HAND DELIVERED

November 10, 2003

Sally Wisely
Utah State Director, Bureau of Land Management
324 South State Street #300
P.O. Box 45155
Salt Lake City, Utah 84145-0155

Re: Protest of Bureau of Land Management's Notice of Competitive Oil and Gas Lease Sale Concerning Twenty-one Parcels in Wayne, Uintah, and Grand Counties.

Dear Director Wisely,

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, Southern Utah Wilderness Alliance, Natural Resources Defense Council, The Wilderness Society, the Sierra Club, and the Honorable Maurice Hinchey (D-NY) (collectively referred to as "SUWA") hereby protest the November 10, 2003 offering, in Salt Lake City, Utah, of the following twenty-one parcels in the Vernal, Richfield and Moab Field Offices:

UT 008	UT 013	UT 020	UT 029	UT 036	UT 053
UT 009	UT 015	UT 026	UT 030	UT 037	
UT 011	UT 016	UT 027	UT 031	UT 038	
UT 012	UT 019	UT 028	UT 034	UT 039	

As explained below, in offering these parcels for lease, the Bureau of Land Management ("BLM") is violating the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq* ("NEPA"), the National Historic Preservation Act 16 U.S.C. §§ 470a *et seq* ("NHPA"), the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq*. ("FLPMA"), and the regulations and policies that implement these laws. Accordingly, SUWA requests that BLM

withdraw these lease parcels from sale until the agency has fully complied with the aforementioned laws and regulations.

More specifically, BLM's decision to lease areas that the agency itself recognized in 1999 meet the wilderness standards of the Wilderness Act and of FLPMA without no surface occupancy (NSO) stipulations constitutes a "major Federal action[s] significantly affecting the quality of the human environment" that requires the preparation of a pre-leasing environmental impact statement. 42 U.S.C. § 4332(C). In addition, the significant congressional support for passage of America's Redrock Wilderness Act (H.R.1796/S.639), a bill that has been supported in the 108th Congress by 15 senators and 158 members of the House of Representatives, further militates towards the preparation of an EIS. If enacted, America's Redrock Wilderness Act would protect the public lands underlying each of the protested parcels as wilderness.

Moreover, although, as you know, SUWA believes that the settlement agreement entered into by Interior Secretary Norton and former Utah Governor Leavitt is legally deficient, we note that the last paragraph of the settlement commits the Department and the BLM to protect the wilderness characteristics of lands. Consequently, we submit that BLM is required to either forego leasing the twenty-one protested parcels located on wilderness quality lands[1] or to attach NSO stipulations to the parcels located on lands with wilderness characteristics.

The grounds of this Protest are as follows

[1] *See, e.g., Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992) (authority to conduct competitive oil and gas lease sale for particular parcels within discretion of the executive branch).

A. Leasing The Contested Parcels Violates NEPA

1. BLM Failed To Take The Required "Hard Look" At Whether Its Existing Analyses Are Valid In Light Of New Information Or Circumstances and Arbitrarily Determined That New Information Did Not Warrant Preparation of Supplemental NEPA Analyses.

NEPA requires federal agencies to take a hard look at new information or circumstances concerning the environmental effects of a federal action even after an environmental assessment (EA) or environmental impact statement (EIS) has been prepared, and to supplement the existing environmental analyses if the new circumstances "raise[] significant new information relevant to environmental concerns." *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708-09 (9th Cir. 1993). Specifically, an "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look' at the environmental effects of [its] planned actions." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000). NEPA's implementing regulations further underscore an agency's duty to be alert to, and to fully analyze, potentially significant new information. The regulations declare that an agency "shall prepare supplements to either draft or final environmental impact statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9(c)(1)(ii) (emphasis added).

When considering whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, the Interior Board of Land Appeals will be guided by the 'rule of reason.'" *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (citation omitted). "The query is whether the [DNA] contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the proposed action." *Southwest Center for Biological Diversity*, 154 IBLA 231, 236 (2001) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)) (emphasis added). *See Friends of the Bow v.*

Thompson, 124 F.3d 1210, 1213 (10th Cir. 1997) (to comply with NEPA's "hard look" requirement an agency must adequately identify and evaluate environmental concerns) (emphasis added).

