



**WESTERN RESOURCE  
ADVOCATES**

Advancing Solutions for the Western Environment

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August 6, 2007

Selma Sierra  
Utah State Director  
Bureau of Land Management  
P.O. Box 45155  
Salt Lake City, UT 84145-0155  
**Hand delivered**

Re: Notice of Competitive Lease Sale Oil and Gas – Rockport Reservoir, Utah  
Parcel UTU85691 (UT0807-002), Weber River, Utah Parcel UTU85690 (UT0807-001)

Dear Ms. Sierra:

Pursuant to regulation 43 CFR 3120.1-3, the Utah Council of Trout Unlimited (UTU) protests the above referenced lease parcels. UTU is deeply concerned that proposed leases along or around Rockport Reservoir and its tributaries will damage aquatic and wildlife habitat and impair the fisheries of these waters as well as Echo Reservoir and the section of the Weber River joining the two reservoirs.

### **I. TROUT UNLIMITED**

Trout Unlimited is a non-profit conservation organization that has more than 155,000 members dedicated to conserving, protecting and restoring North America's trout and salmon fisheries and their watersheds. Since 1959, Trout Unlimited has dedicated staff and volunteers toward the protection of sensitive ecological systems necessary to support robust native and wild trout and salmon populations in their respective range. Trout Unlimited recognizes that the value of public lands is unparalleled in providing habitat to coldwater fisheries, drinking water, wildlife habitat and public recreation opportunities.

Trout Unlimited has a strong base in Utah. UTU has over 2,000 members. Through passion, commitment and agency cooperation, these volunteers have been active for years in coldwater fisheries issues throughout Utah and many members enjoy fishing, hunting, hiking, wildlife watching, and other pastimes on the recreation-rich Rockport Reservoir.

UTU members use the Weber River frequently and have committed to fund raising work to assist the Department of Wildlife Resources in river enhancement and access. In addition, as a participant on the Utah Blue Ribbon Fisheries Advisory Council (BRFAC), UTU is closely involved in maintaining the quality of the Weber River Blue Ribbon Fishery. UTU's members have fished these waters for well over 20 years.

## II. FACTS

Three water bodies will be affected by the proposed leases; Rockport Reservoir and its eastern tributaries, the Weber River, which is a Blue Ribbon Fishery and feeds into Echo Reservoir. Rockport Reservoir and its tributaries and the Weber River are of critical importance to UTU and its members, many of whom have fished there for a long time and plan to do so in the future. These waters also provide potential habitat for native Bonneville cutthroat trout, a designated sensitive species and Utah's state fish.

Rockport Reservoir is becoming a very heavily used recreational fishery. In addition, there is a project in the works to pump underground water from the south end of the Reservoir to the Park City and Snyderville basin areas, so there is a serious water quality issue for the populations in those areas.

The Weber River below Rockport Reservoir has been designated a Blue Ribbon Fishery by the Governor's BRFAC. It has exceptional value for several reasons: a mandated (guaranteed) 25 cfs minimum in-stream flow, excellent fish populations and proximity to the Wasatch Front. To date, the Division of Wildlife Resource (DWR) Habitat Council and BRFAC has expended significant amounts of money on stream restoration, fencing and access. Downstream, Echo Reservoir, is a 303(d) water, listed as impaired for total phosphorous and dissolved oxygen. This reservoir needs a Total Maximum Daily Load (TMDL) analysis and its high score on the TSI index indicates that it is eutrophic. Efforts are being undertaken to evaluate the impact of the Reservoir's tributaries to determine what can be done to bring the Reservoir back into compliance. There are many organizations involved in addressing Weber River issues from the headwaters to the mouth of Weber Canyon. Water quality, riparian habitat and access are rapidly becoming important as population growth occurs. Morgan County has been projected to become the fastest growing county in Utah within 10 years. Davis County water supply authorities are becoming increasingly interested in shifting emphasis to improving watershed health rather than treating the water at the treatment plant.

