



southern
utah
wilderness
alliance

HAND DELIVERED

February 4, 2008

Selma Sierra –State Director
Utah State Director, Bureau of Land Management
440 West 200 South, 5th Floor
P.O. Box 45155
Salt Lake City, Utah 84145-0155

*Re: Protest of Bureau of Land Management’s Notice of Competitive Oil and Gas
Lease Sale Concerning 9 Parcels*

Greetings,

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, the Southern Utah
Wilderness Alliance, Natural Resources Defense Council, The Wilderness Society and
Red Rock Forests (referred to collectively as “SUWA”) hereby timely protest the
February 19, 2008 offering, in Salt Lake City, Utah, of the following 7 parcels in the

Moab, Richfield, Price and Vernal field offices:

Price field office: UTU 85987, UTU 85992 (2 parcels)

**Richfield field office: UTU 85980, UTU 85968, UTU 85970, UTU 85971
(4 parcels)**

Vernal field office: UTU 85991 (1 parcel)

As explained below, the Bureau of Land Management’s (BLM’s) decision to sell the 7
parcels at issue in this protest violates the National Environmental Policy Act, 42 U.S.C.
§§ 4321 et seq. (NEPA), the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.
(NHPA), and the regulations and policies that implement these laws.

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SUWA requests that BLM withdraw these 8 lease parcels from sale until the agency has fully complied with NEPA and the NHPA. Alternatively, the agency could attach unconditional no-surface occupancy stipulations to each parcel and proceed with the sale of these parcels.

The grounds of this Protest are as follows:

A. Leasing the Contested Parcels Violates NEPA

1. Inadequate Pre-Leasing NEPA Analysis: 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 irretrievable commitment of resources, i.e., the sale of non-no 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 (9th 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 (10th 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 tiered 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).

The Richfield DNA states that the 1975 Richfield Oil and Gas Environmental Analysis Record (Richfield EAR) and 1976 Fillmore Oil and Gas Environmental

Analysis Record (Fillmore EAR) adequately “address leasing for oil and gas programmatically.” Richfield DNA at 3. It further asserts that the Richfield and Fillmore EARs “adequately analyzed” the no leasing alternative. Id. at 4. See Richfield EAR at 128-29 (discussion of “do not allow leasing” alternative”). A review of the EARs, however, reveals that the “no-lease” alternative was summarily dismissed and was not, in fact, analyzed, considered, and evaluated. See Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d at 1262-1264 (BLM failed to prepare adequate pre-leasing NEPA analysis to support decision to sell leases in Richfield field office – Henry Mountains field station). Moreover, when BLM prepared the 1982 Mountain Valley MFP, 1982 Parker Mountain MFP, and 1982 Forest Planning MFP also cited in the Richfield DNA, these plans were not accompanied by a separate environmental impact statement or other similar NEPA analysis and thus the current leasing categories and alternatives were not considered in the land use planning context. Southern Utah Wilderness Alliance, 164 IBLA at 123-24 (noting that BLM did not consider MFPs “major federal actions” and thus agency did not prepare EIS to accompany MFP). The subsequent oil and gas NEPA analyses cited to in the Richfield DNA – the Utah Combined Hydrocarbon Leasing Regional EIS (1984), the Oil and Gas Leasing Implementation EA for Henry Mountain and Sevier River Resources Areas (1988) and the Quitcupah Creek Road EIS – did not analyze the no-leasing alternative, but simply carried forward the decisions made in the EARs that lands were available for leasing. BLM should thus defer leasing parcels UTU 85980, UTU 85968, UTU 85970, and UTU 85971 until the agency prepares an adequate pre-leasing NEPA analysis.

2. BLM Failed to Take the Required “Hard Look” at Whether Its Existing Analyses Are Valid in Light of New Information or Circumstances

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 EA or an EIS has been prepared, and to supplement the existing environmental analyses if the new circumstances “raise[] significant new information relevant to environmental concerns.” Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 708-09 (9th Cir. 1993). Specifically, an “agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a ‘hard look’ at the environmental effects of [its] planned actions.” Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000). See Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d at 1264-69 (discussing supplemental NEPA requirement in the context of oil and gas leasing and concluding that BLM acted arbitrarily by proceeding with oil and gas lease sale without first preparing supplemental NEPA analyses). NEPA’s implementing regulations underscore an agency’s duty to be alert to, and to fully analyze, potentially significant new information. The regulations declare that an agency “shall prepare supplements to either draft or final environmental impact statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added).