As explained below, the Richfield, Vernal, and Moab field offices each failed to take a hard look at new information and new circumstances that have come to light since BLM's first generation wilderness inventories and each field office's land use plans and their accompanying EISs and EAs were last prepared. In addition, to the extent that these offices took the required hard look, their determination that that they need not prepare a supplemental NEPA analysis was arbitrary and capricious. *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

(a) Wilderness Inventory Areas

BLM has arbitrarily determined that the sale of twelve lease parcels in four BLM wilderness inventory areas (WIAs) is appropriate, arguing that new information about these lands' wilderness characteristics is not "significant new information." BLM is wrong. These twelve WIAs were inventoried between 1996-98 by the BLM as part of the agency's larger Utah wilderness inventory and determined to contain the necessary wilderness characteristics as defined in the Wilderness Act, 16 U.S.C. §§ 1131 *et seq.*, for potential entry into the National Wilderness Preservation System. *See* Utah Wilderness Inventory, at vii-ix (1999) (excerpts attached as Exhibit 1). As the BLM's wilderness inventory documentation explained,

> The Secretary's instructions to the BLM were to "focus on the conditions on the disputed ground today, and to obtain the most professional, objective, and accurate report possible so we can put the inventory questions to rest and move on." [The Secretary] asked the BLM to assemble a team of experienced, career professionals and directed them to apply the same legal criteria used in the earlier

> inventory and the same definition of wilderness contained in the 1964 Wilderness Act.

Id. at vii (emphasis added). As the result of this review, the BLM determined that its earlier wilderness inventories had failed to recognize 2.6 million acres of lands that met the applicable criteria in its prior reviews, including the Desolation Canyon, Floy Canyon, Coal Canyon, and Flume Canyon WIAs. *See State of Utah v. Babbitt*, 137 F.3d 1193, 1198-99 (10th Cir. 1998) (discussing history of BLM's Utah wilderness inventories). Importantly, the BLM's land use plans that were prepared after the 1978-80 wilderness inventory – including the plans at issue in this protest – did not reanalyze the wilderness characteristics of lands that were passed over for wilderness study area status. Rather, the plans and accompanying NEPA analyses merely adopted the conclusion that lands not identified as WSAs did not contain wilderness characteristics.

Lease parcels UT 026, UT 027, and UT 028 are located in the Desolation Canyon WIA (Vernal field office) and parcels UT 029, UT 030, UT 031, UT 034, UT 036, UT 037, UT 038, UT 039, and UT 053 are located in the Floy Canyon, Coal Canyon, and Flume Canyon WIAs (Moab field office).

BLM Should Adopt Utah Governor Walker's Precautionary Approach to these WIAs

SUWA urges the BLM to adopt the same approach recently advocated by the State of Utah in its November 4, 2003, letter to Director Wisely requesting that the BLM not approve 15 proposed wells in the White River WIA until the Vernal field office completes its land use planning process. *See* Exhibit 2. This precautionary approach is entirely consistent with NEPA's "think first, then act" mandate and is directly applicable to the 12 lease parcels within

WIAs. Likewise, BLM should withdraw these 12 parcels until the Vernal and Moab field office complete their land use planning process.

Desolation Canyon WIA

Lease parcels UT 026, UT 027, and UT 028 are within Unit 1 of the BLM's Desolation Canyon WIA, immediately east and west of the Desolation Canyon section of the Green River. *See* Map - Vernal Area Lease Parcels (attached as Exhibit 3).[2] The BLM compiled a comprehensive case file to support its findings that the Desolation Canyon WIA had wilderness characteristics, including numerous aerial and on-the-ground photographs, as well as a detailed narrative with accompanying source materials. *See* Permanent Desolation Canyon WIA Case File (1998) (maintained in Utah BLM State Office).

The BLM's "wilderness inventory evaluation" of the Desolation Canyon WIA (unit 1) explained that the area is "natural, scenic, rugged terrain" and contains "outstanding opportunities for solitude and primitive and unconfined recreation [which] makes this area stand alone. Unit 1 is an extension of the Desolation Canyon WSA [wilderness study area] to the south and greatly enhances the wilderness values found in the WSA." Wilderness Inventory Evaluation, Desolation Canyon Units 1-9, at 3 (1998) (attached as Exhibit 4). "In combination with the [Desolation Canyon WSA], the [WIA] represents one of the largest blocks of roadless BLM lands within the continental United States." *Id.* at 1. The BLM's evaluation continues that "the focal point" of this area "is the meandering Green River and surrounding Canyons. . . . Numerous side canyons and drainages flow into the Green River with many ridges and benches

[2] The lands to east of the Green River (portions of parcels UT 026 and UT 028) are managed pursuant to the 1984 Book Cliffs resource management plan (RMP) and the lands to the west of the river (portions of parcels UT 026 and UT 028 and all of parcel UT 027) are managed pursuant to the 1991 Diamond Mountain RMP. Neither of these land use plans nor their accompanying NEPA analyses specifically discuss the wilderness characteristics of the Desolation Canyon WIA and only discuss in the broadest of terms the resources found on these lands.

