protecting the forests and watersheds of canyon country

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May 10, 2010

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Division of Lands and Minerals
Bureau of Land Management
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Re: Protest for May, 2010 Utah BLM Oil and Gas Lease Sale Specific protests to Utah parcel numbers: UTU8792 (UT0510-037).

Dear Deputy Director Hoffman:

On behalf of the undersigned, please accept this protest on the above oil and gas lease parcel through the Moab field office. Red Rock Forests (RRF), located in Moab, Utah focuses on the health of the watershed and surrounding landscapes of Utah. Red Rock Forest's mission is to protect the long-term health and viability of these high elevation Forests, watersheds and surrounding lands as they provide critical summer forage for wildlife and support a rich diversity of plant life.

We have reviewed the 2008 Moab Resource Management Plan in its entirety. The Plan does not include a discussion or analysis regarding leasing and development of oil and gas in any detail to provide the public with adequate information regarding the potential impacts to natural resources from leasing these Parcel.

The Resource Management Plan does not include a site-specific analysis that addresses the impacts of oil and gas development in the areas listed above included in lease sale Parcel referenced at the beginning of this letter. BLM must conduct site specific analysis of the impacts to these areas and the impacts to existing and future uses of these areas BEFORE making these areas available for oil and gas leasing. We are concerned that the leasing of these Parcel would convey a right to explore for and develop gas and/or oil reserves to the lessee that, when exercised, will threaten the health of the watershed, air and water quality, scenic quality, as well

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as the rural economy which thrives on a nationally and internationally-renowned and unique vistas, amenities and recreational opportunities.

RRF represents 400 members nationally that recreate in areas covered by leases in this lease sale by walking, hiking, biking, engaging in photography, quiet, solitude and enjoyment of the landscape. RRF members visit many of these areas as often as daily to occasionally when they are visiting the area. Sale of these leases will impact their enjoyment of these areas and for our local members, their quality of life in the Moab area.

We are concerned about the health and safety of residents and visitors to the Moab area in the event that these Parcel are included in this lease sale. We are also concerned about environmental impacts to wildlife, to air and water quality, and to dark night skies, as presented in more detail below. Specifically, we are concerned about the impacts that future development of these leases would seriously impact the town of La Sal's and area rural residential water supply, and request that BLM not risk the water supply of our towns with speculative oil and gas development.

BLM acknowledges that the potential for oil and gas production is low in these areas, so there is no reason to allow permanent scars of access roads and development to damage the landscape that provide a high quality of life, supports a thriving rural economy to residents of Grand and San Juan County and that visitors from around the world come to enjoy.

A large majority of the leases in the Districts below have had 1% or less of the area inventoried for cultural sites and do not meet the requirements of 43 C.F.R. Many sites listed have had zero inventory, and many sites listed below were inventoried many years ago and do not meet current procedures or regulations. Class 1 inventories without any prior studies are not sufficient to meet CFR regulation. In addition, once a lease is sold, the US Courts have, in the past, removed any and all stipulations that prevent an oil company's access to their lease. No cultural or minimal cultural inventories leave open the possibility that a large cultural site will be later discovered on a parcel. The presence of an unknown world class site on a lease site would be damaged by the presence of oil and gas drilling. The BLM in all districts has stated a hope that a parcel is large enough to accommodate at least one drilling rig. Leasing of oil and gas Parcel is required to be based on scientific facts and not on the assumption that the leased area can support a drilling rig. The BLM districts have extrapolated cultural inventories from other areas to cover some of the leased Parcel. This extrapolation does not provide sufficient data for a determination of a lease sale per BLM regulations.

The State of Utah in all the BLM Districts below is either in violation of the EPA air quality for ozone or very close to violations. Canyonlands National Park is reading .073 for ozone pollution and will soon be over the allowed .075. The State of Utah is spending millions of dollars to remediate the air pollution in the Vernal area and will soon spend millions more on studies in the rest of the state. The leasing of more areas by the BLM is a serious detriment to the air quality of this area. The BLM must analyze the cumulative effect of additional oil and gas facilities to current air pollution prior to leasing any further areas.

