

WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment

October 31, 2005

Kent Hoffman, Deputy State Director
Division of Lands and Minerals
Bureau of Land Management
Utah State Office
PO Box 45155
440 West 200 South
Salt Lake City, UT 84145

HAND DELIVERED

Cathrine L. Beaty, Acting Regional Forester
USDA Forest Service, Intermountain Region
324 25th Street
Ogden, UT 84401

VIA FAX (801.625.5359) AND FIRST-CLASS MAIL

Forest Supervisor
Ashley National Forest
355 North Vernal Avenue
Vernal, UT 84078

VIA FAX (435.781.5142) AND FIRST-CLASS MAIL

Re: PROTEST OF OIL AND GAS LEASE SALE – UTAH, NOVEMBER 15, 2005
PARCELS UT-173 through 189 – WITHIN ASHLEY NATIONAL FOREST

This Protest is filed by **Red Rock Forests, Citizens' Committee to Save Our Canyons, High Uintas Preservation Council, Utah Rivers Council, Utah Environmental Congress, and Utah Chapter of Sierra Club** (collectively "Red Rock Forests") pursuant to 43 CFR 3120.1-3. Red Rock Forests protests the inclusion of the following seventeen (17) proposed lease parcels in the November 15, 2005 Competitive Oil and Gas Lease Sale to be held by the Utah State Office of the Bureau of Land Management (BLM):

- UT-173 through 189 (within unnamed roadless areas 0401011 and 0401012 of the Ashley National Forest)

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This protest is directed to (1) the National Forest Service (“Forest Service”), as the agency with surface management authority and the legal responsibility to conserve surface resources, and (2) the Bureau of Land Management (“BLM”), the agency responsible for the lease sale, lease administration, and subsurface minerals management. Collectively, the Forest Service and the BLM are referred to as “the agencies.” Either agency has the authority and the responsibility to withdraw these lands from the lease sale or impose adequate stipulations to ensure compliance with applicable law and policies.

I. INTRODUCTION

The seventeen protested parcels encompass approximately 40,000 acres within the Ashley National Forest. Nearly all of the proposed parcels overlap inventoried roadless areas (IRAs) as designated by the Forest Service. Exhibit 1. Specifically, all or portions of parcels UT-173 through 189 overlap IRAs. Accordingly, the Forest Service has recognized the substantial value in the roadless character of these areas and must undertake site-specific analyses prior to leasing. Also, the roadless character of these parcels should be protected in accordance with the illegally revoked roadless rule.

Moreover, each Ashley National Forest parcels proposed for leasing harbors diverse resource values including, but not limited to, high quality wildlife habitat, essential riparian areas, vital viewsheds, high value watersheds, irreplaceable cultural resources, and important fisheries. Despite the presence of these resources, the agencies have not sufficiently analyzed the impacts of oil and gas development on these values prior to offering these lands for lease. Therefore, the agencies have failed to comply with their duties under the National Environmental Policy Act (NEPA) in connection with the lease sale. By the same token, the agencies, in offering the parcels for lease without complying with their other legal obligations, have violated the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

As a result, the agencies must remove these parcels from the lease sale until they fully meet their statutory and regulatory duties. Moreover, the value of the resources contained within these parcels and the threat to these resources posed by the lease sale and any subsequent oil and gas development may require that the parcels be permanently closed to any oil and gas development.

II. STATEMENT OF STANDING

Red Rock Forests, based in Moab, Utah, has approximately 315 members, many of which reside in Utah. Red Rock Forests’ mission is the preservation of Utah’s forested habitats. Red Rock Forests relies on sound biological principles to guide its policy, goals, and decision-making, with a particular emphasis on conservation biology. Red Rock Forests uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation

mission. Red Rock Forests maintains a particular interest in the forested uplands of Utah's national forests. Red Rock Forest members and staff frequently visit the Ashley National Forest on a regular basis—traveling specifically to the areas encompassed by the lease sale, including the inventoried roadless area lands at issue in this protest. Members hike, camp, observe wildlife, photograph scenery, and find emotional and spiritual sustenance in the forested lands in Utah, including lands on the Ashley National Forest. Red Rock Forests' members' enjoyment of the Ashley National Forest will be severely diminished by oil and gas development and/or leasing.

Citizens' Committee to Save Our Canyons ("SOC") is a Salt Lake City, Utah grassroots environmental organization organized in 1972 to respond to the numerous environmental threats to the Wasatch Mountains. SOC has a membership of approximately 1,000 individuals, most of who reside along the Wasatch Front. SOC's mission is to protect the natural environments of the public lands along the entire Wasatch Range and nearby forestlands, from the Wellsvilles to Mt. Nebo. SOC achieves this mission through active involvement in planning processes at city, county, state, and federal levels. SOC raises awareness on issues of concern through various outlets including publishing a quarterly newsletter, organizing the Wasatch Front Forum, hosting a radio show on KRCL (90.9 FM), and directing an extensive volunteer program. SOC maintains a particular interest in the regions of the Ashley National Forest being offered for oil and gas leasing. SOC members frequently visit the Ashley National Forest to hike, camp, identify plants, observe birds and wildlife, soak in natural hot springs, and photograph the scenery. SOC members have visited the area of Ashley National Forest proposed for oil and gas leasing and intend to return within the next year. SOC members' enjoyment of the Ashley National Forest, in particular the land proposed for oil and gas leasing, will be adversely affected by oil and gas development and/or leasing.

High Uintas Preservation Council (HUPC) is a non-profit conservation organization whose mission is to preserve and restore the integrity of the Uinta Mountains ecosystem. To accomplish this mission and maintain the inherent biodiversity and natural processes of this area, HUPC fosters ecological literacy, activism, and community-based solutions, and encourages the accountability of public decision makers. HUPC members and staff have an intense interest in management decisions affecting the Ashley National Forest because members and staff regularly use and enjoy the Forest to observe wildlife, hike, camp, boat, take photographs, and engage in other environmental, aesthetic, and recreational activities. In particular, HUPC advocates for the conservation of Ashley National Forest IRAs because of their enormous value as habitat and corridors for wildlife, which in the future may include Canada lynx and wolverine. Oil and gas development within the Ashley National Forest adversely affects the environmental, scenic, aesthetic, recreational, and spiritual interests of HUPC members and staff.

