



southern  
utah  
wilderness  
alliance



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

September 15, 2014

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 18, 2014*

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, Natural Resources Defense Council, and The Wilderness Society (collectively "SUWA") hereby timely protest the November 18, 2014, offering, in Salt Lake City, Utah, of the following twenty-seven parcels in the Vernal and Price field offices:

**UTU90733 (Parcel 34), UTU90734 (Parcel 35), UTU90747 (Parcel 50), UTU90748 (Parcel 51), UTU90752 (Parcel 107), UTU90753 (Parcel 109), UTU90754 (Parcel 110), UTU90755 (Parcel 112), UTU90756 (Parcel 113), UTU90757 (Parcel 114), UTU90758 (Parcel 116), UTU90759 (Parcel 118), UTU90760 (Parcel 119), UTU90761 (Parcel 121), UTU90762 (Parcel 124), UTU90763 (Parcel 126), UTU90764 (Parcel 132), UTU90765 (Parcel 133), UTU90766 (Parcel 134), UTU90767 (Parcel 135), UTU90768 (Parcel 137), UTU90774 (Parcel 163), UTU90776 (Parcel 173), UTU90781 (Parcel 195), UTU90782 (Parcel 196), UTU90784 (Parcel 214), and UTU90785 (Parcel 216).**

As explained below, the Bureau of Land Management's (BLM's) decision to sell these twenty-seven 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 twenty-seven 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 NEPA 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. Unfortunately, the BLM has not fully analyzed potential irreversible and irretrievable impacts that could flow from its leasing decision. The sale of leases without nonwaivable, no surface occupancy (NSO) stipulations represents a full and irretrievable commitment of resources. BLM 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 reasonable, foreseeable potential impacts of oil and gas development on these leases now rather than wait until a later date. BLM has not performed the requisite analysis for all relevant resources at the leasing stage. As explained below, this failure may have irreversible negative impacts on imperiled species, air quality, water quality, and cultural resources, among other things.

## **II. Yellow-Billed Cuckoo**

The BLM has failed to take a hard look at the potential impacts of its leasing decision on the yellow-billed cuckoo. Parcels 132 and 163 (UTU90764 and UTU90774) should be removed from this lease sale or issued only with no surface occupancy (NSO) stipulations because they overlap with proposed critical habitat.

On August 15, 2014, the U.S. Fish and Wildlife Service (FWS) published a notice in the Federal Register of proposed critical habitat for the yellow-billed cuckoo. 79 Fed. Reg. 48,548 (Aug. 15, 2014) (attached). FWS has recently proposed that the yellow-billed cuckoo in the western United States be listed as a threatened species under the Endangered Species Act. *See* 78 Fed. Reg. 61,622 (Oct. 3, 2013). Critical habitat

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<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).

consists of areas “[e]ssential to the conservation of the species ... [w]hich may require special management considerations or protection.” 79 Fed. Reg. at 48,549.

One area that FWS has proposed as critical habitat is located along the Green River in Uintah County. *See, e.g.*, FWS, Map, Yellow Billed Cuckoo Critical Habitat Unit 61: UT-1 Green River 1 Uintah County, Utah (June 2014) (attached). This proposed habitat overlaps with two parcels proposed for leasing here: 132 and 163.

The Vernal Field Office environmental assessment prepared for this lease sale (Vernal EA) mentions the potential for yellow-billed cuckoo occurrence in these two lease parcels. *See* November 2014 Lease Sale, Environmental Assessment, DOI-BLM-UT-G010-2014-093-EA, at 28 (June 2014) (Vernal EA). It then only briefly discusses how the yellow-billed cuckoo found in these areas might be impacted by oil and gas development. *See id.* at 43. It also attaches a lease notice to the parcels at issue here, warning of the potential occurrence of the yellow-billed cuckoo and stating that surface-disturbing activities may not be permitted within 100 meters of yellow-billed cuckoo habitat during a two-month period. *See id.* at 44-45, 82.<sup>2</sup>

However, the Vernal EA has failed to mention or discuss the proposed FWS critical habitat that will overlap with lease parcels 132 and 163. *See infra* (discussing new information in FWS’s proposed critical habitat designation). This is significant new information and must be addressed before BLM irretrievably and irreversibly commits this area to leasing. Offering these leases for sale with the present analysis would violate NEPA’s requirement that the agency supplement its existing environmental analyses based on new information.

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<sup>2</sup> Importantly, lease notices have no legal consequences and are unenforceable. *See* 43 C.F.R. § 3101.1-3.

BLM's NEPA duties do not end once it has completed an initial environmental analysis and approved a federal project. *See S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1264 (D. Utah 2006) (*SUWA*). NEPA seeks to prevent uninformed decisions and thus it would be "incongruous" for an agency to overlook adverse environmental impacts simply because a decision has received initial approval. *Id.*; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). When

"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."

*SUWA*, 457 F. Supp. 2d at 1264 (quoting *Marsh*, 490 U.S. at 374; also citing 40 C.F.R. § 1502.9(c); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9<sup>th</sup> Cir. 2000)).

This duty to supplement applies to both environmental impact statement and an environmental assessment. *SUWA*, 457 F. Supp. 2d at 1264 (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9<sup>th</sup> Cir. 1998)).

~~BLM has now received new information from SUWA concerning the potential~~  
designated of critical habitat for the yellow-billed cuckoo that overlaps with two lease parcels. BLM's existing NEPA analyses for this area—the Vernal EA and the Vernal resource management plan (RMP)—never considered or analyzed this potential designation or even the potential listing of the species as threatened under the Endangered Species Act. Thus, BLM cannot offer these parcels for lease until this matter is addressed. NEPA prevents such willful ignorance of changed circumstances and information.

Furthermore, BLM's Vernal EA contains no discussion or analysis as to whether its proposed lease notice will be adequate to address impacts to the yellow-billed cuckoo

and its critical habitat. *See* Vernal EA at 82. Based on FWS rationale for the proposed critical habitat designation, BLM's leases appear inadequate. For example, outside of a two-month window from May 15 to July 20 when BLM *may* decide to prevent surface disturbing activities, BLM will allow oil and gas activity within yellow-billed cuckoo habitat. *See id.* BLM never explains whether activity outside of this window will have a detrimental effect, how it chose the window of limitation, what the window is intended to address, and whether its buffer limitation of 100 meters from habitat is adequate. *See id.* FWS says that the peak nesting season for the yellow-billed cuckoo can extend through August. *See* 78 Fed. Reg. at 61,632. If BLM's window of limitation, which ends mid-July, is aimed at limiting activity during nesting season it is too short to cover peak season. The Vernal EA fails to analyze whether activity that takes place within yellow-billed habitat outside of nesting season will impact the birds. FWS data indicates that yellow-billed cuckoos can return to previous nesting sites in any given year. *Id.* at 61,633. The Vernal EA provides no analysis regarding whether yellow-billed cuckoos will return to a nest that has been impacted by oil and gas activity that occurred while the birds were away during winter, for example. FWS says that yellow-billed cuckoos "rarely used smaller patches of habitat." *See id.* Thus, oil and gas development that might fragment habitat, even if it takes place outside of nesting season, could result in the essential loss of that habitat.

Because BLM has not considered the potential critical habitat designation overlap with parcels 132 and 163 it should remove these proposed leases from the November lease sale. In addition, the Vernal EA lacks adequate analysis to determine potential

impacts on these birds from oil and gas development and whether BLM's proposed lease notice has any basis in science or is likely to actually protect the birds.

### **III. BLM Failed to Analyze Impacts to Relevant and Important Values and Prevent Those Impacts**

BLM has failed to analyze impacts to agency identified relevant and important values in parcels 126, 134, 137, 173, 195, 214, and 216 and to prevent those potential impacts, as it is required to do. As a result, these parcels should be removed from the lease sale.

FLPMA requires the BLM to "give priority to the designation and protection of areas of critical environmental concern" during land use planning. 43 U.S.C. § 1712(c)(3)). Areas of critical environmental concern (ACECs) are defined as "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes." 43 U.S.C. § 1702(a). BLM has well-established criteria for identifying relevant and important values. *See, e.g.*, 43 C.F.R. § 1610.7-2(a)(2) (value must have "substantial significance"); *see also* Vernal Field Office, Record of Decision and Approved Resource Management Plan G-1 to -2 (2008) (Vernal ROD) (explaining relevance and importance criteria). Once BLM has identified the relevant and important values within the planning area, it must ensure their protection. If "special management attention is required" to do so, BLM must designate an ACEC. 43 U.S.C. § 1702(a).

BLM's proposed leasing in the Main Canyon, White River, Four Mile Wash, and Nine Mile Canyon Expansion potential ACECs<sup>3</sup> fails to comply with this mandate.

Parcel 173 is located in the Main Canyon potential ACEC. *See, e.g.*, Vernal Field Office, Proposed Resource Management Plan and Final Environmental Impact Statement, EIS-Figure 32 (2008) (Vernal RMP); Statewide Map, State of Utah Competitive Oil and Gas Lease Sale November 2014, *available at*

[http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands\\_and\\_minerals/oil\\_and\\_gas/november\\_2014.Par.30970.File.dat/Statewide%20Lease%20Sale%20Map\\_Arc10.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands_and_minerals/oil_and_gas/november_2014.Par.30970.File.dat/Statewide%20Lease%20Sale%20Map_Arc10.pdf); BLM

Utah November 2014 Competitive Oil and Gas Lease Sale Uintah County Proposed Sale Parcels, Map 25 (Aug. 15, 2014), *available at*

[http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands\\_and\\_minerals/oil\\_and\\_gas/november\\_2014.Par.69539.File.dat/Map25.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ut/lands_and_minerals/oil_and_gas/november_2014.Par.69539.File.dat/Map25.pdf). The Vernal RMP identified relevant and

important values for this potential ACEC but decided not to designate this in its final

decision. *See* Vernal ROD at 120, G-4. The Vernal RMP found that the Main Canyon

potential ACEC possesses important historic resources and natural systems. Vernal RMP

at G-4. In fact, the Vernal RMP acknowledges that this area has been part of an area

proposed for management for its "exemplary natural systems." Vernal RMP at 3-90.

The BLM is required to protect those relevant and important values of Main Canyon.

