

2013 SEP 16 PM 4:30



southern  
utah  
wilderness  
alliance

**HAND DELIVERED (Attachments Provided on Accompanying CD)**

September 16, 2013

Juan Palma  
Utah State Director  
Bureau of Land Management  
440 West 200 South, 5<sup>th</sup> 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 to Be Held on November 19, 2013*

Greetings,

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, the Southern Utah Wilderness Alliance, Sierra Club, Grand Canyon Trust, Rocky Mountain Wild, Utah Rivers Council, Natural Resources Defense Council, Wilderness Society, and Great Old Broads (collectively "SUWA") hereby timely protest the November 19, 2013, offering, in Salt Lake City, Utah, of the following fifty-five parcels in the Vernal and Price field offices:

UTU89901, UTU89903, UTU89904, UTU89905, UTU89906,  
UTU89907, UTU89908, UTU89909, UTU89910, UTU89911,  
UTU89912, UTU89922, UTU89923, UTU89925, UTU89926,  
UTU89927, UTU89928, UTU89929, UTU89930, UTU89931,  
UTU89932, UTU89933, UTU89934, UTU89935, UTU89936,  
UTU89937, UTU89946, UTU89947, UTU89948, UTU89949,  
UTU89950, UTU89951, UTU89952, UTU89953, UTU89954,  
UTU89955, UTU89960, UTU89961, UTU89962, UTU89963,  
UTU89964, UTU89965, UTU89966, UTU89967, UTU89968,  
UTU89969, UTU89970, UTU89971, UTU89972, UTU89973,  
UTU89974, UTU89975, UTU89978, UTU89979, UTU89980  
(55 parcels)

As explained below, the Bureau of Land Management's (BLM's) decision to sell these fifty-five parcels at issue in this protest violates, among other federal laws and regulations, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA); the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (FLPMA); the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f); and the regulations and policies that implement these laws.

SUWA requests that BLM withdraw these fifty-five lease parcels from sale until the agency has fully complied with all the federal laws, regulations, and executive orders discussed herein. Alternatively, the agency could attach unconditional no surface occupancy (NSO) stipulations to each parcel and proceed with the sale of these parcels.

**I. BLM Must Undertake Satisfactory Analysis Now Because Leasing Is a Point of Irreversible Commitment**

It is critical that BLM undertake satisfactory NEPA analysis before issuing these leases as subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. The sale of leases without no surface occupancy (NSO) stipulations represents a full and irretrievable commitment of resources. It cannot make such a commitment without adequate analysis. "BLM regulations, the courts and [Interior Board of Land Appeals (IBLA)] precedent proceed under the notion that the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease." *Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-43 (2003) (citing *Friends of the Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9<sup>th</sup> Cir. 1998) (additional citations omitted); see *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1159-61 (10<sup>th</sup> Cir. 2004); *Union Oil Co.*, 102 IBLA 187, 189 (1988) (citing *Sierra Club v.*

*Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983)); *Conner v. Burford*, 848 F.2d 1441, 1448-51 (9<sup>th</sup> Cir. 1988) (holding that the selling of leases containing “no surface occupancy” stipulations did not require preparation of an environmental impact statement, but that an environmental impact statement was required before the selling of leases without “no surface occupancy” stipulations); *Peterson*, 717 F.2d at 1414 (same).

Thus, in *Southern Utah Wilderness Alliance*, the IBLA explained that

[t]he courts have held that the Department must prepare an EIS before it may decide to issue such “non-NSO” oil and gas leases. The reason, according to the Ninth Circuit, is that a “non-NSO” lease “does not reserve to the government the absolute right to prevent all surface disturbing activities” and thus its issuance constitutes “an irreversible commitment of resources” under Section 102 of NEPA.

159 IBLA at 241-43 (citing *Conner*, 848 F.2d at 1448-51); *Union Oil*, 102 IBLA at 192-93 (same).

As the IBLA recognized in *Union Oil*, “[i]f BLM has not retained the authority to preclude *all* surface disturbance activity, then the decision to lease is itself the point of ‘irreversible, irretrievable commitment of resources’ mandating the preparation of an [environmental impact statement (EIS)].” (Emphasis added). *Union Oil*, 102 IBLA at 189 (quoting *Peterson*, 717 F.2d at 1412); *see also Southern Utah Wilderness Alliance*, 159 IBLA at 241-43 (same); *Sierra Club, Oregon Chapter*, 87 IBLA 1, 5 (1985) (because issuance of non-NSO oil and gas leases constitutes an irreversible commitment of resources, BLM cannot defer preparation of an EIS unless it either retains authority to preclude development or issues the leases as NSO). BLM itself identifies lease issuance as the point of irretrievable commitment:

[t]he BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized

*fluid minerals activities. By law, these impacts must be analyzed before the agency makes an irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance.*

BLM Handbook on Planning for Fluid Minerals Resources, Chapter (H-1624-1), at I.B.2 (1988) (emphasis added);<sup>1</sup> *see S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006).

Therefore, it is critical that BLM analyze all potential impacts of oil and gas development on these leases now rather than wait until a later date. As explained below, such delay could have irreversible negative impacts on air quality and cultural resources, among other things.

## **II. BLM's Air Quality Analysis Is Inadequate**

### **a. BLM Did Not Take a Hard Look at Potential Impacts to Air Quality and Climate Change**

#### **i. Air Pollution**

The BLM failed to take a hard look at the potential impacts to air quality—including direct, indirect, and cumulative impacts—from this proposed lease sale and the likely development that will accompany this leasing. Megan Williams, an air quality expert, detailed a lengthy and substantial list of issues that the Price and Vernal EAs failed to consider. *See generally* Letter from Megan Williams to Steve Bloch and David Garbett (July 12, 2013) (Williams Comments) (attached). Her comments and suggestions were largely ignored as the Price and Vernal EAs took a position that leasing will not

---

<sup>1</sup> A lessee is granted the “exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas [in the lease parcel] together with the right to build and maintain necessary improvements thereupon for the term indicated below, subject to renewal or extension in accordance with the appropriate leasing authority.” BLM Form 3100; *see also* 43 C.F.R. § 3110.1-2 (surface use rights) (BLM may only require mitigation to the extent it does not require relocation of proposed operations by greater than 200 meters or prohibit new surface disturbance for longer than 60 days in any given lease year).

result in any direct air emissions. *See, e.g.*, Price EA at 214-15. However, this suggestion ignored BLM's obligation to evaluate impacts before it makes an irreversible and irretrievable commitment of resources.

Ms. Williams's comments are reincorporated here. Briefly, however, Ms. Williams flagged the following concerns, which the Vernal and Price EAs failed to consider or fully analyze: the BLM did not prepare dispersion modeling;<sup>2</sup> it did not

---

<sup>2</sup> Ms. Williams requested that the BLM make use of dispersion modeling for determining whether or not its actions in leasing these parcels would comply with federal air quality standards. *See, e.g.*, Williams Comments at 2. "[D]ispersion models ... are mathematical approximations of the behavior of the atmosphere" and their results are "estimates of possible future concentrations and not exact predictions in time and space." Vernal RMP at 4-13. As BLM explained in its development of the Vernal RMP, which includes some dispersion modeling (though, not for ozone), those models "are the generally accepted methods available to predict potential air quality impacts for a NEPA-related analysis." Vernal RMP, Comments on the Draft RMP/EIS by Resource at 69.

Dispersion modeling is a preferred method for analyzing air quality impacts because it allows for quantification as well as the expression of data in the same format as the air quality standards. "Air quality in a given location is defined by pollution concentrations in the atmosphere and is generally expressed in units of parts per million (ppm) or micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ )." Vernal RMP at 3-4; *see also* 40 C.F.R. §§ 40 C.F.R. 50.4 – 50.17 (containing NAAQS, which are expressed in ambient concentrations). Dispersion modeling is a mathematical approximation of the atmosphere, allowing the BLM to estimate how certain pollutants will concentrate or disperse once emitted. *See id.* at 4-13. Thus, modeling allows for descriptions of pollution concentrations that are similar to federal air quality standards, the benchmark that BLM should use to evaluate air quality impacts. *See* 43 U.S.C. § 1712(c)(8); 40 C.F.R. § 1502.2(d); 43 C.F.R. § 2920.7(b)(3).

