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## Western Environmental Law Center

December 14, 2012

*Sent via Overnight Federal Express Delivery*

Helen Hankins, State Director  
Bureau of Land Management  
Colorado State Office  
2850 Youngfield Street  
Lakewood, CO 80215

**Re: Citizens for a Health Community's Protest of BLM's February 2013 Lease Sale  
DOI-BLM-CO-S050-2012-0009 EA**

Dear State Director Hankins:

The Western Environmental Law Center submits the following comments on behalf of Citizens for a Healthy Community in protest of the Bureau of Land Management ("BLM") Uncompahgre Field Office ("UFO") Final Environmental Assessment ("EA") and unsigned Finding of No Significant Impact ("FONSI") prepared for the February 2013 competitive oil and gas lease sale, identified as: DOI-BLM-CO-S050-2012-0009 EA.

Citizens for a Healthy Community ("CHC") is a grass-roots organization formed in 2010 for the purpose of protecting people and their environment from irresponsible oil and gas development in the Delta County region. CHC's members and supporters include organic farmers, ranchers, vineyard and winery owners, sportsmen, realtors, and other concerned citizens impacted by oil and gas development. CHC members have been actively involved in commenting on BLM's oil and gas activities.

CHC protests the inclusion of all North Fork Valley parcels to be offered in the February 2013 lease sale, as identified by Serial Number and Parcel ID:

COC75865 (6604), COC75869 (6605), COC75870 (6606), COC75875 (6607),  
COC75876 (6608), COC75871 (6609), COC75877 (6610), COC75872 (6611),  
COC75873 (6612), COC75878 (6613), COC75879 (6614), COC75880 (6615),  
COC75866 (6616), COC75867 (6617), COC75863 (6618), COC75860 (6619),  
COC75726 (6621), COC75864 (6623), COC75868 (6624), COC75874 (6625).

CHC finds it deeply troubling that BLM would irresponsibly push forward with the inclusion of North Fork Valley parcels in BLM's February 2013 lease sale – particularly because of the outpouring of public opposition that this proposed action has received since BLM originally announced its intent to include these public lands in the August 2012 lease sale. Indeed, BLM has received over 3,000 scoping and Draft EA comment letters from individuals, organizations, and government agencies vehemently opposing the sale of these public lands. The noticed parcels surround the communities of Paonia, Hotchkiss, Crawford, and Somerset, and extend northeast along State Highway 133 to the Paonia Reservoir State Park and the headwaters of the North Fork of the Gunnison River, and threaten the very lifeblood of these communities. BLM's press release of November 16, 2012 blindsided these communities, who were given no prior notice or warning of BLM's intent to move forward with the sale of these public lands in such a hurried manner.<sup>1</sup> BLM's announcement also set in motion the subject 30-day protest deadline, which, once again, came in the middle of the holiday season.

Also of great concern is BLM's decision to release a substantially different EA without allowing any opportunity for public comment. This document bears little resemblance to the Draft EA that was released last spring – with the exception that BLM still maintains that it can avoid performing *any* analysis of impacts until the application for permit to drill (“APD”) stage. As we continue to point out, Council on Environmental Quality (“CEQ”) regulations provide that “public scrutiny [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). In particular, the federal agency must “involve environmental agencies, applicants, and the public, to the extent practicable,” 40 C.F.R. § 1501.4(b), and “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” *Id.* at § 1506.6(a); *see also, e.g., Bering Strait Citizens for Responsible Development v. U.S. Army Corps of Engineers*, 511 F.3d 1011, 1024 (9<sup>th</sup> Cir. 2008) (providing a framework for public participation in the NEPA process). “NEPA’s public comment procedures are at the heart of the NEPA review process” and reflect “the paramount Congressional desire to internalize opposing viewpoints into the decision making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision.” *California v. Block*, 690 F.2d 753, 770-71 (9<sup>th</sup> Cir. 1982). Moreover, as the Tenth Circuit has provided: “The purpose behind NEPA is to ensure that the agency will only reach a decision on a proposed action after carefully considering the environmental impacts of several alternative courses of action and *after taking public comment into account.*” *Forest Guardians v. U.S. Fish and Wildlife Service*, 611 F.3d 692, 717 (10<sup>th</sup> Cir. 2010) (emphasis added). Here, BLM seems intent on treating public participation as a box they can check off, rather than the type of meaningful engagement that CEQ regulations and the courts envision. By BLM's own account, public input on the Draft EA was central in the agency's decision to defer these parcels in order to conduct additional analysis. *See* BLM Press Release, May 2, 2012 (attached as Exhibit 1). Yet, BLM has now chosen to proceed in a manner that shuts-out further public participation and