The Vernal EA does not address this matter and does not explain how leasing and

potential future development will protect—or at least, not harm—the relevant and

important values BLM identified in the Main Canyon potential ACEC.

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<sup>3</sup> As used in this protest, the term "potential ACEC" means an area identified in the Vernal RMP planning process with identified relevant and important values but which was ultimately not designated as such in the approved Vernal RMP.

The Vernal RMP indicates that oil and gas leasing is likely to destroy the relevant and important values of this area. BLM acknowledged in the Vernal RMP that “the more acres where mineral development is likely within existing and potential ACECs, the fewer acres there would be that would retain relevant and important values.” Vernal RMP at 4-427. The Vernal RMP also acknowledged that by not designating this area as an ACEC, it would only “protect some of the relevant and important values.” *Id.* at 4-435. BLM largely relied on the management of the Winter Ridge wilderness study area, which only covers roughly half of the potential Main Canyon ACEC, to protect relevant and important values. *See id.* However, neither the Vernal RMP nor the Vernal EA explain how the relevant and important values outside of the wilderness study area will be protected if the area is leased.

Here, oil and gas leasing and development will impair the “exemplary natural systems” of the Main Canyon potential ACEC. *See Vernal RMP* at 3-90. The Vernal EA acknowledges that oil and gas development can destroy habitat and damage plant species. *See, e.g., Vernal EA* at 38. It also predicts that oil and gas development will impair natural systems by introducing invasive weeds and facilitating erosion, sediment loading, and channelization. *See id.* at 39. Recently, a federal court ruled that a similar situation in the Utah BLM’s Richfield Field Office violated FLPMA’s ACEC mandate. *See S. Utah Wilderness Alliance v. Burke*, 981 F. Supp. 2d 1099, 1113-14 (D. Utah 2013) (ruling that BLM decision to not designate a potential ACEC because nearly half was covered by a wilderness study area did not explain how relevant and important values would be protected outside the wilderness study area).

Similarly, parcels 195, 214, and 216 overlap with the White River potential ACEC. *See* Vernal RMP at EIS-Figure 32; Vernal EA at 90. The relevant and important values of this area include unique geological features, high value scenery, and riparian ecosystems. Vernal ROD at G-5. Although the Vernal RMP did not designate this ACEC, these relevant and important values must still be protected. *See* Vernal ROD at 122. However, the Vernal EA does not specifically discuss the relevant and important values of this potential ACEC and whether the stipulations it envisions will protect these values. As with Main Canyon, the Vernal RMP acknowledges that its current management regime will only protect “some of the relevance and importance values.” Vernal RMP at 4-433. Again, the Vernal EA has indicated that oil and gas development can lead to impacts that will impair the relevant and important values of the White River potential ACEC. The Vernal EA indicates that oil and gas development will increase sediment loading in riparian areas. Vernal EA at 39. The Vernal EA also states that oil and gas development adversely impact an area’s scenic quality. *Id.* at 41. Thus, the White River potential ACEC’s high value scenery and riparian ecosystem are threatened by these parcels. The Vernal RMP and Vernal EA do not, in combination, show how the relevant and important values BLM identified will be protected by the decision to lease these three parcels. Thus, parcels 195, 214, and 216 must be removed from this lease sale.

Similarly, parcels 134 and 137 overlap with the Four Mile Wash potential ACEC. *See* Vernal RMP at EIS-Figure 32; Vernal EA at 88. The relevant and important values of this area include high value scenery and riparian ecosystems. Vernal ROD at G-3. Although the Vernal RMP did not designate this ACEC, these relevant and important values must still be protected. *See* Vernal ROD at 119. However, the Vernal EA does

not specifically discuss the relevant and important values of this potential ACEC and whether the stipulations it envisions will protect these values. As with Main Canyon, the Vernal RMP acknowledges that its current management regime will only protect “some of the relevance and importance values.” Vernal RMP at 4-430. While the Vernal EA does address concerns for scenery on the portion of parcel 134 that overlaps with the Lower Green River ACEC, it does not discuss the scenery and riparian values that were found in the Four Mile Wash potential ACEC. *See* Vernal EA at 35. The Lower Green River ACEC covers only a small portion of the area of the Four Mile Wash potential ACEC and the majority of parcel 134 falls outside the Lower Green River ACEC. *See, e.g.,* Vernal RMP at EIS-Figure 32. The Vernal EA indicates that oil and gas development will increase sediment loading in riparian areas. Vernal EA at 39. The Vernal EA also states that oil and gas development adversely impact an area’s scenic quality. *Id.* at 41. Thus, the Four Mile Wash potential ACEC’s high value scenery and riparian ecosystem are threatened by these parcels. The Vernal RMP and Vernal EA do not, in combination, show how the relevant and important values BLM identified will be protected by the decision to lease these two parcels. Thus, parcels 134 and 137 must be removed from this lease sale.

Finally, parcel 126 overlaps with the Nine Mile Canyon Expansion potential ACEC considered in the Vernal RMP. *See* Vernal RMP at EIS-Figure 32; Vernal EA at 88. The relevant and important values of this area include high quality scenery, special status plant species, and significant cultural resources. Vernal ROD at G-4. Although the Vernal RMP did not designate this ACEC, these relevant and important values must still be protected. *See* Vernal ROD at 120. However, the Vernal EA does not

specifically discuss the relevant and important values of this potential ACEC and whether lease notices and stipulations will protect these values. The Vernal RMP is not clear about whether the relevant and important values of this area will be protected if leased for oil and gas development. *See* Vernal RMP at 4-434 to -435. While the Vernal EA does address concerns for the Nine Mile Canyon ACEC, it does not discuss the relevant and important values found in the Nine Mile Canyon Expansion potential ACEC. *See* Vernal EA at 35-36. The Nine Mile Canyon ACEC does not overlap with parcel 126. *See, e.g.,* Vernal ROD at Figure 14a; Vernal EA at 88. The Vernal EA indicates that oil and gas development will increase sediment loading in riparian areas. Vernal EA at 39. The Vernal EA also states that oil and gas development will lead to potential habitat loss and impacts to individual special status plant species, as well indirect impacts from competition with newly introduced invasive weeds and fugitive dust. *Id.* at 38. Thus, the Nine Mile Canyon Expansion potential ACEC's high value scenery and special status plants are threatened by these parcels. The Vernal RMP and Vernal EA do not, in combination, show how the relevant and important values BLM identified will be protected by the decision to lease this parcel. Thus, parcel 126 must be removed from this lease sale.

#### **IV. BLM Has Not Fulfilled Commitments Made in the Gasco Final Environmental Impact Statement and Gasco Record of Decision**

Parcels 50, 51, 107, 109, 110, 112, 113, 114, 116, 118, 119, 121, 124, 126, 133, and 135 are all located within the boundaries of the Gasco project area. The Vernal EA relies on the Gasco Final Environmental Impact Statement (Gasco EIS) and Record of Decision (ROD) for cumulative impacts air quality analysis. *See* Vernal EA at 46. The sixteen parcels at issue here fit into the overarching Gasco development scheme for the

area, the scheme considered in the Gasco EIS. Therefore, any flaws or shortcomings in this analysis also infect the Vernal EA. Because the Gasco air quality analysis suffers from flaws that prevent its application here, the BLM should withdraw these parcels.

The Gasco EIS indicated that ozone pollution in the Uinta Basin was a “cause for concern.” *See* Gasco EIS at 4-442. As a result, the BLM developed an ozone action plan to address high levels of ozone pollution and limit emissions from oil and gas development in the Gasco project area. *See id.* at 4-442 to -444. This action plan included specific commitments both from BLM and from the project proponent. *See id.* Unfortunately, these commitments have not been fulfilled, even though the time period for their completion has passed.

In the Gasco EIS, Gasco, the project proponent, committed to developing a project-specific adaptive management strategy if “there is a monitored ozone standard exceedance.” Record of Decision for the Gasco Energy Inc. Uinta Basin Natural Gas Development Project, Attachment 2 at 2-6 (June 2012) (ROD) (attached). When triggered, this provision required the applicant to work “with the BLM to analyze enhanced mitigation measures and employ them within 1 year.” *Id.* The Gasco ROD includes a non-exhaustive list of measures such as a reduction in drilling rigs, using Tier IV or better drill rig engines, seasonal reductions, etc. *Id.*

There have been numerous exceedances of the ozone standard since the ROD was issued in June 2012. *See* Gasco ROD at Cover Page. The state and federal government have both made clear that ozone pollution in excess of 75 parts per billion (ppb) during an eight-hour period constitutes an impermissible exceedance. *See* 40 C.F.R. § 50.15. In 2013 the fourth-highest 8-hour ozone reading was 114 ppb in the Uinta Basin (114 ppb in

Uintah County and 108 ppb in Duchesne County); there were thirty-one actual exceedances in Uintah and twenty-six in Duchesne.<sup>4</sup> The three-year average for the 2011-13 period was 101.6 ppb (114 ppb in 2013, 75 ppb in 2012, and 116 in 2011).<sup>5</sup> At least seven days appear to have exceeded the eight-hour ozone standard in 2014 in the Uinta Basin, based on preliminary data.<sup>6</sup>

Gasco has not implemented or mentioned any adaptive management strategy yet. The Vernal EA does not include any mention of this obligation. More than one year has passed BLM and has still not required the implementation of this control strategy and has not undertaken any of the steps required by the Gasco ROD. *See* Gasco ROD, Attachment 2 at 2-6.

In the Gasco EIS the BLM recognized that its air quality analysis was insufficient. As a result, it committed to developing new air quality modeling analysis for the Uinta Basin within two years of the signing of the Gasco ROD. *See* Gasco EIS at 4-444. However, more than two years have passed since the Gasco ROD was signed and BLM has not updated its air quality modeling as promised. *See, e.g.,* Gasco ROD at 1 (indicating that ROD was signed in June 18, 2012). Development, however, has continued at a brisk pace in Uintah and Duchesne counties with 4,289 drilling permits approved from 2012 through September 15, 2014. Utah Division of Oil, Gas and Mining,

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<sup>4</sup> Based on data available at EPA, AirData, Monitor Values Report, [http://www.epa.gov/airdata/ad\\_rep\\_mon.html](http://www.epa.gov/airdata/ad_rep_mon.html) (entering "Ozone" as pollutant, "2013" as year, and "Utah" as geographic area) (attached).