The 77 leases that were just removed by the Secretary of Interior were partially due to the BLM's inadequate air quality studies. The BLM must know prior to leasing additional land that

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additional oil and gas exploration will not raise the ozone limits above the new EPA limit of .075.

The grounds of this Protest are, as follows:

A. Leasing the Contested Parcel 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 leases 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 Moab DNA states that the 2008 Moab Field Office Resource Management Plan (RMP) adequately addresses leasing for oil and gas programmatically. Nonetheless neither the DNA, nor the 2008 Moab Resource Management Plan (RMP) included an analysis of a 'no leasing' alternative, thereby violating the intent of NEPA to provide the decision maker a 'reasonable range of alternatives.'

2. BLM Failed to Take the Required "Hard Look" at Whether Its Existing Analyses Are Valid in Light of Information or Circumstances During the Development of the Moab Resource Management Plan

The BLM was presented with extensive substantive comments during the Resource Management Planning process by the National Park Service, which demonstrated that data collected by NPS shows "a deteriorating trend for ozone, which may reflect more current data than that used for the RMP" (RMP, Response by Resource, p 56). The deteriorating trend for ozone does, in fact, demonstrate that ozone levels are very close to standard thresholds for maintenance of the Class I Airshed designations for Arches and Canyonlands National Parks under the Clean Air Act. As such, by including Parcel 112, 129, 230, 132, 133, 134, 135, 137, 139, 161, 162, 165, and 166 BLM ignored the c cumulative impact that the development of oil and/or gas on any or all of these Parcel would potentially impact that ozone levels in these Parks, and thus cause the significant deterioration of their Class 1 Airshed designations.

The BLM failed to consider during the RMP process, which is used to justify the adequacy of presenting these Parcel for lease, comments presented by the State of
Utah Public Lands Policy Coordination, which "encourages the BLM to impose air emission standards as lease conditions and conditions of approval for Applications for

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Permit to Drill." (RMP, Response, p 56). The BLM's response was provided as "The BLM does not have the responsibility to set air emission standards. That responsibility lies with EPA and the State of Utah. The BLM can only approve actions that meet the National Ambient Air Quality Standards as set by EPA or the State." (RMP, Response, p. 56). By such statements, the data provided by the National Park Service regarding ozone levels would be sufficient and justifiable for the BLM to permanently defer Parcel # 112, 129, 230, 132, 133, 134, 135, 137, 139, 161, 162, 165, and 166 because the development of oil and/or gas on any or all of these Parcel would potentially impact that ozone levels in these Parks, and thus cause the significant deterioration of their Class 1 Airshed designations.

In addition, the Acting Regional Director of Region 8 of the Environmental Protection Agency wrote a letter to the BLM on November 25, 2008 in response to the December 2008 proposed lease sale. The letter specifically states, "As noted in our recent letters, the lack of air quality analysis when necessary at the Resource Management Plan (RMP) stage of NEPA analysis remains a paramount concern. Our concern stems from the possibility that decision makers may not have enough information to provide appropriate mitigations to ensure National Air Quality Standards (NAAQS) is met without conducting needed analysis. EPA stated its concerns that the qualitative emission comparison conducted in these RMP Final EISs would be insufficient to provide BLM with the necessary information to issue categorical exclusions while still being protective of NAAQS and the air quality related values of the Class 1 areas of Arches and Canyonlands National Parks. Given the potential for categorical exclusions following these new RMP completions, EPA had urged BLM to complete air quality modeling for future projects and to implement specific air quality mitigation measures if needed." The BLM has failed to address the concerns of EPA by still not conducting the appropriate modeling necessary to provide information sufficient to ascertain the extent of impact of oil and gas drilling on the National Parks in this area.