Utah Rivers Council works to protect our ecosystems by educating and involving everyone in the decisions being made about our rivers, our finances, and our management of our water. Utah Rivers Council seeks the most fiscally and environmentally conservative policies to meet water supply needs and protect our river ecosystems through grassroots organizing, citizen-led legislation, research, education, and community leadership. Utah Rivers Council members

regularly explore and enjoy the Ashley National Forest, including area proposed for oil and gas development.

The Utah Environmental Congress is a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. The UEC has an organizational interest in the proper and lawful management of National Forests located in Utah, including the Ashley National Forest. The UEC's members, staff, and board members participate in a wide range of hiking, hunting, fishing, photography and other recreational activities on the Ashley National Forest, including the area in and surrounding the proposed lease areas. The UEC represents 228 individual members, 16 organizations, and 43 businesses representing approximately 30,000 people, many of whom have visited the Ashley National Forest and have a direct interest in its management.

The Utah Chapter of the Sierra Club ("Utah Chapter") is a group of members and volunteer activists dedicated to preserving and enjoying the land and quality of life in Utah and the West. The Utah Chapter has more than 5,000 members statewide. The Utah Chapter's members use and enjoy the Ashley National Forest for hiking, solitude, bird and wildlife watching, angling, photography, and other environmental, spiritual, aesthetic, and recreational pursuits. The Utah Chapter's members regularly visit the Ashley National Forest, including the affected roadless areas, and intend to continue to visit these biologically important areas in the near future. The Utah Chapter is involved in public land decision-making by reviewing environmental documents, representing environmental interests at public meetings and hearings, and researching and writing on specific public land and environmental health issues. Utah Chapter volunteer and members' interests will be adversely impacted by oil and gas exploration and development and/or leasing of the protested parcels..

III. STATEMENT OF FACTS

The protested parcels encompass approximately 40,000 acres within the Ashley National Forest. Nearly all of the protested parcels overlap inventoried roadless areas (IRAs).¹ Exhibit 1. Specifically, all or portions of parcels UT-173 through 189 overlap roadless areas. Accordingly, the Forest Service has recognized the substantial value in the roadless character of these areas and must undertake site-specific analyses prior to leasing. Also, the roadless character of these parcels should be protected in accordance with the illegally revoked roadless rule.

The parcels proposed for leasing harbor diverse resource values including, but not limited to, high quality wildlife habitat, essential riparian areas, vital viewsheds, high value watersheds, important fisheries, and irreplaceable cultural resources. Despite the presence of these resources, the agencies have not sufficiently analyzed the impacts of oil and gas development prior to

¹ Based on Ashley National Forest's April 26, 2005 undeveloped area map, the protested parcels overlap the First Canyon, Right Fork Indian Canyon, and Cottonwood IRAs. These areas are currently undergoing evaluation as part of the Ashley National Forest Plan revision to determine whether they are appropriate for wilderness designation. See Ashley NF Undeveloped Areas in Duchesne, Wasatch and Utah Counties – South End Map, available at: http://www.fs.fed.us/r4/ashley/projects/forest_plan_revision/roadless/undeveloped_areas_duchesne_s_web.pdf.

offering these lands for lease. Therefore, the agencies have failed to comply with their duties under the National Environmental Policy Act (NEPA) in connection with the lease sale. By the same token, the agencies, in offering the parcels for lease without complying with their other legal obligations, have violated the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

As a result, the agencies must remove these parcels from the lease sale until they fully meet their statutory and regulatory duties. Moreover, the value of the resources contained within these parcels and the threat to these resources posed by the lease sale and any subsequent oil and gas development may require that the parcels be permanently closed to any oil and gas development.

IV. Procedural Background and Legal Framework

According to BLM's Notice of Competitive Lease Sale list for the November 15, 2005 lease sale, BLM intends to lease seventeen parcels within the Ashley National Forest. The Forest Service did not conduct any site-specific analysis prior to authorizing BLM to offer these parcels. Rather, according to the Forest Service, "[t]he decision to authorize the issuance of oil and gas leases for these lands is contained in the Record of Decision dated September 1997, which is based on the Final Environmental Impact Statement (FEIS), Western Uinta Basin, Oil and Gas Leasing on the Uinta and Ashley National Forest." See e.g. Letter from Cathrine L. Beaty, Acting Regional Forester, Forest Service to Sally Wisely, State Director, BLM (Aug. 9, 2005). The Forest Service does not suggest that the Forest Plan EIS supports the decision to lease the parcels.

As discussed further below, the Western Uinta Basin Oil and Gas EIS (Oil and Gas EIS), along with the associated Record of Decision (ROD), demonstrate that the agencies did **not** conduct any pre-leasing site-specific analysis of the disputed parcels, other than the general analysis performed in conjunction with the Oil and Gas EIS and ROD. More specifically, the agencies have not analyzed the site-specific impacts of oil and gas development in the parcels on important resource values, such as roadless areas, threatened and endangered species, or cultural resources. In fact, neither agency sufficiently informed the Fish and Wildlife Service (FWS), the State Historic Preservation Office, or affected tribes of the intention to lease these parcels in the Ashley National Forest.

According to the 1997 Western Uinta Basin Oil and Gas EIS, "[a] [controlled surface use stipulation] will ensure that impact to . . . roadless areas can be minimized when locating and designing facilities." Oil and Gas ROD at 5. The Forest Service also notes that "[s]ubsequent leasing decisions and associated [oil and gas] activities may affect the character of these areas." Oil and Gas FEIS at Questions and Answers #12. Moreover, "[o]il and gas exploration and development activities, including access roads, well pads and operational activities would increase vehicular traffic and human activities resulting in a loss of natural integrity and appearance within roadless areas." Oil and Gas DEIS at 4-50; see also *Id.* ("Exploration and development activities would impact the various roadless characteristics in some areas to the

extent that the area could no longer be effectively managed as a roadless area, for as long as the activity continued”). By requiring only a controlled surface use stipulation for roadless areas, the Forest Service acknowledged that “[s]ince access and surface occupancy of the leasehold would be allowed if this leasing option were adopted, impacts to the roadless character could not be avoided.” Oil and Gas DEIS at 4-51; *see also* *Id.* (“other effects on other values and resources, such as wildlife, that may be dependent on the roadless character[,] would not be avoided”).