throughout the area. Excellent vistas into the river canyon are found along the high ridges 1,000 feet about the river." *Id.* at 3-4. The evaluation concludes that the Desolation Canyon WIA appears to be natural, offers outstanding opportunities for solitude and for primitive and unconfined recreation, and also contain numerous supplemental values. *Id*

Confronted with its own detailed findings from 1998 that the Desolation Canyon WIA contains wilderness characteristics that had not previously been identified in either the Book Cliffs or Diamond Mountain RMPs or any other land use plan or NEPA analysis, the Vernal field office DNA[3] has admitted that "recent change in the sensitivity (i.e. condition) of those characteristics may have raised new heightened concerns for this area. These heightened concerns should be afforded a new review and assessment of options in the planning arena and reassessed/reanalyzed in a [sic] updated NEPA document." *Id.* *See id.* ("There is new information that outlines/provides an opportunity for a change in resource values/perception of values (i.e. change of condition) that may warrant a re-assessment."). Based on this candid statement that the 1998 Wilderness Inventory provided significant new information that has not been analyzed in existing NEPA documentation, SUWA is as at a complete loss why parcels UT 026, UT 027, and UT 028 have not been removed from the November sale list. BLM's failure to do so is a clear violation of NEPA because: (a) the 1998 wilderness inventory is undeniably new information, as BLM itself admits; (b) the 1988 wilderness inventory meets the textbook definition of what constitutes "significant" information;[4] and (c) the sale of non-NSO leases constitutes an irreversible and irretrievable commitment of resources and thus requires a pre-leasing EIS, *see infra* at 15-16.

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[3] *See* Instruction Memorandum 2001-062 (January 3, 2001) (Documentation of Land Use Plan Conformance and National Environmental Policy Act (NEPA) Adequacy).

[4] *See Hughes River*, 81 F.3d at 443 ("'[T]he new [information] must present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned.'") (citations omitted) (emphasis in original).

Moreover, BLM cannot credibly claim that it has ever taken a hard look at the impact that oil and gas development would have on the wilderness characteristics of the WIA. The 1998 Desolation Canyon wilderness inventory case file post-dates the 1984 Book Cliffs RMP/EIS and the 1991 Diamond Mountain RMP/EIS by fourteen and seven years respectively. At the time those documents were prepared the BLM did not know that the area contained wilderness quality lands. Hence neither document could contain the type of site specific information about the wilderness characteristics of the Desolation Canyon WIA that was provided in the BLM's own 1998 wilderness inventory evaluation, nor could either document analyze the impacts of energy development on those characteristics. Moreover, the BLM's DNAs do not purport to contain any independent analysis – they only determine whether the analyses previously done are adequate. *See* BLM Instruction Memorandum No. 2001-062 (DNA's are an internal review process which assists BLM in determining "whether [it] can rely on existing NEPA documents for a current proposed action") (attached as Exhibit 5). In sum, BLM's wilderness inventory evaluation constitutes precisely the type of significant new information that requires additional environmental analysis before BLM approves the irreversible commitment of resources – the November 2003 lease sale.

Floy Canyon WIA, Coal Canyon WIA, and Flume Canyon WIA

Parcels UT 029, UT 030, UT 031, UT 034, and parts of UT 036 are located in the Floy Canyon WIA; parts of parcel UT 036 and parcels UT 037, UT 038, and UT 039 are located in the Coal Canyon WIA; and parcel UT 053 is located in the Flume Canyon WIA. *See* Map –

Moab Area Lease Parcels (attached as Exhibit 6).[5] The BLM compiled a comprehensive case file to support its findings that the Floy Canyon, Coal Canyon, and Flume Canyon WIAs had wilderness characteristics, including numerous aerial and on-the-ground photographs, as well as a detailed narrative with accompanying source materials. *See* Permanent Floy Canyon, Coal Canyon, and Flume Canyon WIA Case Files (1998) (complete files maintained in Utah BLM State Office).