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<sup>1</sup> BLM also announced the inclusion of North Fork Valley parcels in the February 2013 lease sale despite a pending FOIA action against the agency, Civil Action No. 1-12-cv-01661-RPM. This action would require BLM to disclose the identities of the persons or entities that submitted Expressions of Interest nominating these parcels for inclusion in a BLM lease sale. BLM's decision to proceed with the lease sale comes in the middle of the briefing schedule, to which BLM stipulated, forcing Plaintiff CHC to seek a preliminary injunction and expedited decision. BLM also failed to provide prior notice of the lease sale to counsel in this case.

engagement in the agency's NEPA process. As stewards of our public lands, more is required of BLM and its efforts to engage the public in the agency's oil and gas leasing and development decisionmaking. The agency's failure to allow public comment on a substantially new EA – and therefore inability to integrate those comments – undermines the validity of BLM decisionmaking and its implementation of NEPA.

Furthermore, actions by the BLM have resulted in the propagation of misinformation to, and the misguiding of, the public. The Final EA contains an error in the listing of parcel numbers on different maps, and within the “analysis” of resource concerns. Specifically, parcels numbered 6623, 6624, and 6625 by the BLM in the Final EA at 10, fig. 1.1, are labeled parcels numbered 6601, 6602, and 6603, respectively, in the map of the Preferred Alternative, originally posted to the BLM UFO web site, and attached as Exhibit 2. (This map has since been updated to reflect correct internal parcel numbers, but no errata sheet has been issued by the BLM to clarify this to the public). Most recently, BLM UFO Public Affairs Specialist Shannon Borders provided inaccurate information to Kathy Browning, Staff Writer for the DELTA COUNTY INDEPENDENT, the primary newspaper serving Delta County and the North Fork Valley. In an email to Ms. Browning, Ms. Borders states: “We will dismiss a late-filed protest, a protest filed without a statement of reasons, or a protest not listing *the internal four-digit parcel ID number.*” See Letter from Kathy Browning, Delta County Independent, to Stephen Gulick (Dec. 12, 2012) (emphasis added) (attached as Exhibit 3). This statement is contrary to the BLM's policy of requiring protestors include the serial number of any parcel being protested. See BLM Colorado Office, *Leasing: Frequently Asked Questions* (stating “A protest must state the interest of the protesting party, their mailing address and reference the specific COC 5-digit serial number being protested.”) (emphasis in original).<sup>2</sup> This misinformation provided by BLM was published in the December 12, 2012 edition of the DELTA COUNTY INDEPENDENT, just days before protests are due to the BLM Colorado office. See Kathy Browning, *What BLM requires for a protest*, DELTA COUNTY INDEPENDENT, Dec. 12, 2012 (attached as Exhibit 4). BLM's failure to adequately provide correct information to the public is deeply troubling, especially considering the agency's reckless decision to proceed with this lease sale with no public comment period on the substantively different Final EA, as discussed above.

Given CHC's extensive engagement to date regarding BLM oil and gas leasing and development on public lands in and around the North Fork Valley, CHC hereby incorporates by reference a series of earlier comments and associated exhibits submitted to BLM UFO. First, CHC includes the original set of comments submitted to BLM regarding the subject North Fork Valley parcels, and includes both Scoping Comments, submitted on February 8, 2012 (hereinafter “Scoping Comments”) (attached as Exhibit A), as well as comments on BLM's preliminary Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”), submitted on April 19, 2012 (hereinafter “Draft EA Comments”) (attached as Exhibit B). In addition, CHC also includes comments submitted to BLM UFO regarding the draft EA/FONSI for the proposed Bull Mountain Master Development Plan, DOI-BLM-CO-150-2009-0005 EA, submitted April 23, 2012 (hereinafter “Bull Mountain Comments”) (attached as

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<sup>2</sup> BLM Colorado Office, *Leasing: Frequently Asked Questions*, available at: [http://www.blm.gov/co/st/en/BLM\\_Programs/oilandgas/Frequently\\_Asked\\_Questions\\_Leasing.html](http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/Frequently_Asked_Questions_Leasing.html).