According to the Oil and Gas EIS, the reasonably foreseeable scenario, utilized to analyze oil and gas development, anticipated that a total of 20.4 acres of land will be disturbed on the Ashley National Forest pursuant to oil and gas development. Oil and Gas DEIS at 4-51 to 52. This contrasts with the agencies decision now to offer approximately 40,000 acres of roadless areas in the Ashley National Forest for oil and gas development with limited stipulations to restrict surface disturbances. Simply stated, the Oil and Gas EIS did not analyze this level of development or assess the site-specific impacts of development on important resources including, the roadless character, cultural resources, and threatened and endangered species.

The Forest Service indicates that it has relied on the minimum management requirements or stipulations set forth in the Oil and Gas EIS to determine the necessary stipulations for the proposed parcels. As a result, the parcels are primarily subject to controlled surface use stipulations.² The lease notice fails to indicate that most of the protested parcels are partially or wholly within IRAs. Although the lease notice provided for various stipulations and special provisions, these stipulations or provisions do not relate to the roadless character or the full range of resource values of the proposed parcels. For example, the no surface occupancy (“NSO”) stipulations only prohibit development on slopes greater than 35%.³

Accordingly, as set forth below, the leasing proposal for the relevant parcels violates the National Environmental Policy Act (NEPA), the Forest Service’s Oil and Gas leasing regulations, the National Forest Management Act (NFMA), the illegally rescinded roadless rule, the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

² Controlled Surface Use means “[u]se and occupancy is allowed (unless restricted by another stipulation), but identified resource values require special operational constraints that may modify the lease rights. CSU is used for operating guidance, not as a substitute for the NSO or timing stipulations.” Western Uinta Basin Oil and Gas FEIS at A-2.

³ The absence of NSO stipulations to protect riparian areas appears to contradict the minimal management requirements or stipulations required by the Western Uinta Basin EIS imposed “to require that activities are located or designed so as to minimize surface disturbing activities and protect riparian areas.” Western Uinta Basin Oil and Gas ROD at 6. Although Red Rock Forests appreciates the inclusion of the slope NSO stipulation, the provisions fail to adequately maintain the character of the IRAs .

V. LEASING THE PROTESTED PARCELS VIOLATES NEPA AND NFMA BECAUSE THE AGENCIES FAILED TO PERFORM ADEQUATE PRE-LEASING ANALYSIS OF SIGNIFICANT ENVIRONMENTAL IMPACTS.

The agencies have violated NEPA and NFMA by offering the seventeen parcels for oil and gas development. This violation of NEPA occurred because the agencies have not completed adequate environmental review of the areas that will be leased without no surface occupancy stipulations. In addition, the agencies violated NFMA by failing to ensure that the leasing of the protested parcels is consistent with the the Forest Plan. See 16 U.S.C. § 1604(i).⁴

Leasing of roadless lands that may be eligible for wilderness “require[s] preparation of an EIS unless the lease absolutely prohibits surface disturbance in the absence of specific governmental approval.” Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988)). In the instant case, NEPA documentation must be completed prior to leasing the roadless parcels to ensure, or at the very least to consider, stipulations that fully protect wilderness characteristics of these lands. Of note, the Forest Service has recently acknowledged that these areas may be eligible for wilderness by including them as part of the “undeveloped area” consideration during the forest plan revision process. See Ashley NF Undeveloped Areas in Duchesne, Wasatch and Utah Counties – South End Map, available at: http://www.fs.fed.us/r4/ashley/projects/forest_plan_revision/roadless/undeveloped_areas_duchesne_s_web.pdf.

IBLA precedent confirms that pre-leasing NEPA analysis is required under these circumstances. Once the BLM issues a lease without adequate NSO stipulations, denial of future APDs and the imposition of NSO stipulations are no longer an “available alternative” for future NEPA analysis at the APD stage. Southern Utah Wilderness Alliance, IBLA 91-330, Slip Op. at 6. “If 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 preparation of an EIS.” Union Oil Co. of Cal., 102 IBLA 187, 189 (1988). IBLA decisions and federal case law are consistent with the Forest Service Handbook, which provides that proposals to construct roads and substantially impair the roadless character of IRAs require an EIS. FSH 1909.15, sec. 20.6. (Class 3).

Moreover, the IBLA has recognized that “when BLM adopts the FEIS of another agency in lieu of performing its own environmental analysis and relies on it as the basis for an exercise of its own decisionmaking authority, this Board properly may review that FEIS to determine whether BLM’s decision is supported by the record, guided by the same principles ordinarily applicable to an FEIS prepared by BLM.” Wyoming Outdoor Council, 159 IBLA 388, 401 (2003). Accordingly, “before issuing an oil and gas lease, and thus irreversibly and irretrievably committing to the exploration and development of the oil and gas resources in the leased lands, section 102(2)(C) of NEPA requires an agency to assess the potential environmental impacts of

⁴ Red Rock Forests understands that BLM has no jurisdiction over issues pertaining solely to the Forest Service and therefore, will not address them in its protest decision. However, this protest is being directed to both the Forest Service and BLM and the Forest Service does have authority, and in fact the legal obligation, to withdraw these parcels prior to the lease sale.

such exploration and development.” *Id.* at 401-402. Pursuant to NEPA and the Uinta National Forest Plan, this pre-leasing environmental analysis must be site-specific.

Although the Forest Service suggests, and BLM adopts the position that the Oil and Gas EIS sufficiently analyzed the consequences of oil and gas leasing in the Ashley National Forest, this assertion is not supportable because the analysis is not sufficient to meet the agencies obligation to analyze the site-specific consequences of the proposed oil and gas leasing on roadless areas or other significant resource values on the Ashley National Forest. As previously noted, the Oil and Gas EIS did not consider or analyze the impacts of oil and gas leasing in roadless areas. Moreover, the Forest Service did not analyze site-specific consequences of oil and gas development within the protested parcels on important resource values, such as endangered and threatened species or cultural resources.