The Vernal and Price EAs claim that modeling is not a practical, effective way to identify possible impacts and that such impacts could not be quantified by modeling. *See, e.g.*, Vernal EA at 21. This explanation, however, conflicts with prior declarations by the BLM, with BLM's practice, and with guidance from the EPA.

In the Vernal RMP the BLM explained that dispersion modeling allowed the agency to estimate "possible future concentrations" and that modeling is a "method[] available to predict potential air quality impacts." Vernal RMP at 4-13, Comments on the Draft RMP/EIS by Resource at 69. In the resource management planning process for a neighboring field office, BLM recognized that modeling was required to assess ozone pollution from oil and gas development. BLM, Response to Public Comments, Comments on the [Moab] Draft EIS by Resource Type at 70 ("Predicting ozone associated with oil and gas development requires air dispersion modeling, which was not used in [the Moab RMP]."). The BLM's repeated use of dispersion modeling on various projects demonstrates that the agency does find it useful for estimating impacts and quantifying them. The Vernal RMP made use of modeling for most pollutants, with the exception of ozone, and quantifies pollution levels. *See* Vernal RMP at 4-13 to -14. A recent nine-well project made use of modeling, with the exception of ozone, and it

determine whether state and federal air quality standards would be met; it did not consider the implications of high background pollution levels; it ignored the potential for the National Ambient Air Quality Standard for ozone to be lowered in the coming years; the Price and Vernal EAs do not consider nitrogen dioxide pollution nor do they adequately analyze fine particulate matter pollution; the BLM did not fully consider visibility impacts; the agency's assumptions and information used for emissions inventories was flawed; the Price EA does not have sufficient analysis for potential

---

quantified impacts to pollution levels. *See* Tumbleweed II Exploratory Natural Gas Drilling Project, Final Environmental Assessment and Biological Assessment 73-74 (June 2010) (excerpts attached). Recently, the BLM has released to the public the Greater Natural Buttes Draft Environmental Impact Statement and the Gasco Energy Inc. Uinta Basin Natural Gas Development Project, Draft Environmental Impact Statement, both of which included dispersion modeling for ozone and PM<sub>2.5</sub>. In addition, the EPA, the agency charged with protecting the nation's air quality and the technical expert in this realm, has continually indicated to BLM that modeling is useful and worthwhile. *See* 42 U.S.C. §§ 7403, 7408 (tasking the EPA with providing technical guidance for pollution control as well as with establishing national ambient air quality standards). For the Vernal RMP, EPA explained that without modeling, "it is difficult to determine accurately potential impacts from future development." Letter from Larry Svoboda, EPA, to Selma Sierra, BLM Vernal Field Office 2 (Sept. 23, 2008) (attached). In response to a resource management plan in the adjacent field office, the EPA stated, "the absence of detailed dispersion modeling does not provide for confidence that [NAAQS will be met] . . . . Ozone is of particular concern." Letter from Larry Svoboda, EPA, to Brent Northrup, BLM 1-2 (Sept. 12, 2008) (attached). The National Park Service has also confirmed, without conducting ozone modeling, BLM does not have the "information necessary to determine whether air quality standards could be violated." National Park Service Memorandum: Notice of December 19, 2008 Competitive Oil & Gas Lease Sale of Lands Proximal to Arches National Park, Canyonlands Park and Dinosaur National Monument 2 (Nov. 24, 2008) (attached). These statements by BLM, EPA, the National Park Service, as well as the BLM's own actions indicate that modeling is a useful and valuable tool, effective and predicting potential impacts.

Ms. Williams does not assert that modeling is without flaws. It is a means to estimate possibilities, not an "exact prediction[]." Vernal RMP at 4-13. It is a planning tool. "Dispersion modeling is generally conducted in a somewhat conservative manner, attempting to ensure that the final results do not underestimate the actual or future impacts, so that appropriate planning decisions can be made." Vernal RMP at 4-13. Without it, as the EPA explains, the BLM cannot assure the public that development will comply with air quality standards. *See supra*.

Even for wintertime ozone analysis modeling can be helpful, since current techniques generally cannot fully predict this phenomenon. *See* Letter from James B. Martin, EPA, to Juan Palma, BLM 3 (Jan. 7, 2011) (attached). As the EPA explained to BLM, "wintertime ozone issues should be addressed qualitatively in light of the significant predicted project impacts with the knowledge gained from the modeling, monitoring and potential mitigation scenarios." *Id.*

development outside of the West Tavaputs Plateau project area; BLM ignored mobile-source emissions emitted during oil and gas construction and operations activities; the Price and Vernal EAs overlook the fact that emission controls are not likely to be 100 percent effective; the BLM did not consider the cumulative impacts to public health from the emission of hazardous air pollutants; the EAs both fail to consider how the development activities that could result from these leases will effect prevention of significant deterioration increment levels; and the BLM did not fully analyze mitigation measures proposed by Ms. Williams. *See generally* Williams Comments.

BLM must conduct full analysis of air quality impacts before offering or issuing these fifty-five leases. All of the analysis described by Ms. Williams could be conducted now.

The U.S. Environmental Protection Agency (EPA) has already asked the BLM to perform this sort of analysis in the Price Field Office. *See* Letter from Larry Svoboda, EPA, to Selma Sierra, Re: Final Resource Management Plan and Environmental Impact Statement for the Price Planning Area (Oct. 2, 2008) (EPA Price Letter) (attached). Specifically, the EPA asked the BLM to undertake a full analysis of air quality impacts—to prepare a quantitative air quality analysis—at the RMP stage. *Id.* at 2. The EPA emphasized the importance of such quantitative modeling because without it BLM could not know if activities envisioned in the future would maintain air quality within the limits established by federal and state air quality standards. *Id.* EPA particularly warned that BLM was underestimating the likelihood of exceedances of the federal ozone standard in the Price Field Office. *See id.*

EPA's comments, offered at the planning stage and well before the actual leasing stage, demonstrate that quantitative air quality analysis can take place now. As the BLM retains full discretion whether or not to lease parcels at this point it can easily modify its lease sale. Based on the results of quantitative modeling it can then ensure that its activities do not push air standards above federal air quality standards. The Price and Vernal EAs discuss possible mitigation that may be implemented after these leases are issued to address air quality concerns. *See, e.g.*, Price EA at 34-35. However, these measures are not mandatory and will not, therefore, ensure that air quality levels meet state and federal air quality standards. *See, e.g., id.* Based on BLM's modeling, it could then impose mandatory restrictions prior to leasing, if necessary, to ensure that air quality was not compromised and that its modeling estimates and assumptions would hold true during development. *See, e.g., id.* at 32 (refusing to engage in quantitative modeling because of the possibility that development technology and emission controls may vary).

The fact that the BLM prepared quantitative modeling at the planning stage—and therefore, a pre-leasing stage—for the Vernal RMP undercuts its argument in the Price EA that it cannot prepare such modeling now. *See, e.g.*, Vernal RMP 4-20 to -21 (discussing quantitative modeling prepared for the Vernal RMP). BLM has also prepared quantitative modeling for the Farmington, New Mexico RMP and the Roan Plateau, Colorado RMP. Therefore, BLM cannot reasonably claim that air quantitative modeling is impossible at the leasing stage because it has prepared such modeling at the planning stage.

