Ridge, the Montezuma Creek watershed, and the San Juan River" that required additional analysis. May 2015 Memo at 4-5. BLM concurred and deferred the proposed leases. "Since that time, BLM-Utah has been developing a landscape-level cultural resource inventory strategy to increase its capacity to make better-informed leasing decisions in a timely manner. This strategy would include the development of a Class I inventory, completing Class II inventories, as well as a corresponding regional mitigation strategy for cultural resources within the . . . planning area." *Id*. at 5. BLM has yet to complete those actions, however, which, again, it identified as being a necessary prerequisite to future leasing east of Highway 191.

- **Lands with Wilderness Characteristics:** In response to these leasing proposals, BLM also received "new wilderness characteristics inventory information for two inventory units totaling 33,147 acres" and stated that, in order to comply with BLM Manual 6310, it would need to evaluate and consider this information "to determine whether possible direct, indirect, and cumulative impacts form potential fluid mineral development warrant" new planning decisions. *Id*. at 5-6.

- **Hovenweep National Monument:** In response to lease sale protests from the National Park Service and others, BLM stated that it needed to further evaluate "potential impacts to night sky resources from fluid mineral development. Southeastern Utah currently maintains world famous night sky viewing opportunities, *a resource that was not addressed* in the 2008 Monticello Field Office Resource Management Plan." *Id*. at 6 (emphasis added); *see also Or. Natural Desert Ass'n*, 625 F.3d at 1122 (recognizing that BLM has a duty under NEPA and FLPMA to determine whether legitimate values of the public lands "are now present in the planning area . . . and, if so, how the Plan should treat land with such values.").

- **Alkali Ridge NHL and Various ACECs:** BLM also stated that it needed to reconsider leasing allocations and stipulations for the Alkali Ridge ACEC and NHL "to ensure that potential impacts to the Landmark's broader cultural resource landscape are properly considered." *Id*. BLM made a similar determination for other ACECs in the same general area. *Id*.

Third, in August 2015, BLM again confirmed that the ongoing cultural resources inventory and mitigation strategy efforts were necessary in order to make "well-informed and timely oil and gas leasing decisions in the future" and "that additional analysis was needed in order to assess the impacts of oil and gas leasing on cultural resources." Utah MLP Strategy at 6.

Yet, BLM completely disregards these prior statements and ongoing need to update the Monticello RMP based on "substantial new information." In the DNA for proposed parcels in the Monticello Field Office, BLM references the analysis conducted for BLM's March 2018

lease sale, which included parcels in the same vicinity as the parcels now under consideration. BLM, DNA for the December 2018 Competitive Oil and Gas Lease Sale – Monticello Field Office 5 (Oct. 2018). However, the Final EA for the March 2018 sale addressed none of the issues identified above.

BLM has still not developed or implemented "a landscape-level cultural resource inventory strategy" for the Montezuma Creek watershed or any of the surrounding areas. Nor has BLM evaluated new information concerning lands with wilderness characteristics in a manner that complies with existing policy. BLM has also not evaluated impacts of the proposed leases on Hovenweep National Monument's night skies (and, notably, made the novel and unsupported claim in the March lease sale EA that such an evaluation is no longer necessary). BLM, Final EA for the March 2018 Competitive Oil and Gas Lease Sale at App. E-4. There is no reasoned explanation provided for this sudden reversal of opinion, and no discussion of the potential impacts of the proposed leases in conjunction with other reasonably foreseeable activities. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("an [u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."). Finally, there is no consideration in the Final EA of additional lease stipulations or other measures to address potential impacts on the Alkali Ridge ACEC.

ii. The DNA Failed to Take a Hard Look at Air Quality and GHG Emissions Impacts

BLM cannot rely upon the Moab MLP for its analysis of impacts to air quality and GHG emissions. The Moab MLP did not analyze certain site-specific air quality impacts from oil and gas leasing and development because, as explained by BLM at that time, "certain information is unavailable or requires site-specific information to analyze." Moab MLP FEIS at 4-2. The lack of site-specific information made it impossible for the MLP to analyze air quality impacts based on quantitative data. BLM acknowledged as much and the subsequent need to do so prior to lease issuance:

> Due to a lack of quantitative data, some impacts can be discussed only in qualitative terms. *Subsequent project-level NEPA documents will provide the opportunity to collect site specific data and analyze these data in quantitative terms.*

Moab MLP FEIS at 4-2 (emphasis added). The MLP likewise did not perform site-specific air quality modeling analysis for similar reasons:

> Since the MLP is a planning document, and no specific projects are being proposed or analyzed in the Planning Area, modeling conducted for this analysis is by necessity speculative.