Exhibit C), as well as the Supplemental Information letter sent to BLM UFO regarding the pending revision of the Uncompahgre Basin Resource Management Plan (“RMP”) submitted October 23, 2012 (hereinafter “Supplemental Information”) (attached as Exhibit D). As these comments and associated exhibits provide significant detail regarding both procedural requirements and specific resource concerns in the North Fork Valley, they should likewise be considered in this protest.

**STATEMENT OF REASONS  
IN SUPPORT OF CITIZENS FOR A HEALTHY COMMUNITY’S PROTEST OF  
BLM’S FEBRUARY 2013 COMPETITIVE OIL & GAS LEASE SALE:**

**I. BLM Cannot Offer the Subject North Fork Valley Parcels at Any Lease Sale While the Uncompahgre Basin RMP Revision Remains Uncompleted.**

As provided in earlier comments, there is a pending revision to the RMP and environmental impact statement (“EIS”), which is meant to update the out-of-date and inoperable 1989 Uncompahgre Basin RMP. When there is such a pending action, NEPA establishes a duty “to stop actions that adversely impact the environment, that limit the choice of alternatives for the EIS, or that constitute an ‘irreversible and ir retrievable commitment of resources.’” *Conner v. Burford*, 848 F.2d 1441, 1446 (9<sup>th</sup> Cir. 1988). When an EIS is underway, CEQ regulations prohibit an agency from taking any actions that would significantly impact the environment. *See* 40 C.F.R. § 1506.1(c) (1997); Draft EA Comments at 3-5; Supplemental Information at 2-3 (incorporated by reference).

Proceeding with the sale of North Fork Valley parcels at the February 2013 Lease Sale – or, for that matter, taking any other major Federal action covered by the stale 1989 RMP – is impermissible due to the inherent prejudice that this action will cause to the pending revision of the Uncompahgre Basin RMP and EIS. Revision of the 1989 RMP is fundamental to the public land use decisionmaking process in the UFO – creating the foundation upon which all mineral resource management decisions are made – and in its current form is woefully incapable of performing this function. The agency must allow itself the time to complete its RMP revision before proceeding with the sale of public lands in the North Fork Valley.

**a. It is Inappropriate to Tier to the 1989 RMP or Accompanying Documents.**

Tiering to the 1989 RMP and its accompanying documents – as the Final EA consistently does – is inappropriate and cannot serve to guide BLM decisionmaking. *See, e.g.*, Final EA at 19 (stating reliance on 1989 RMP). These documents contain stale and out-of-date information and analysis, which is temporally limited and fails to account for the significant changes in the North Fork Valley over the last quarter-century. *See* 40 C.F.R. § 1508.28 (tiering regulations). The 1989 RMP contains very little analysis of oil and gas drilling in the Uncompahgre area generally, much less any analysis of the impacts that could result from drilling in the Valley. *See* 1989 RMP at 28, 31. The 1989 RMP, accompanying EIS, and technical report for oil and gas simply did not analyze the site-specific impacts of gas development using today’s modern extraction techniques – specifically the use of hydraulic fracturing, or fracking – much less any analysis of the areas nominated in the February 2013 lease sale. *See also* Scoping Comments at 10-14

(identifying the insufficiencies of the 1989 RMP); and 15-22 (identifying myriad potential impacts from fracking) (incorporated by reference). Moreover, there is no updated, current analysis that identifies what overall level of development – and the nature of that development (e.g., oil or natural gas, what technologies and drilling techniques, etc., would be used to extract resources) – is reasonably foreseeable.

Not only is there no updated development scenario, but BLM’s UFO continues to rely on these stale documents to guide its decisionmaking. For example, in Attachment G to the Final EA – the summary and response to public comments – BLM repetitively states:

BLM expects that this lease sale will result in a low level of development. The reasonably foreseeable development scenario (1987 UBRA Oil and Gas Technical Report) predicts ten new well pads per year in the entire UBRA including the North Fork Valley.