As explained below, the Richfield, Price and Vernal field offices failed to take a hard look at new information and new circumstances that have come to light since BLM finalized the Mountain Valley MFP, Parker Mountain MFP, San Rafael RMP, Book

Cliffs RMP, Diamond Mountain RMP and subsequent oil and gas EAs. See also Pennaco Energy, 377 F.3d at 1162 (explaining that DNAs determine whether “previously issued NEPA documents were sufficient to satisfy the ‘hard look’ standard,” and are not independent NEPA analyses); Southern Utah Wilderness Alliance, 457 F. Supp. 2d at 1255-56 (discussing DNAs); Center for Native Ecosystems, 170 IBLA 331, 345-50 (2006) (discussing SUWA v. Norton and concluding that BLM failed to consider new information). In addition, to the extent that the Richfield and Price field offices took the required hard look, their conclusions that they need not prepare supplemental NEPA analyses was arbitrary and capricious.

a. *Richfield field office – new wilderness character information*

The following four lease parcels are all located (in whole or in-part) in the lands identified by the Southern Utah Wilderness Alliance and others in their comments on the Richfield draft resource management plan as having wilderness character:

UTU 85968: North Sevier Mountains wilderness character units
UTU 85970: Tushar Mountains wilderness character units
UTU 85971: Tushar Mountains wilderness character units
UTU 85980: Thousand Lake Mountains wilderness character units.

See Southern Utah Wilderness Alliance et al. Comments on BLM Richfield Draft Resource Management Plan/Environmental Impact Statement, at 37-48 and Exhibit D (January 23, 2008) (excerpts attached hereto as Exhibit 1). The Richfield field office’s outdated MFPs and EARs do not adequately address the wilderness-specific values and resources identified in SUWA’s DRMP comments. See, e.g., Richfield DNA at 7 (citing Staff Report, “Other Lands With Wilderness Characteristics” Review, which recommended deferral of several previously unidentified wilderness character parcels). BLM must review and fully consider this significant, new information before it offers

these four parcels for sale. The Richfield field office has not previously reviewed new information from SUWA regarding these four parcels.

b. Price field office – new wilderness character information

A portion of lease parcel UTU 85987 is located partially within (at a minimum all or some of T22S, R6E, Section 6) the “Wildcat Knoll” unit identified by The Wilderness Society and others in their comments on the Price draft resource management plan and Price supplemental to Price draft resource management plan for non-WSA lands with wilderness characteristics as having wilderness character. See The Wilderness Society et al. Comments on Supplement to Price Draft RMP/EIS for Non-WSA Lands with Wilderness Character, at 2-5, 14-15 (Dec, 17, 2007) (excerpts attached hereto as Exhibit 2); Comments Submitted by Southern Utah Wilderness Alliance et al. for the Price Draft Resource Management Plan, at 1-4 and Attachment B (July 2004) (excerpts attached hereto as Exhibit 3). In its review of this information, the Price field office agreed with SUWA that a part of its Wildcat Knolls proposed wilderness unit contained wilderness character. See Supplement to the Price Field Office Draft Resource Management Plan/Environmental Impact Statement for Non-WSA Lands with Wilderness Characteristics, at 2-4, 3-3, 4-95, Map 3-27 (Sept. 2007) (excerpts attached hereto as Exhibit 4) (acknowledging that the “Wildcat Knolls Extension Unit B” has wilderness character).¹ This is significant, new information that has not been considered in the

¹ As set forth in its comments on the Supplemental DRMP/DEIS, SUWA disagrees with BLM’s contention that areas smaller than 5,000 acres – but that otherwise have wilderness character – may not be managed specifically for their wilderness values. Thus, as it pertains to this protest, SUWA maintains that BLM’s evaluation of the Wildcat Knolls proposed wilderness unit was flawed because it inappropriately limited its review to areas either larger than 5,000 acres or contiguous with Forest Service roadless

existing NEPA analyses – the San Rafael RMP/EIS. A portion of this Wildcat Knolls unit is contained in parcel UTU 85987 and thus BLM must either defer leasing this parcel until the Price RMP/EIS is finalized or correct the legal description to exclude this acreage.