Id. at 4-5. Nor did the Moab MLP contain near-field analysis for site-specific authorizations because

> Specific characteristics of the source to be modeled . . . are required to conduct this analysis, and, given the nature of this planning level air quality analysis, that information is not available.

Id. at 4-10. Similarly, neither the Monticello RMP nor the Moab MLP analyzed the direct, indirect, or cumulative impacts to human health or the environment from increased GHG emissions and climate change. *See, e.g.*, Moab MLP FEIS at 4-12 (explaining that BLM did not conduct certain modeling because it could not determine potential oil and gas well locations).

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 2. 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.

BLM similarly cannot rely on the March 2018 EA for its air quality analysis because that analysis itself violated NEPA. *See* SUWA March 2018 EA Protest at 12-19. SUWA incorporates by reference the air quality and GHG emissions argument in full. Specifically, BLM illegally postponed its direct, indirect and cumulative impact analysis of GHG emissions, air quality and climate change. *See id.* at 12. The agency failed to quantify and account for direct GHG emissions from that lease sale (and undoubtedly did not quantify emissions associated with the current lease sale) and failed to analyze the effect of those emissions. *Id.* at 12-14. BLM also failed to take a hard look at the cumulative impact of GHG emissions to climate change, air quality, and the environment. *Id.* at 14-17. Further, BLM failed to update its air quality analysis, and instead relied on air quality models conducted for areas more than forty miles (and as far as ninety miles) away from the Protest Parcels. *Id.* at 17-19. 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*, 565 F.3d at 707 ("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."). Here, BLM is unlawfully attempting to do the opposite.

iii. The DNA Failed to Take a Hard Look at Impacts to the Alkali Ridge ACEC and Failed to Prioritize the Protect of the Alkali Ridge ACEC[6]

BLM designated the Alkali Ridge ACEC to protect its relevant and important cultural values. *See* Monticello FEIS at 3-142. Alkali Ridge is "one of the best-known and influential examples of scientific archeological investigation in the southwestern U.S" and contains cultural resources that "are regionally and nationally significant." *Id.* at 3-143. BLM relies upon the NEPA analysis in the Monticello RMP to support its NEPA obligations. Lease Sale DNA App. C at 2. That reliance is misguided.

The Monticello RMP is a programmatic field office wide NEPA document. It made no decision with regard to the issuance of the Protest Parcels, and did not analyze the potential site-specific impacts from the issuance of those parcels. Instead, the Monticello RMP contains only generalized statements about potential impacts and lacks the required specificity to support the sale of the Protest Parcels. *See, e.g.*, Monticello FEIS at 4-485 to 4-489. In short, BLM cannot tier to NEPA analysis that does not exist. *See* 40 C.F.R. § 1508.28.

BLM's position is especially untenable where – as here – the agency has expressly admitted that the Monticello RMP did *not* adequately analyze impacts to cultural resources in the Alkali Ridge ACEC and that *more analysis is needed* prior to issuance of oil and gas leases in these areas. *See, e.g.*, Updated Master Leasing Plan Strategy at 6. BLM has recognized that decisions made in the Monticello RMP, including lease stipulations, may not adequately protect the relevant and important values in the designated ACECs and that those management decisions need to be revisited prior to issuance of new oil and gas leases such as the Protest Parcels. *See* May 2015 MLP Memo at 5 ("[T]he development of the San Juan MLP would provide an opportunity to ensure that oil and gas leasing decisions and associated limitations are properly protecting the ACECs' values."). In fact, BLM has expressly stated that

> During recent oil and gas lease sales [in the Canyon Country District], BLM-Utah has deferred several proposed lease parcels within the [San Juan] MLP boundary [including parcels in and near Alkali Ridge and the San Juan River ACECs] because of determinations that *additional analyses was needed* in order to assess and address the potential impacts of oil and gas leasing on cultural resources.

Updated Master Leasing Plan Strategy at 6. BLM cannot rely on NEPA analysis that it has admitted is insufficient.

iv. BLM Failed to Take a Hard Look at 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'

[6] This argument pertains to Parcels UT1218-327, UT1218-302, UT1218-326, UT1218-328, UT1218-329, and UT1218-329. All of parcel 327 and portions of parcels 302, 326, 328 and 329 are within the Alkali Ridge ACEC.

effects" are not sufficient. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

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

First, BLM makes no attempt to discuss or assess potential impacts to cultural resources 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 12-22. 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 contains 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, many of the Protest Parcels are in the same general geographic area as oil and gas parcels offered at the March 2018 lease sale. Because BLM cannot preclude – and may allow – impacts to cultural resources, it must take a "hard look" at impacts to cultural resources *before* leasing. It has not done so here.