Final EA at G-22, G-23, G-24, G-25 (emphasis added). Elsewhere, however, BLM predicts: “the area will average 20 new wells per year ... creat[ing] approximately 68 acres of new disturbance per year from oil and gas development.” Final EA at 27. It should be further noted, however, that the “area” BLM refers to is the North Fork Valley, and not the entire UBRA as mentioned in the 1987 Technical Report. If BLM cannot even be consistent about what a reasonably foreseeable development scenario is for the North Fork Valley, it is hard to imagine how it could possibly consider impacts from the lease sale.

Moreover, it continues to astonish that BLM’s assumptions regarding development in the North Fork Valley are unabashedly based on analysis that is over 25 years old – and that these out-of-touch predictions are meant to assuage the public’s concerns regarding present leasing and development decisionmaking. Perhaps more galling is the fact that BLM’s reliance on this low development prediction comes at a time when the Valley is already facing a significant increase in oil and gas development. For example, the BLM UFO is currently considering the 150-well Bull Mountain development (CO-150-2009-0005-EA), the UFO approved a 16-well development (CO-150-2008-35-EA (2008)), and BLM identifies 15 total APDs as pending in the subject EA. Final EA at 26. Additionally, the 1987 Technical Report unambiguously provides that any analysis contained therein is inherently limited in its temporal scope – providing that its evaluation of projected development is limited to “the next ten to fifteen years.” *See* 1987 Technical Report at 10-11. BLM itself recognizes that “development potential in the proposed parcels is unknown.” Final EA at G-19. Without an updated development scenario analysis, it seems self evident that there is considerable uncertainty and controversy regarding the size, nature, and impacts of further leasing, in particular relative to cumulative impacts.

BLM itself acknowledges the shortcomings of the UFO’s existing RMP, and has provided that “[p]reparation of the Uncompahgre RMP is necessary in order to respond to changing resource conditions, new issues, and federal policies, as well as to prepare a comprehensive framework for managing public lands administered by the UFO.” *See* Draft EA Exhibit 2 (BLM UFO, *Uncompahgre RMP Newsletter* (December 2009)). “Management is becoming more complex due to the emergence of new issues of national significance, as well as heightened controversy surrounding certain existing issues. Increased oil, gas, and uranium

activity, recreation demands, impacts from a growing population and urban interface, and pressures on wildlife and land health are among the many challenges to be addressed.” See Draft EA Exhibit 3 (BLM UFO, *Analysis of the Management Situation: for the BLM Uncompahgre Planning Area* (June 2010)). Moreover, BLM Leasing Reforms – Instruction Memorandum No. 2010-117 – recognize that field offices must determine whether “RMPs adequately protect important resource values,” and that – as the UFO recognizes above – RMP updates may be necessary “prior to making any decision whether or not to lease.”

Here, both the law and the public interest demand that the revised RMP and EIS be completed *before* deciding whether it is appropriate to lease the public lands of the North Fork Valley. According to BLM oil and gas statistics, there are currently 4,380,275 acres of leased land that is “in effect” in Colorado, only about a third of which is actually in production. See Draft EA Exhibit 4 (BLM, Oil and Gas Statistics by Year for Fiscal Years 1988 – 2011); *see also* Producing Acres (attached as Exhibit 5). In the North Fork Valley area alone, 124,078 acres of public lands are already leased (representing 32.6%), with only 304.1 acres in production. Final EA at 24, 25. Given the over-supply of leased lands in the North Fork, and Colorado more generally, it makes no sense to push forward with this lease sale other than for the continued benefit of speculative oil and gas industry practices. This lack of urgency is underscored by the historically low prices for natural gas, which commodities experts describe is a result of a “chronically oversupplied market.” See U.S. Energy Information Administration, *U.S. Natural Gas Prices*, November 30, 2012 (attached as Exhibit 6); Gary Kaminsky, *Who Will Survive the Natural Gas Oversupply?*, CNBC BUSINESS NEWS, Jan. 4, 2012 (attached as Exhibit 7). Even industry publications anticipate the gas market oversupply to last another five-years. INTERNATIONAL OIL & GAS ENGINEER, *Oversupply of gas expected on the market for next five years* (Aug. 2012) (attached as Exhibit 8). Given these conditions, there is no reason to rush forward with the sale of public lands in the North Fork Valley. BLM should allow time for completion of the Uncompahgre Basin revised RMP and EIS, as well as perform the necessary site-specific analysis to help guide agency decisionmaking related to the nominated North Fork parcels.

