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RED ROCK FORESTS

DEPT OF INTERIOR
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90 W. Center Street • Moab, Utah 84532 • 435-259-5640
redrockforests.org

May 19, 2008

Kent Hoffman
Deputy State Director
Division of Lands and Minerals
Bureau of Land Management
P.O. Box 45155
Salt Lake City, UT 84145-0155

By Fax: (801) 539-4237

Re: Protest for June, 2008 Utah BLM Oil
and Gas Lease Sale - Specific protests to
Utah parcel number: UTU86170; 86171;
86172; 86173; 86174; 86175; 86176; 86177;
86178; 86179; 81780; 81781; 81782; 81782.

Dear Deputy Director Hoffman:

On behalf of the undersigned please accept this protest on the above oil and gas lease parcels in Vernal, Emery and Carbon Counties Utah. Red Rock Forests is located in Moab, Utah and focuses on the health of the mountains and surrounding landscapes of Utah. Red Rock Forests' mission is to protect the long-term health and viability of these high elevation forests and surrounding lands as they provide critical summer forage for wildlife and support a rich diversity of plant life. We are concerned that proposed leases along or around these watersheds will damage fish and wildlife habitat there. The leasing of these parcels would convey a right to explore for and develop gas and/or oil reserves to the lessee that, when exercised, could impact the migratory corridors and water quality necessary for the survival of coldwater fisheries.

RRF requests that BLM withdraw these 14 lease parcels from sale until the agency has fully complied with NEP A 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 NEP 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 a major federal action and/or '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. Dept 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, 377F.3d at 1162).

The Vernal and Price DNA states that the 1975 Vernal and Price Oil and Gas Environmental Analysis Record (Vernal and Price EAR) and 1976 Fillmore Oil and Gas Environmental Analysis Record (Fillmore EAR) adequately address leasing for oil and gas programmatically. Vernal and Price DNAs at 3. It further asserts that the Vernal and Price and Fillmore EARs "adequately analyzed" the no leasing alternative. Id. at 4. See Vernal and Price 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 Vernal and Price

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 Vernal and Price 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 Vernal and Price DNA - the Utah Combined Hydrocarbon Leasing Regional BIS (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 all 14 leasing parcels 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 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 applicable MFPs, RMPs and oil and gas BAs. See also Pennaco Energy, 377 F.3d at 1162 (explaining that DNAs determine whether "previously issued documents were sufficient to satisfy the 'hard look' standard," and are not independent NEPA analysis); 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 Vernal and Price and Price field offices took the required hard look, their conclusions that the need not prepare supplemental NEPA analyses was arbitrary and capricious.

B. Leasing the Contested Parcels Violates the NHPA.

As described below, BLM's decision to sell and issue leases for the 14 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, 16 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 RRF, regarding the effect of leasing all the protested parcels. Such consultation must take place before the BLM makes an irreversible and 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)(i)(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 RRF, "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 carving out the actions under terms" of this Protocol. ").

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 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 14 parcels that are the subject of this protest.

2. Failure to Adequately Consult with Native Americans

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, or Vernal and Price 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 14 parcels at issue here until the agency fully and adequately consult with Native American tribes.

C. Violations of the Federal Land Management Policy Act

1. Changed Circumstances and a Lack of Public Comment Opportunity

The underlying Resource Management Plans covering the management areas where these leases are located provide a general analysis and leasing decision, however, the analyzed in a supplement to that leasing decision. Because specific lease parcels have never been analyzed in a NEPA document, this needs to occur before they can be offered for sale.

Up until the sale notice, the public was unaware of the location of specific lease parcels to be sold. Because the public has been unaware as to where specific lease parcels would be sold, identification of specific lease parcels represent changed circumstances upon which the public has not been able to comment or review site-specific NEPA analysis.

The Federal Lands Policy Management Act (FLPMA) requires that BLM "shall allow an opportunity for public involvement and . . . shall establish procedures . . . to give . . . the public adequate notice and an opportunity to comment on and participate in the formulation of . . . programs relating to the management of the public lands." 43 U.S.C. §

1712(f). While the public had the opportunity to comment on the underlying land use plan, that right has not been made available regarding the specific leases parcels. The BLM has provided no opportunity for public comment on the protested lease parcels prior to this protest, which is essentially an after-the-fact opportunity for involvement, which fails to meet the requirements of FLPMA. Until this oversight is corrected, the protested lease parcels should not be offered for sale.

2. Failure to Properly Map Lease Parcels

Given the documents provided in the Competitive Lease Sale Notice, it is difficult at best to for the public to understand where the leases are located. As a result, it is extremely difficult for the public to offer meaningful public comment and analysis. In the maps made available that the sale notice, the relation to existing lease parcels is not shown. We believe that this constitutes a violation of the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA) that requires: "*Such notice shall include the terms or modified lease terms and maps or a narrative description of the affected lands. Where the inclusion of maps in such notice is not practicable, maps of the affected lands shall be made available to the public for review. Such maps shall show the location of all tracts to be leased, and of all leases already issued in the general area.*" 30 U.S.C. § 226(f) (emphasis added.).

Certainly in the information age when oil and gas lease sale notices are made available online, appropriate lease sale maps are a 'practical' need to be included as well. These maps are required to not only show lease parcels to be sold, but also their relation to *existing parcels*. In addition, it would be extremely helpful if the maps provided showed drainages, roads, and other topographical features so that the public can accurately determine what lands and resources they own are up for lease.