<sup>5</sup> *Id.* (substituting "2012" and "2011" in year category) (attached).

<sup>6</sup> Based on data available at EPA, AIRNow Archives, <http://www.airnow.gov/index.cfm?action=airnow.mapsarchivecalendar> (reviewing "Ozone AQI" for January, February, and March of 2014, the colors orange, red, purple, and maroon indicate values above the 8-hour ozone standard) (attached), it appears that exceedances in 2014 took place on January 1-3, 20, and 26-27, as well as February 8.

Applications for Permit to Drill (APD) – by County,

[http://oilgas.ogm.utah.gov/Statistics/APD\\_county.cfm](http://oilgas.ogm.utah.gov/Statistics/APD_county.cfm) (Sept. 15, 2014) (attached).

In addition, in the Gasco ROD the BLM committed to implement and enforce an emissions control strategy and/or limitation to ensure compliance with applicable ambient air quality standards for ozone. Gasco ROD, Attachment 2 at 2-5. The non-exhaustive list of strategies included a many different control technologies. *See id.* However, these strategies have yet to be implemented by BLM.

Thus, because the BLM relied on future analysis and emissions commitments in the Gasco EIS that have not been fulfilled, it may not rely on the Gasco EIS in the Vernal EA. The BLM does not understand the potential impacts to air quality that could result from leasing and development on these fifteen parcels. As a result, BLM's NEPA analysis here is inadequate and these parcels should be removed from the lease sale by BLM.

#### **V. BLM Failed to Consider the Social Cost of Carbon**

Neither the Vernal and Price EAs, nor the Vernal and Price RMPs upon which they rely, consider the social cost of carbon that will result from the leasing and development of these proposed leases as well as the cumulative costs of carbon emissions from oil and gas development in the Vernal and Price field offices as a whole. The social cost of carbon refers to the costs and benefits of decisions increasing or decreasing carbon. Because the BLM did not consider this it did not comply with NEPA.

SUWA provided both the Price and Vernal field offices with information relating to this issue. *See* Letter from Landon Newell, SUWA, to Stephanie Howard, BLM, 30-31 (July 14, 2014) (attached) (SUWA Vernal Comments); Letter from Landon Newell,

SUWA, to Don Stephens, BLM, 10-11 (July 14, 2014) (attached) (SUWA Price Comments). SUWA pointed the Vernal FO to a formula developed by the U.S. Environmental Protection Agency for estimating potential costs and benefits of decisions increasing or decreasing carbon. *See* U.S. Environmental Protection Agency, *The Social Cost of Carbon* (Nov. 26, 2013),

<http://www.epa.gov/climatechange/EPAactivities/economics/scc.html> (attached)).

SUWA explained that this formula and these calculations had already been used by the Billings Field Office of the BLM in an environmental analysis performed to evaluate the socioeconomics of a proposed oil and gas lease sale. *See* BLM, *Oil and Gas Lease Parcel Sale, Environmental Assessment DOI-BLM-MT-0010-2013-0022-EA*, at 73 (July 2013), *available at*

[http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm\\_programs/energy/oil\\_and\\_gas/leasing/lease\\_sales/2013/october/7-24-](http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm_programs/energy/oil_and_gas/leasing/lease_sales/2013/october/7-24-)

[13\\_post\\_docs.Par.9918.File.dat/Finial\\_Billings\\_EA.pdf](#) (excerpts attached)).

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Both the Price and Vernal EAs, however, refused to perform this analysis, suggesting that it was only to be used for rulemaking. *See* Vernal EA at 132-33; Price EA at 108. Yet, this response ignored the fact that other BLM offices have already conducted this analysis for environmental assessments related to oil and gas leasing and development. *See, e.g.*, BLM, *Oil and Gas Lease Parcel Sale, Environmental Assessment DOI-BLM-MT-0010-2013-0022-EA*, at 73. It also ignores the fact that the U.S. Environmental Protection Agency has “expressed support for its use in other contexts.” *High Country Conservation Advocates v. U.S. Forest Serv.*, Case No. 1:13cv01723-RBJ, 2014 WL 2922751, --- F. Supp. ---, at \*9 (D. Colo. June 27, 2014) (attached). Indeed, a

U.S. District Court in Colorado recently held that an agency refusal to quantify the social cost of carbon related to a lease modification was arbitrary and capricious in violation of NEPA. *See id.* at \*8-11. Thus, this methodology can and should be used for quantifying these impacts. Because the Vernal and Price EAs failed to do this, they violated NEPA and all the protested parcels should be withdrawn.

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

SUWA raised a host of issues related to air quality with the Vernal and Price field offices. BLM responded to SUWA's comments by focusing only on whether it should have prepared quantitative analysis at the lease stage. While the BLM should have prepared such analysis at this stage, this disagreement missed a number of key matters that were not addressed by BLM. Importantly, BLM has not addressed SUWA's contention that air quality is so bad in the Uinta Basin that the agency may not continue to issue new leases.

~~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 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. Leasing and subsequent development in the Price Field Office could contribute to air quality exceedances. Leasing and subsequent development in the Vernal Field Office will also contribute to air quality exceedances.

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. Megan Williams detailed the various pollutants of concern in the region and the contributions of oil and gas development to their levels. *See generally* SUWA Vernal Comments & SUWA Price Comments, Letter from Megan Williams to David Garbett (July 11, 2014) (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>7</sup> and ground-level ozone. *See, e.g.*, 40 C.F.R. § 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

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<sup>7</sup> This number refers to particles 2.5 microns in diameter or smaller.

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>8</sup> As the Vernal EA acknowledges, ozone levels in the Uinta Basin are well above the current federal standards. See Vernal EA at 16-17. The values recorded during the winters of 2010, 2011, 2012, and 2013 demonstrate that this is an ongoing problem. See, e.g., *id.*; attached monitoring report compilations from U.S. Environmental Protection Agency data 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. See Williams Vernal Comments, Detailed Comments at 6-7. If this standard were lowered in the future then ensuring compliance with this standard would become even more difficult. See *id.*

While the BLM has acknowledged the ozone problem in the area, it has done nothing to ensure its activities will not lead to further exceedances of this problem. The

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<sup>8</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.

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. *See, e.g.,* Vernal EA at 46-47. 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.* Just because the potential development on these leases may be small in comparison to the level of development in the Uinta Basin does not mean that their emissions are small. To the contrary, overall ozone precursor emissions in the Uinta Basin are incredibly high. In fact, scientist recently estimated that volatile organic compound emissions—an ozone precursor—from oil and gas in the Uinta Basin are the equivalent of emissions from approximately 100 million automobiles. D. Helmig *et al.*, *Highly Elevated Atmospheric Levels of Volatile Organic Compounds in the Uinta Basin, Utah, Environmental Science & Technology* (2014) (attached). Even a small slice of emissions from such a gargantuan pie is a notable amount of pollution. 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 Vernal Comments, Detailed Comments at 12-14; Williams Price Comments, Detailed Comments at 12-13.* 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>9</sup> The Price and Vernal EAs indicate that this is also a problematic pollutant in this area. See Vernal EA at 17; Price EA at 9. 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. BLM should withdraw all twenty-seven parcels identified by SUWA in this protest.

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

### **a. 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 Williams Vernal Comments; Williams Price Comments. Her comments and suggestions were largely ignored as the Price and Vernal EAs took a position that leasing will not result in any direct air emissions or that now is not the appropriate time to consider such issues. See, e.g., Vernal EA at 133-34; Price EA at 118-20. However, this suggestion ignored BLM's obligation to evaluate impacts before it makes an irreversible and irretrievable commitment of resources.

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<sup>9</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.

Ms. Williams's comments are reincorporated here. Briefly, however, Ms.

Williams identified the following concerns, which the Vernal and Price EAs failed to consider or fully analyze: the BLM did not prepare dispersion modeling;<sup>10</sup> it did not

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<sup>10</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, Detailed Comments at 1-5. “[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.*, Price EA at 118. 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; it did not consider nitrogen dioxide pollution nor did it adequately analyze fine

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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 released 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 useful 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.*

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 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 Vernal Comments; Williams Price Comments.

BLM must conduct full analysis of air quality impacts before offering or issuing these twenty-seven 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 22-23. 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.* Only based on this modeling could BLM 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.

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 BLM 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.

Ms. Williams raised issues with the Vernal and Price EAs regarding their visibility impacts analysis. *See* Williams Vernal Comments, Detailed Comments at 14-15. As Ms. Williams pointed out, BLM's RMPs have indicated that oil and gas development could impact visibility in protected airsheds. *See id.* BLM has done nothing to address this matter. This comes in spite of the fact that BLM cannot authorize development that will contribute to adverse impacts to visibility. BLM has not taken a hard look at 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 twenty-seven leases should be withdrawn.

**b. Climate Change**

Ms. Williams also 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 Vernal Comments, Detailed Comments at 23-28; Williams Price Comments, Detailed Comments at 22-28.* Rather than address these comments, the BLM has pushed its analysis off to some future date. *See, e.g., Price EA at 118; Vernal EA at 47.* In response, the Vernal and Price EAs principally 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., Vernal EA at 47.* 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 Vernal Comments, Detailed Comments at 23-28; Williams Price Comments, Detailed Comments at 22-28.* 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 Vernal Comments, Detailed Comments at 23-28; Williams Price Comments, Detailed Comments at 22-28.* 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 Vernal & Price Comments).<sup>11</sup> It should have conducted this same analysis

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<sup>11</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. 8, 2014).

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 28; Vernal EA at 47. 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.

**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 Vernal 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 twenty-seven 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 twenty-seven 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 twenty-seven 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 in the Price and Vernal EAs 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 Vernal Comments, Detailed Comments at 28-33; Williams Price Comments, Detailed Comments at 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 Vernal Comments, Detailed Comments at 28-33; Williams Price Comments, Detailed Comments at 28-32. 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* Williams Vernal Comments, Detailed Comments at 28-33; Williams Price Comments, Detailed Comments at 28-32. As Ms. Williams proposed mitigation measures are drawn from BLM projects elsewhere they are both reasonable and feasible. *See* Williams Vernal Comments, Detailed Comments at 28-33; Williams Price Comments, Detailed Comments at 28-32. Therefore, the Price and Vernal EAs should have considered her proposed leasing alternative.