The BLM's wilderness inventory evaluation for the Flume Canyon WIA explained that "[t]he Flume Canyon inventory area is one of seven contiguous inventory areas [including Coal Canyon and Floy Canyon WIAs] across much of the Roan Cliffs and Book Cliffs, the longest continuous escarpment in the world." Flume Canyon wilderness inventory evaluation, at 1 (1998) (attached as Exhibit 7). BLM's 1998 wilderness inventory evaluation described the Floy Canyon WIA as follows:

> Outstanding opportunities for solitude and primitive recreation are outstanding throughout the inventory area. Topographic and vegetative screening provide many places to be alone. The inventory area contains long and deep canyons, unusual geologic features, visual diversity, and a variety of wildlife species. Wilderness values are enhanced by the contiguous Desolation Canyon and Floy Canyon Wilderness Study Areas (WSAs).

Floy Canyon wilderness inventory evaluation, at 1 (1998) (attached as Exhibit 8). BLM similarly described the Coal Canyon WIA as retaining "a natural condition with little or no evidence of the presence of man. Opportunities for solitude and primitive recreation are outstanding. The inventory area contains panoramic vistas, many long and deep canyons, perennial streams, and a broad variety of wildlife species." Coal Canyon wilderness inventory evaluation, at 1 (1998) (attached as Exhibit 9). In each of these three WIAs, the BLM identified

[5] These nine lease parcels are located on lands managed by the BLM's Moab field office pursuant to the 1985 Grand RMP and EIS, and the 1988 Grand RMP oil and gas supplemental EA ("1988 Oil and Gas EA" or "Oil and Gas EA").

certain lands that did not have wilderness character and excluded them from the final WIA boundary. *See, e.g.,* Coal Canyon wilderness inventory evaluation, at 1 ("Portions of four units (1,890 acres) do not have wilderness character."). The BLM's evaluations conclude that the Floy Canyon, Coal Canyon, and Flume Canyon WIAs all appear to be natural, offer outstanding opportunities for solitude and for primitive and unconfined recreation, and also contain numerous supplemental values.

Faced with this significant new information from its own reinventories about the wilderness character of these areas, the BLM's Moab field office arbitrarily concluded that the 1985 Grand RMP and 1988 Oil and Gas EA sufficiently addressed wilderness values. Again and importantly, when those documents were prepared, the BLM did not know that the lands in question had wilderness characteristics, because its prior inventories had erroneously concluded that they did not. Consequently, it is hardly surprising that a detailed review of the Grand RMP and the Oil and Gas EA reveals that neither of these documents contains any information about the wilderness qualities of the public lands proposed for leasing at the November 2003 lease sale or any site-specific analysis of the impacts to those qualities. For example, the Moab DNA states that the Oil and Gas EA "addresses impact to overall recreational opportunities," citing an excerpt from the EA which states that the Grand RMP's oil and gas leasing categories "adequately protect the recreation resource values in 22 areas identified in the [] RMP as having exceptional values." Moab DNA, Wilderness Characteristics Analysis, at 1 (citing 1988 Oil and Gas EA at unnumbered 5). This statement is repeated verbatim for each of the nine WIA proposed lease parcels. A close reading of the Grand RMP, however, reveals that it only alleges to identify 1985 recreation values – and not the wilderness characteristics identified in the 1998 wilderness inventory (which include, but are not limited to, outstanding opportunities for

recreation) – because the BLM had not yet concluded that those lands possessed wilderness characteristics.

In other words, because BLM's 1998 wilderness inventory determined that the Floy Canyon, Coal Canyon, and Flume Canyon WIAs contain remarkable wilderness character, something that the 1985 Grand RMP and the Oil and Gas EA failed to acknowledge, but the BLM later found to exist, BLM cannot rely on its outdated planning documents to argue that these values were previously identified and the impacts of oil and gas development on them were previously evaluated. As the Vernal field office noted, "recent changes in sensitivity" to the wilderness resource, as well as a "heightened concern" for the protection of WIAs, is sufficient new and significant information to require a supplemental NEPA analyses before leasing takes place. *See supra* at 6-7.

In addition, for each of the nine WIA parcels the DNA incorrectly states that the 1988 Oil and Gas EA "specifically addresses the effects of leasing on wildlife, recreation, visual resources, vegetation, soil and water quality," and suggests that this analysis is sufficient for the particular parcels at issue. Moab DNA, Wilderness Characteristics Analysis, at 1. To the contrary, the 1988 EA contains only the broadest discussion of the effects of leasing over 1.8 million acres of public lands, and certainly does not contain any site specific analysis as to the resources found on each of these nine parcels. Moreover, because the 1998 wilderness inventory contains new information about many of these very same resources, including recreation, visual resources, and wildlife, it represents the best and most current information that must be considered.[6]