**b. BLM has Failed to Prepare a Master Leasing Plan for the North Fork Valley in Violation of BLM Oil & Gas Leasing Reforms.**

CHC has repeatedly requested that BLM initiate a Master Leasing Plan (“MLP”) for public lands in the North Fork Valley, pursuant to agency guidance set forth in IM 2010-117. See Draft EA Comments at 5; Supplemental Information at 4 (incorporated by reference). BLM has failed to directly respond to CHC’s request.

The MLP is a mechanism for completing the additional planning, analysis, and decisionmaking, and is required for areas meeting the following listed criteria:

- (1) a substantial portion of an area is not currently leased;
- (2) it has a majority federal mineral interest;
- (3) the oil and gas industry has expressed a specific interest in leasing;
- (4) a moderate to high potential exists for oil and gas developments;
- and (5) that development may harm important resource values, such as natural/cultural resource conflicts, air quality, wildlife and wilderness.

See IM 2010-117. Attachment G to the Final EA recognizes the agency's mandate to prepare a MLP when these conditions are met. Final EA at G-18. BLM's response to this requirement is indirect, but describes the following conditions: "The development potential in the proposed parcels is unknown," and later continues: "The analysis in an MLP is generally done for an area that meets the aforementioned criteria and *would be based on a larger scale of analysis.*" Final EA at G-19 (emphasis added). BLM then concludes that it has "carefully considered public input and believes that the methods used were sufficient to identify and refine issues and analysis for the proposed action and alternatives." *Id.* However, when a specific interest in leasing has been expressed and additional analysis or information is needed, an MLP is mandatory. See IM 2010-117. These are precisely the circumstances that BLM describes only a few sentences earlier that would require an MLP. See Final EA at G-19. Indeed, the requirement that the agency create a MLP when the foregoing conditions are met is not a technicality or another box that BLM must check off, but reflect a larger policy imperative to carefully analyze the impacts of oil and gas development before it is too late. BLM UFO's decision not to perform the necessary analysis because "methods used were sufficient" cannot satisfy the agency's mandate under IM 2010-117 or NEPA.

## **II. BLM Will Make an Irretrievable Commitment of Resources Upon Lease Issuance.**

CEQ regulations require BLM to analyze all environmental impacts that are "reasonably foreseeable," 40 C.F.R. § 1502.22, before the agency makes an "irretrievable commitment of resources." 42 U.S.C. § 4332(2)(C)(v); *Pennaco Energy, Inc. v. U.S. Department of the Interior*, 377 F.3d 1147, 1160 (10<sup>th</sup> Cir. 2004). As CHC has consistently maintained, lease issuance represents such a commitment. See Scoping Comments at 8-10; Draft EA Comments at 7-9 (incorporated by reference). In the context of oil and gas leasing, the Tenth Circuit stated: "[t]he operative inquiry [is] simply whether all foreseeable impacts of leasing [are] taken into account before leasing [can] proceed." *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 717 (10<sup>th</sup> Cir. 2009) (hereinafter "*Otero Mesa*"). Here, BLM has admitted that it has failed to meet this standard. See, e.g., Final EA at G-12 (providing that BLM failed to conduct site-specific analysis).

Oil and gas leases confer "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." 40 C.F.R. § 3101.1-2; *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10<sup>th</sup> Cir. 1988) (agencies are to perform hard look NEPA analysis "before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values"); see also 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values."). BLM's failure to perform a hard look NEPA analysis before holding the February 2013 lease sale represents a fundamental error that cannot be overlooked, and is a decision which results in the systemic failure of the Final EA.

The Tenth Circuit has unambiguously held that (1) environmental impacts are reasonably foreseeable at the leasing stage, and (2) that leasing constitutes an irretrievable commitment of

resources because oil and gas regulations entitle the leaseholder to drill. *Otero Mesa*, 565 F.3d at 718-19 (“we conclude that issuing an oil and gas lease without an NSO stipulation constitutes such a commitment.”). In other words, significant environmental impacts may result once the transfer of rights occurs upon lease issuance. Here, “[e]ach lease would be issued subject to stipulations identified in the 1989 UBRA RMP,” which do not include a NSO stipulation. Final EA at 16. Therefore, once BLM issues the February 2013 leases, the agency’s authority will thereafter be limited to imposing mitigation measures consistent with the terms of the lease. BLM UFO will not be able to impose conditions inconsistent with the lease terms and cannot deny the developer the right to drill altogether. *See, e.g.*, Final EA at 34, 39 (recognizing that “COAs cannot take away lease rights or prevent development.”). Relying on decades old lease stipulations, which the agency itself admits are in need of revision, cannot protect the critical public resources of the North Fork Valley from myriad environmental impacts that will occur upon lease issuance. BLM’s suggested approach cannot be sustained under either law or good-conscience.