#### **VIII. BLM Ignored Dust on Snow Issues**

The Vernal 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 Vernal Field Office, on soil disturbance which leads to early snowmelt in nearby mountains when transported in wind storms. SUWA Vernal Comments at 18 (citing to SUWA comments on the BLM's Gasco environmental impact statement, where this issue was raised on page 2 of SUWA's comments on the Gasco final environmental impact statement). 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.,*

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*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.crwcd.org/media/uploads/2009\\_09\\_18\\_Belnap\\_Seminar.pdf](http://www.crwcd.org/media/uploads/2009_09_18_Belnap_Seminar.pdf). The BLM has never evaluated this issue in the Vernal 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 Vernal—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 Vernal EA suggests that it has already dealt with analysis of this issue. *See* Vernal EA at 127. However, the analysis simply exclaims that the matter is too speculative to address. *See id.* (referring to Gasco final environmental impact statement at P-26).

This matter is not too speculative to ignore. The EPA has already asked BLM to consider this issue. Disclosing this information is a necessary step in the NEPA process and in ensuring that the public receives all the information necessary to 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 Vernal 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 Vernal EA's own commitment, the BLM should have undertaken some analysis here. In the Vernal EA, the BLM indicates that when it "cannot complete necessary quantitative analysis ... it will include" at least a "qualitative narrative description of the air quality issues or impacts." Vernal EA at 134. The Vernal

EA lacks any narrative description of air quality issues or impacts related to eolian dust deposition on mountain snowpack. The Vernal 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 twenty-five parcels protested by SUWA in the Vernal Field Office.

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

##### **a. Introduction**

The following lease parcels must be removed from the November 2014 oil and gas lease sale on account of BLM's failure to take a hard look at lands with wilderness characteristics and in particular, wilderness characteristics inventory reports provided by SUWA:

UT-1114-034; UT-1114-035; UT-1114-51; UT-1114-109; UT-1114-110;  
UT-1114-112; UT-1114-113; UT-1114-114; UT-1114-116; UT-1114-134;  
UT-1114-195; UT-1114-214; UT-1114-216.

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The BLM is required under FLPMA to prepare and maintain "on a continuing basis" an inventory of all public lands and their resources and other values. 43 U.S.C. § 1711(a). "This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resources and other values." *Id.* BLM conducts this inventory to also comply with its mandate under the Wilderness Act of 1964. *See* 16 U.S.C. § 1131 *et seq.*

On March 15, 2012, BLM released new guidance for conducting wilderness characteristics inventories on public lands as well as for considering wilderness characteristics during land use planning. *See* BLM, 6310 – Conducting Wilderness

Characteristics Inventory on BLM Lands (Public) (March 15, 2012) (Manual 6310) (attached); BLM, 6320 – Considering Lands Wilderness Characteristics in the BLM Land Use Planning Process (Public) (March 15, 2012) (Manual 6320) (attached). These manuals “supersede[d] all previous guidance on this topic.” Manual 6310.01, Manual 6320.01.

When BLM is engaged in the NEPA process – as it is here – it must “[u]pdate and maintain the wilderness inventory for lands within the planning area consistent with BLM wilderness characteristics inventory guidance [*i.e.*, Manual 6310].” Manual 6320.04(C)(1). Moreover, BLM must also “[e]nsure that wilderness characteristics inventories are considered and that . . . lands with wilderness characteristics are protected in a manner consistent with this manual in BLM planning process.” *Id.* § 6320.04(C)(2). Manual 6310 specifically states that BLM *will* update its wilderness characteristics inventory on a continuing basis and in particular, when

1. The public or the BLM identifies wilderness characteristics as an issue during the NEPA process.
2. [ . . . ]
3. The BLM has new information concerning resource conditions, including wilderness characteristics information submitted by the public . . .
4. A project that may impact wilderness characteristics is undergoing NEPA analysis.
5. [ . . . ]

Manual 6310.06(A). On July 14, 2014, SUWA submitted to BLM wilderness characteristics inventory reports for Currant Canyon (addition), Bad Land Cliffs (addition), Sheep Wash, Big Wash, Desolation Canyon (addition), and White River (addition) (collectively, “Wilderness Character Submissions.”)<sup>12</sup> The Wilderness

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<sup>12</sup> The material submitted for each new wilderness characteristic inventory report is attached.

Character Submissions identified wilderness characteristics as an issue and provided new information regarding wilderness characteristics present in each area. Moreover, the lease sale may impact wilderness characteristics. The BLM arbitrarily concluded that the submissions did not contain “significant new information” and as a result failed to review *any* of the submissions in compliance with Manual 6310. The aforementioned lease parcels must then be removed from the upcoming oil and gas lease sale.

**b. BLM’s Dismissal of SUWA’s Wilderness Characteristics Inventory Submissions was Arbitrary and Capricious**

In response to SUWA’s Wilderness Character Submissions, the Vernal Field Office stated that

BLM has preliminarily reviewed those submissions and has determined that all the submitted inventories have been previously inventoried by the BLM. The primary differences between the submitted inventories and the previous inventories are disputes over the proper place to draw boundaries for the wilderness characteristics . . . Given the onsite visits, the previous inventories, the proposed action’s consideration of the Vernal RMP leasing decisions, and the large areas covered by the submitted inventories that do not overlap with the proposed action, it has been determined that ~~the submitted inventories do not constitute significant new information.~~

Vernal EA at 131. SUWA did not submit new wilderness characteristics inventories to the PFO for the upcoming oil and gas lease sale. Instead, SUWA provided new information demonstrating that the proposed action may impact lands with wilderness characteristics; requiring PFO to update its inventory of wilderness characteristics on federal lands in compliance with Manual 6310.

In response, the Price Field Office stated that it had made wilderness characteristics management decisions in the 2008 Price RMP and it had visited each parcel in 2014 so no additional analysis or wilderness characteristics consideration was required. *See* Price RMP at 107.

Both field offices' reasoning is arbitrary and capricious.

First, the BLM has *never* inventoried or updated its inventories for any of the Wilderness Character Submissions in compliance with Manual 6310 and Appendices A-D. Moreover, BLM may have previously inventoried the general area in or near the land encompassed by each new submission but it has never inventoried the areas *as submitted* (*i.e.*, following the provided boundary lines and/or cherry stems around substantially noticeable human impacts). *See, e.g.*, SUWA, VFO's Previous Wilderness Inventories – 1980, 1999 and 2002, Eastern White River Addition (Map – Eastern White River Addition) (attached).<sup>13</sup>

As evidence of this, BLM admits that it inventoried lease parcel UT-1114-134, UT-1114-195, UT-1114-214, and UT-1114-216 most recently “during the preparation of the Vernal RMP” (*i.e.*, *prior* to Manual 6310). Vernal EA at 131. Those inventories also did not follow the boundaries as submitted by SUWA in the present instance. *See* Map – Eastern White River Addition; SUWA, VFO's Previous Wilderness Inventories – 1980, 1999, 2001 and 2012, Desolation Canyon Additions (Map – Desolation Canyon Additions) (attached); SUWA, VFO's Previous Wilderness Inventories – 1980 and 2011, Currant Canyon Addition (Map – Currant Canyon Addition) (attached); SUWA, VFO's Previous Wilderness Inventory – 2012, Sheep Wash and Big Wash (Map – Sheep Wash and Big Wash) (attached); SUWA, VFO's Previous Wilderness Inventory – 2012, Bad Land Cliffs Addition (Map – Bad Land Cliffs Addition) (attached).

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<sup>13</sup> This map shows the boundary of previous BLM wilderness characteristics and also the boundary of SUWA's Eastern White River Addition. As shown, the BLM has *never* inventoried the area in yellow (marked as “A”) and inventoried the small area depicted in orange in between A and “B” but established an arbitrary boundary at the area's western edge (marked as B).

The BLM inventoried UT-1114-051, UT-1114-109, UT-1114-110, UT-1114-112, UT-1114-113, UT-1114-114, and UT-1114-116, “subsequent to the Vernal RMP.”

Vernal EA at 131. However, these inventories were done prior to and not in compliance with Manual 6310. *See, e.g.*, BLM, Documentation of BLM Wilderness Characteristics Inventory Findings on Record – Bad Land Cliffs (July 2011) (BLM, Bad Land Cliffs WC Inventory) (attached); BLM, Documentation of BLM Wilderness Characteristics Inventory Findings on Record – Currant Canyon (July 2011) (BLM, Currant Canyon WC Inventory) (attached); BLM, Wilderness Characteristics Review – Desolation Canyon Area (Feb. 2007) (BLM, Desolation Canyon WC Inventory) (attached); BLM, Wilderness Characteristics Review – White River Area (Feb. 2007) (BLM, White River WC Inventory) (attached). The BLM then has yet to inventory any of the Wilderness Character Submissions in accordance with Manual 6310; it merely assumed that since it had inventoried the *general* area in or around each submission it had inventoried each *specific* unit as submitted. Manual 6310 clearly does not allow such an approach. *See, e.g.*, Manual 6310.06.B.2. (“the BLM shall evaluate the information regarding the validity of proposed boundaries of the area(s).” BLM must compare SUWA’s new information to BLM’s existing inventory and if the new information such as proposed boundaries is substantially different then it must perform a new inventory of the area. *See id.*

Second, the boundaries BLM has in place for identified wilderness characteristics areas violate Manual 6310. Under Manual 6310, wilderness characteristics boundaries can be formed by (1) wilderness inventory roads, (2) property lines, (3) developed rights-of-way, or (4) substantially noticeable *human* impacts. *See* Manual 6310.07 (defining

“[b]oundaries”); *see also* Manual 6310.06.C.3. SUWA’s boundaries for each Wilderness Character Submission meet these requirements while BLM’s do not.<sup>14</sup> For example, SUWA’s Desolation Canyon Wilderness Character Addition for Kings Canyon and Kings Canyon Bottom near the Green River utilizes boundaries such as wilderness inventory roads and other substantially noticeable human impacts. *See* SUWA, Attachment A – Detailed Wilderness Character Map, Vernal BLM Wilderness Character Area, Desolation Canyon Additions (Desolation Canyon Additions Map) (attached). The wilderness characteristics boundary identified by BLM in its 2008 Vernal RMP however arbitrarily follows a natural wash and then moves upward along cliffs and ridges to connect to human features on the benches above Kings Canyon. Similarly, BLM’s boundary which excludes the Sand Wash area is arbitrary as it crosses the natural landscape, opposed to being located along a substantially noticeable human impact. *See* Desolation Canyon Additions Map. Both of these areas are arbitrarily excluded from the larger Desolation Canyon area identified by BLM as possessing wilderness characteristics on account of these inaccurate boundaries.