Pursuant to 40 C.F.R. § 1502.20, “[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review.” 40 C.F.R. § 1502.20. Tiering allows agencies to “concentrat[e] solely on the issues specific to the statement subsequently prepared.” 40 C.F.R. § 1508.28. As these regulations make clear, the issues the agencies must still analyze and have not yet analyzed are the site-specific impacts of oil and gas leasing within the protested parcels. As noted in NWF v. BLM,

[T]o say that the Henry Mountain EA may be tiered to the Henry Mountain EIS does not resolve the issue before us. If, as in this case, implementation of a decision based on a site-specific EA will significantly affect the quality of the human environment, the effect must be analyzed and considered in an EIS. Tiering an EA to a previously completed EIS simply raises the question whether the EIS adequately addresses the environmental effects of the proposed actions, or a supplemental EIS is required because the EIS' analysis is broad and does not address specific impacts.

NWF, 140 IBLA 85, 95.

The Oil and Gas EIS fails to address adequately the impact of oil and gas leasing within roadless areas and therefore, site-specific analysis must be conducted before leasing occurs. Furthermore, the Council on Environmental Quality’s NEPA recognizes that “[a]s a rule of thumb, if the proposal has not yet been implemented, or if the **EIS concerns an ongoing program**, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.” Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed.Reg. 18,026, 18,038 (Council on Env’tl. Quality 1981). The Forest Service completed the Oil and Gas EIS in 1997 before the promulgation of the illegally rescinded Clinton roadless rule or the more recent, roadless rule vesting greater decision-making in states. As well, the Oil and Gas FEIS did not consider or analyze impacts associated with coalbed methane development or the current status of the area’s wildlife and wildlife habitat. Accordingly, the agencies must prepare either a supplement to the Oil and Gas EIS or an Environmental Assessment of the site specific impacts to the leased areas.

Moreover, the Ashley Forest Plan contemplates site-specific analysis prior to leasing. According to the Forest Plan, “[s]urface occupancy will be allowed only where impacts on surface resources will be acceptable.” Ashley Forest Plan at IV-43. Moreover, the Forest Service, at the lease proposal stage, intended to “[r]ecommend against leasing and sale of minerals when critical adverse impacts cannot be mitigated” and anticipated “withdrawal of lands from mineral leasing when there are sensitive, unique surface resources that can not be adequately protected under current public laws and Federal regulations.” *Id.* Also, the Forest Plan requires that “stipulations will be assigned on a case-by-case basis.” *Id.* However, in violation of NFMA’s consistency requirement, the Forest Service has not taken any of these necessary steps prior to offering these parcels. For example, the roadless character of the areas presents a “sensitive, unique surface resource” that must be protected by the Forest Service. Moreover, as discussed below, the Forest Service failed to analyze impacts on cultural resources, threatened and endangered species, and other important resource prior to offering these parcels for leasing.

In a recently released report, Trout Unlimited concludes oil and gas development adversely impacts hunting and fishing, even where total surface disturbances are small, by contaminating ground an surface water, reducing water quantity, degrading fish habitat, and fragmenting wildlife corridors, calving grounds and nesting areas. Trout Unlimited, *Gas and Development on Western Public Lands*, available at: www.vallevidal.org/Downloads/TU_Oil_Gas_low.pdf. This report also points to the significant adverse effects of oil and gas development on viewsheds and aesthetics – the development drastically changes the landscape where hunting, fishing and wildlife viewing take place. *Id.*

Accordingly, the agencies are compelled to withdraw the proposed parcels from the lease sale. The agencies have failed to conduct additional site-specific analysis of the proposed parcels. This site-specific analysis is required by NEPA and mandated by the Ashley Forest Plan. Moreover, the sheer importance of the resources found in the lease area and vulnerability of these resources to oil and gas development necessitates site specific environmental analysis before the leasing of the parcels can proceed.

VI. THE FOREST SERVICE VIOLATED THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT BY FAILING TO COMPLETE THE REQUIRED TWO-STAGE ANALYSIS OF THE PROTESTED PARCELS

The Federal Onshore Oil and Gas Leasing Reform Act “authorized the Secretary of Agriculture to develop procedures and regulations governing leasing for oil and gas resources . . . with the National Forest System.” 55 Fed. Reg. 10423 (March 21, 1990). The Secretary of Agriculture promulgated regulations to implement this Act, which in relevant part, are codified at 36 C.F.R. § 228.102. Pursuant to the implementing regulations:

the decision as to whether to authorize the Bureau of Land Management to offer National Forest System land for leasing is made at the conclusion of the second stage of the

process set forth in the rule. The second stage is referred to as the 'leasing decision for specified lands.' 55 Fed. Reg. at 10428-29.

Pursuant to the second stage of the Forest Service's leasing decision-making process, the Regional Forester shall offer specific lands for lease subject to:

1) Verifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest land and resource management plan. If NEPA has not been adequately addressed, or if there is significant new information or circumstances [] requiring further environmental analysis, additional environmental analysis shall be done before a leasing decision for specific lands will be made. If there is inconsistency with the Forest land and resource management plan, no authorization for leasing shall be given unless the plan is amended or revised.

2) Ensuring that conditions of surface occupancy identified in § 228.102(c)(1) are properly included as stipulations in resulting leases.

3) Determining that operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

36 C.F.R. § 228.102(e).

Accordingly, the decision to authorize BLM to offer forest parcels for leasing is "dependent on the results of three determinations that the Forest Service must make." 55 Fed. Reg. at 10429. However, the Forest Service has failed to make each finding for the Ashley National Forest parcels. First, the protested parcels have not been adequately analyzed in a NEPA document and are not consistent with the Revised Forest Plan. Second, the appropriate stipulations have not been included for the protested parcels. And, third, oil and gas operations should not occur on roadless parcels absent NSO stipulations or a thorough analysis of the impact on the roadless character of the parcel.