## III. BASIS OF PROTEST AND RELIEF REQUESTED

BLM's decision to lease the parcels at issue in this protest violates the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA), the Endangered Species Act, 16 U.S.C. 1531 *et seq.* (ESA), and the regulations and policies that implement these laws. As a result, UTU requests that BLM withdraw these lease parcels from sale until the agency has fully complied with NEPA. UTU requests that BLM withdraw these lease parcels from sale until the agency has fully complied with NEPA and ESA. Alternatively, the agency could attach unconditional no-surface occupancy stipulations to each parcel and proceed with the sale of these parcels.

### A. NEPA

NEPA requires federal agencies to take a hard look at new information or circumstances concerning the environmental effects of a federal action even after an environmental assessment (EA) or an environmental impact statement (EIS) has been prepared, and to supplement the existing environmental analyses if the new circumstances raise significant new information

relevant to environmental concerns. As explained below, BLM has failed to consider adequately the impacts of the proposed action, failed to take a hard look at new information and new circumstances that have come to light since BLM finalized the relevant NEPA documents and failed to consider a no-leasing alternative.

## **1. Failure to Consider Impacts of the Proposed Action**

NEPA requires that the BLM prepare a pre-leasing NEPA document that fully considers and analyzes the environmental impacts of a proposed action **before** the agency engages in an irretrievable commitment of resources such as the sale of non-surface occupancy oil and gas leases. Importantly, BLM's pre-leasing analysis must be contained in its already completed NEPA analyses because Determinations of NEPA Adequacy (DNAs) are not themselves documents that may be tiered to NEPA documents, but are used to determine the sufficiency of previously issued NEPA documents.

BLM's NEPA analysis is insufficient in that it fails to consider adequately the impact of potential oil and gas development on the ecosystems of the Weber River, and Echo and Rockport Reservoirs. The Weber River between Rockport Reservoir and Echo Reservoir, and the reservoirs themselves, are habitat or potential habitat for the Bonneville cutthroat trout. The State of Utah and federal resource management agencies have developed a conservation agreement for the Bonneville cutthroat trout, intended to "[e]nsure the long-term conservation of the [Bonneville cutthroat trout] within its historic range in Utah." Utah Dept. of Natural Resources, Conservation Agreement and Strategy for Bonneville cutthroat trout in the State of Utah.<sup>1</sup> This agreement represents "a collaborative and cooperative effort among resource agencies," including the United States Fish & Wildlife Service. BCT Conservation Agreement at 2. The BCT Conservation Agreement recognizes that potential threats to the cutthroat trout include "road building with associated sedimentation and migration corridor blockage, and water depletions for dust control, maintenance activities, and fossil fuel exploration." BCT Conservation Agreement at 30.

The BCT Conservation Agreement designates the area which encompasses the two parcels "the Northern Bonneville Geographic Management Unit" and finds that, for the Bonneville cutthroat populations in this area, "[f]ragmentation is probably the greatest threat." BCT Conservation Agreement at 52. As part of the BCT Conservation Agreement, federal resource management agencies have agreed that "[i]mpacts from existing and proposed watershed development that affects riparian and instream habitats should be assessed and mitigation should be determined on a case-by-case development." BCT Conservation Agreement at 53. Despite the importance of case-by-case development analysis for protecting Bonneville cutthroat trout and their potential habitat from sedimentation and water quality effects from potential oil and gas development, the BLM has not undertaken site-specific analysis of the effects of the proposed leasing on Bonneville cutthroat trout. Without site-specific analysis, the agency simply lacks the information to fulfill this and other management duties relative to these imperiled fish and the other sensitive species that rely on the lands and water resources encompassed by the two parcels. As a result, the lease sale is premature and the two parcels must be dropped from the proposed offering.

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<sup>1</sup> Available at: <http://mountain-prairie.fws.gov/species/fish/bct/UtahConservationAgreement.pdf> ("BCT Conservation Agreement")

## 2. Failure to Adequately Consider New Information

NEPA also requires that the BLM supplement EISs when new information or circumstances arise. The BLM must analyze significant recent information relevant to environmental concerns in the affected area before actions such as the proposed leasing may proceed. If the BLM fails to do so, Council on Environmental Quality (“CEQ”) regulations mandate preparation of a supplemental analysis before the proposal may proceed. CEQ regulations implementing the National Environmental Policy Act (“NEPA”) explicitly recognize that circumstances may arise after completion of an EIS that create an obligation for supplemental environmental review. According to 40 C.F.R. § 1502.9(c)(1), a supplemental EIS is required when:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

An agency also has discretion to prepare a supplemental statement if “the purposes of the Act will be furthered by doing so.” 40 C.F.R. § 1502.9(c)(2).