The Big Wash and Sheep Wash wilderness characteristics unit boundaries submitted by SUWA comply with Manual 6310 while BLM’s current boundaries do not. BLM’s “boundaries” are amorphous at best since the areas have never been inventoried

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<sup>14</sup> This is not a “dispute” over the proper place to draw the boundary. Rather, it is a fact that BLM has simply failed and continues to fail to use inventory boundaries that comply with the agency’s own guidance. As described in detail in each Wilderness Character Submission, BLM’s boundaries in part or in whole do not follow *any* of the allowable boundary lines but instead arbitrarily cross natural, undisturbed, terrain or follow ridges or cliffs. To the extent that BLM is attempting to justify its current boundaries as “setbacks” or “buffers” placed some distance from substantially noticeable human impacts, that is unallowable too. *See, e.g.*, Manual 6310.06.C.3.b. (“When establishing the boundary, *do not* create a setback or buffer from the physical edge of the imprint of man.”) (emphasis added).

on their own merits. Instead, as discussed *infra*, BLM inventoried a *small fraction* of Bad Land Cliffs area but then eliminated a much larger (and non-inventoried) area, including the Big Wash and Sheep Wash areas, from wilderness characteristics consideration in the Gasco EIS. *See* Map – Sheep Wash Big Wash. The GPS data points provided by BLM for each photograph taken or route driven clearly demonstrate that BLM inventoried a small portion of the much larger Bad Land Cliffs area, and did not inventory the Big Wash or Sheep Wash wilderness characteristics units. *Id.* In particular, this evidence shows that BLM only inventoried to the south, southeast, of both units and never inventoried to the north, northwest, or northeast of either unit and more importantly, never inventoried *within* either unit. *Id.*

Similar problems exist regarding BLM's treatment of SUWA's other Wilderness Character Submissions. BLM's designated boundaries in these areas do not comply with Manual 6310 but instead cross natural undisturbed terrain, follow cliff edges and rims, and/or follow section lines. For example, the boundary at the southern end of the identified White River wilderness characteristics area crosses straight across natural undisturbed land rather than follow a substantially noticeable human impact. *See, e.g.,* SUWA, Attachment A – Detailed Wilderness Character Map, Vernal BLM Wilderness Character Area, White River Additions (showing that BLM's current boundary is a straight line through sections 1, 3-5, and part of 6, of township 11 south, range 23 east) (attached). As a result, the area referred to in SUWA's submission as the "southern White River Addition" has been arbitrarily eliminated from the larger wilderness characteristics unit. *Id.* The area referred to as the "eastern White River Addition" has

never been inventoried but instead fits like a puzzle piece between other previously inventoried areas. *See* Map – Eastern White River Addition.

The GPS data points for BLM’s wilderness characteristics reviews for the Desolation Canyon area and Currant Canyon area clearly show that BLM inventoried only to the east (e.g., Desolation Canyon) or to the south (e.g., Currant Canyon) but *never* inside either unit. *See, e.g.,* Map – Desolation Canyon Addition; Map – Currant Canyon Addition. The agency then used this limited review to discredit much larger – non-inventoried – areas based on factors observed elsewhere. BLM has yet to verify the Wilderness Character Submissions boundaries *as submitted* to determine whether the units should be considered part of larger identified wilderness character areas or as new wilderness character areas (for those newly submitted areas of sufficient size *e.g.,* Eastern White River Addition). *See* Manual 6310.06.B.2 (“the BLM shall evaluate the information regarding the validity of proposed boundaries of the area(s).”).

Third, it is arbitrary for BLM to conclude that SUWA’s Wilderness Character Submissions do not present “significant new information” because the areas submitted are larger than or otherwise do not entirely overlap with the proposed lease parcels. The public is under no obligation whatsoever to submit wilderness characteristics information that is the same size as or overlaps neatly with a proposed project. More to the point though, these two arbitrary requirements have nothing to do with whether information provided is significant or new. Instead, Manual 6310 states that

The minimum standard that new information must meet in order for the BLM to consider the information . . . requires the submission of the following information to BLM:

- i. a map of sufficient detail to determine specific boundaries of the area in question;

- ii. a detailed narrative that describes the wilderness characteristics of the area and documents how that information substantially differs from the information in the BLM inventory of the area's wilderness characteristics; and
- iii. photographic documentation.

Manual 6310.06.B.1.b. SUWA's Wilderness Character Submissions met each of these standards. As discussed previously, SUWA's newly proposed boundaries are substantially different than earlier BLM inventories; the narrative for each submission coupled with the maps and photographic documentation provided make clear this point. Furthermore, and most importantly; the VFO has *never* inventoried any of the submitted areas in compliance with Manual 6310 because its inventories of the submitted areas were all done prior to March 2012 when Manual 6310 was released.<sup>15</sup>

The Wilderness Character Submissions meet the "new information" standard in Manual 6310 and the areas referenced therein must then be reviewed "as soon as practicable." BLM Manual 6310.06.B.2. This includes evaluation of the proposed boundaries such as the existence of wilderness inventory roads, the size of the areas, and the presence or absence of wilderness characteristics. *Id.* Evaluation of existing information is permissible and encouraged but if the newly provided information is substantially different – as it is here – then BLM must "determine whether the area[s] qualif[y] as lands with wilderness characteristics." *Id.*

Finally, BLM failed to document its conclusions when it rejected out-of-hand SUWA's Wilderness Character Submissions provided for the 2014 November oil and gas lease sale. BLM is required to update its inventory of all public lands "on a continuing basis." *See* 43 U.S.C. § 1711(a); Manual 6310.06.A. In so doing,

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<sup>15</sup> This fact alone is significant new information.

[i]t is *essential* that an adequate record of the inventory and subsequent updates be maintained to ensure proper documentation of inventory findings, including relevant narratives, maps, photographs, new information, and any other relevant information.

Manual 6310.06.A. (emphasis added). Whether or not BLM finds that an area contains wilderness characteristics it must “document the rationale for the findings, make the findings available to the public, and retain a record of the evaluation and the findings as evidence of the BLM’s consideration.” *Id.* § 6310.06.B.2. This must be done “[r]egardless of past inventor[ies].” *Id.* § 6310.06.A.

Manual 6310 also requires that certain forms be used and completed in order for the inventory to be finalized and documented. *See, e.g.*, Manual 6310.06.B.4 (citing Appendix B: Inventory Area Evaluation, Appendix C: Route Analysis, and Appendix D: Photo Log); *id.* (“[BLM] must document wilderness characteristics inventories according to attached Appendices A-D as applicable.”).

The Vernal EA claims that “[i]n accordance with BLM Manual 6310, the BLM has conducted additional wilderness characteristics inventories” for leases parcels that fall within lands encompassed by the Wilderness Character Submissions. *See EA* at 131. To SUWA’s knowledge this statement is only partially accurate. Generally speaking, BLM has inventoried the areas in and around the lands encompassed by SUWA’s recent submissions. None of the inventories, however, were done “in accordance with BLM Manual 6310.” The BLM’s inventories were done prior to Manual 6310 and did not use the new forms in Appendices A – D. *See, e.g.*, BLM, Bad Land Cliffs WC Inventory; BLM, Currant Canyon WC Inventory; BLM, Desolation Canyon WC Inventory; BLM, White River WC Inventory; *see also* E-Mail from Stephanie Howard, BLM, to Landon Newell, SUWA (Sept. 12, 2014) (clarifying that “the ‘additional characteristics

inventories' referenced on [Vernal] EA page 131 are any inventories completed after the [Vernal] RMP was signed.") (attached).

The Price EA states that "[i]n April 2014, the PFO IDT conducted on-site visits to the November 2014 proposed lease parcels, including parcels 034 and 035, in order to validate existing data and gather new information in order to make an informed leasing recommendation." Price EA at 107. At the moment, it is unclear whether the PFO updated its wilderness character inventory report in compliance with Manual 6310 and Appendices A-D, because SUWA has yet to receive requested information regarding the most recent field visits. *See* E-mail from Landon Newell, SUWA, to Matt Blocker, BLM (Sept. 12, 2014) (requesting "any new wilderness characteristics inventory review forms/documentations compiled or completed for (sic) these recent visits") (attached).

For these reasons, BLM failed to comply with its obligations under FLPMA, the Wilderness Act of 1964, and Manuals 6310 and 6320 and as a result the aforementioned lease parcels should be removed from the upcoming oil and gas lease sale.

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**X. The BLM Failed to Take a Hard Look at Graham's and White River Beardtongue**

There are several lease parcels, specifically UT-1114-121, UT-1114-126, UT-1114-214, UT-1114-248, and UT-1114-254, which overlap with Graham's and/or White River beardtongue conservation areas. The Vernal EA did not consider or analyze this factor or the reasonably foreseeable direct, indirect, or cumulative impact to such areas or to either species in these areas. As a result, the BLM should not offer these lease parcels or in the alternative should attach mandatory NSO stipulations to each, respectively.

Oil and gas exploration and development poses a significant threat to Graham's and White River beardtongue habitat and long-term viability. *See See Conservation*

Agreement and Strategy for Graham's Beardtongue (*Penstemon grahamii*) and White River Beardtongue (*P. scariosus* var. *albifluvis*) at 19 (April 2014) (Conservation Agreement) (attached). Road construction and maintenance, invasive weeds, off-road vehicles, habitat fragmentation, and climate – all factors exacerbated by the leasing of parcels in these areas – also threaten both species' habitat and ability to survive in the long-term. *Id.* Potential threats – the majority from energy development – to the Graham's and White River beardtongue could impact 91% and 100%, respectively, of the total known populations. *See* Conservation Agreement at 1.