Despite this staged process for oil and gas leasing, the Forest Service has never adequately analyzed the site-specific impacts of oil and gas leasing on the protested parcels. Moreover, the Forest Service has failed to provide an appeal process for its decision, and therefore, the only recourse at this time, is to the BLM. Correct application of the leasing regulations requires site-specific analysis. Because this has not been completed, the agencies must withdraw the Ashley National Forest parcels.

VII. THE ESA REQUIRES THAT THE FOREST SERVICE CONSULT WITH THE FWS REGARDING ESA SPECIES' HABITAT BEFORE LEASING.

The DOI Office of the Solicitor for the Rocky Mountain Region has concluded that the ESA requires the Forest Service and 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, 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 may authorize oil and gas operations in habitat of the Bald eagle, Canada lynx, whooping crane, Mexican spotted owl, black-footed ferret, and southwestern willow flycatcher. However, the Forest Service pre-leasing analysis has not even considered the habitat issue for these or other listed plant and animal species.

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.

As part of its ESA obligations, 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.

The agencies have not consulted with FWS on the Ashley National Forest parcels.⁵ In fact, FWS has not provided a comment/consultation letter on any of the National Forest parcels in this lease sale. Accordingly, the agencies have failed to fulfill their duty to consult with FWS prior to leasing and must withdraw the Ashley National Forest parcels.

⁵ In addition, consultation with FWS should have occurred pursuant to the Fish and Wildlife Conservation Act, 16 U.S.C. 661 *et seq.*, which provides for “the coordination of wildlife conservation and rehabilitation.”

VIII. LEASING THE PROTESTED PARCELS VIOLATES THE NATIONAL HISTORIC PRESERVATION ACT.

The IBLA has recently determined that the agencies must make a good faith attempt to “identify ‘historic properties’ located on the subject parcels” during the leasing process. Southern Utah Wilderness Alliance, 164 IBLA 1, 23 (2004). Accordingly, the IBLA has made clear that “[c]ompliance with section 106 [of the National Historic Preservation Act] at the leasing stage is intended to ascertain [] the presence of historic properties, including unidentified but identifiable eligible properties.” Id. at 28. Identification of cultural resources is a necessary step in the National Historic Preservation Act in order to ensure that agencies “evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.5(2). Neither the Oil and Gas EIS or the Forest Plan EIS made any attempt to identify cultural resources in the parcels proposed for leasing.

The Ashley National Forest Plan also requires that reasonable steps to identify cultural resources must be pursued prior to offering parcels for leasing. For example, the Forest Plan mandates that the Forest Service “[c]onduct cultural resource surveys prior to any agency undertaking which could affect significant cultural values until inventories are completed.” Forest Plan IV-20. It is settled law that offering parcels for leasing is an undertaking under the NHPA. See Southern Utah Wilderness Alliance, 164 IBLA 1, 22 (2004) (“BLM concedes that the March 2002 lease sale is an undertaking under 36 CFR 800.16(y)”). However, the agencies have not conducted any pre-leasing inventories for cultural resources.

Moreover, the Oil and Gas EIS acknowledges the presence of cultural resources within a very small portion of the generalized area analyzed by the document. “Cultural resources surveys of 5,640 acres within the Ashley NF portion of the study area have identified 57 sites, including lithic scatters, rock shelters, and a trail. Other site types known to be present in the vicinity include burials, vision quests, peeled trees, rock art, and pithouses.” Oil and Gas EIS – Summary at S-8. Of particular concern is the agencies awareness of **burials**, which triggers the heightened protections of the **Native American Grave Protection and Repatriation Act** (NAGPRA), 25 U.S.C. 3001 *et seq.*, which requires consultation with tribes based on the possibility for inadvertent discovery of a burial sites. *See e.g.* 43 CFR § 10.5(b).

In addition, pursuant to the National Historic Preservation Act, the agencies must consult with tribes whose cultural sites are potentially affected by the leasing. 16 U.S.C. § 470 *et seq.*⁶ The letter and spirit of the NHPA also requires the agencies to consult with SHPO, Native Americans, and the public **before** the agency proceeds with undertakings that “may affect” listed or eligible historic properties. As previously noted, leasing is the point of an irreversible and irretrievable commitment of resources, and thus constitutes an “undertaking” under the NHPA. *See* BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); *see also* 36

⁶ Form letters to tribal governments regarding planning documents are insufficient to meet the agencies’ duty under the NHPA to make a “reasonable and good faith effort” to seek information from Native American tribes. *See Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

C.F.R. § 800.16(y). The NHPA's implementing regulations further confirm that the "[t]ransfer, lease, or sale of property out of federal ownership and control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance" results in an "adverse effect" on historic properties. *Id.* § 800.5(a)(2)(vii) (emphasis added). *See* 65 Fed. Reg. 77689, 77720 (Dec. 12, 2000) (Protection of Historic Properties - Final Rule; Revision of Current Regulations) (discussing intent of § 800.5(a)(2)(iii)). It is therefore at the leasing stage that the agencies may lose the ability to protect cultural resources. The agency cannot defer consultation until the APD phase of operations.

In addition to the NHPA, the agencies must ensure compliance with:

- Federal treaties, which vest Tribes with ongoing rights and the Federal government with ongoing responsibilities;
- The American Indian Religious Freedom Act, requiring consultation to identify traditional Native American spiritual practitioners' concerns relative to proposed federal actions; and,
- Federal Executive Order 13007 on Native American Sacred Sites, requiring federal land management agencies to accommodate access to and ceremonial use of Indian sacred sites and to avoid adversely affecting these sites' physical integrity.

According to the Advisory Council on Historic Preservation, federal agencies should integrate Section 106 requirements under the NHPA with the requirements of the EO 13007: "Not only would it be more efficient to integrate the requirements, but it might also ensure that all issues and values are given appropriate and timely consideration." Advisory Council on Historic Preservation, *The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106* (available at <http://www.achp.gov/eo13007-106.html>).