The United States Supreme Court validated the CEQ regulations in 1989, holding that a supplemental environmental review must be performed when:

[T]here remains “major federal action” to occur, and the new information is sufficient to show that the remaining action will “affect the quality of the human environment” in a significant manner or to a significant extent not already considered . . .

*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). The *Marsh* opinion confirms that an agency’s duty to comply with NEPA is ongoing, and continues even after the agency has made its decision based on an EIS. *Id.* The Supreme Court reasoned:

It would be incongruous with this approach to environmental protection, and with [NEPA’s] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

*Id.* at 371. CEQ regulations provide that, where either an EIS or supplemental EIS is required, the agency “shall prepare a concise public record of decision” which “shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable,” and (c) “[s]tate whether all practicable means to avoid or minimize environmental

harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. § 1505.2.

CEQ guidance concerning NEPA's implementation state that "if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new circumstances or information] compel preparation of an EIS supplement." 46 Fed. Reg. 18026 (1981). The NEPA documents that much of the proposed leasing are tied to are outdated, and do not adequately analyze the impacts of leasing on the Blue Ribbon Fishery designation of the Weber River and its associated Reservoirs. "Blue Ribbon Fishery waters are to be managed principally by protecting their watersheds, maintaining and restoring habitat, and implementing appropriate angling regulations." Utah Division of Wildlife Resources, Mission statement of the Blue Ribbon Fishery Advisory Council.<sup>2</sup>

### **3. Failure to Adequately Consider the No-Leasing Alternative**

NEPA requires that the BLM prepare a pre-leasing NEPA document that fully considers and analyzes the no-leasing alternative before the agency engages in an irrevocable commitment of resources, i.e., the sale of non-surface occupancy oil and gas leases. See Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253, 1262-1264 (D. Utah 2006); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-30 (9<sup>th</sup> Cir. 1988) (requiring full analysis of no-leasing alternative even if EIS not required); Montana Wilderness Ass'n. v. Fry, 310 F. Supp. 2d 1127, 1145-46 (D. Mont. 2004); Southern Utah Wilderness Alliance, 164 IBLA 118, 124 (2004) (quoting Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1162 (10<sup>th</sup> Cir. 2004)). Importantly, BLM's pre-leasing analysis must be contained in its already completed NEPA analyses because, as the Interior Board of Land Appeals recognized in Southern Utah Wilderness Alliance, "DNAs are not themselves documents that may be tied to NEPA documents, but are used to determine the sufficiency of previously issued NEPA documents." 164 IBLA at 123 (citing Pennaco, 377 F.3d at 1162).

BLM has not adequately considered a no leasing alternative for these parcels. In a 1994 document, BLM listed No Leasing as an "Alternative Considered but Rejected." BLM did not actually consider a No Leasing alternative but rather dismissed it as "unreasonable and not in the public interest." Proposed Plan Amendment/EA/FONSI Bear River East Oil and Gas Leasing, 8. Prior to this in 1975, the BLM failed to properly consider a No Leasing alternative when it rejected such an alternative and stated that "[a]lternative sources of energy could mitigate the impacts of this alternative, but a decision of those sources is considered to be beyond the scope of this analysis..." Salt Lake District Oil & Gas Environmental Analysis Record (EAR), 178.

### **B. ESA**

The Department of the Interior (DOI) Office of the Solicitor for the Rocky Mountain Region has concluded that the ESA requires BLM to complete consultation with the FWS before issuing a lease that encompasses habitat occupied by threatened or endangered species:

[T]he Department of the Interior may not deny all rights to drill on a Federal oil and gas lease, unless it has expressly reserved that right in the initial lease terms by, for example,

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<sup>2</sup> Available at <http://www.wildlife.utah.gov/blueribbon/mission.php>.

imposing a no surface occupancy stipulation (NSO). This means that the appropriate stage for comprehensive study in the case of endangered species . . . is the leasing stage. . . . This also means that in the absence of an NSO stipulation biological opinions need to be completed at the leasing stage to determine whether the Department must expressly reserve the right to prohibit all surface activity on the lease.