B. Leasing the Contested Parcel Violates the NHPA

As described below, BLM's decision to sell and issue leases at issue in this protest violates § 106 of the NHPA. 16U.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 Parcel. Such consultation must take place before the BLM makes an irreversible and irretrievable commitment of resources

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- in other words, before any future lease sales are conducted by BLM in Utah. 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)(t)(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 and Native American tribes "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 states, letters were sent to Native American Tribes on January 27, 2009. However, since the tribes specified are sovereign entities, with recognized governments, the BLM must do more than send a letter to a specific tribe to undergo appropriate government-to-government consultation on matters of importance.

The publication of the Draft EIS inviting public comment provided insufficient detail to allow any member of the public or Native American tribe to identify specific Parcel that might be identified as known to be eligibly or potentially eligible properties that might be subject to oil and gas leasing. Permitting public participation only at the "protest stage," or arguing that the time period for seeking public input ended when BLM completed its resource management plans, is not equivalent to encouraging participation in an open NEPA process, and BLM should withdraw the Parcel 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 Moab Field office 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 routinely send to various tribes suffers from the same flaw that the IBLA recently held to be fatal to BLM's consultation efforts. Thus, BLM must withdraw leasing the Parcel 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, they are analyzed in a

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supplement to that leasing decision. Because specific lease Parcel 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 Parcel to be sold. Because the public has been unaware as to where specific lease Parcel would be sold, identification of specific lease Parcel 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 Parcel. The BLM has provided no opportunity for public comment on the protested lease Parcel prior to this protest, which is essentially an after-the-fact opportunity for involvement, which fails to meet the requirements of FLPMA. As such, the 70 protested lease Parcel should not be offered for sale.

2. Failure to Properly Map Lease Parcel

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. The BLM failed once again, as they did for the December 2008 sale, to provide maps showing the location of the Parcel and parcel numbers. The maps posted on the BLM website are wholly inadequate for members of the public to gain a clear view of where the Parcel are located. In fact, RRF did receive a map with Parcel on it, but only after we specifically requested this information from the BLM – it was not readily provided to the public as part of its information on the lease sale. The BLM and the Department of the Interior must comply with President Barack Obama's Executive Order, issues on January 21, 2009 calling for more transparency in government actions by providing TIMELY, LEGIBLE, and EASILY READ maps <u>on the day the sale is announced</u> and make that information easily accessible to the public. The public should not have to chase the information down one-by-one from the agency.

The BLM's practice of announcing sales and then not providing maps, with parcel numbers and other appropriate identifying information (roads, counties, landmarks) make it extremely difficult for the public to offer meaningful public comment and analysis. 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 and complete lease sale maps are "practical" need to be included as well. These maps are required to not only show lease Parcel to be sold, but also their relation to *existing Parcel*. In

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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 or up for lease.

3. Lack of Cumulative Impacts Analysis
Rivers, lakes and terrestrial habitat throughout Utah, including those in the watersheds in Grand and San Juan County where the protested Parcel 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, authorizes.

4. Inconsistency with the Resource Management Plans
There's 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 Parcel 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 Parcel as provided by applicable Resource Management Plans (RMPs) issued by the agency. The Moab Resource Management Plan, issued in October, is inadequate in its failure to consider information provided by the National Park Service and others on air quality impacts to Class 1 Airsheds; inadequate in consultation with Native American Tribes on historical and cultural sites; inadequate in public participation; inadequate in disclosure of cumulative of impacts; and inadequate in analysis of impacts from development on lands adjacent to Parcel designated with NSO stipulations. This fact is borne out by the Secretary of Interior's recent decision to pull back 77 Parcel from the December 2008 lease sale due to inadequate analysis in the subject RMPs.

The failure of BLM to prepare an adequate RMP illustrates that rather than federal laws, the industry largely drives the leasing program in Utah in which 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 since for 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 Parcel 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 .

The BLM announces the Parcel that will be available at its next quarterly auction, and the companies will place their bids accordingly, paying anywhere from the federal minimum of $2

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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, even in the event the BLM provides NSO stipulation, in relation to the lease Parcel, these are frequently waived in the Lease Stipulations, if, for example, " there are no active lek site(s) in the leasehold and it is determined the site(s) have been completely abandoned or destroyed or occur outside current defined area, as determined by the BLM." http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands_and_minerals/oil_and_gas/march_2009.Par.31175.File.dat/Stips,%20Notices%20and%20T&E.pdf. These waivers occur without any additional analysis in the RMP or as otherwise required by NEPA.