c. Price field office – endemic pollinators

Lease parcel UTU 85992 is located in the greater San Rafael Desert/Sweetwater Reef region, an area rich in endemic pollinators including bees, wasps, and bee wasps. See Terry Griswold, Frank Parker, and Vincent Tepedino, *The Bees of the San Rafael Desert: Implications for the Bee Fauna of the Grand Staircase-Escalante National Monument* (1997) (attached hereto as Exhibit 5). The San Rafael RMP/EIS contains no mention of this important aspect of the environment – and accordingly the lease stipulations and notices for parcel UTU 85992 do not take into account identification or protection of this essential aspect of the environment. See id. at 176, 184 (“[W]e found the bee fauna of the SRD [San Rafael Desert] to be very rich in bee endemics. We also found it to be very rich in the total number of bee species . . . The fauna is remarkable for its high rate of endemism.”). The stipulations included with parcel UTU 85992 do nothing to protect against damage to this important biological resource. BLM must defer leasing this parcel until it considers whether this significant, new information is adequately analyzed in existing NEPA analyses. See Center for Native Ecosystems, 171 IBLA at 345-50 (concluding that BLM violated NEPA’s supplementation requirement). Because BLM will find that this information was not considered in the San Rafael RMP/EIS (or any other pre-leasing NEPA analysis identified in the Price field office

areas. BLM should defer leasing parcel UTU 85992 until, at a minimum, the Price resource management plan is finalized and any appeals resolved.

DNA), BLM must not offer or sell this parcel (or for that matter any in the greater San Rafael Desert) until it considers, analyzes, and evaluates this information.

d. Vernal field office – existing and proposed Nine Mile Canyon ACEC

Parcel UTU 85991 is located within the existing Nine Mile Canyon ACEC as well as the proposed Nine Mile Canyon Expansion ACEC. See Vernal DNA, Attachment 2 (Consolidated Interdisciplinary Team Review of Preliminary Parcels for February 2008 Oil & Gas Lease Sale), at 5. The Vernal DEIS/DRMP explains that the existing ACEC and proposed expansion contain “Nationally significant Fremont, Ute, and Archaic rock art and structures; regionally significant populations of special status plant species, and high quality scenery. . . . [The ACEC h]as more than locally significant qualities, which give it special worth, and distinctiveness.” See Vernal DRMP/DEIS, at 3-79 to 3-81 (Jan. 2005). Parcel UTU 85991 is also located in an existing and proposed special recreation management area for Nine Mile Canyon. Vernal DNA, Attachment 2 (Consolidated Interdisciplinary Team Review of Preliminary Parcels for February 2008 Oil & Gas Lease Sale), at 5. Parcel UTU 85991 would be protected as an ACEC under either alternative A or C in the Vernal DRMP/DEIS.

Despite these acknowledged special values in the Vernal DRMP/DEIS – including high value scenery and nationally significant cultural sites – the Vernal DNA summarily asserts that “[r]elevant and important values can be protected; therefore these parcels [including parcel UTU 85991] can go forward” and be leased. Vernal DNA, at 7. There is no analysis or explanation how the newly identified values in the Vernal DRMP/DEIS will be protected when this parcel is leased under the current, inadequate, NEPA analyses. For example, under both alternatives A and C in the Vernal

DRMP/DEIS, portions of the Nine Mile Canyon ACEC (existing and proposed) will be either closed to leasing or available for leasing with no-surface occupancy or special stipulations. See Vernal DRMP/DEIS at Figure 11 and 13. See also id. at Figures 29 and 31 (depicting new visual resource management classes – parcel UTU 85991 may be either Class II or Class III under these alternatives, it is currently Class IV).² In short, current lease stipulations – standard stipulations, parcel UTU 85991 does not propose any additional lease stipulations or notices – are inadequate to protect newly recognized values and resources (scenery, cultural properties, etc) and thus BLM should defer leasing this parcel.

In addition, BLM failed to add a lease notice for raptors that was recommended by the Vernal field office biologist. See Vernal DNA, Attachment 2 (Consolidated Interdisciplinary Team Review of Preliminary Parcels for February 2008 Oil & Gas Lease Sale), at 48-49 (recommending Lease UT-LN-07).

² The failure to defer leasing parcel UTU 85991 also violates 40 C.F.R. § 1506.1. Deferral would also be consistent with Instruction Memorandum No. 2004-110 (Change 1). See also 40 C.F.R. § 1502.2(f) (while preparing environmental impact statements, federal “[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).”). While BLM has a land use plan and NEPA analysis in place for the lands at issue in the Vernal field office (Book Cliffs and Diamond Mountain RMP/EIS), the agency’s own February 2000 Report to Congress – Land Use Planning for Sustainable Resource Decisions made clear that existing land use plans such as the Diamond Mountain/Book Cliffs RMPs/EISs do not accurately reflect current, unanticipated levels of interest and attention in oil and gas development. See BLM Report to Congress – Land Use Planning for Sustainable Development, at 4, 7 (Feb. 2000).

B. Leasing the Contested Parcels Violates the NHPA³

As described below, BLM's decision to sell and issue leases the 7 parcels at issue in this protest violates § 106 of the NHPA, 16 U.S.C. § 470(f) and its implementing regulations, 36 C.F.R. §§ 800 et seq.