BLM must undertake a thorough analysis now, including dispersion modeling, before it reaches a point of irreversible and irretrievable commitment. The present matter

is directly on point with a prior BLM leasing decision that was called into question by a federal district court. In January 2009, a federal district court issued a temporary restraining order against the issuance of certain oil and gas leases from a December 2008 oil and gas lease sale because, in part, the court found it likely that the Vernal and Price RMPs were flawed because they lacked ozone dispersion modeling. *See* Memo. Order, *S. Utah Wilderness Alliance v. Allred*, 1:08-cv-02187-RMU, at 3 (D.D.C. Jan. 17, 2009) (attached). The latter case is directly on all fours with the present matter. There, as here, BLM attempted to offer oil and gas leases in the Price and Vernal field offices while relying on the Price and Vernal RMPs. The federal district court indicated that this action was likely a violation of BLM's obligations. *See* Memo. Order, *S. Utah Wilderness Alliance* at 3. This decision reiterates that the Price and Vernal RMPs have no sufficient ozone analysis upon which it can rely for leasing. Considering the fact that the Uinta Basin has some of the worst ozone pollution in the nation, it is even more important now that the BLM address this issue.

Once these leases are issued, any level of development, even minor, may result in serious health ramifications as air quality levels for certain pollutants in this region are already problematic. The BLM cannot defer this analysis until a later date. Since it has not done so here these fifty-five leases should be withdrawn.

## **ii. Climate Change**

Ms. Williams provided extensive comments indicating that the BLM had not taken a hard look at the potential impacts on global climate change from this proposed lease sale. *See* Williams Comments at 23-28. Rather than address these comments, the BLM has pushed its analysis off to some future date. *See, e.g.,* Price EA at 132-33; Vernal EA at 23. Principally, the Vernal and Price EAs argue that the scientific models

for establishing the precise contribution of oil and gas development, for example, to increased global temperatures are in their infancy. *See, e.g.*, Price EA at 132-33; Vernal EA at 23. However, this does not excuse the BLM from attempting some level of analysis, such as describing the problem of climate change, describing how greenhouse gas emissions can contribute to that problem, describing the potential contributions from oil and gas development likely to result from these leases to that problem (at least in terms of greenhouse gas emissions inventory), and developing alternatives and mitigation to reduce those emissions. *See* Williams Comments at 23-28. Unfortunately, the BLM did none of that here and its decision should be set aside.

The best scientific evidence available shows that climate change is a real and compelling threat to public lands. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 (2007). In Secretarial Order 3289, Secretary Salazar stated that BLM “must consider and analyze potential climate change impacts when undertaking long-range planning exercises” and also made clear that the requirements in Secretarial Order No. 3226 remain in effect. Order 3226 requires BLM to “consider and analyze potential climate change impacts” when undertaking long-range planning exercises, including specifically “management plans and activities developed for public lands.” These Orders are enforceable and demand BLM’s compliance.

Under NEPA, BLM must adequately and accurately describe the environment that will be affected by the proposed action—the “affected environment.” 40 C.F.R. § 1502.15. This includes the affected environment as modified by climate change. BLM must also consider a “no action” alternative, which describes the environmental baseline, and compare all alternatives to this baseline. 40 C.F.R. § 1502.14(d). Climate change is

both part of the baseline as well as a reasonably foreseeable impact under each alternative.

BLM failed to take a hard look at the potential impacts to climate change from greenhouse gas emissions for all of the reasons described by Ms. Williams. *See* Williams Comments at 23-28. The BLM has conducted the sort of analysis Ms. Williams describes in the past elsewhere. *See generally* BLM, Climate Change Supplementary Information Report, Montana, North Dakota and South Dakota (Oct. 2010) (attached as Ex. 37 to Williams Comments).<sup>3</sup> It should have conducted this same analysis here. This prior analysis refutes all of the excuses that the BLM has offered in the Price and Vernal EAs for not preparing such analysis here. In the Price and Vernal EAs the BLM asserts that it cannot quantify the BLM's contributions in terms of greenhouse gasses from a potential leasing decision. *See, e.g.*, Price EA at 132-33; Vernal EA at 23. However, the BLM did just that in its prior report, where it estimated likely oil and gas greenhouse gas emissions in a planning-level document. *See* Climate Change Supplementary Information Report, Montana, North Dakota and South Dakota at 1-1, 5-5. Thus, BLM could have, and should have, prepared similar analysis here. Its failure to do so here violates NEPA.

**b. BLM Has Failed to Show Compliance with Federal Air Quality Standards**

FLPMA requires BLM to ensure that its land use plans “provide for compliance with applicable pollution control laws, including State and Federal air . . . pollution standards or implementation plans.” 43 U.S.C. § 1712(c)(8). This is a requirement for both the Price and Vernal RMPs. Moreover, once a land use plan is in place, BLM must

---

<sup>3</sup> Available at [http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm\\_programs/energy/oil\\_and\\_gas/leasing/eas.Par.26526.File.dat/SIRupdate.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm_programs/energy/oil_and_gas/leasing/eas.Par.26526.File.dat/SIRupdate.pdf) (last visited on Sept. 12, 2013).

conform all site-specific authorizations, including those affecting air quality, with its land use plan. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004). BLM acknowledged these legal obligations in the Price RMP, stating that it would “manage all BLM and BLM-authorized activities to maintain air quality within the thresholds established by the [National Ambient Air Quality Standards].” Price ROD at 64. However, the BLM has failed to comply with this legal obligation for the proposed lease sale.

The BLM acknowledges that the oil and gas development activities that could result from the leasing of these parcels will contribute emissions of various pollutants. Some of these pollutants are at levels close to exceeding, or are presently exceeding, federal and state air quality standards. Because of this the BLM cannot assure the public that federal and state air quality standards will be met, as it is required to do by FLPMA. Ms. Williams detailed the various pollutants of concern in the region and the contributions of oil and gas development to their levels. *See generally Williams Comments.*

Under the Clean Air Act, the EPA establishes National Ambient Air Quality Standards (NAAQS) for certain pollutants that are designed to protect the public health and welfare. *See* 42 U.S.C. §§ 7408, 7409. Utah has incorporated the NAAQS into state law and implements the standards within the state, including the Price and Vernal planning areas. *See, e.g., Utah Admin. Code R307-101-1.*

EPA has established NAAQS for two pollutants that are relevant here: fine particulate matter, referred to as “PM<sub>2.5</sub>”<sup>4</sup> and ground-level ozone. *See, e.g., 40 C.F.R. §*

---

<sup>4</sup> This number refers to particles 2.5 microns in diameter or smaller.

50.13 (PM<sub>2.5</sub>); *id.* § 50.15 (ozone). These pollutants both lead to serious health impacts. Both short-term and long-term exposure to PM<sub>2.5</sub> can lead to premature mortality, increased hospital admissions, and chronic respiratory disease; these particles also create regional haze, thereby impairing visibility. *See* 71 Fed. Reg. 2620, 2627-28, 2675-78 (Jan. 17, 2006). Ozone pollution is not emitted directly, but is formed from the combination of precursor emissions—principally volatile organic compounds and nitrogen oxides—and its concentrations are affected by temperature, sunlight, wind, and other weather factors. *See* 73 Fed. Reg. 16,436, 16,437 (Mar. 27, 2008). Ozone exposure can lead to adverse health effects ranging from decreased lung function to possible cardiovascular-related mortality and respiratory morbidity. *Id.* at 16,436. Ozone pollution also contributes to plant and ecosystem damage. *See, e.g.*, 72 Fed. Reg. 37,818, 37,883-95 (July 11, 2007).

NAAQS limits ozone concentrations to 0.075 parts per million (ppm) during any daily eight-hour averaging period. 40 C.F.R. § 50.15.<sup>5</sup> As the Price and Vernal EAs both acknowledge, ozone levels in the Uinta Basin are well above the current federal standards. The values recorded during the winter of 2013 demonstrated that this is an ongoing problem. *See, e.g.*, EPA, AirData, Monitor Values Report (Sept. 15, 2013) (showing significant numbers and levels of exceedances). Furthermore, there is a possibility that during the ten-year life of any lease that might be offered in the lease sale, the EPA will lower the ozone pollution limit further. If this standard were lowered in the future then ensuring compliance with this standard would become even more difficult.