Because the agencies have failed to identify cultural resources prior to leasing, the parcels must be withdrawn. In addition, because no consultation occurred, the agencies should withdraw the parcels from the lease sale and initiate consultation to determine whether leasing may affect listed or eligible historic properties, as well as burial sites. In the meantime, the agencies should initiate a dialogue with SHPO, Tribes, and the public on historic properties and cultural resource protection, as required by the NHPA. SHPO review and tribal consultation cannot wait until after undertakings have been completed.

IX. THE LEASING PROPOSAL FAILS TO PROVIDE FOR A DIVERSITY OF PLANT AND ANIMAL COMMUNITIES

A. THE FOREST SERVICE FAILED TO ADDRESS IMPACTS TO SENSITIVE SPECIES

By not conducting a site-specific analysis of the direct, indirect, and cumulative impacts of the lease sale, the Forest Service has failed to provide for a diversity of plant and animal

communities on the Ashley Nation Forest. As part of the NEPA process, the Forest Service is required to prepare a site-specific biological evaluation to determine the potential effect of leasing on sensitive species. Forest Service Manual (FSM) at 2670.32 (“As part of the National Environmental Policy Act process, review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species”). A site-specific EA or biological evaluation is needed to analyze the potential effect of oil and gas development on sensitive forest species, and to ensure that leasing would not threaten the viability of Forest Service sensitive species.

The Forest Service’s obligation to manage fish and wildlife habitat “provide for diversity of plant and animal communities”, 36 U.S.C. § 1604(g)(3)(B), is particularly relevant to sensitive species. Sensitive species are

[t]hose plant and animal species identified by the Regional Forester for which population viability is a concern, as evidenced by: (1) significant current or predicted downward trends in population numbers or density; or, (2) significant current or predicted downward trends in habitat capability that would reduce a species’ existing distribution.

FSM, Sec. 2670.5(19). For sensitive species, the Forest Service is required to: (1) develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions; (2) maintain viable populations of all native and desired non-native wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands; and (3) develop and implement management objectives for populations and/or habitat of sensitive species. FSM, Sec. 2670.22. As stated above, on the site-specific level, through the NEPA process, the Forest Service must “review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species.” FSM, Sec. 2670.32(2). If impacts from forest plan implementation cannot be avoided, the Forest Service must “analyze the significance of potential adverse effects *on the population or its habitat* within the area of concern and on the species as a whole.” FSM, Sec. 2670.32(4) (emphasis added).

The Ashley National Forest provides habitat to numerous sensitive species, including; peregrine falcon, spotted boat, Townsend’s big-eared bat, boreal owl, great gray owl, flammulated owl, wolverine, common loon, three-toed woodpecker, northern goshawk, and trumpeter swan. Without site-specific analysis, the agency simply lacks the information to fulfill this and other management duties relative to these sensitive species that rely on the lands and water resources encompassed by the protested parcels. As a result, the lease sale is premature and the protested parcels must be dropped from the lease sale.

B. THE FOREST SERVICE FAILED TO ADEQUATELY ADDRESS IMPACTS TO MIS, MIS HABITAT, AND MIS POPULATIONS

Pursuant to NFMA, the Forest Service is required to “provide for the diversity of plant and animal communities...” 16 U.S.C. § 1604(g)(3)(B). Since 1983, the Forest Service has used

Management Indicator Species (MIS) to ensure species viability on the forests. However, the Forest Service has recently amended its regulations to avoid this responsibility. This decision to remove MIS monitoring requirements from NFMA implementing regulations is currently being litigated in several courts. Accordingly, until courts have sufficiently resolved challenges to the Forest Service's new NFMA implementing regulations, the agencies should adhere to MIS requirements to ensure species viability on the Uinta National Forest. Moreover, MIS monitoring requirements are mandated by the Revised Forest Plan and, as such, compliance at the leasing stage remains necessary to guarantee consistency with the Forest Plan.

The Management Indicator Species (MIS) for the Ashley National Forest are the Northern goshawk and cutthroat trout. ROD, Amendment to Ashley National Forest Plan MIS (June 2004). The Forest Service violated NFMA's MIS provisions by failing to conduct a quantitative analysis of MIS population trends and determine the impacts of the proposed leasing on these populations prior to offering the parcels for oil and gas development. 36 C.F.R. §§219.19 and 219.26 (1999). This collection of data and analysis must occur prior to leasing, as leasing is an irretrievable commitment of resources. Pennaco Energy, Inc. v. Dept. of Interior, 2004 WL 1776013, at 9 (10th Cir. 2004). Pennaco also establishes that, prior to leasing, the agencies are required to consider whether coalbed methane development might result in unique impacts not analyzed in an existing NEPA document.

Unless it is technically infeasible and not cost-effective, the Forest Service is required to collect and analyze quantitative population data, both actual and trend, for MIS in relation to any proposed action and prior to any irretrievable commitment of resources. Sierra Club v. Martin, 168 F.3d 1, 6-7 (11th Cir.1999) (MIS regulations require collection of quantitative population data); Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 763 n. 12 (9th Cir.1996) (where data for MIS were not available because the species was reclusive, the Forest Service properly used habitat trend data rather than acquiring actual population counts because there was no technically reliable and cost-effective method of counting individual members of the species); Utah Envtl. Congress v. Zieroth, 190 F.Supp.2d 1265, 1271 (D. Utah 2002) (Forest Service failed to comply with regulations where failure to collect data was not due to any inability to collect it, but to an agency decision not to collect it); Forest Guardians v. United States Forest Service, 180 F.Supp.2d 1273, 1282 (D. NM 2001)(Forest Service obligated as a matter of law to acquire and analyze both actual and trend MIS population); Colorado Wild v. Forest Service, 299 F.Supp.2d 1184 (D. Colo. 2004)(granting summary judgment where Forest Service failed to conduct a quantitative analysis of MIS population trends). The MIS requirement applies at both the forest plan stage and **subsequent project level decisions**. See Martin, 168 F.3d at 6 n. 9 (*citing Inland Empire*, 88 F.3d at 760 n. 6); Zieroth, 190 F.Supp.2d at 1270 n. 1. Actual and trend population data must be collected **before** decisions are made to allow the Forest Service to evaluate data and monitor population trends. Martin, 168 F.3d at 6.