As Utah BLM has recognized for some time, the sale of an oil and gas lease is the point of "irreversible and irretrievable" commitment and is therefore an "undertaking" under the NHPA. See BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); see also 36 C.F.R. § 800.16(y); Montana Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1152-53 (D. Mont. 2004); Southern Utah Wilderness Alliance, 164 IBLA at 21-28. 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" constitutes 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)).

1. Failure to Involve the Public

BLM has violated the NHPA by failing to adequately consult with members of the interested public such as SUWA regarding the effects of leasing all the protested parcels. Such consultation must take place before the BLM makes an irreversible and

³ To the extent that BLM's issued Instruction Memorandum 2005-003 Cultural Resources and Tribal Consultation for Fluid Mineral Leasing, Oct. 5, 2004, is inconsistent with the Interior Board of Land Appeals' decision in Southern Utah Wilderness Alliance, 164 IBLA 1 (2004) and the recently issued decision in Southern Utah Wilderness Alliance, IBLA 2004-124 (2007), BLM must comply with the IBLA's interpretation of the agency's duties under the NHPA. See 43 C.F.R. § 4.1(b)(3).

irretrievable commitment of resources – in other words before the May 2007 lease sale. See Southern Utah Wilderness Alliance, 164 IBLA 1 (2004). The NHPA requires BLM to “determine and document the area of potential effects, as defined in [36 C.F.R.] § 800.16(d),” identify historic properties, and to affirmatively seek out information from the SHPO, Native American tribes, consulting parties, and other individuals and organizations likely to have information or concerns about the undertaking’s potential effects on historic properties. 36 C.F.R. § 800.4(a). See Southern Utah Wilderness Alliance, 164 IBLA at 23-24 (quoting Montana Wilderness Ass’n, 310 F. Supp. 2d at 1152-53). The NHPA further states that BLM shall utilize the information gathered from the source listed above and in consultation with at a minimum the SHPO, Native American tribes, and consulting parties “identify historic properties within the area of potential affect.” Id. § 800.4(b). See id. § 800.04(b)(1) (discussing the “level of effort” required in the identification process as a “reasonable and good faith effort to carry out appropriate identification efforts”).

The NHPA’s requires – and the Protocol repeats – that the BLM “seek information” from organizations like SUWA “likely to have knowledge of, or concerns with, historic properties in the area.” 36 C.F.R. § 800.4(a)(3) (emphasis added). See Protocol § IV.C (“BLM will seek and consider the views of the public when carrying out the actions under terms of this Protocol.”).⁴

As BLM’s DNA forms plainly state, the DNA process is an “internal decision process” and thus there is no opportunity for the public to participate in the identification

⁴ Because the National Programmatic Agreement – which the Protocol is tiered from – was signed in 1997, well before the current NHPA regulations were put in place, it is questionable whether either document remains valid. This further reinforces the need for BLM to fully comply with the NHPA’s Section 106 process.

of known eligible or potentially eligible historic properties. Permitting public participation only at the “protest stage,” or arguing that the time period for seeking public input ended when BLM completed its dated resource management plans, is not equivalent to encouraging participation in an open NEPA process, and BLM should withdraw the 7 parcels that are the subject of this protest.

2. Failure to Adequately Consult with Native American

As in the recent decision from the IBLA - Southern Utah Wilderness Alliance, IBLA 2004-124, the record here does not demonstrate that the Price, Vernal, Richfield field offices adequately consulted with the Native American tribes. See Southern Utah Wilderness Alliance, IBLA 2004-124 at 12 (holding that BLM failed to meaningfully consult with Native American tribes). In short, the form letters that these offices sent to various tribes suffers from the same flaw that the IBLA recently held to be fatal to BLM’s consultation efforts. Thus, BLM must defer leasing the 7 parcels at issue here until the agency fully and adequately consult with Native American tribes.

REQUEST FOR RELIEF

SUWA requests the following appropriate relief: (1) the withdrawal of the 7 protested parcels from the February 19, 2008 Competitive Oil and Gas Lease Sale until such time as the agency has complied with NEPA and the NHPA or, in the alternative (2) withdrawal of the 7 protested parcels until such time as the BLM attaches unconditional no-surface occupancy stipulations to all protested parcels.

This protest is brought by and through the undersigned legal counsel on behalf of the Southern Utah Wilderness Alliance, Natural Resources Defense Council, The Wilderness Society and Red Rock Forests. Members and staff of these organizations

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 affected and impacted by, the proposed action.



Stephen Bloch
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84111

Attorney for Southern Utah Wilderness Alliance et al.