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

The proximity of the Protest Parcels to those oil and gas parcels analyzed in the March 2018 EA do not obviate the need for BLM to complete comprehensive NEPA analysis for this lease sale. Instead, BLM must analyze the reasonable foreseeable impacts of this lease sale in combination with those impacts from the March 2018 lease sale, especially with regard to air quality, wilderness-caliber lands and cultural resources. 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. *See supra* at 12

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, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), 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*, 565 F.3d at 709. 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 a hard look at a broad range of NEPA alternatives. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1186 (D. Colo. 2014).

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 alternatives included in the Monticello RMP FEIS and Moab MLP FEIS which specifically analyzed the related impacts associated with leasing. Lease Sale DNA at 4. 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 developed for the Monticello RMP informed BLM's decision regarding how to allocate resources across 1.8 million acres of federal public land. *See* Monticello FEIS ES-1. It is a 30,000 foot level of analysis offering no insight into specific resource conflicts at the lease sale stage. The sale of the Protest Parcels was similarly not a feature of the alternatives analyzed in the Moab MLP FEIS. As discussed above, 15 of the Protest Parcels are not within the boundaries of the Moab MLP so the potential leasing of those parcels was clearly not analyzed. *See* SUWA Map_Moab MLP (attached). Further, the Moab MLP was a programmatic document; it did not analyze the impacts of leasing particular parcels, but rather evaluated different potential development scenarios and identified potential resource conflicts and impacts on a broad level. *See* Moab MLP FEIS at 1-2.

The March 2018 EA also did not analyze the potential impacts from leasing the Protest Parcels. It analyzed leasing parcels nearby, but with decidedly different site specific resource issues and impacts. *See* SUWA Map_March 2018 December 2018 Lease Parcels (attached).

ii. The Range of Alternatives BLM Considered in the Monticello RMP, Moab MLP and March 2018 EA are Inapposite with Respect to the Proposed Lease Sale

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 Monticello RMP and the Moab MLP 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 entire field offices (or large planning areas) such as designating federal public lands as open or closed to oil and gas leasing and development. Notably they did not make site-specific leasing decisions or mandate that any particular parcels be offered for lease. The dissimilarities between those alternatives and an oil and gas leasing alternative is made clear by examining BLM's stated purpose and need for each of those documents.

- BLM's stated purpose for the Monticello RMP was "to provide a comprehensive framework for BLM management of public lands within the [planning area] and allocation of resources pursuant to the multiple-use and sustained-yield requirements of FLPMA[.]" Monticello FEIS at 1-1.

- BLM's stated purpose for the Moab MLP was "to 1) evaluate in-field considerations such as optimal parcel configurations and potential development scenarios; 2) identify and address potential resource conflicts and environmental impacts from development; 3) develop mitigation strategies through leasing stipulations and best management practices; and 4) consider a range of new constraints, including prohibiting surface occupancy or closing areas to leasing." Moab MLP FEIS at 1-2. And BLM's stated need for that document is to provide "additional planning and analysis . . . prior to new or additional leasing and development." *Id.*

There are no similarities between the purpose and need statements of the Moab RMP or Moab MLP and the purpose for which BLM has prepared the Lease Sale DNA – to consider offering certain parcels for lease. As noted *supra*, RMPs and MLP are programmatic field office (or large planning area wide) NEPA documents that made broad level management decisions regarding resource values under BLM's management, not site-specific leasing decisions. Likewise, they 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.

The alternatives analysis contained in the March 2018 EA also does not satisfy BLM's obligations under NEPA. First, the alternatives BLM analyzed in that EA related to different oil and gas lease parcels, implicating different environmental concerns and resource values than the Protest Parcels. *Compare* March 2018 EA App. B *with* Lease Sale DNA App. B; *see also* MAP_ March 2018_December 2018 Lease Parcels. Second, in that lease sale, BLM analyzed only the extreme lease nothing or lease everything alternatives despite the broad purpose and need of that lease sale "to respond to the nominations or expressions of interest for oil and gas leasing on specific federal mineral estate." March 2018 EA at 3; *see also* SUWA March 2018 Lease Sale

Protest at 24-29. The agency failed to analyze any middle-ground reasonable, feasible alternatives that would have both responded to the purpose and need of that lease sale and minimized impacts to sensitive resources. *See* SUWA March 2018 EA Protest at 24-29. BLM cannot rely upon a deficient NEPA alternatives analysis to support this DNA.

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

NEPA has twin aims, or objectives: 1) it "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 proposed several alternatives to the sale of the Protest Parcels:

- 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 not 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. *See* DNA at 5. 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 alternatives 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.[7]

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.

[7] 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).

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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