D. No Surface Occupancy Stipulations Does Not Include Environmental Analysis of Impacts of Drilling Infrastructure and Roads on Adjacent Lands

The BLM has indicated in the Moab DNA for the March 2009 lease sale that a number of the Parcel include No Surface Occupancy (NSO) stipulations, which therefore provides sufficient protections of the resources of concern (e.g., air, noise, wildlife habitat, water quality, etc). However, the RMP and the DNA fail to provide an analysis of the impacts that would occur to lands adjacent to these Parcel, in terms of surface disturbance with the placement of drilling structures, employee facilities, access via roads by heavy truck traffic, fugitive dust, runoff and sedimentation, and impacts to recreational trails.

1. NSOs Not Protective. Past challenges by the oil and gas industry in court to occupancy restrictions on leased Parcel have established in case law that the BLM cannot impose a "no surface occupancy" condition on a lease if it leaves the leaseholder with no practical means of exploring the lease for gas and oil and developing a production platform for any resource discovered. If the leaseholder can locate a drilling and production platform outside the leased "no surface occupancy" parcel, then the "no surface occupancy" stipulation can be enforced. If the leaseholder determines that, in their opinion, it is not feasible for them to explore and produce from a leased "no surface occupancy" parcel, they can first demand that the BLM remove or modify the stipulation to allow them their legal right of access to their lease. If the BLM does not modify the occupancy stipulation, the leaseholder can go to court, and in the past leaseholders have obtained court orders voiding the no surface occupancy stipulation when the leaseholder convinced the court there was no other way for them to exercise their property right to explore the lease for oil and gas. The oil and gas lease, which the oil company purchases, is a paid-for property right in the eyes of the courts. Stipulations limiting that right of occupancy for exploration to certain seasons in order to protect wildlife reproduction, or to certain parts of the leased lands to avoid visual impacts on a National Park unit nearby, are enforceable because the leaseholder's property right can still be reasonably exercised.

2. VRM Objectives Beyond the Parcel

A further reason to consider deferment concerns the agency's responsibility to

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meet and maintain VRM objectives outside the Parcel along the access rights of way. If the BLM cannot meet the visual objectives established in the RMP along the route accessing the leased Parcel, then those routes would be violating the visual objectives set forth in the RMP.

F. 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 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). The Parcel that are included in this lease sale include the following Threatened, Endangered and Sensitive Species: Greater Sage grouse, Gunnison Sage Grouse, Southwestern willow flycatcher, Western yellow billed cuckoo, White-tailed prairie dog, Gunnison prairie dog, and raptors, including Burrowing owl, Bald eagle and Golden eagle.

Even though the Department of Interior currently refuses to recognize 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 blew off; and (3) improper political meddling by Julie MacDonald.

As a result, due to the presence of sage grouse on several of the Parcel 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.

Finally, while the Lease sale stipulations provide that for the purpose of protecting occupied lek sites within Greater sage-grouse habitat, if such leks are discovered within sage grouse habitat, no surface disturbing activities will be allowed within 0.5 miles of a lek, this protection is diluted by the BLM's conclusion that "an exception may be granted by the Field Manager if the operator submits a plan which demonstrates that impacts from the proposed action can be adequately mitigated." UTSO-S-66. In addition, the "Field Manager may modify the boundaries of the stipulation area if (1) portions of the area do not include lek sites, or (2) the lek site(s) have been

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completely abandoned or destroyed, or (3) occupied lek site(s) occur outside the current defined area; as determined by the BLM." *Id*.