While the BLM has acknowledged the ozone problem in the area, it has done

---

<sup>5</sup> This standard is met when the three-year average of the annual fourth-highest daily maximum eight-hour average is less than or equal to 0.075 ppm. 40 C.F.R. § 50.15.

nothing to ensure its activities will not lead to further exceedances of this problem. The Vernal and Price field offices have essentially taken the approach that although the oil and gas activity that could result from these leases will contribute ozone pollution, in the context of all emission sources in the region it will not be a major contributor. However, even if oil and gas activity from these leases were to only be a small part of the future problem, that does not excuse the BLM from its obligation here. BLM cannot approve activities that will not maintain federal air quality standards. *See supra*. Neither the Price nor Vernal EA suggest that future oil and gas activity from these leases—added to the existing and future background levels of pollution—will actually make air quality better. Hence, given the fact that this area already exceeds ozone pollution limits, the BLM has not met its FLPMA obligation.

Evidence indicates that this area is already exceeding the federal limit for ozone pollution and it may be exceeding the pollution limit on PM<sub>2.5</sub>, as well. *See Williams Comments at 12-14*. NAAQS limit ambient concentrations of PM<sub>2.5</sub> to 35 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) or less during any 24-hour averaging period. 40 C.F.R. § 50.13.<sup>6</sup> The Price and Vernal EAs indicate that this is also a problematic pollutant in this area. *See Vernal EA at 11; Price EA at 10-11*. Thus, it is questionable whether this area is complying with the short-term fine particulate limits imposed by federal and state air quality standards.

Given that these two pollutants are above, or near, the limit imposed by federal and state air quality standards, the Price and Vernal EAs have not demonstrated compliance with federal air quality standards.

---

<sup>6</sup> This 24-hour standard is met when the 98th percentile 24-hour concentration is less than or equal to 35  $\mu\text{g}/\text{m}^3$ . 40 C.F.R. § 50.13.

**c. BLM Improperly Concluded That There Would Be No Significant Impacts**

Since the BLM did not conduct a full and thorough analysis of air quality impacts it could not properly conclude that there would be no significant impacts from its approval of this lease sale. Indeed, the Price RMP acknowledges that it contains only a qualitative air analysis—as do the Vernal and Price EAs here—and as a result “specific impacts ... cannot be determined.” *See* Price RMP at 4-4. The National Park Service pointed out that BLM’s air analysis was deficient in a November 24, 2008 letter, which applies just the same now, and specifically noted that the lack of modeling prevented BLM from adequately assessing impacts to national parks:

The air quality analyses that BLM has performed to date do not provide the information necessary to determine whether air quality standards could be violated, or if visibility and other [air quality related values] could be adversely impacted. We believe a study using appropriate air quality models, and considering all other regional sources, needs to be done prior to lease offerings to determine whether additional safeguards are needed to keep the area as attainment and protect [air quality related values].

NPS, Memorandum to Director, Utah BLM State Office 2 (Nov. 24, 2008) (attached).

Even small-scale development can create a significant impact. The BLM has previously prepared PM<sub>2.5</sub> analyses for oil and gas development in the Vernal Field Office that consistently show measurable, impactful increases in this pollutant. For example, one recent analysis which evaluated the development of only three wells—one being constructed, one being drilled, and one being completed—predicted that these three would increase the 24-hour average maximum PM<sub>2.5</sub> value by 3.6 µg/m<sup>3</sup> in the area of development. Tumbleweed II Exploratory Natural Gas Drilling Project, Final Environmental Assessment and Biological Assessment 73 (June 2010) (excerpts attached). Even if PM<sub>2.5</sub> levels were not already reaching levels well above the NAAQS limit of 35 µg/m<sup>3</sup>, this value would be impactful and meaningful; it alone is ten percent of the federal air quality limit. *See* 40 C.F.R. § 50.13 (establishing limit of 35 µg/m<sup>3</sup>).

Given that PM<sub>2.5</sub> levels in the region are likely near or above the 35 µg/m<sup>3</sup> limit, this increase is quite meaningful as it further exacerbates poor air quality. *See* Williams Comments (discussing elevated PM<sub>2.5</sub> levels in the Uinta Basin). This was for a development of three wells, the impact only increases when considering the potential for development from the fifty-five protested leases here. A project proposed for the Uinta Basin recently predicted that a 100-well-per-year development pace would increase the 24-hour average maximum background values by 8.61 µg/m<sup>3</sup>. Gasco Energy Inc. Uinta Basin Natural Gas Development Project, Draft Environmental Impact Statement 4-8 (October 2010) (excerpts attached). This level is roughly one quarter of the federal limit, a meaningful increase, with or without a background that is currently exceeding, or near exceeding, federal air quality standards. *See* 40 C.F.R. § 50.13 (establishing limit of 35 µg/m<sup>3</sup>). The EPA also notified the BLM that its 100 well-per-year project had the “potential to contribute to significant impacts to PM<sub>2.5</sub>.” Letter from James B. Martin, EPA, to Juan Palma, BLM at 4 of Detailed Comments (Jan. 7, 2011). Even if this pace and level of development does not result from the fifty-five parcels offered by the BLM here, cumulatively, the region as a whole will see a much higher pace.

Therefore, there is no support for BLM’s conclusion that federal standards will be met, and BLM has failed to adequately analyze the impacts of oil and gas development on human health. As explained, given the elevated levels of pollution in the area of these leases and the lack of analysis undertaken by the BLM here, it could not properly conclude that there would be no significant impact as a result of offering these fifty-five proposed leases. Given the limitations that BLM may face after lease issuance, it is possible that any additional pollution from activities on these leases could contribute to continued or future exceedances of federal and state air quality standards. Such a contribution would be a significant impact. Likewise, the BLM acknowledges that development here could lead to visibility impacts in National Parks and Class I airsheds,

something it is not allowed to do. These significant impacts make the BLM's finding here unjustified.

**d. BLM Failed to Analyze an Alternative That Would Have Adequately Addressed Air Quality Concerns**

The BLM failed to consider an alternative that would have avoided further exceedances of federal and state air quality standards as well as addressing greenhouse gas emissions. Ms. Williams requested that the BLM consider this sort of alternative in her comments. *See Williams Comments at 1, 28-32.*

This alternative could have made use of restrictions, such as seasonal drilling prohibitions, to ensure that the subsequent oil and gas development would not threaten further exceedances of federal and state air quality standards. Ms. Williams proposed a slew of mitigation measures that the BLM could have considered prior to leasing. *Williams Comments at 29-33.* Had the Price and Vernal field offices considered these measures it would have given them greater flexibility to provide for compliance with state and federal air quality standards. *See id.* As Ms. Williams proposed mitigation measures are drawn from BLM projects elsewhere they are both reasonable and feasible. *See id.* Therefore, the Price and Vernal EAs should have considered her proposed leasing alternative.

**III. BLM Ignored Dust on Snow Issues**

The Price EA completely ignores the critical issue of soil disturbance leading to early snowmelt. In its comments, SUWA informed the BLM of this issue and asked that it evaluate the potential contributions of the oil and gas development activities that would result from this leasing decision, along with all other cumulative impact activities in the Price Field Office, on soil disturbance which leads to early snowmelt in nearby

mountains when transported in wind storms. The problem of disturbed desert dust causing regional climate change and early snowmelt is discussed in numerous recent scientific articles. See, e.g., J.C. Neff *et al.*, *Increasing Eolian Dust Deposition in the Western United States Linked to Human Activity*, *Nature Geoscience* 1, Advanced Online Publication, 189 (2008) (attached) (documenting how the dust on snow phenomenon is largely coincidental with increased settlement of the American West); Thomas H. Painter *et al.*, *Impact of Disturbed Desert Soils on Duration of Mountain Snow Cover*, *Geophysical Research Letters*, vol. 34, L1202 (June 23, 2007) (attached) (describing how dust on snow leads to early snow melt); Thomas H. Painter *et al.*, *Response of Colorado River Runoff to Dust Radiative Forcing in Snow*, *Proceedings of the National Academy of Sciences of the United State of America* (Sept. 20, 2010) (attached) (describing the extent of early snowmelt in the entire Upper Colorado River Basin). Recently, scientists estimated that disturbed desert soils traceable to settlement of the American West landing on mountain snowpack in the Upper Colorado River Basin was resulting in a net loss of approximately 5% of the annual flow of the Colorado River as measured at Lees Ferry. See Painter *et al.*, *Response of Colorado River*. It is likely that most of this dust on mountain snowpack is coming from nearby lands, where soil-disturbing activity makes lands susceptible to wind erosion; activities such as energy development, off-road vehicle use, and grazing serve to destabilize soils. See, e.g., Jayne Belnap *et al.*, *Dust in Low Elevation Lands: What Creates It and What Can We Do About It?*, Presentation, Colorado River District Seminar, Grand Junction, Colorado (Sept. 18, 2009) (attached) available at [http://www.crwd.org/media/uploads/2009\\_09\\_18\\_Belnap\\_Seminar.pdf](http://www.crwd.org/media/uploads/2009_09_18_Belnap_Seminar.pdf). The BLM has never evaluated this issue in the Price Field Office.