[6] In addition, the DNA states that, contrary to the BLM's 1998 WIAs which discuss the potential presence of several threatened, endangered, or sensitive animal species in the nine lease parcels, "inventories have not shown that listed species reside within these parcels, and oil and gas development should not affect current habitat as addressed in the current NEPA record." Moab DNA, Wilderness Characteristics Analysis, at 2. No such inventories for the vast

(b) Citizen Proposed Wilderness

The BLM's Richfield field office arbitrarily determined that it was appropriate to lease the following five parcels, all of which are located in the Flat Tops citizen's proposed wilderness unit: UT 008, UT 009, UT 011, UT 012, and UT 013. *See* Hanksville Area Lease Parcels (attached as Exhibit 10). In 2002, SUWA provided new and significant information to the BLM regarding the wilderness characteristics of the Flat Tops proposed wilderness unit and the BLM determined that there is a "reasonable probability" that this unit has or "may have" wilderness characteristics. *Id.* at 6. *See* Richfield DNA, at 6 and attachment 4 (BLM evaluation of new information suggesting that an area of public lands has wilderness characteristics).[7]

Based on a confused misunderstanding of the Department of the Interior's settlement of the wilderness inventory lawsuit, the Richfield DNA states that "the definition of wilderness characteristics is now somewhat different than was used in the 1999 Utah Wilderness Inventory and in the review of the UWC Flat Tops unit. BLM now defines wilderness characteristics around naturalness and visitor experience." *Id.* at 6. Since that settlement, BLM has not issued a redefinition of "wilderness characteristics." In fact, since preparation of the Richfield DNA, BLM issued Instruction Memoranda 2003-274 (BLM Implementation of the Settlement of *Utah v. Norton* Regarding Wilderness Study) and 200-275 (Consideration of Wilderness Characteristics in Land Use Plans (Excluding Alaska), neither of which attempt to redefine "wilderness characteristics" in the manner suggested by the Richfield DNA. This error alone is sufficient to call into question BLM's conclusions.

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majority – if not all – of the species have been conducted and BLM's assertion to the contrary lacks any support in the record.

[7] The Flat Tops proposed wilderness unit is included in American's Redrock Wilderness Act and passage of the Act would designate that area as wilderness.

Additionally, the Richfield DNA relies heavily on the 1975 Price environmental analysis record ("Price EAR") as support for the claim that the naturalness and special values of the Flat Top area have already been sufficiently inventoried. *Id.* Again, as of 1975, BLM had not determined that these lands had wilderness values. Indeed, FLPMA had not even been passed at that time. Hence, even a cursory review of the pages cited by BLM in the 1975 Price EAR, which covered millions of acres of public lands in mainly southeastern Utah, reveals that this document in no way whatsoever "addressed" and "analyzed" the environmental resources at issue and in particular their wilderness values and characteristics. *See id.* (citing 1975 Price EAR 15, 21, 35-45, 51, 65-78, 129, and 132). For example, pages 67-72, cited by the DNA for their alleged discussion of "naturalness" and "special value components of wilderness characteristics," contain only photographs of various uranium and oil development projects in southeastern Utah. Moreover, the DNA relies on single phrase on a single page in the 250 page Price EAR – a so-called "opportunity to roam" – as its sole support to argue that the EAR contains an adequate discussion of "primitive recreation opportunities." DNA at 6. This sole reference to support BLM's decision strains credibility and is insufficient evidence that the current wilderness characteristics were ever analyzed in the Price EAR. In sum, the information SUWA provided to the BLM concerning the wilderness character of the Flat Tops unit constitutes "new and significant" information – something BLM inasmuch admitted when it concluded that the area "may have" wilderness character – and the BLM must prepare a supplemental NEPA analysis to evaluate this information before leasing these parcels. A decision by BLM to "lease first, plan later" will violate NEPA.

(c) Proposed Areas of Critical Environmental Concern (ACECs)

Green River Corridor Region, Vernal Field Office

Protested lease parcels UT 026, UT 027, and UT 028 lie wholly or partially within the proposed Green River Corridor ACEC, nominated by SUWA and internally by the BLM as part of the Vernal Field Office's ongoing land use planning process. *See* Southern Utah Wilderness Alliance Green River Corridor ACEC Nomination (attached as Exhibit 11). The Vernal DNA acknowledges that "ACECs were not considered in the BCRMP/EIS," which provides management prescriptions for the eastern side of the Green River (lease parcels 26 and 28). Vernal DNA at 29. This proposed ACEC seeks a heightened level of protection for the public lands in the Green River Corridor, and identifies several management prescriptions that are not included in BLM's current leasing stipulations. These include, but are not limited to: off-road vehicle restrictions (closed or at least restricted to designated trails), heightened protections for irreplaceable cultural and historic resources, class 4 leasing stipulations (closed to leasing), and VRM II classification.