Here, the Forest Service lacks the required MIS data and analysis to approve the leasing of the protested parcels for oil and gas development. Nothing in the the Oil and Gas EIS gathers and relates MIS data to the specific leasing decision. Under its illegally revoked regulations, the Forest Service must gather and apply present population data for the MIS to determine

relationships between the habitat impacts and population changes for the leasing proposal. The agency must provide and evaluate such data and impacts, at a minimum, in a site-specific EA. Site-specific analysis must address the impacts of future oil and gas development under each lease to MIS, MIS populations, and MIS habitat.

In sum, until the legality of the new forest planning regulations is determined, project-level decisions such as leasing must be informed by MIS data. Absent a site-specific MIS analysis or population trend data, the agency has not determined the relationship between population trends and MIS habitat changes brought about by the proposed leasing as required by the illegally revoked 36 CFR § 219.19(a)(6). As a result, the lease sale violates NFMA.

X. LEASING THE ROADLESS PARCELS VIOLATES THE ILLEGALLY REVOKED ROADLESS RULE

On January 12, 2001, the Secretary of Agriculture issued the final Roadless Area Conservation Rule, generally prohibiting road construction to protect natural values in IRAs of the National Forest System. 66 Fed. Reg. 3244 (Jan. 12, 2001). The Roadless Rule prohibited new mineral leases that would allow new road construction within inventoried roadless areas. 36 C.F.R. § 294.12 (repealed).

On May 13, 2005, the Forest Service announced a new rule purportedly protective of IRAs. Essentially, the Forest Service established “a petitioning process that will provide Governors an opportunity to seek establishment of and adjustment of IRAs [with their state].” 70 Fed. Reg. 25653, 25654 (May 13, 2005). The legality of the Forest Service’s new Roadless Rule is currently being determined through litigation as it appears the Forest Service violated the Administrative Procedures Act and NEPA in promulgating the rule. Accordingly, because the leasing proposal does not accord the full range of protection required by the previous Roadless Rule and the legality of the new Roadless Rule is uncertain, the Forest Service should ensure compliance with both rules pending judicial resolution.

The previous Roadless Rule sets forth the Forest Service’s legal obligations for these areas. The Forest Service may not ignore its dictates until the new Roadless Rule is determined to be legal. Essentially, the previous Roadless Rule prohibited oil and gas leasing in IRAs absent NSO stipulations. Because the Forest Service has not attached NSO stipulations to the parcels within IRAs, the Forest Service is violating the previous Roadless Rule.

Moreover, under the new Roadless Rule, the Forest Service has established a deadline of November 13, 2006 for the Governor of any State to petition the Forest Service “to promulgate regulations establishing management requirements for all or any portion [of an IRA].” 36 C.F.R. § 294.12. Yet, the Forest Service is proposing to lease parcels within IRAs prior to allowing Utah’s Governor to petition for their protection. As such, the Forest Service is prejudicing the state petition process. Therefore, under the new Roadless Rule, the Forest Service should delay leasing in IRAs until the petition process has run its course.

If the parcels are not withdrawn, the agencies must condition leasing on imposing NSO stipulations – not subject to waiver or exemption – for all IRA lands within the proposed lease parcels to protect the full range of roadless area values as required by the previous Roadless Rule and as presumed by the new Roadless Rule.

XI. BLM HAS BROAD DISCRETION OVER LEASING DECISIONS.

The Mineral Leasing Act provides: “All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.” 30 U.S.C. § 226(a). In 1931, the Supreme Court found that the Mineral Leasing Act “goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare.” United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A 1965 case stated that the Mineral Leasing Act “left the Secretary discretion to refuse to issue any lease at all on a given tract.” Udall v. Tallman, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325. Thus, the BLM has discretionary authority to approve or disapprove minerals leasing of public lands.

At the point of submission of an application for lease to the federal government, no right has vested for the applicant and the BLM retains the authority not to lease:

The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.

Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966); see Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (“[R]efusing to issue [certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior”); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) (“While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory”); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975) (“[T]he Secretary has discretion to refuse to issue any lease at all on a given tract”); Geosearch, Inc. v. Andrus, 508 F.Supp. 839 (D.C. Wyo. 1981) (leasing of land under Mineral Leasing Act is left to discretion of the Secretary of Interior). Similarly, IBLA decisions consistently recognize that the BLM has “plenary authority over oil and gas leasing” and broad discretion with respect to decisions to lease. Penroc Oil Corp., 84 IBLA 36, 39 (1985).

By withdrawing the protested parcels, BLM would properly exercise its discretionary authority under the Mineral Leasing Act. BLM should withdraw the Ashley National Forest parcels to ensure compliance with all applicable laws.

XII. ANY FUTURE DEVELOPMENT ON THE ASHLEY NATIONAL FOREST SHOULD MINIMIZE THE SURFACE FOOTPRINT AND IMPACTS TO OTHER RESOURCES.

Red Rock Forest appreciates various NSO stipulations for some portions of the roadless lands. However, advance drilling technologies have proved effective in reducing the impacts of oil and gas development throughout the region. Indeed, horizontal drilling has allowed greater recovery of reserves from several reservoirs.