As the EPA recently mentioned in its comment letter to the BLM regarding the Cedar City RMP scoping (attached), the dust on snow issue is significant in the West. The BLM's management of a planning area—such as Price—can have a significant impact on the amount of disturbed desert dust that makes its way to the nearby mountain ranges. The EA does not discuss how each decision it makes will, or will not, help to alleviate dust on snow problems. Instead, the Price EA suggests that this will be analyzed at some other date. *See* Price EA at 213-15. However, this suggestion is related specifically to air pollution, rather than eolian dust problems. *See id.* at 214-15. The Price EA never discusses this problem or attempts even cursory analysis regarding the lease sale's impacts on this matter. While more specific information regarding well locations may be forthcoming, the BLM can still conduct some analysis at the leasing stage since it knows that leasing will likely lead to some level of development.

The methodology for inventorying dust generation, discussed above, could be applied to any activity that will cause fugitive dust (e.g. mining, oil and gas development, grazing) in order to estimate total dust emissions. Disclosing this information is a necessary step in the NEPA process and in ensuring that the public receives all the information necessary begin to understand these impacts. Although there may not be a method for modeling dust on snow impacts at the present time, BLM should have attempted to create an emissions inventory for fugitive dust for the various alternatives it analyzes in the EA along with the ongoing, planned, and reasonably foreseeable activities it approves or authorizes in the Price RMP. This would have allowed BLM and the public to understand the differences between the impacts of the various alternatives, impacts that would likely significantly influence the dust on snow problem.

Furthermore, by the Price EA's own commitment, the BLM should have prepared some analysis here. In the Price EA, the BLM indicates that when it "cannot complete necessary quantitative analysis (e.g. if a reasonably foreseeable number of wells cannot be determined ...), it will include" at least a "qualitative narrative description of the air quality issues or impacts." Price EA at 214. The Price EA lacks any narrative description of air quality issues or impacts related to eolian dust deposition on mountain snowpack. The Price EA fails to comply with BLM's own interpretation of its duty.

Since the BLM did not analyze these potential impacts, either qualitatively or quantitatively, it should withdraw from leasing all fifty parcels protested by SUWA in the Price Field Office.

#### **IV. BLM Has Not Complied with the Requirements of IM 2010-117**

The BLM has not complied with the requirements of IM 2010-117. It has not considered an alternative that would allow for leases not overlapping with areas with wilderness characteristics to be offered while removing those leases that overlap with BLM-identified wilderness characteristics. The BLM should have considered this alternative for all fifty parcels in the Price field office and for the two parcels in the Vernal Field Office located in the Bad Land Cliffs wilderness characteristics area: UTU89974 and UTU89975.

IM 2010-117 directs BLM to "take into account" several "other considerations" during its evaluation of lease sale parcels, including (1) whether non-mineral resource values outweigh mineral development values in "undeveloped areas;" and (2) whether leasing will cause "unacceptable impacts" on units of the National Park System. Because several of the sale parcels are located in "undeveloped areas" and/or are likely to have

impacts on visibility in national parks, BLM should have evaluated both of these considerations in the Price and Vernal EAs. In doing so, the BLM should have followed the example of Wyoming's High Desert District Office, which recently included a separate discussion for the IM's "other considerations" in a lease sale EA.

When evaluating lease parcels, BLM should determine whether "non-mineral resource values are greater than potential mineral development values" in "undeveloped areas." The seven parcels at issue here, are located in undeveloped areas. Because these areas also have considerable "non-mineral resource values," such as inventoried wilderness characteristics, important recreation and scenic values, and cultural resource values, the BLM must evaluate and determine whether they are outweighed by potential mineral development values. The BLM has not performed this weighing. Instead, the BLM inappropriately pointed to prior analysis that predated IM 2010-117. Simply because the BLM chose to manage certain areas as natural areas in the Vernal and Price RMPs, does not mean that the agency is now excused from fully considering alternatives to avoid impacts and fully disclosing non-mineral values from parcels in areas with wilderness character.

This determination "is a policy decision that is not dependent upon the economic values that may be assigned to competing resources." IM 2010-117, n.ix; *see also* 43 U.S.C. § 1702(c) (requiring BLM to give "consideration . . . to the relative values of the resources [of the public lands] and not necessarily to the combination of uses that will give the greatest economic return"). The BLM has not made those policy decisions subsequent to the release of IM 2010-117 and has not disclosed the necessary non-mineral values or impacts to national parks in either the Vernal or Price EAs.

## **V. BLM Failed to Consider Impacts to Wilderness Characteristics**

The BLM has ignored significant new information regarding wilderness characteristics in the Vernal Field Office. This oversight is remarkable as it is the same problem that resulted in a federal court overturning prior BLM lease sales. This section applies to parcels UTU89974 and UTU89975.

An agency's NEPA duties do not end when it completes its initial environmental analysis and approves a federal project. As the Supreme Court has explained, "[i]t would be incongruous with . . . the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Thus,

[i]f there remains "major federal action" to occur, and if . . . new information is sufficient to show that the remaining action will "affect[t] the quality of the human environment" . . . to a significant extent not already considered, a supplemental [environmental impact statement] must be prepared.

*Id.* at 374; *see also* 40 C.F.R. § 1502.9(c) (regulations mandating supplementation); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9<sup>th</sup> Cir. 2000) (agencies 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 action.'" (*quoting Marsh*, 490 U.S. at 374). The issuance of oil and gas leases constitutes the sort of major federal action where new information can require supplementation. *See Southern Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1262-69 (D. Utah

2006) (ruling that BLM had failed to supplement its environmental analyses in an oil and gas lease sale).

The Bad Land Cliffs area of wilderness characteristics overlaps with UTU89974 and UTU89975. The wilderness characteristics of this area were not identified during the Vernal RMP in 2008. *See, e.g.*, Vernal EA at 13; Vernal RMP at Title Page. The Bad Land Cliffs were neither inventoried for wilderness characteristics nor identified as possessing this character during the Vernal RMP; SUWA submitted information on this area to the BLM in May 2012. *See, e.g.*, Letter from David Garbett, SUWA, to Stephanie Howard, BLM (May 22, 2012) (attached). As the Vernal EA acknowledges, the Vernal RMP was never amended or changed to acknowledge this resource. *See* Vernal EA at 13-14.

However, the Vernal EA then treats this area as if the Vernal RMP had considered the wilderness characteristics of the Bad Land Cliffs and had decided not to manage this area to protect these values. *See* Vernal EA at 25-26, 35-36. The Vernal RMP clearly did not consider the wilderness characteristics of this area and its analysis does not apply here. *See, e.g.*, Vernal ROD at Figure 12a (identifying areas inventoried for the Vernal RMP) (attached), *available at*

[http://www.blm.gov/pgdata/etc/medialib/blm/ut/vernal\\_fo/planning/rod\\_maps.Par.18379.File.dat/MAP%20FIGURE%2012a%20%20%20%20NON-WSA%20LANDS%20-%20WILDERNESS%20CHAR..pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ut/vernal_fo/planning/rod_maps.Par.18379.File.dat/MAP%20FIGURE%2012a%20%20%20%20NON-WSA%20LANDS%20-%20WILDERNESS%20CHAR..pdf).