The Vernal Field Office recommended that the following lease parcels in the Green River Corridor be withheld from the November 2003 lease sale until the agency could analyze further the impacts of leasing on recreation and visual resources: UT 051, UT 052, UT 056, UT 057, and UT 058. The BLM should similarly withdraw parcels UT 026, UT 027, and UT 028 from the November 2003 sale until such time as the agency conducts additional land use planning and considers the merits of SUWA's ACEC nomination and the new information provided by SUWA to support that nomination. For instance, SUWA identified that the proposed ACEC provides habitat for many threatened, endangered, and sensitive plant and animal species, some of which were not identified in earlier land use planning documents. *See id.*

In addition, SUWA and the BLM's proposed expanded Green River ACEC extends beyond the portions of parcels UT 026, UT 027, and UT 028 that are proposed for lease with NSO stipulations. *See id.* Thus, the discussion in the Vernal DNA, at 29, stating that SUWA's proposed ACEC is strictly limited to the portions of parcels UT 026-UT 028 that are proposed for lease with NSO stipulations is incorrect, and BLM should withdraw these parcels until it takes a hard look at SUWA's new information.

Dirty Devil ACEC, Richfield Field Office

Richfield BLM's brief analysis of SUWA's Dirty Devil ACEC nomination (provided as part of attachment 3 to the Richfield DNA) determined that SUWA's proposal has merit, but the Richfield DNA erroneously concludes that leasing parcels UT 008, UT 009, UT 011, UT 012, UT 013, UT 015, and UT 016 will not "substantially impact" the identified "relevant values," including scenic, cultural/historic, plant and wildlife habitat, and natural processes and geologic features. *See* Richfield DNA, attachment 3. *See also* Southern Utah Wilderness Alliance Dirty Devil Drainage ACEC Nomination (attached as Exhibit 12). For example, BLM determined that cultural and historic values are located within the proposed Dirty Devil ACEC, but then concludes that other federal laws will protect these resources and that leasing is therefore appropriate. However, as SUWA explains *infra*, the National Historic Preservation Act requires the BLM to engage in up-front consultation (i.e. before BLM sells oil and gas leases), and BLM's refusal to do so means that it cannot absolutely preclude surface development – even when such development may damage cultural resources. In addition, leasing these parcels without special stipulations (i.e. category 2 stipulations) will result in future, unmitigable impacts to values such as stunning visual resources.

2. NEPA Requires An Adequate Pre-Leasing Document.

The BLM has not analyzed the potential site-specific impacts of leasing and development on the protested parcels and therefore the sale of these parcels violates NEPA. NEPA requires the BLM to prepare an environmental impact statement whenever major federal actions may significant alter the quality of the human environment. *See* 42 U.S.C. § 4332(2)(C). The Interior Board of Land Appeals and numerous courts have held that NEPA requires an EIS for non-NSO proposed oil and gas leases because they constitute a full and irretrievable commitment of resources. *See Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-43 (2003); *Colorado Envtl. Coalition*, 149 IBLA 154, 156 (1999); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

All of the twenty-one protested parcels are being offered without NSO stipulations, meaning that they all (to some extent) authorize surface occupancy. Moreover, the environmental analyses previously prepared by the BLM for the contested parcels – *i.e.* EISs accompanying resource management plans ("RMPs") and EAs accompanying oil and gas supplements and plan amendments – did not examine site-specific impacts of oil and gas leasing and development on wilderness and other important, sensitive public resources. For example, these documents failed to consider the potential impacts of roads, pipelines, drilling rigs, waste pits, and other drilling-related activities to the specific lands at issue.

Because the BLM has not adequately examined the potential impacts of leasing and development activities on the contested parcels, the agency should withdraw the twenty-one protested parcels from the lease sale. The parcels should be offered for lease only after the agency prepares an EA or an EIS that describes, analyzes, and discloses the site-specific effects of oil and gas exploration, leasing, development, and reclamation. In particular, a decision to

postpone leasing until these plans and NEPA analyses are finalized is appropriate because the Richfield, Vernal and Moab field offices are preparing new land use plans with new leasing categories and stipulations. In the alternative, the BLM could avoid running afoul of NEPA's EIS requirement by offering the twenty-one contested parcels with NSO stipulations.