On May 5, 2014, the United States Fish and Wildlife Service (FWS) released a draft conservation agreement for the Graham's and White River beardtongues. *See* Conservation Agreement. The BLM Vernal Field Office, State of Utah School and Institutional Trust Lands Administration, and Utah Public Lands Policy Coordination Office, along with others are signatories to the Conservation Agreement. The Conservation Agreement was prepared in response to the FWS's proposed listing of the Graham's and White River beardtongue as threatened and proposed designation of approximately 82,873 acres as critical habitat under the ESA. *See* Conservation Agreement at 1; 78 Fed. Reg. 47590 (Aug. 6, 2013). The Conservation Agreement set forth 44,373.4 acres of federal and non-federal land as conservation areas. *See* Conservation Agreement at 15. These areas are to be managed according to twenty-nine "conservation actions" including the following:

- A maximum of 5% new surface disturbance for Graham's beardtongue and 2.5% new surface disturbance for White River beardtongue will be allowed per conservation unit.
- Ground-disturbing activities will avoid Graham's and White River plants by 300 feet both inside and outside designated conservation areas.

Conservation Agreement at 18.

However, the Vernal EA did not mention the Conservation Agreement, and the BLM's response to comments merely states that they will analyze impacts at a later time. *See generally* Vernal EA at 129-30. BLM states, in its response to comments, that any "[p]roposed surface disturbing activities within these areas would require pre-disturbance surveys to 300 feet a minimum of one year before the activities would take place." *Id.* at 129. Additionally, BLM argues that any potential impacts to populations or habitat would be avoided or reduced by site-specific mitigation. *Id.* However, this is insufficient for the following reasons.

First, the post-lease site-specific analysis of the effects of drilling on Graham's and White River beardtongues is untimely and insufficient. NEPA requires that an agency conduct all environmental analyses at "the earliest possible time." 40 C.F.R. § 1501.2; *see also* *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 973, 977-78 (9th Cir. 2006); *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009). In the case of impacts to the Graham's and White River beardtongue it appears, the BLM appears to be delaying and pushing back that analysis to a later day. This is insufficient to comply with the Conservation Agreement and violates NEPA.

At the leasing stage, BLM makes an irrevocable commitment of resources to allow surface disturbing activity. *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983). BLM regulations provide that unless otherwise stipulated in the lease, "[a] lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. § 3101.1-2. Accordingly, once the lease is issued, BLM no longer has the

authority to prevent some level of development. *Sierra Club v. Peterson*, 717 F.2d at 1415; see also *Connor v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) (“the sale of a non-NSO oil and gas lease constitutes ‘the point of commitment;’ after the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment.”). Under this decision the consequences of conveying the right to surface disturbance must be analyzed now, when the BLM still has the right to prohibit or regulate comprehensively the scope of surface activity. Here, this means that the BLM must make a reasonable effort to anticipate and analyze all reasonably foreseeable impacts on the Graham’s and White River beardtongue now, before it has leased the land and is unable to prevent environmental impacts.

Second, pursuant to the Conservation Agreement the BLM may not permit more than 5% new surface disturbance for Graham’s beardtongue and 2.5% new surface disturbance for White River beardtongue in the conservation areas. To SUWA’s knowledge, BLM does not have an established method or plan for calculating current or future surface disturbance(s) in a particular area (*i.e.*, Graham’s or White River beardtongue conservation area) and it is possible that conservation areas already exceed the new surface disturbance threshold. If the new surface disturbance threshold percentages have already been reached in a particular conservation area then BLM must either remove overlapping proposed lease parcels or attach mandatory NSO stipulations.<sup>16</sup>

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<sup>16</sup> Even though the entire area within a proposed lease parcel that overlaps with Graham’s or White River beardtongue conservation area habitat may be undisturbed, the same conservation area habitat may be disturbed elsewhere; thereby surpassing the 2.5% or 5% threshold.

Finally, BLM must follow the mandates of the Conservation Agreement when determining whether to issue oil and gas leases within the conservation areas. Signatories to the Conservation Agreement have made clear that the twenty-nine “conservation actions” contained therein, including the three hundred foot buffer, cannot be waived (or altered), and offer “legally binding protection on state, federal and private lands.” See Mike McKee, Mark Raymond, and Darlene Burns, *Op-ed: Penstemon Agreement Saves More Flowers than Endangered Species Act Would*, Salt Lake Trib., July 11, 2014 (attached); see also *id.* (“Some critics claim that this conservation plan — negotiated between local, state and federal agencies — is voluntary and so does not provide ‘real’ protection for these plants. Uintah County wants to be clear that this is incorrect. The agreement is enforceable by law.”). As such, BLM should attach NSO stipulations for all activity within three hundred feet of Graham’s or White River beardtongue species/habitat, if the agency goes forward with the sale of parcels in these critical areas.

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

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The BLM must remove parcels 51, 114, 116, 121, 214, and 216 because it has not incorporated new information related to visual resources on the lands covered by these parcels.

In preparing the 2008 RMP, 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. 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). Rather than relying on this new information, the Vernal EA

used the outdated VRM data incorporated in the 2008 RMP to protect visual resources. This use of outdated information does not sufficiently protect 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. Parcels 51 and 116 as well as portions of 114 and 121 are located in an area listed as VRM Class III in the 2008 RMP. *See Vernal ROD at Figure 16a.* The 2011 inventory revised this and changed the scenery quality classification to a level that would be the equivalent of VRM Class II. *See Vernal VRI Final Report at 5-3.* Similarly, parcels 214 and 216 either wholly, or in part, are located in areas listed as Class III and IV, which were then changed to Class II in the 2011 inventory. *See Vernal ROD at Figure 16a; Vernal VRI Final Report at 5-3.* In preparing the 2008 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.

BLM, 2008 Vernal RMP, Draft EIS § 3.17.1. “[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. This is the difference in the

areas where VRM classification 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. 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.

Because the new VRM information is significant, BLM was required to consider it. Unfortunately, the Vernal EA rejected this information without considering what SUWA had actually said. *See* Vernal EA at 130. The Vernal EA essentially argued that the Vernal RMP visual resource management classification was justified when it was made. *See id.* However, that issue is not in contention. What SUWA asked the BLM to consider was the impact of new information regarding visual resource since the completion of the Vernal RMP. The Vernal EA sidesteps this issue. *See* Vernal EA at 132. Therefore, BLM must withdraw parcels inside any area where visual resource management classifications have improved to account for the unanalyzed change in visual resource classification.

## **XII. The BLM Failed to Take a Hard Look at Water Quality/Resources**

The EA failed to take a hard look at the direct, indirect, and cumulative impacts to water quality/resources from leasing the following parcels:

UT-1114-118; UT-1114-121; UT-1114-126; UT-1114-132; UT-1114-134;  
UT-1114-135; UT-1114-137; UT-1114-173; UT-1114-195; UT-1114-196;  
UT-1114-214; UT-1114-216.

The Vernal EA does not discuss impacts to water quality from the leasing of these parcels and their subsequent exploration and development to the Green and White rivers, as well as to Bitter, Evacuation, Ninemile, and Willow creeks.

See Vernal EA at 101-103 (water quality is an issue that is “present, but not affected to a degree that detailed analysis is required”). BLM concluded – incorrectly – that analysis of potential impacts could be postponed because (1) leasing of parcels does not authorize ground disturbance; and (2) site-specific effects cannot be analyzed until an exploration or development application is received, after leasing has occurred. *See id.* at 103. This approach is arbitrary and capricious since the issuance of oil and gas lease *is* an irrevocable commitment of resources; thereby requiring detailed analysis at this stage. *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 717-19 (10th Cir. 2009); *Sierra Club v. Peterson*, 717 F.2d 1409, 1413-14 (D.C. Cir. 1983).

**a. BLM Generally Does Not Analyze Impacts to Water Quality/Resources in Subsequent Site-Specific Environmental Assessments**

The BLM must conduct meaningful analysis now – at the lease sale stage – because it generally does not analyze the direct, indirect, or cumulative impact to water quality/resources from site-specific proposals. This is true for site-specific proposals in new (*i.e.*, undisturbed) areas as well as for proposals to expand existing disturbances. *See, e.g.*, BLM, QEPs KJ 2-2-7-22 Gas Well, DOI-BLM-UT-G010-2014-0037-EA (Jan. 2014) (new well pad and associated infrastructure but EA lacked water quality/resource analysis) (attached); BLM, Foundation Energy proposes to drill Three new gas wells The Davis 7-12-13-25, Displacement Point 1-1-13-25, and the Davis Canyon 2-7-13-26, DOI-BLM-G010-2013-0239-EA (May 2014) (new well pad and associated infrastructure and expansion of existing well pads but lacking water quality/resource analysis) (attached); BLM, Red Wash Four Oil Well Project, DOI-BLM-UT-G010-2014-0080-EA (2014)

(three new well pad locations but no water quality/resource analysis) (attached); BLM, Bill Barrett Corporation proposes to drill one new oil well: Aurora Federal 9-27D-7-20, on split estate in Uintah County, Utah, DOI-BLM-UT-G010-2014-0237-EA (Aug. 2014) (one new well pad and associated infrastructure but EA did not contain water quality/resource analysis) (attached); Bill Barrett Corporation proposes to drill 4 new oil wells on split estate in Uintah County, Utah, DOI-BLM-UT-G010-2014-0130-EA (April 2014) (four new well pads and associated infrastructure but EA lacked water quality/resource analysis) (attached); BLM, Bill Barrett Corporation proposes to drill the following oil well: Federal 11-26D-7-20, on split estate in Uintah County, Utah (March 2014) (new well pad and associated infrastructure but no water quality/resource analysis) (attached); *see also* BLM, Kerr-McGee Oil & Gas Onshore, LP Proposal to Directionally Drill Eight-Five Wells from Two New and Eight Existing Pads Greater Natural Buttes Unit, Uintah County, Utah (April 2014) (*eighty-five wells near the White River* but no water quality/resource analysis) (attached); BLM, Gasco Production Company Proposes to Drill 16 Gas Wells From Three Existing Well Pads, DOI-BLM-UT-G010-2013-0132-EA (July 2014) (expansion of three existing well pads for sixteen new wells near the Green River without water quality/resource analysis) (attached); BLM, Two Horse Butte (42-32 Gas Well and Access Road Upgrade 2013), DOI-BLM-UT-G010-2013-0203 (June 2013) (no water quality/resource analysis) (attached); BLM, GMBU West 2014-3 Infill Development within the Greater monument Butte Unit, DOI-BLM-UT-G010-2014-0194 (July 2014) (twenty-one new wells and expansion of existing well pads without water quality/resource analysis); BLM, Red Wash 2 Oil and 2 Gas Well Project, DOI-

BLM-UT-G010-2014-0013-EA (Dec. 2013) (no water quality/resource analysis)  
(attached).