BLM, therefore, does not understand fully the effects of its oil and gas leasing decision on wilderness characteristics of the Bad Land Cliffs area because it has not supplemented the Vernal RMP with this new, significant information or fully analyzed

this matter in the Vernal EA. This lack of supplementation is fatal and BLM's decision denying SUWA's protest should be set aside. *See Southern Utah Wilderness Alliance*, 457 F. Supp. 2d at 1266 (finding a BLM decision to lease certain parcels in Utah as arbitrary and capricious and setting it aside because the BLM had failed to consider significant new information regarding wilderness characteristics).

#### **VI. BLM Failed to Consider Significant New Information Related to Visual Resources**

Similar to the agency's failure to consider supplemental new information related to wilderness characteristics, the BLM failed to consider supplemental new information related to visual resources.

In preparing the Vernal and Price RMPs, BLM utilized dated visual resource management (VRM) inventory data. This is demonstrated by the fact that a short time after the RMP was released BLM undertook a new visual resource inventory for both planning areas. This inventory provided updated data on the presence of visual resources as well as provided updated information about the area VRM classifications. *See* BLM Vernal Field Office, Visual Resource Inventory (2011) (attached); Price Field Office, Visual Resource Inventory (2011) (attached). Rather than relying on this new information, the Vernal and Price EAs use the outdated VRM data incorporated in the Vernal and Price RMP to analyze impacts to visual resources. This use of outdated information does not sufficiently analyze visual resource issues in areas found to possess greater visual resources than previously thought. In *Southern Utah Wilderness Alliance v. Norton*, the court held that BLM violated NEPA "by failing to consider significant new information about wilderness values and characteristics" on sixteen parcels which BLM

was preparing to lease for oil and gas development. 457 F. Supp. 2d 1253, 1269 (D. Utah 2006).

Here, the issue is the same. BLM has significant new information about a resource which it has completely failed to consider in proposing leases.

The land within parcel UTU89975 was listed as VRM Classes III and IV in the Vernal RMP. The 2011 inventory revised this and changed the scenery quality classification to a level that would be the equivalent of VRM Class II. Land within parcel UTU89974 was listed as VRM Class IV in the Vernal RMP, and the 2011 inventory revised and changed this classification to the equivalent of VRM Class III. These changes are significant. In preparing the Vernal RMP, BLM briefly described the VRM class objectives as:

VRM I - preserve the existing character of the landscape; VRM II - retain the existing character of the landscape, with a low level of landscape change; VRM III - partially retain the existing character of the landscape, with only moderate change to the landscape; VRM IV - major modifications are allowed to the existing character of the landscape, and the level of change can be high.

Vernal RMP at 3-124. “[R]etaining the existing character of the landscape, with a low level of landscape change” is significantly different than allowing major modifications and a high level of landscape change. *See id.* This is the difference in the parts of parcel UTU89975 where the VRM Class went from IV to II. Even the difference from Class IV to Class III is significant, going from high levels of landscape change to moderate levels cannot be considered insignificant. *See id.* Landscape change, by its very nature, is an act which can easily be classified as significant when excessive change is allowed. Here, moderate to high or low to high is clearly significant.

SUWA made the following comments on visual resources and parcels in the Price

Field Office:

BLM has significant new information about a resource which it has completely failed to consider in its lease sale EA. A portion of the land within Parcel 6530 was listed as VRM Class IV in the 2008 Price RMP. The remainder of the land within Parcel 6530 was not given a VRM classification. The 2011 inventory changed a portion of the classification for lands within Parcel 6530 to VRM Class II. Additionally, all or a portion of the land within parcels 6401, 6402, 6404, 6430, 6431, 6432, 6433, 6434, 6435, 6436, 6437, 6438, 6439, 6440, 6500, 6502, 6503, 6505, 6506, 6512, 6513, 6514, and 6541 was listed as VRM Class IV in the 2008 RMP, and the 2011 inventory revised and changed at least a portion of the land in each of the parcels to VRM Class III. These changes are significant. The 2008 Price RMP Appendix R-15 listed the management objectives for the various VRM management classes as follows:

Class I

- preserve the existing character of the landscape
- does not preclude very limited management activity
- level of change to the characteristic landscape should be extremely low and must not attract attention

Class II

- retain the existing character of the landscape
- management activities may be seen, but should not attract the attention of the casual observer

Class III

- partially retain the existing character of the landscape
- areas where changes in the basic elements (form, line, color, or texture) caused by a management activity should not dominate the view of the casual observer
- changes to the landscape may attract attention but may not dominate the landscape.

Class IV

- Provide for the management activities that require major modification of the existing character of the landscape
- Changes may be dominant landscape components

2008 Price RMP, Appendix R-15 at 1-2. “[R]etain[ing] the existing character of the landscape” while allowing management activities that “may be seen, but should not attract the attention of the casual observer” is significantly different than allowing major modifications and

dominant landscape changes. This is the difference in the parts of Parcel 6530 where the VRM Class went from IV to II. Instead of the limited activities allowed under Class II, BLM, in not attaching the proper Class II stipulations, is allowing for major modification of the landscape. The difference from Class IV to Class III is also significant, going from major modifications of the landscape to changes that may attract attention but not dominate. Landscape change, by its very nature, is an act which can easily be classified as significant when excessive change is allowed.

Because the new VRM information is significant, BLM was required to consider it. Therefore, BLM must withdraw Parcel 6530 as well as parcels 6401, 6402, 6404, 6430, 6431, 6432, 6433, 6434, 6435, 6436, 6437, 6438, 6439, 6440, 6500, 6502, 6503, 6505, 6506, 6512, 6513, 6514, and 6541 to account for the unanalyzed change in visual resource classification.

SUWA Comments on Price at 3-4.

Because the new VRM information is significant, BLM was required to consider it. Therefore, BLM must withdraw parcels UTU89974 and UTU89975 in the Vernal Field Office and to account for the unanalyzed change in visual resource classification.

## **VII. BLM Has Not Complied with the Endangered Species Act (ESA)**

Because the fifty-five leases SUWA has protested all contain public lands that are being leased as non-NSO, BLM policy and federal caselaw mandate that the BLM comply with the ESA's consultation requirements prior to lease sale and issuance.<sup>7</sup> *See Conner v. Burford*, 848 F.2d 1441 (9<sup>th</sup> Cir. 1988). Specifically, the BLM must, at a minimum, review each parcel being offered at the November 19, 2013, lease sale to determine whether the sale of these leases might "affect" federally listed species.

Depending on the outcome of that assessment, BLM may be required to enter into formal

---

<sup>7</sup>Furthermore, BLM must utilize a current species list to determine whether any federally listed species will be □affected□ by the lease sale (assessing the effects from lease sale through abandonment). BLM's failure to utilize a current species list when conducting this assessment is a violation of NEPA's □hard look□ requirement. *See* 40 C.F.R. □1502.9(c)(1)(ii). *See also Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9<sup>th</sup> Cir. 2000); IM 2001-062.

section 7 consultation with the U.S. Fish and Wildlife Service (FWS) or to seek a seek a written letter of concurrence from FWS through informal consultation.

Regardless, it is important to point out that the scope of BLM's internal review must be *comprehensive*; that is, from the lease sale stage through and including production and abandonment. *See Conner*, 848 F.2d at 1451-1458 (requiring FWS to prepare comprehensive biological opinion evaluating oil and gas leasing impacts from lease stage through abandonment). To date, BLM has not engaged in such comprehensive consultation with the FWS. In short, BLM cannot sell and issue the lease parcels SUWA has protested in this lease sale because the agency has not complied with the ESA.

**VIII. BLM Violated the National Historic Preservation Act by Failing to Take Into Account the Impact of the Travel Plan on Archeological Resources**

**a. The NHPA and Its Implementing Regulations Require BLM to Consider the Adverse Impacts of Its Undertakings on Archeological Resources**

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. *See* 16 U.S.C. §§ 470(b), 470-1. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal "undertaking" unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 16 U.S.C. §§ 470f, 470w(7); *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is a "stop, look, and listen provision" that requires federal agencies to consider the effects of their actions and programs on historic properties and sacred sites before implementation. *Muckleshoot Indian Tribe v. U.S. Forest*

*Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *see also Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004).