3. BLM LUPs Fail to Consider The Unique Impacts Of Coalbed Methane Gas Development.

There is moderate potential for Coalbed Methane ("CBM") gas development on protested parcels UT 029, UT 030, UT 031, UT 034, UT 036, UT 037, UT 038, UT 039, and UT 053, located on the southern flank the Book Cliffs. However, the NEPA documents relied upon by the agency in its determination of NEPA adequacy – the 1985 Grand Resource Area Resource Management Plan and associated environmental impact statement and the 1988 Oil and Gas EA– fail to consider the unique issues and impacts associated with CBM development. Because it is reasonably foreseeable that CBM development and extraction will take place on these lease parcels, BLM must comply with NEPA's EIS requirement before proceeding with the sale of these lease parcels.

Though the NEPA documents accompanying the land use plans and supplements identified above discuss environmental impacts of oil and gas leasing in general, they do not analyze the significantly different impacts, environmental or otherwise, of CBM extraction. *See* 1988 Colorado BLM Notice, NTL-88-2 (BLM has acknowledged that the "[p]roduction characteristics of [CBM] gas wells are radically different than gas completed in conventional reservoirs."). As such, these documents cannot serve as the EIS required by NEPA. Moreover, to the extent the BLM contends that the impacts of CBM development have been sufficiently analyzed in project level NEPA documents completed in the Price field office, it is mistaken. It

is well settled that project level NEPA analyses cannot and do not stand in the place of resource management plans and their accompanying EISs.

In short, NEPA requires the preparation of an EIS that will evaluate, analyze, and disclose CBM related impacts prior to the sale of UT 029, UT 030, UT 031, UT 034, UT 036, UT 037, UT 038, UT 039, and UT 053. *See Southern Utah Wilderness Alliance*, 159 IBLA at 240-43. Alternatively, BLM could issue a lease for these parcels with an additional stipulation prohibiting CBM development, drilling (exploration or otherwise), or extraction until BLM completes the necessary NEPA documents to authorize such activities.

4. Failure To Take A Hard Look

Lease parcels UT 008, UT 009, UT 011, UT 012, UT 013, UT 015, and UT 016 are located on lands that are identified by 2001 Utah Division of Wildlife Resources (UDWR) data as designated critical year-long habitat for pronghorn antelope, but BLM has not included the necessary timing stipulations to protect this species. *See* 2001 UDWR pronghorn antelope critical year-long habitat map (attached as Exhibit 13). BLM's Richfield DNA fails to identify this critical habitat in its wildlife section and only mentions it by reference in a discussion of the proposed Dirty Devil ACEC. *See* Richfield DNA, Attachment 3 (Dirty Devil Drainage ACEC Nomination) ("The subject oil and gas lease parcels do overlap critical year-long habitat for pronghorn antelope."). BLM should withdraw parcels UT 008, UT 009, UT 011, UT 012, UT 013, UT 015, and UT 016 until it evaluates this important resource and determines the appropriate wildlife timing stipulations for these four parcels, if leasing is appropriate at all.

B. Leasing the Contested Parcels Violates NHPA.

The BLM is violating § 106 of the NHPA, 16 U.S.C. § 470(f) and its implementing regulations, 36 C.F.R. §§ 800 *et seq*., by failing to seek review from the State Historic Preservation Officer ("SHPO") until after undertakings have been completed and by failing to consult with SHPO, Native American tribes, and members of the interested public regarding the effects of leasing the protested parcels. Such consultation must take place before the BLM makes an irreversible and irretrievable commitment of resources – in other words before the November 2003 lease sale. Failing such consultation, the BLM should not offer these parcels at the November sale.

NHPA requires BLM to consult with SHPO, Native American tribes, and interested publics before the agency proceeds with undertakings that "may affect" listed or eligible historic properties. BLM's sale of oil and gas leases is the point of "irreversible and irretrievable" commitment and is therefore an "undertaking" under the provisions of the NHPA. *See* BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); *see also* 36 C.F.R. § 800.16(y). The NHPA's implementing regulations further confirm that the "[t]ransfer, *lease*, or sale of property out of federal ownership and control *without adequate and legally enforceable restrictions or conditions to ensure long-term preservation* of the property's historic significance" results in an "*adverse effect"* on historic properties. *Id.* § 800.5(a)(2)(vii) (emphasis added). *See* 65 Fed. Reg. 77689, 77720 (Dec. 12, 2000) (Protection of Historic Properties – Final Rule; Revision of Current Regulations) (discussing intent of § 800.5(a)(2)(iii)).