There is thus no basis to reasonably believe that BLM will conduct water quality/resource analysis in response to future site-specific oil and gas development proposals, despite the agency's repeated assurances. *See, e.g.*, Vernal EA at 102 (water quality/resource analysis will be conducted "prior to the approval of *any* ground disturbance proposal on the parcels") (emphasis added); *id.* at 125 ("[s]ince this action [the submission of a site-specific APD in the future] will acquire (sic) additional analysis at the site specific level, any water quality concerns will be analyzed at that time. Most likely analysis will be documented in an [EA].").<sup>17</sup> In fact, as of September 15, 2014, the VFO lists sixty oil and gas development projects on its ePlanning website.<sup>18</sup> Thirty-seven of the projects are listed as "Completed."<sup>19</sup> For the thirty-seven site-specific projects, BLM conducted water quality/resource analysis *for only one* proposed project.<sup>20, 21, 22</sup> *See*

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<sup>17</sup> In response to SUWA's comments, BLM also stated that it will consider – at the site-specific proposal stage only – new information prepared and released by the Utah Department of Environmental Quality, Division of Water Quality (DWQ), relating to the listing of new and additional waters/impairments on Utah's Clean Water Act section 303(d)(1) list of impaired waters. *See* Vernal EA at 125-26. It is arbitrary and capricious to delay the direct, indirect, and cumulative impacts to water quality/resources until an unknown date when – as discussed *infra* – the analysis at that time will very likely not be performed. BLM is obligated by state and federal law to ensure that projects it authorizes do not threaten or harm aquatic resources. *See, e.g.*, 33 U.S.C. § 1251(a); Utah Admin. Code R317-2-3.1.

<sup>18</sup> The website is available at [https://www.blm.gov/epl-front-office/eplanning/nepa/nepa\\_register.do](https://www.blm.gov/epl-front-office/eplanning/nepa/nepa_register.do). To narrow the results please select "Utah," "UT – Vernal FO," "All," "All," and then "Oil and Gas." Clicking "search" should then show a list of the sixty project proposals in various stages of the NEPA process.

<sup>19</sup> This includes many of the projects discussed *supra*.

<sup>20</sup> Almost all of the thirty-seven completed projects authorized new surface disturbance in one form or another. The one exception being the Vitruvian Reinstatement of Terminated Oil and Gas Leases, DOI-BLM-UT-G010-2014-0019-DNA (June 2014). The EAs for each of the thirty-seven completed projects are attached.

BLM, Newfield Production Company's Proposed GMBU West 2013-3 (29 Directional Wells Drilled from 18 Existing Pads) Infill Development in the Greater Monument Butte Unit, Duchesne County, Utah at 16, 20 (Dec. 2013) (attached). However, BLM's consideration of this resource was far from detailed; containing approximately three paragraphs of "analysis." *See id.* at 16, 20. In other words, the VFO's promise to conduct water quality/resource analysis "later" (*i.e.*, site-specific project) rings hollow since the agency only performed this analysis *less than three percent* of the time over the past year. In the last year alone, the VFO has authorized hundreds of new wells – many from new well pads, hundreds of thousands of feet of new roads, pipelines, and gathering lines; all without consideration of the direct, indirect, or cumulative impact to water quality/resources.

The BLM cannot ignore its obligations under NEPA by postponing meaningful analysis to an undetermined date and then again ignore its obligation when that date finally arrives in the form of a site-specific proposal. Under such an approach, water quality/resource analysis is never conducted *at anytime ever* for many oil and gas wells

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<sup>21</sup> One project lists "Water: Surface Water Quality" in the table of contents but that section does not appear in the actual document. *See* BLM, Newfield Production Company's Proposed GMBU West 2013-4 (40 Directional Wells Drilled from 22 Existing Pads) Infill Development in the Greater Monument Butte Unit, Duchesne County, Utah, DOI-BLM-LLUT-G010-2014-0041 at i (Dec. 2013) (attached). Another project is listed as "completed" but the ePlanning website does not contain a link to the relevant NEPA document. *See* BLM, EOG Resources, Inc. Proposes to Drill Six New Federal Gas Wells on BLM Surface in Alger Pass, Uintah County, Utah, DOI-BLM-UT-G010-2014-0122-EA (July 2014).

<sup>22</sup> Water quality/resources was analyzed in a programmatic sense in the Greater Natural Buttes FEIS, *see e.g.*, Greater Natural Buttes Final Environmental Impact Statement FES12-8 at 3-97 – 114, 4-134 – 145 (March 2012), but BLM postponed much of the analysis until site-specific projects were proposed. *See, e.g., id.* at 4-135 ("Because of the programmatic nature of this EIS, the specific locations of well pads, roads, and other facilities are not presently known."); *id.* at 4-136 ("The severity of impacts would depend on their location and the nearby features in the affected floodplain.").

and associated infrastructure in the Vernal Field Office. Such an approach violates NEPA and is otherwise arbitrary and capricious.

**b. The Price Field Office Analyzed Water Quality/Resource Issues but the Vernal Field Office Did Not**

The Price Field Office – the other field office in this same BLM District, the Green River District, has considered the impacts to water quality/resources in past lease sale environmental assessments and in fact, considered impacts to this resource for *this same upcoming lease sale*. See, e.g., BLM, November 2014 Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-G021-2014-029-EA at 10-13 (Aug. 2014); BLM, November 2013 Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-G021-2013-0021-EA at 12-16, 35-36 (June 2013). SUWA raised this issue in its comments over the Vernal EA but BLM failed to respond to it. Compare SUWA, Comments on November 2014 Oil and Gas Lease Sale, DOI-BLM-UT-G010-2014-093-EA at 5 (July 14, 2014) (SUWA Comments on November 2014 Lease Sale) (attached), ~~with Vernal EA at 125-27 (BLM's responses to SUWA's water quality/resource~~ comments).

Many of the proposed lease parcels in the VFO are located adjacent to critical water sources such as the Green and White Rivers; both of which eventually flow into the Colorado River. See, e.g., Vernal EA at 87 (parcels 126, 132, 134, 135, 137, 214, and 216). These waters are relied upon by millions of people as sources of drinking water, and for agriculture and irrigation. The development of oil and gas activity in these areas is reasonably foreseeable to occur as is the potential for pollutants from such activity to reach nearby waterways.

Furthermore, and as noted in SUWA's comments on the Vernal EA, BLM has repeatedly failed to inspect "high-priority" or "high risk" oil and gas wells. *See generally* SUWA, Comments on Vernal Lease Sale EA at 16-17 and exhibits referenced therein. These are wells that due to their location pose the highest threat to human health and safety and/or critical environmental ecosystems. *See* Brian Maffly, *Utah 'high risk' oil wells among those left uninspected*, SL Trib. (June 16, 2014) (Maffly, *High Risk Wells*) (attached). This is all the more reason to consider water quality/resources now; before an irretrievable commitment of resource occurs, as any future wells drilled on the proposed lease parcels will likely be considered "high risk" due to their proximity to waterways. In light of these factors, the BLM should only permit levels of drilling that it is able to monitor.

It is therefore arbitrary and capricious for the BLM Vernal Field Office to postpone analysis of impacts to this resource while its counterpart in Price does not, especially in light of the important nature of these waterways and due to the fact that many of the future high risk wells likely will not be properly inspected. *See* 5 U.S.C. § 706(2)(A).

**c. The BLM Did Not Respond to SUWA's Water Quality Concerns, Including Utah 303(d)(1) Listed and Proposed Impaired Waters**

By delaying meaningful water quality/resource analysis until an undetermined date and rejecting SUWA's concerns about this issue as premature; BLM failed to respond to SUWA's specific and detailed comments, including significant and new information on waters proposed for listing on the State of Utah's Clean Water Act section 303(d)(1) list of impaired waters. In particular, SUWA provided new information regarding recent updates to the State of Utah's

water quality, including newly proposed impairments to the Green and White Rivers, and Bitter, Evacuation, Ninemile, and Willow creeks. Moreover, new segments of waters are proposed for listing as impaired; for example, the “Green River-3” segment of the Green River, an approximately 110-mile stretch that flows past parcels 126, 132, 134, 135, and 137, is proposed for the first time for listing on the state’s 303(d)(1) list. *See, e.g.*, Utah Department of Environmental Quality, Division of Water Quality, Draft 2012-2014 Integrated Report, Chapter 5 (excerpt attached). BLM did not respond to this or other similar issues raised by SUWA.

SUWA therefore reincorporates all water quality/resource comments that it provided to BLM for the November 2014 oil and gas lease sale. *See generally* SUWA Comments on Vernal November 2014 Lease Sale at 3-17. The aforementioned lease parcels then must be removed from the 2014 oil and gas lease sale until BLM responds to these concerns. *See* 40 C.F.R. § 1503.4(a); *see also Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1165 (10<sup>th</sup> Cir. 2002) (“NEPA require[s] that the agency . . . respond to substantive issues raised in comments.”).

### **XIII. The BLM Failed to Take a Hard Look the Direct, Indirect, and Cumulative Impacts to Wetlands and Riparian Areas**

The BLM should remove lease parcels 034 and 035 because they are in/near identified riparian/wetland areas. *See* Price EA at 72, Map 2; BLM, Price Field Office, Record of Decision and Approved Resource Management Plan, Map 3-4 (Oct. 2008) (depicting riparian habitat) (attached). The Price EA recognizes that riparian habitats

are among the most important, productive, and diverse ecosystems in the [Price Field Office]. Healthy and productive riparian areas provide water, food, cover, and travel lanes for many aquatic and terrestrial wildlife species, some of which are obligate to the riparian area and not found in dryer upland areas. Native riparian area plants and their root systems contribute to improved water quality and quantity by holding soils in place while filtering sediments, increasing ground water recharge, and protecting streambanks.

Price EA at 13.

The Price RMP states that riparian areas will be managed in compliance with Executive Order 11990 (EO 11990). See Price RMP at 67 (WAT-1). EO 11990 was issued on May 24, 1977, to provide protection to wetlands and riparian areas, “in order to avoid . . . the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands.” EO 11990 at 1 (May 24, 1977) (attached). To help achieve this objective EO 11990 provides that each federal agency “*shall* take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities.” *Id.* § 1(a) (emphasis added).