These conditions make the protection standards of the stipulations entirely unenforceable by deferring the final decision making authority, as to whether the above modification standards exist, to agency representatives. Finally, combined with the modification discretion of the BLM, the protection standards are rendered entirely meaningless by the fact that a "waiver may be granted if there are no active lek site(s) in the leasehold and it is determined the site(s) have been completely abandoned or destroyed or occur outside current defined area, as determined by the BLM." *Id*. The BLM even delegates discretion to the operator to decide when sage grouse leks may or may not be protected by stating that oil and gas leasing will be managed as open subject to major constraints (NSO) within ½ mile of greater sage-grouse leks. [unless the Field Manager grants an exception] if the operator submits a plan that demonstrates that impacts from the proposed action can be adequately mitigated. *Id*.

G. Violations of the Clean Water Act

In addition, the BLM is subject to the requirements of the Clean Water Act (CWA) 33 U.S.C. §§ 1271?1387. The primary cause of water quality degradation on public lands, including those within the planning area, is pollution from nonpoint sources. The evidence linking road building and maintenance to water quality problems is overwhelming and conclusive.

Section 303 of the CWA requires states to develop water quality standards, which specify the appropriate uses of water bodies and set standards to protect those uses and to place those waters not meeting water quality standards on the 303(d) list. 33 U.S.C. § 1313(d)(1)(A)?(B). States must then calculate total maximum daily loads (TMDLs) for those waters not meeting water quality standards. Id. § 1313(d)(1)(C); 40 C.F.R. § 130.7.

Road building and maintenance of existing roads adjacent to water quality limited streams may violate the CWA's requirement that federal agencies must adhere to state water quality standards to the same extent as nongovernmental entities. 33 U.S.C. § 1323(a) (referring to federal agencies "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants").

The requirements of Section 313 are mandatory in nature. The BLM must actually satisfy water quality standards and must actually insure that it does not engage in any activity (including issuance of federal permits) that may result in runoff of pollutants into streams that are currently experiencing impacts to water quality.

The BLM has failed to adopt a water protection plan to protect water quality as required by the Clean Water Act. The most effective method to accomplish this would be to incorporate a watershed protection plan to maintain and protect the City's/County's water supply and waterworks from injury and water supply from pollution or from activities that may create a hazard to health or water quality or a danger of pollution to the water supply of the City/County. The plan should restrict any activity, or requiring changes in the way the activity or use is performed, within a watershed which creates a

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substantial risk of pollution or injury to the City's/County's water supply or waterworks and/or the lands from under, or across or through which the water flows or is gathered.

H. Violations of NEPA and the Utah Water Code

Issuance of the lease Parcel fails to recognize that Utah and areas from the Southwest to Southern California are experiencing a drought that shows no sign of ending and which scientists see as a permanent condition due to rising temperatures and dwindling snowpack that comes with climate change. In addition, a 2007 U.S. Geological Survey report found that, by 2050, rising temperatures in the Southwest could rival those of the nation's fabled droughts, including the Dust Bowl of the 1930s. Hotter weather is expected to reduce Colorado River runoff by at least 30 percent during the 21st century.

If the USGS is correct, and if this century's trend persists, average annual flow in the Colorado could fall to 8.2 million acre-feet per year which will negatively impact more than 30 million people and 3.5 million acres of farmland in seven states, 34 tribal nations and Mexico including 10 million residents of Utah, New Mexico, Wyoming and Colorado which make up the northern stretch of the Colorado River and whose water rights are junior, to those in Southern California, Nevada and Arizona.

In violation of NEPA and the Utah Water Code, however, neither the RMPs nor the Moab DNA mention, let alone adequately analyze, the impact of the Lease Parcel on diminishing Colorado River flows. Dozens of scientific studies issued since 2004 have documented the Colorado's decline. The river's annual flow has averaged 11.7 million acre-feet this decade, according to federal records. In 2002, the U.S. Bureau of Reclamation measured only 6.2 million acre-feet passing Lee's Ferry below Glen Canyon Dam, the lowest flow of the decade. Even after this year's above-average precipitation, Lake Powell and Lake Mead combined are at 57 percent capacity.