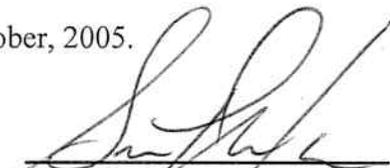
Both directional drilling techniques and drilling multiple bores from a single wellpad can reduce disturbances. The agencies should not hesitate to mandate minimum footprint drilling technologies to protect sensitive surface resources. It appears that these technologies are readily available and that their use can balance environmental protection and multiple use-sustained yield principles with mineral development. Minimum footprint technologies should be applied across the Ashley National Forest

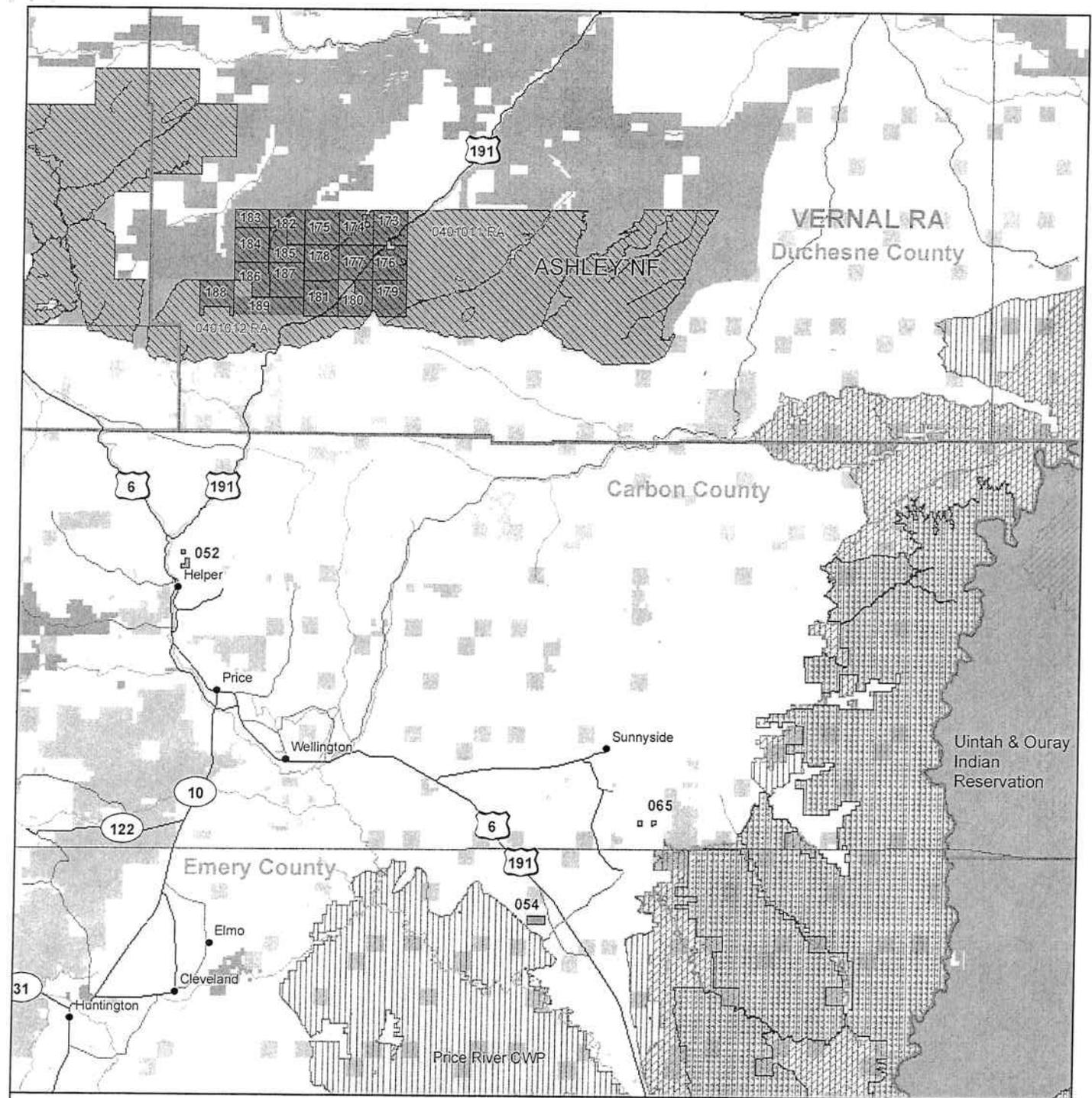
XIII. CONCLUSION AND REQUEST FOR RELIEF

NEPA requires that the agencies take a hard look at the environmental impacts prior to offering these Ashley National Forest lands for leasing and to make the analysis available for public review and comment. The Forest Plan also requires site-specific analysis prior to leasing. In addition, the agencies must consult with FWS on the proposed parcels within the Ashley National Forest. Also, NHPA requires identification of cultural resources and consultation with Tribes and other Native American groups prior to leasing. The agencies have failed to comply with these mandates.

Therefore, Red Rock Forests respectfully requests that the agencies withdraw the protested parcels from leasing absent adequate protections for the substantial resource value of the proposed parcels, including roadless characteristics, ESA listed species, and cultural resources. In the event leases are issued for the protested parcels, Red Rock Forests also requests that the agencies provide notice of any APDs or other exploration and development activities proposed for these lands.

Respectfully submitted the 31st day of October, 2005.

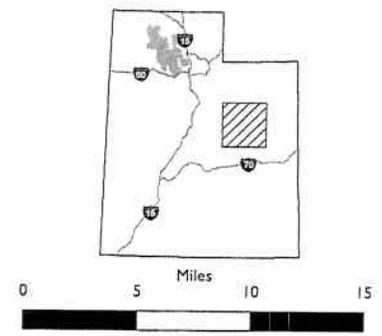

Sean Phelan
Joro Walker
Attorneys for Red Rock Forests, Citizens'
Committee to Save Our Canyons, High Uintas
Preservation Council, Utah Rivers Council, Utah
Environmental Congress, and the Utah Chapter of
the Sierra Club



Book Cliffs Area Lease Parcels

Federal Lease Sale - Utah BLM, November 15, 2005

- Lease Parcels
- Land Management & Administration**
- | | | |
|-------|-------------------------|---|
| BLM | USFS | Wilderness (BLM & USFS) |
| BIA | State Parks & Rec Areas | BLM Wilderness Study Area |
| DOD | State | Citizens' Wilderness Proposal |
| NPS | Private | Area w/ Wilderness Character [^] |
| USFWS | | USFS Roadless Area |
- [^] 1998 BLM Wilderness Characteristics Inventory



NAD 1983 UTM Zone 12N
 Data Sources: BLM, NRDC, SITLA, USDA-FS, UT-AGRC, WUP
 Sara Watterson, Earthjustice | October 31, 2005