3. Lack of Cumulative Impacts Analysis

Rivers, lakes and terrestrial habitat throughout Utah, including those in the watersheds in Vernal, Emery and Carbon Counties where the protested parcels are located, have experienced deleterious impacts to the aquatic and terrestrial environment

in recent drought years due to low stream flows, increased water temperatures and interruption of wildlife corridors due to development. The BLM needs to conduct an assessment of vulnerable aquatic and terrestrial wildlife species, and natural systems that will be adversely impacted by global climate change. The BLM should manage vulnerable systems and their tributaries to prevent them from experiencing regime shifts brought on by the impacts of climate change and remove other stressors from those systems by thoroughly analyzing cumulative impacts that leasing, and in turn development, authorize.

4. Inconsistency with the Resource Management Plans

There is a complete inconsistency in how BLM offices are handling the execution of lease sales in the state of Utah, in violation of the system for putting federal parcels up for bid as provided in the Mineral Leasing Act of 1920. As required by the Leasing Act and FLPMA, BLM is authorized to issue lease parcels as provided by applicable Resource Management Plans (RMPs) issued by the agency. The decades-old Vernal and Price RMPs, however, do not authorize the issuance of any of the protested parcels and, in fact, have withdrawn many of the areas from any oil and gas leasing.

The failure of BLM to comply with current RMP's illustrates that rather than federal laws, the industry largely drives the leasing program in Utah. Record high prices for natural gas and oil, and diminishing reserves in long-producing basins, drilling companies and other speculators have mostly convinced the BLM to offer bigger and more lucrative lease sales, such as those in question in this lease sale.

In addition, rather than even attempting to stay out of controversial areas, the lease sales in this case illustrate that the BLM has readily leased parcels in important wildlife habitat and wilderness-quality lands. In fact, over the past seven years, the BLM has leased 17 million acres in the five major oil- and gas-producing states in the Interior West, for about \$500 million. Further, hundreds of thousands of acres of public land in the Interior West will be auctioned off this year.

Moreover, in violation of the Leasing Act and FLPMA, the structure of the process for issuing the protested lease sales is based on the benefits to the oil and gas industry, to the point where the industry is largely making the decisions for the BLM. In

relation to the lease sale in question, for example, companies nominate parcels in areas the BLM have set aside even though these are not listed as suitable for leasing in the Vernal or Price RMPs. The BLM announces that those parcels will be available at its next quarterly auction, and the companies will place their bids accordingly, paying anywhere from the federal minimum of \$2 an acre to thousands of dollars an acre. The winning bidders get the right to tap the land's energy resources without accurate consideration or analysis of the impacts to resources, sensitive lands, listed species or aquatic habitat.

Further, even though the BLM often says that just because a lease is issued that does not mean a well will actually be drilled, a lease gives oil and gas companies a vested right to develop the lands, making it difficult for the BLM to say no later. And the agency is very susceptible to pressure from industry. It used to be that companies knew they could not drill in the winter in deer and elk habitat. Now they are pushing to remove this impediment and drill all year round.

Finally, that political pressure rather than compliance with legal mandates is driving this and other BLM leases in Utah is illustrated by the fact that the BLM's aggressive leasing program is directly tied to the current administration which has made energy development the agency's highest priority. A few months after taking office in 2001, George W. Bush issued an executive order directing federal agencies to "expedite energy-related projects." Subsequent memos from the BLM's Washington headquarters to state-level managers reinforced the message, including a 2003 memo instructing state offices to not "unduly restrict access to the public lands for oil and gas development." Any stipulations placed on leases to mitigate impacts on wildlife had to be "the least restrictive necessary to accomplish the desired protection." The following year, the agency told state directors that any time they decided not to issue a lease, they had to provide a letter to the operators interested in the tract, stating the reasons for the BLM's decision.

D. Violations of the Endangered Species Act

Congress enacted the ESA in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and]

to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Section 4 of the ESA directs the Secretary to determine which species should be listed as endangered or threatened. *Id.* at § 1533(a)(1). The Secretary has delegated this duty to the Fish and Wildlife Service (FWS).

An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range" and a threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at §§ 1532(6), (20). In deciding whether or not a species qualifies as endangered or threatened, the FWS is required to consider the following five factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. *Id.* at § 1533(a)(1).

Regardless of the ESA's directive, in issuing the lease parcels, the BLM is ignoring the fact that UTU 86178; 86179 & 81780 contain winter, brooding and other habitat for the Greater sage grouse species. In addition, even though the Department of Interior currently refuses to recognize the Greater sage grouse as a species listed under the federal Endangered Species Act, this ignores recent federal court precedent in Western Watersheds Project v. U.S. Forest Service, Memorandum Opinion, Case No. CV-06-277-E-BLW (December 4, 2007) which faulted the U.S. Fish and Wildlife Service for this oversight in three key areas: (1) use of separate expert panel versus decision team (which is a process the Service is increasingly using to keep experts out of the actual listing decision); (2) failure to really address habitat threats and inadequacy of regulatory mechanisms, particularly in light of science showing accelerating loss of key habitats which the Service ignored; and (3) improper political meddling by Julie MacDonald.

As a result, due to the presence of sage grouse on several of the parcels and the impacts leasing will have on sage grouse habitat from leasing, BLM has failed to adequately assess the impacts to this very imperiled species and the potentially significant impacts to sage grouse as required by NEPA.

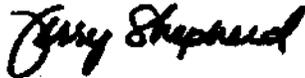
REQUEST FOR RELIEF

Red Rock Forests requests the following appropriate relief: (1) the withdrawal of the 14 protested parcels from the June 5, 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 14 protested parcels until such time as the BLM attaches unconditional no-surface occupancy stipulations to all protested parcels.

This protest is brought by the Executive Director of Red Rock Forests on behalf of Red Rock Forests, its staff and members, and Grand County resident, Bill Love.

Thank you for your consideration of our concerns.

Sincerely,



Terry Shepherd
Executive Director