This is regardless of the fact that experts conclude that the oil and gas development process uses "a huge amount of water." In fact, each fracturing uses between 1.5 and 6 million gallons of fresh water. According to Halliburton at the Petroleum Technology Transfer Council, each well is fracked an average of 17 times. Michelle Nijhuis. This means that the fracking process uses, on average, as much water as 1,040 households would use in an entire year. http://drillingsantafe.blogspot.com/2007/08/high-use-of-water-for-fracing.html

The issuance of leases on the proposed Parcel will, therefore, only add to demand for the Colorado's water from municipalities such as Moab, Castle Valley, and La Sals, other industry giants including existing oil drillers, farmers, fishers, ranchers and recreational users, in addition to wildlife and natural systems. In fact, conservative trend analyses by federal scientists predict the population dependent on the Colorado River will reach at least million people during the coming decade.

Neither do the RMPs or the Moab DNA for this sale consider the fact that, currently, California, with the most senior rights and the largest share of the Colorado under the 1922 Colorado River Compact (Compact) is struggling with a statewide water shortage and already uses all of its

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Colorado River allocation. The 1922 Colorado River Compact divided the river during a wet cycle that assumed an average annual flow of 16.5 million acre-feet. The Compact requires that 9 million acre-feet per year pass Lee's Ferry below Glen Canyon Dam every year to serve the Lower Basin states and Mexico, which leaves 7.5 million acre-feet for the Upper Basin.

Sixty years ago, recognizing the danger of promising too much, the states amended Upper Basin allocations: Colorado would get 51.75 percent; Utah, 23 percent; Wyoming, 14 percent; and New Mexico, 11.25 percent. More recently, the Upper Basin states acknowledged the drought and agreed that they will base their percentage allotments on 6 million acre-feet per year rather than the 7.5 million acre-feet assumed in the Colorado Compact.

The significance of the BLM's failure to analyze current and up-coming water shortages is the fact that water managers in Utah and the Upper Basin are working to get all of their water rights in use, even as their cities and counties register some of the highest per-capita consumption in the nation. Utahns on average use 291 gallons of water per person per day, including 255 gallons in Salt Lake County; 350 gallons in Washington County and a bloated 430 gallons in Kane County. These figures are second only to Nevada. Yet, the "Law of the River" under the Compact requires 9 million acre-feet to pass Lee's Ferry on the way to the Lower Basin and Mexico. Under a strict interpretation of the law, the Upper Basin could be left with nothing.

Based on the high demand combined with decreasing flows in the Colorado, the leasing of the Parcel as listed at the start of this protest will contribute to Utah's oncoming water crises unless the BLM and other state and federal agencies develop a plan to deal with the shortage.

In addition, the BLM has failed to acknowledge the fact that the Utah Code Ann. §73-3-8(1) dictates that applications must be rejected if approval would result in the impairment of existing water rights, or interfere with more beneficial uses of water -- such as stockwatering, municipal and agricultural uses, and providing habitat for state-sensitive fish and wildlife species and other fish and wildlife. When combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the leasing of these Parcel will directly and negatively affect agriculture and livestock in central Utah. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts.

Further, the BLM fails to acknowledge that the Utah Code Ann. §73-3-8(1) requires that applications must be rejected if the State Engineer has information or has reason to believe that the appropriation of water will affect public recreation, the natural spring environment, or prove detrimental to the public welfare. The impairment of these River flows in the Green and Colorado Rivers and elsewhere would decrease the value of public recreation in the Southeastern Utah area, by limiting the sources and/or amounts of water flow for recreational users. In addition, these natural flows are critical to the continued existence of native fish and wildlife in this area.

In addition, there is a high probability that water appropriated for use in development of these leases will become polluted by exploration and drilling for oil and/or gas, will likely contaminate ground water resources in the area, and will present a clear threat to public health and welfare in

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the immediate area. Neither the RMP nor the Moab DNA provides information regarding the impacts of leasing these Parcel on the welfare of the community and its environment.

This lack of analysis also omits the fact that once water used in the development of the proposed leases is used in the fracking and other development processing, it will be permanently contaminated and may not be used for any other beneficial use in the future. Based on the fact, therefore, that the oil and gas process will consume the entirety of the water diverted, the leases would impact water rights held by the senior and other water right holders. Any proposed use of water that has a clear potential to be detrimental to the public welfare as illustrated by the Utah Water Code should not be approved without supporting evidence to the contrary.