Moreover, EO 11990 requires that each agency “consider factors relevant to a proposal’s effect on the survival and quality of the wetlands,” such as

- a. public health, safety, and welfare, including water supply quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;
- b. maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and
- c. other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

EO 11990 § 5. None of these factors were considered in the Price EA for parcels 034 or 035.

**a. The BLM has Repeatedly Failed to Inspect “High Risk” Oil and Gas Wells**

The BLM, as discussed *supra*, does not inspect the vast majority of “high risk” oil and gas wells scattered throughout Utah. *See, e.g., Maffly, High Risk Wells; see also Hope Yen, Fed govt failed to inspect higher risk oil wells, SL Trib. (May 11, 2014) (attached).* Oil and gas wells are considered high risk due generally to their proximity to sensitive ecosystems or potential to adversely impact human health or safety. *See Maffly, High Risk Wells.* It is reasonable to conclude that due to their close proximity to riparian and wetlands areas, any oil or gas wells drilled on lease parcels 034 or 035 would be considered to be “high risk” wells. It is also reasonable to conclude that BLM will likely not inspect wells drilled on these parcels or at least inspect them as often as required. It therefore, makes little sense to offer even more land for oil and gas ~~development in sensitive ecosystems when BLM cannot properly manage the heavy~~ amount of energy development that is currently taking place in other similarly sensitive areas in Utah.<sup>23</sup>

The BLM should permit only levels of drilling that it is able to monitor. In a recent Government Accountability Office (GAO) report it was determined that the BLM does not inspect all high risk (high-priority) wells, does not have key data on wells, and does not review and monitor inspections activities at its state and field offices. *See GAO, Oil and Gas, Updated Guidance, Increased Coordination, and Comprehensive Data Could*

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<sup>23</sup> The fact that these inspections are made even more difficult due to limited money and staff further supports the removal of parcels 034 and 035.

Improve BLM's Management and Oversight, GAO-14-238 at 33-34 (May 2014) (GAO Report) (attached). The BLM should not authorize additional oil and gas development in sensitive areas so long as it lacks adequate resources, including funding and staff, to properly monitor and inspect such activity.

Currently, BLM cannot ensure that the current oil and gas infrastructure are operating and maintained in a safe condition. Damage from the lack of inspections is evident over the last few months. Recently, there have been at least three oil spills in Utah alone. *See, e.g.,* Amy Joi O'Donoghue, *Oil Spills, Leaks Plaguing Forest Service, BLM in Grand Staircase-Escalante Area*, DESERET NEWS, April 2, 2014 (attached); Brian Maffly, *Blowout was Firm's Second Spill from Old Well Near Green River*, SALT LAKE TRIB. May 24, 2014 (attached); Brian Maffly, *Escalante Residents Tour 'Little Valdez' Oil Spill Site*, Salt Lake Trib. March 31, 2014 (attached); BLM-Utah Releases Final Report on Little Valley Wash Oil Spill, KCSG.com, June 3, 2014 (attached). These recent leaks are examples of "how Utah's aging oil and gas fields, often equipped with outdated and failing infrastructure, threaten public lands." *See* Brian Maffly, *Ruptured Pipe Spills Oil into Utah's San Juan River*, SALT LAKE TRIB. August 19, 2014 (attached). These leaks highlight the BLM's inability to properly inspect and manage the present oil and gas infrastructure, leading to environment damage. If the BLM cannot ensure that it has the resources to properly inspect and manage existing infrastructure, it should not issue new leases in sensitive riparian areas. The BLM's issuance of these leases will further extend its limited resources, and the likelihood of a failure to inspect high-risk wells leading to environmental damage will increase.

Finally, BLM's authorization of the development of additional high risk wells near sensitive riparian habitats present in parcels 034 and 035 does not conform to EO 11990's instructions to avoid the long and short term adverse impacts associated with the destruction or modification of wetlands, enhance the natural and beneficial values of wetlands, and does not protect public health, safety, or welfare.

**XIV. BLM Has Failed to Sufficiently Analyze Cultural Resources in Violation of the National Historic Preservation Act and NEPA**

**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>24</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).

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

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<sup>24</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).

affected” by the particular undertaking at hand. *Id.* § 800.4(d)(2).<sup>25</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 American tribes, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

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**b. BLM Has Failed to Make 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

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<sup>25</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).

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 Vernal and Price field offices have failed to meet this obligation.

Neither the Vernal nor Price field office has prepared a Class I inventory to support their proposal to sell the twenty-seven parcels at issue in the November 2014 lease sale. Rather, at most they merely prepared a “Class 1 Literature 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 79. *But see* Vernal EA at 94, 127 (failing to describe what, if any, inventory or review of cultural resources was prepared). 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). In its response to comments, the Vernal field office asserts that it does not need to comply with its own manual because the sale of an oil and gas lease is not a “Land Use Authorization.” Vernal EA at 128. *Cf.* Price EA at 79-80 (no assertion that oil and gas leasing is not a land use authorization). To the contrary and as explained throughout SUWA’s protest, the sale of a non-NSO oil and gas lease is the point BLM’s engages in an irreversible commitment of resources and thus authorizes some level of surface disturbance on a particular parcel. Thus, BLM Manual 8110

applies here and the Vernal and Price field offices have failed to meet their obligations to make a reasonable and good faith effort at the leasing stage.

The Final Vernal and Price EAs also include a short statement in their Interdisciplinary Checklist and “response to comments” which notes that BLM will attach a Cultural Resources Stipulation to all issued lease parcels as set forth in WO IM 2005–003. *See* Vernal EA at 94 (citing IM) and 128 (text of stipulation); Price EA at 80 (same). This stipulation does not cure BLM’s violations of the NHPA because it sanctions an unauthorized “lease now, think later” approach to leasing.<sup>26</sup> As detailed above, there is no question that the sale of a non-NSO oil and gas lease is an irretrievable commitment of resources which demands thorough and complete analysis before leases are issued. BLM’s failure to conduct such an analysis here is contrary to the NHPA.

SUWA noted in its comments that BLM failed to identify the area of potential effect (APE) for this lease sale, as required by the NHPA. *See* SUWA Comments on November 2014 Vernal Lease Sale at 18-20; SUWA Comments on November 2014 Price Lease Sale at 5-6. The Vernal EA still has not done so. *Compare* Vernal EA at 94, 17-29 (no discussion of APE) *with* Price EA at 106 (describing APE). The Advisory Council on Historic Preservation defines area of potential effect as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” *Id.* § 800.16(d). Determining

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<sup>26</sup> The plain language of this stipulation makes clear that subsequent undertakings may be approved even if they result in “minimized” adverse effects. Vernal EA at 94; Price EA at 80. The NHPA does not make such a distinction between “minimized” adverse effects and adverse effects. Because BLM admits that it may allow subsequent undertakings to proceed if adverse effects are “minimized” or “mitigated,” BLM’s “no historic properties affected” determination – is without support.

the APE of a particular undertaking is the touchstone of any NHPA review. The Vernal EA's failure to identify the relevant APE is fatal to its efforts to comply with the NHPA.

Finally, both the Vernal and Price EAs note that BLM consulted with SHPO and received its concurrence. Vernal EA at 94, Price EA 80. As SUWA explained in its comments, SHPO's concurrence does not excuse BLM from complying with its obligations under the NHPA. "While the NHPA requires the BLM to consult with the Utah SHPO, its consultation with SHPO merely satisfies the procedural requirement of doing such a consultation. A concurrence from the SHPO does not satisfy the other procedural requirements of NHPA. There is nothing in the NHPA or Section 106 that excuses the BLM's failure to comply with the other procedures based on a concurrence from the SHPO." *Southern Utah Wilderness Alliance v. Burke*, 981 F. Supp. 2d 1099, 1109-1110 (D. Utah 2013). BLM responded to this point in the final Price EA by simply asserting that it complied with Section 106. Price EA at 106-07. For the reasons explained above, this is not so.

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**c. BLM Has Failed to Take A Hard Look at the Project's Effects to Cultural Resources**

BLM acknowledges that "a complete inventory of the proposed lease parcels has not occurred," though concedes that "cultural resource sites have been identified within the parcels." Vernal EA at 94; Price EA at 79. BLM does not discuss at all the nature of these sites, their extent – either on a parcel-by-parcel basis or on a field office basis, or why additional inventories were not conducted. *See id.* BLM also fails to discuss what type of direct or indirect effects oil and gas development may have to the cultural sites located in these parcels. This information should have been included in the final EA. *See* SUWA Comments on November 2014 Vernal Lease Sale at 18-20; SUWA Comments on

November 2014 Price Lease Sale at 5-6. The EA's current cursory treatment of this important resource does not comply with NEPA's hard look mandate. *See* BLM Handbook on Planning for Fluid Minerals Resources, Chapter (H-1624-1), at I.B.2 (1988) (emphasis added);<sup>27</sup> *see S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006).

### **REQUEST FOR RELIEF**

SUWA respectfully requests the following appropriate relief: (1) the withdrawal of the twenty-seven protested parcels from the November 18, 2014, 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 twenty-seven protested parcels until such time as the BLM attaches unconditional no surface occupancy stipulations to all protested parcels.

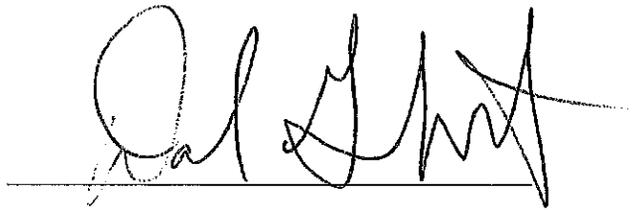
This protest is brought by and through the undersigned on behalf of SUWA. These members and staff of SUWA reside, work, recreate, or regularly visit the areas to be impacted by the proposed lease sale and therefore have an interest in, and will be affected and impacted by, the proposed action.

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<sup>27</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).

*Southern Utah Wilderness Alliance et al. Protest  
September 15, 2014  
Re: November 18, 2014 Oil and Gas Lease Sale*

September 15, 2014

A handwritten signature in black ink, appearing to read "David Garbett", written over a horizontal line.

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