To adequately “take into account” the impacts on archeological resources, all federal agencies must comply with binding Section 106 regulations established by the Advisory Council on Historic Preservation (Advisory Council).<sup>8</sup> Under these regulations, the first step in the Section 106 process is for an agency to determine whether the “proposed [f]ederal action is an undertaking as defined in [Section] 800.16(y).” 36 C.F.R. § 800.3(a). Undertakings include any permit or approval authorizing use of federal lands. *Id.* § 800.16(y). If the proposed action is an undertaking, the agency must determine “whether it is a type of activity that has the potential to cause effects on historic properties.” *Id.* § 800.3(a). An effect is defined broadly to include direct and indirect adverse effects that might alter the characteristics that make a cultural site eligible for listing in the National Register of Historic Places. *See id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

---

<sup>8</sup> The Advisory Council, the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA’s requirements. *See Nat’l Ctr. for Pres. Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C. 1980), *aff’d per curiam*, 635 F.2d 324 (4th Cir. 1980); *CTIA-Wireless Ass’n v. F.C.C.*, 466 F.3d 105, 115 (D.C. Cir. 2006) (“[T]he Advisory Council regulations command substantial judicial deference.”) (quotations and citations omitted). The Advisory Council’s regulations “govern the implementation of Section 106” for all federal agencies. *Nat’l Ctr. for Pres. Law*, 496 F. Supp. at 742; *see also Nat’l Trust for Historic Pres. v. U.S. Army Corps of Eng’rs*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

The agency next “[d]etermine[s] and document[s] the area of potential effects” and then “[r]eview[s] existing information on historic properties within [that] area.” 36 C.F.R. § 800.4(a)(1)-(2). “Based on the information gathered, . . . the agency . . . shall take the steps necessary to identify historic properties within the area of potential effects.” *Id.* § 800.4(b). “The agency shall make a reasonable and good faith effort to carry out appropriate identification efforts.” *Id.* § 800.4(b)(1).

If the undertaking is a type of activity with the potential to affect historic properties then the agency must determine whether in fact those properties “may be affected” by the particular undertaking at hand. *Id.* § 800.4(d)(2).<sup>9</sup> Having identified the historic properties that may be affected, the agency considers whether the effect will be adverse, using the broad criteria and examples set forth in section 800.5(a)(1). Adverse effects include the “[p]hysical destruction of or damage to all or part of the property.” *Id.* § 800.5(a)(2)(i). If the agency concludes that the undertaking’s effects do not meet the “adverse effects” criteria, it is to document that conclusion and propose a finding of “no adverse effects.” *Id.* § 800.5(b), (d)(1). “The agency official should seek the concurrence of any Indian tribe . . . that has made known to the agency official that it attaches religious and cultural significance to a historic property subject” to a no adverse effect finding. *Id.* § 800.5(c)(2)(iii).

If, however, the agency concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native

---

<sup>9</sup> The agency may also determine that there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them, at which point it consults with the State Historic Preservation Officer and notifies relevant Indian tribes of its conclusion. *Id.* § 800.4(d)(1).

American tribes, and the Advisory Council in an effort to resolve the adverse effects. *Id.*

§§ 800.5(d)(2), 800.6.

**b. The Price Field Office Inconsistently Described the Potential Effects of Leasing in Its Consultation Letter with the SHPO and Indian Tribes.**

In its April 30, 2013 letter to the SHPO and Indian Tribes the Price field office inconsistently described the potential effects of leasing at the November 2013 oil and gas lease sale as having both “No Adverse Effect on historic properties” and “No Historic Properties Affects; eligible sites present but not affected as defined by 36 C.F.R. § 800.4.” Letter from Patricia Clabaugh, BLM to Lori Hunsaker, SHPO (April 30, 2013) (attached.) *See* Letter from Patricia Clabaugh, BLM to LeRoy N. Shingoitewa, Hopi Tribe (May 1, 2013) (attached).<sup>10</sup> Though BLM has conflated them, these are two distinct findings regarding the predicted effects of this lease sale. *Compare* 36 C.F.R. § 800.4(d)(1) *with id.* § 800.5. In response, the SHPO merely stated that it concurred with BLM’s “determinations of . . . effect for this undertaking” without specifying which determination of effect it concurred with. *See* Letter from Chris Merritt, SHPO to Patricia Clabaugh, BLM (May 15, 2013) (attached).

In its response to BLM, the Hopi Tribe, interpreting BLM’s May 1 letter as proposing a No Adverse Effect finding, stated that it did not concur with that determination. Letter from Leigh J. Kuwanwisiwma, Hopi Tribe to Patricia Clabaugh, BLM (May 20, 2013) (attached). Specifically, the Hopi Tribe explained that

[t]he sparse records are a significant concern because the determination of No Adverse Effect on historic properties is based on unknowns and a lack of sufficient information to make a determination

---

<sup>10</sup> The text of the Price field office letter to the Hopi Tribe is slightly different than the letter to the SHPO but both letters proposed the two different findings: No Historic Properties Affects and No Adverse Effects.

pursuant to the National Historic Preservation Act (NHPA). Therefore, we do not concur that a determination of No Adverse Effect to historic properties is appropriate for this undertaking, and recommend the BLM undertake a sample cultural survey of these 76 parcels to enable you to make an appropriate determination of effect pursuant to NHPA.

*Id.* The Price field office did not respond to the Hopi's letter though it claimed to have done so in the Final Leasing EA. *See* Price FO Leasing EA at 45 (alleging that BLM responded to Hopi Tribe in an August 14, 2013 letter). Discussions with BLM staff have confirmed that in fact BLM never sent this August 14 letter. Because BLM's consultation with the SHPO and Hopi Tribe was flawed it should reinitiate consultation and defer leasing the 76 Price field office parcels.

To the extent BLM intends to stand by its "No Historic Properties Affected" finding, it must comply with 36 C.F.R. § 800.4(d) and either consult with the Hopi Tribe to resolve its objections or forward the Tribe's objections to the Advisory Council. 36 C.F.R. § 800.4(d)(1)(ii). And to the extent BLM intends to stand by its "No Adverse Effects" finding, it should seek the concurrence of the Hopi Tribe before proceedings. *See id.* § 800.5(c)(2)(iii).

**c. BLM Failed to Take a Reasonable and Good Faith Effort to Identify Historic Properties.**

The NHPA regulations require that agencies make a "reasonable and good faith effort to carry out appropriate identification efforts." 36 C.F.R. § 800.4(b)(1); *see Pueblo of Sandia*, 50 F.3d at 860-62 (concluding that Forest Service did not make a reasonable effort to identify historic properties). As the Advisory Council emphasized in its preamble to the Section 106 regulations, knowing the historic properties at risk from an undertaking is essential: "[i]t is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those

historic properties are in the first place.” 65 Fed.Reg. 77,698, 77,715 (Dec. 12, 2000).

The Price Field Office has failed to make such a reasonable and good faith effort here to identify historic properties.

Indeed, the Price field office has not even prepared a Class I inventory to support its proposal to sell the 51 parcels at issue in the November lease sale. Rather, it merely prepared a “Cultural Resources Records Review” – which BLM’s own manual describes as a “brief first step” in the Section 106 process. BLM Manual 8110.21A1b; *see* Price EA at 45-46 (citing BLM Manual 8110.21A1b). BLM Manual 8110.21A1b explains that completing a “records review” like the one the Price field office “means consulting the part II documentation of a *completed and up-to-date class I inventory* (see .21A4) and/or the SHPO’s automated database. Sometimes it means checking relatively undeveloped BLM and SHPO survey and site records to learn whether and survey has been conducted and any cultural properties have been records nearby.” (Emphasis added). As the Hopi Tribe noted in its May 20 letter, BLM has not done sufficient work here: “[t]hree quarters of the surveys [relied on by BLM] are 10 years old” and thus BLM did not meet the standards set forth in its own Manual to perform this rudimentary records check. Moreover, as BLM concedes less than 10% of the Price field office parcels have been surveyed and “[a]s a result, the potential for locating additional cultural resources within the proposed lease parcels . . . is unknown.” Cultural Resources Records Review for the Price Field Office, November 2013 Oil & Gas lease sale at 23. Letter from Clabaugh to Hopi Tribe at 1; *see id.* (describing extent of existing cultural resource inventories as “sparse”). BLM’s limited cultural records check does not constitute a reasonable and good faith inventory effort as required by the NHPA.