In fact, the Utah Constitution provides "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." Article XVII, Section 1. In addition, the BLM has not pointed to any statute or regulation that defines water pumped from the ground in the course of extracting oil and gas as something different than ground water that is required to obtain a water right permit under state law. The source of water is still the ground and the point of diversion is the ground. *See, Northern Plains Resource Council, et al v. State of Montana*, Cause No. CDV-2007-425, p. 6 (December 15, 2008) (defining water pumped out of the ground in connection with coal bed methane gas as "groundwater" requiring a water right appropriation permit).

Further, the Utah Code Ann. § 73-3-8(1)(a)(i) requires sufficient unappropriated water for the proposed appropriation. Water needs in Utah are increasingly clashing with reality. The State has already doled out 180,000 rights to tap rivers and dig wells, but there is not enough water to honor them all. For example, the State Engineer, seeing Wayne County perilously close to the deadline, last year approved a farmer's request for transfer of 50,000 acre-feet per year of Fremont River water to the Green River — one of the largest water-right transfers in recent State history. The farmer now can draw on the Green River — about 60 miles upstream from where the right exists — for Wayne County's Fremont River allocation and may irrigate more than 16,000 acres across three counties.

Moreover, the BLM has failed to acknowledge that Based upon the language of the Utah Water Code (Code), water resources in Utah must be put to optimum beneficial use, not wasted, protected and conserved for public uses and for wildlife and aquatic life, and protected for existing uses and to ensure supplies for domestic, industrial, agricultural and other beneficial uses. The Code, therefore, clearly focuses on the protection and utilization of Utah's water resources for beneficial purposes. This authority mandates that the production, use, or disposal of large quantities of ground water for fracking and other oil and gas development must serve a statutorily defined beneficial use.

Similarly, the Utah Code Ann. § 73-1-1 requires that any "appropriation must be for some useful and beneficial purpose." Moreover, the Utah Code Ann. § 73-1-17 requires that the State Engineer may not certify a water right until, among other things, that the water appropriated has been put to a beneficial use…" This requires the applicant to establish that it "can and will put the conditionally appropriated water to

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beneficial use within a reasonable period of time." *See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 2007).

Further, the appropriator may not merely posses or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. Utah Rev. State § 73-1-4. These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005). In Utah, the restriction on speculation and waste is enforced by a recognition that the approval of an application is "only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. *See Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.*, 839 P.2d 791, 794 (Utah 1992). The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Envtl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.*at 964. *See High Plaints A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

The BLM, additionally, fails to analyze the fact that the fracking and produced water process associated with the leasing of the Parcel in this lease sale will consume massive amounts of water that will largely end up in evaporation pond waste facilities and, therefore, that this use likely constitutes "waste" of water resources. *See, Diamond Cross Properties, LLC, v. State of Montana*, Cause No. DV 05-70, p. 18 (July 14, 2008) (concluding that the quantity of water that is produced in coal bed methane extraction "dwarfs" the amounts of water disposed of as a byproduct of traditional extraction activities).

The Utah Water Code, therefore, mandates legally acceptable methods for managing the use and disposal of water in relation to the lease Parcel including the management of such water recognized beneficial use. Based on the fact that the Utah Water ResourcesDivision exercises regulatory authority over the production, use or disposal of water used in the fracking or produced water process, the BLM may only issue the Lease Parcel in compliance with the Code and other relevant state and federal statutes that require management of such water for beneficial purposes and proper analysis of environmental impacts. The fact that the Code is the current statutory scheme in Utah for appropriation of ground water for beneficial uses and, as in this case, provides criteria to be considered when senior water users may be adversely impacted by a proposed water appropriation. In addition, federal statutes such as NEPA require the BLM to analyze the environmental impact of the use of water resources. Moreover, the significant State interest in the management of enormous quantities of the State's surface and ground water is advanced by appropriate state agency review.