Memorandum from Regional Solicitor, Rocky Mountain Region, to Regional Director, Fish and Wildlife Service, Region 6, at 2 (Nov. 18, 1992).

The protested parcels are known to contain habitat for a species listed pursuant to the ESA. These parcels contains habitat for the endangered Canada lynx. Biological Evaluation/Staff Report for the August 2007 Oil and Gas Lease Sale at 5.

Section 7 of the ESA commands that all federal agencies “shall, in consultation with and with the assistance of” FWS: (1) “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered and threatened species,” 16 U.S.C. § 1536(a)(1), and (2) “insure that any action authorized, funded, or carried out by any agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” *Id.* at § 1536(a)(2). DOI regulations implement this consultation requirement by directing that formal consultation is required before a federal agency may take “any action [that] may affect listed species.” 50 C.F.R. § 402.14(a). As the Supreme Court has observed, “[t]his language admits of no exception.” *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 173 (1978). Indeed, by regulation “the granting of . . . leases” is an action requiring formal consultation under Section 7. 50 C.F.R. § 402.02.

In addition, the agencies must adhere to the Canada Lynx Conservation Assessment and Strategy (LCAS). The agencies developed the action plan “to provide a consistent and effective approach to conserve Canada lynx on federal lands in the conterminous United States.” LCAS at Executive Summary. In drafting the LCAS, the agencies recognized that “[t]he development of wells can impact lynx habitat. However, the greatest impact is likely the development of road access to facilitate exploration and development.” LCAS at 28.

Thus, ESA consultation with FWS for the proposed parcels was not adequate. Because the consultation was inadequate the agencies cannot offer the parcels for development without NSO stipulations. Alternatively, absent adequate consultation, UTU can file 60-day notice letters pursuant to 16 U.S.C. § 1540(g)(2), and subsequently litigate any ESA violations. The agencies can avoid litigation by canceling the lease sale of the subject lands or imposing NSO stipulations.

#### IV. CONCLUSION

Oil and gas exploration and production has a high potential of severely impacting this very important resource. In a report titled “Gas and Oil development on Western Public Lands” Trout Unlimited detailed the impact of these activities on Fish, Wildlife, hunting, and angling.<sup>3</sup> For these reasons, it is UTU’s position that a decision to offer the referenced lands for lease would adversely impact our constituency.

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<sup>3</sup> Available at [http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/TU\\_Oil\\_Gas\\_LO.pdf](http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/TU_Oil_Gas_LO.pdf)

UTU is not against oil and gas leasing and/or development as a use of our public lands. Rather, UTU supports responsible development that does not prescribe oil and gas the dominant land use and includes setting aside special areas, proper stipulations, effective mitigations, and enforcement of environmental safeguards so as to ensure the protection of fish, wildlife, and their habitats. That being said, UTU is concerned that oil and gas leasing, and the exploration and development that naturally follows leasing, creates an irretrievable commitment of public resources that can have deleterious impacts on coldwater fisheries and wildlife habitat. UTU is specifically concerned about potential impacts from energy development that could harm coldwater aquatic habitats and watershed conditions necessary to support the long-term sustainability of native aquatic species including Bonneville cutthroat trout. In addition, as sportsmen and conservationists, UTU members are concerned about the impacts of oil and gas activities to hunting and game species found on these parcels and in the nearby Wasatch Cache National Forest.

UTU asks the BLM to reconsider selling leases on parcels that abut or that may affect critical fisheries such as the Weber River and Echo and Rockport Reservoirs. UTU further urges the BLM to consult (even informally) with conservation groups like UTU before pushing through leases in these important natural areas. Doing so will go a long ways toward reducing conflict over the management of public lands, and will save time, effort, and expense on all sides.

Thank you for the consideration of our concerns in your evaluations.

Sincerely,

A handwritten signature in black ink, appearing to read "David H. Becker", with a long horizontal flourish extending to the right.

David Becker