Likewise, the Vernal field office's description of its "existing literature review" as a "Class 1 inventory" is misleading and inconsistent with BLM Manual 8110.21. *See* Vernal EA at 67. BLM Manual 8110.21A1b is clear that a Class1 inventory is not the same thing as a "literature review," which is work to a much lower standard. BLM's inventory effort in support of the Vernal EA similarly does not meet the reasonable and good faith standard required by the NHPA.

**d. The Price Field Office's "Effects" Finding is Arbitrary<sup>11</sup>**

Either of BLM's proposed effects findings – No Historic Properties Affected or No Adverse Effect – is arbitrary and capricious. As the Hopi Tribe noted in its letter, BLM's No Adverse Effect finding is unsupportable:

Your correspondence states that less than 10% of the parcels have been surveyed for cultural resources, three quarters of the surveys are more than 10 years old, the potential for locating cultural resources is unknown, and concludes that the sparse records fail to identify and significant concerns.

The sparse records are a significant concern because the determination of No Adverse Effect on historic properties is based on unknowns and a lack of sufficient information to make a determination pursuant to the [NHPA].

Letter from Kuwanwisiwma to BLM at 1. *See also* Letter from Clabaugh to Hopi Tribe. SUWA echoes these concerns; BLM erred by concluding that the sale of the subject 51 leases in the Price field office would have *no* adverse effect on cultural resources. BLM's admitted lack of relevant information regarding these parcels makes it clear that this conclusion is without basis.

In the alternative, BLM's No Historic Properties Affected determination is also arbitrary and capricious. Lease stipulation UT-S-169, which the Price field office

---

<sup>11</sup> BLM does not disclose in the Vernal EA what effects finding is proposed – No Adverse Effects or No Historic Properties Affected. *See* Vernal EA at 67.

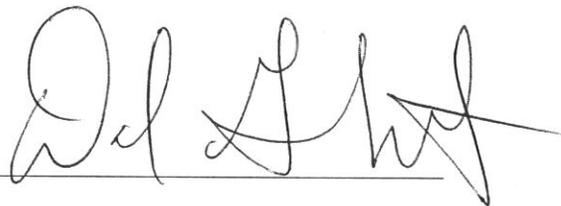
relies on as support for this determination, provides that effects *may occur* from oil and gas development, though adverse effects will allegedly be minimized. See Letter from Clabaugh to Hopi Tribe at 2 (quoting from lease stipulation: BLM may approve undertakings that result in minimized adverse effects). BLM's acknowledgment that there may be some effects means the No Historic Properties Affected conclusion is arbitrary.

### REQUEST FOR RELIEF

SUWA respectfully requests the following appropriate relief: (1) the withdrawal of the fifty-five protested parcels from the November 19, 2013, Competitive Oil and Gas Lease Sale until such time as the agency has complied with NEPA, FLPMA, the NHPA, and other federal laws, or, in the alternative, (2) withdrawal of the fifty-five protested parcels until such time as the BLM attaches unconditional no surface occupancy stipulations to all protested parcels.

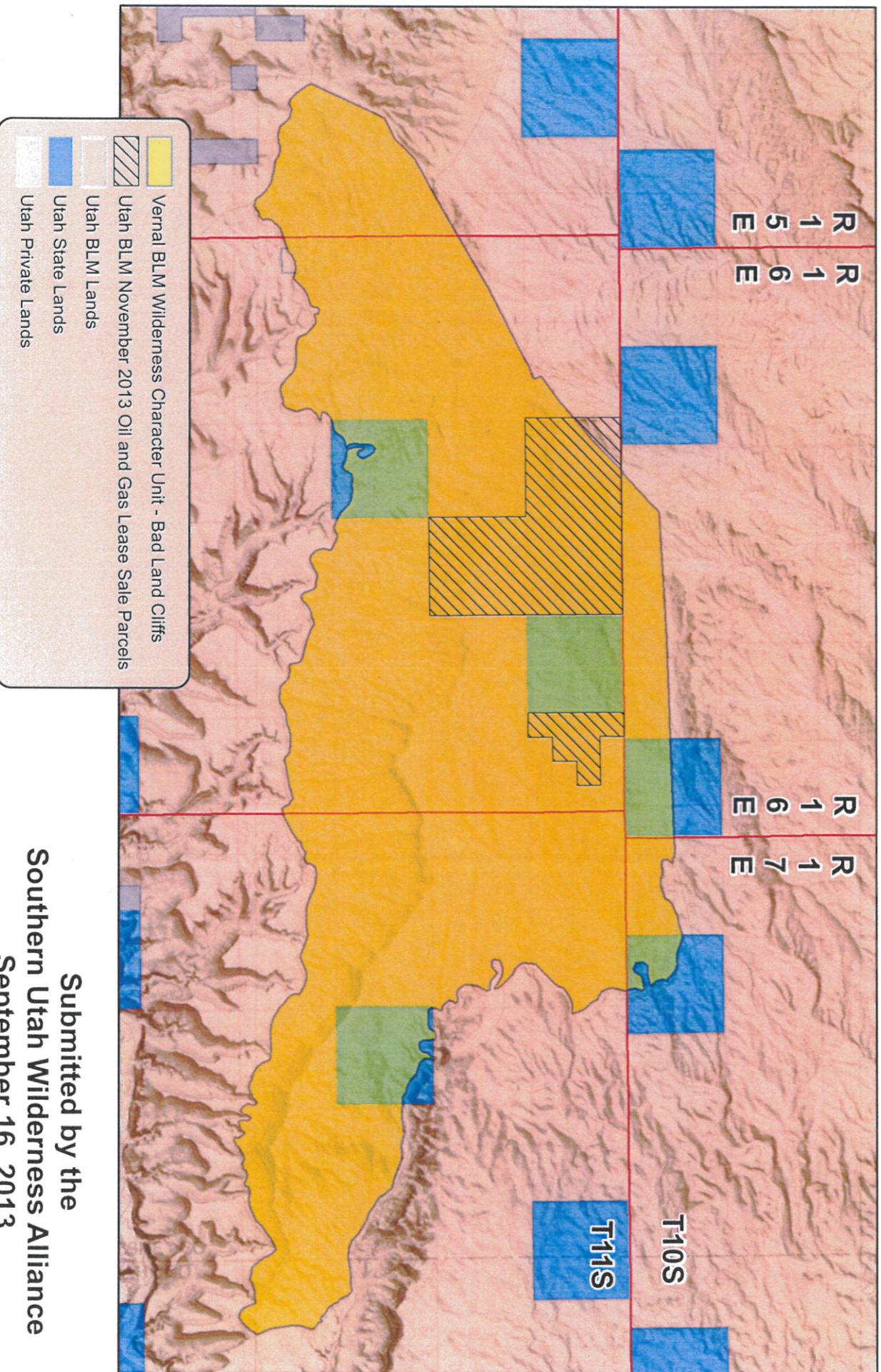
This protest is brought by and through the undersigned on behalf of SUWA. These members and staff of SUWA reside, work, recreate, or regularly visit the areas to be impacted by the proposed lease sale and therefore have an interest in, and will be affected and impacted by, the proposed action.

September 16, 2013

A handwritten signature in black ink, appearing to be "David Garbett" and "Stephen Bloch", written over a horizontal line.

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

# Bad Land Cliffs Wilderness Character Area November 2013 Oil and Gas Lease Sale (2,109 acres with Overlap)



Submitted by the  
Southern Utah Wilderness Alliance  
September 16, 2013