There is little question that the Utah legislature, through oil and gas legislation sought to facilitate the use of water in the oil and gas development process. However, the Utah constitution and relevant statutes require management of surface and ground water for beneficial purposes.

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Such development of example must recognize the undeniable value of water consumed in by the issuance of the leases and make accommodations for management of such water in beneficial ways. Use and disposal of water used to develop the Parcel in a manner without any recognized benefit form the water, therefore, will not pass legal muster. The water resulting from the oil and gas development processes represent value to the people, industry and wildlife in Utah. The production and management of each must be balanced against each other so that Utah benefits to the greatest extent possible from both vital resources.

This crisis could express itself in the form of court decision that severely limit the use of water needed by senior water right holders, municipalities, recreationists and others. A federal judge, for example, has ordered California water managers to leave 30 percent more water in the Sacramento-San Joaquin Delta in Northern California to stave off fish kills and keep the massive estuary healthy. More for the environment means less for Los Angeles.

Neither the RMP nor the Moab DNA address the impact of leasing the noted Parcel on potential tribal water claims on the availability of water for the lease Parcel in relation to other demands on Utah's water supply. The Utah Division of Water Resources, for example, reports that the state is currently using about 1 million acre-feet of its yearly 1.4 million acre-foot allotment from the Colorado and, a yet to be signed, tribal water settlement with the Navajo Nation would take up about 186,000 acre-feet.

Further, new agricultural uses, mostly dedicated to controlling the salinity of the water that flows back to the Colorado, would take 35,000 acre-feet. Municipal and industrial uses along the river corridor would account for 5,000 acre-feet, and the proposed LakePowell Pipeline would need 100,000 acre-feet, leaving about 74,000 acre-feet unused, theoretically.

Finally, the impairment of River flows in the Green River and elsewhere by Leases would decrease the value of public recreation in the Southeastern Utah area, by limiting the sources and/or amounts of water flow for recreational users. The impairment of these natural stream environments, therefore, must not be allowed. In addition, these natural flows are critical to the continued existence of native fish and wildlife in this area. Part of the reason the proposed use will prove detrimental to the public welfare is because "four endangered species including the humpback chub…, bonytail…, Colorado pikeminnow…, and razorback sucker" depend on the Colorado River for critical habitat. U.S. Fish and Wildlife Service, OPERATION OF FLAMING GORGE DAM, FINAL ENVIRONMENTAL IMPACTS STATEMENT, FINAL BIOLOGICAL OPINION, pp. 18-56, (SEPTEMBER 2005) and FINAL PROGRAMMATIC BIOLOGICAL OPINION FOR BUREAU OF RECLAMATION'S OPERATIONS AND DEPLETIONS, OTHER DEPLEATIONS, AND FUNDING AND IMPLEMENTATION OF RECOVERYV PROGRAM ACTIONS IN THE UPPER COLORADOD RIVER ABOVE THE CONFLUENCE WITH THE GUNNISON RIVER, pp. 19-35, (DECEMBER 1999). In fact, the U.S. Fish and Wildlife Service states that water diversions, such as the one proposed by the Applicant, are detrimental to these species. U.S. Fish and Wildlife Service, Power-Point Presentation-Upper Colorado Endangered Fish Recovery Program, p. 2 2009. (http://www.waterrights.utah.gov/meetinfo/m20090930/jana1.ppt).

REQUEST FOR RELIEF

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RRF requests the following appropriate relief: (1) the withdrawal of all of the protested Parcel from the March 2009 Competitive Oil and Gas Lease Sale until such time as BLM complies with federal law as listed in this protest because as proposed their sale and subsequent potential development will cause irreparable harm to the ecology, instream flows and economy of Grand and San Juan counties; (2) BLM establish a Southeast Utah Working Group to be chartered under the Federal Advisory Committee Act (FACA) for the purpose of providing the BLM with citizen participation in determination of appropriate future lease sales.

This protest is brought by Red Rock Forests and members and staff of RRF.

Thank you for your consideration of our concerns.

Sincerely,

s/*Harold Shepherd*
Harold Shepherd, Executive Director, Red Rock Forests

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