When BLM fails to include NSO lease stipulations – as is the case for the parcels protested here – the agency loses its ability to prevent all surface disturbing activities. The BLM

cannot postpone consultation with SHPO, Native American tribes, and interested public until the APD phase, even under the Protocol Agreement between SHPO, BLM, and others. *See* Protocol § VII.B ("BLM will make determinations of…effect according to 36 C.F.R. Part 800.5"). BLM should therefore withdraw the twenty-one protested parcels in the Vernal, Moab, and Richfield field offices until the agency determines – through consultation with SHPO and the interested public – whether their sale, without NSO stipulations, will affect listed or eligible historic properties. Alternatively, BLM could lease these parcels with NSO stipulations, and thus preserve its ability to preclude surface disturbance.

Moreover, the DNA process violates the NHPA and Protocol § IV.C. which states that "*BLM will seek and consider the views of the public when carrying out the actions under terms of this Protocol.*" As BLM's DNA forms plainly state, the DNA process is a BLM "internal decision process" and thus there is no opportunity for the public to participate in the identification of known eligible or potentially eligible historic properties. *See* Exhibit 5 (IM 2001-062). Permitting public participation only at the "protest stage," or alleging that the time period for seeking public input ended when BLM completed its dated resource management plans, is not equivalent to encouraging participation in an open NEPA process, and BLM should withdraw the nineteen parcels in the Vernal, Moab, and Richfield field offices that are the subject of this protest.

Furthermore, brief conversations with, or form letters to, tribal councils or leaders regarding the potential effects of oil and gas leasing and development are insufficient to meet BLM's duty under the NHPA to make a "reasonable and good faith effort" to seek information from Native American tribes. *See Pueblo of Sandia v. United States,* 50 F.3d 856 (10th Cir. 1995). In this case, the Richfield BLM office's efforts to involve Native American tribes was

wholly inadequate because the record does not indicate what steps, if any, were taken to inform the Ute, Hopi, Navajo, Goshute, and Pauite tribes as to the nature of this undertaking.

Because BLM's sale of the twenty-one lease parcels identified above contain inadequate stipulations (*i.e* , non-NSO stipulations), the inescapable conclusion is that their sale will constitute an adverse effect that, under the NHPA and the Protocol, required consultation with SHPO, Native American tribes, and the interested public. *See* BLM Form 3100-11 (Oct. 1992) ("This lease is issued granting the exclusive right to drill for, mine, extract, remove and dispose all the oil and gas [ ] in the lands described"); *see also* 43 C.F.R. § 3101.1-2 (describing a lessee's surface use rights – known as the 200 meter/60 day rule). BLM failed to initiate this consultation and thus its sale and issuance of these nineteen leases must be postponed until the agency has complied with the NHPA and the Protocol. BLM's DNA's which state that the sale of the twenty-one parcels protested here has "no potential to effect" historic properties, lack any foundation in either the NHPA or its implementing guidelines.

In short, BLM must withdraw the twenty-one protested parcels until such time as the agency fully complies with NHPA § 106 and its implementing regulations.

C. Leasing The Contested Parcels Violates FLPMA.

FLPMA requires the BLM to establish management plans for the lands under its jurisdiction and requires that decisions, permits and other authorizations conform to an approved plan. 43 U.S.C. §§ 1712(a) and 1732(a). *See Southern Utah Wilderness Alliance*, 111 IBLA 207, 210-11 (1989); *Jennott Mining*, 134 IBLA 191, 192 (1995). Existing planning documents authorize conventional oil and gas development for parcels UT 029, UT 030, UT 031, UT 034, UT 036, UT 037, UT 038, UT 039, and UT 053, but do not address CBM development. As a

result, existing plans fail to identify the necessary stipulations and other leasing conditions that would protect these lands from the unique impacts associated with CBM development. Because there is moderate potential for CBM development in this area, the BLM cannot proceed with its leasing on UT 029, UT 030, UT 031, UT 034, UT 036, UT 037, UT 038, UT 039, and UT 053 without a revised plan in place that addresses these issues and provides the means for protecting these resources.

REQUEST FOR RELIEF

SUWA requests the following appropriate relief: (1) the withdrawal of the twenty-one protested parcels from the November 2003 Competitive Oil and Gas Lease Sale until such time as the agency has complied with NEPA, NHPA, and FLPMA; or, in the alternative (2) withdrawal of the twenty-one protested parcels until such time as the BLM attaches NSO stipulations to all twenty-one protested parcels.

This protest is brought by and through the undersigned legal counsel on behalf of Southern Utah Wilderness Alliance, Natural Resources Defense Council, The Wilderness Society, the Sierra Club, and the Honorable Maurice Hinchey. Members and staff of these organizations and Mr. Hinchey 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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et al.