### **III. BLM has Impermissibly Predetermined its Outcome Regarding Oil & Gas Leasing and Development in the North Fork Valley in Violation of NEPA.**

CHC has consistently warned that BLM has impermissibly predetermined its outcome by advancing the oil and gas agenda, as made evident through the agency’s subject decisionmaking process. *See* Draft EA Comments at 5-7; Scoping Comments at 6-8 (incorporated by reference). This concern has been left unaddressed in the Final EA and remains a primary shortcoming of the agency’s NEPA analysis.

As CHC previously noted, NEPA “requires ... that an agency give a ‘hard look’ to the environmental impact of any project or action it authorizes.” *Morris v. U.S. Nuclear Regulatory Commission*, 598 F.3d 677, 681 (10<sup>th</sup> Cir. 2010). This examination “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Forest Guardians*, 611 F.3d at 712 (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9<sup>th</sup> Cir. 2000)); *see also* 40 C.F.R. § 1502.2(g) (“Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”); *id.* § 1502.5 (“The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.”). Here, BLM has failed to meet even the most primary threshold for its NEPA process – taking an honest hard look.

#### **a. BLM Violates NEPA, BLM Leasing Reforms, and Legal Precedent by Failing to Provide Site-Specific Analysis Until the APD Stage.**

BLM’s failure to take a hard look is made evident by the UFO’s consistent refusal in the Final EA to acknowledge and analyze *any* impacts that will result from the sale of the North Fork parcels. BLM’s constant refrain throughout the Final EA is some variation of: “the act of leasing the parcels would produce no impacts....” *See, e.g.*, Final EA at 32, 43, 45, 56, 61, 64, 69, 74, 77, 79, 82, 85, 90, 105, 115, 116, 124; *see also* Draft EA Comments at 6 (describing the same approach taken at the Draft stage) (incorporated by reference). Following nearly every instance of this obfuscation, BLM went on to perfunctorily describe the reasonably foreseeable

impacts that may or would result from parcel development, but which would only undergo actual analysis at the application for permit to drill (“APD”) stage. BLM’s shell game – which inevitably results in decisions that blindly sell our public lands for oil and gas development – fails to meet its mandate as stewards of our public lands, and moreover is explicitly contrary to NEPA’s requirement that the analysis of impacts take place *before* the federal action can proceed.

Indeed, in responding to the public’s concerns regarding BLM’s FONSI, the agency states: “BLM cannot at this time provide site-specific analysis.” Final EA at G-12; *see also, e.g.*, Final EA at 8, 69, 72, 74, 78, 121 (providing, generally, that “site-specific analysis would be conducted at the APD stage to determine and to mitigate potential impacts”). BLM UFO’s failure to perform site-specific analysis is directly in conflict with requirements set forth through the agency’s leasing reforms. For example, the leasing reforms state: “The [Interdisciplinary Parcel Review Team] will complete site-specific NEPA compliance documentation for all BLM surface and split estate lease sale parcels.” *See* IM 2010-117 at III.E.

Moreover, the courts have warned that the agency must analyze site-specific impacts at the leasing stage, as noted above. *See Otero Mesa*, 565 F.3d 683. In *Otero Mesa*, the Tenth Circuit analyzed two prior cases addressing this same issue: *Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609 (10<sup>th</sup> Cir. 1987), and *Pennaco*, 377 F.3d 1147. Based on its analysis of those two cases, the Tenth Circuit gave the following guidance for courts to follow in future cases addressing site-specific analysis:

Taken together, these cases establish that there is no bright line rule that site-specific analysis may wait until the ... [APD] stage. Instead, the inquiry is necessarily contextual. Looking to the standards set out by regulation and by statute, assessment of all “reasonably foreseeable” impacts must occur at the earliest practicable point, and must take place before an “irretrievable commitment of resources” is made. Each of these inquiries is tied to the existing environmental circumstances, not to the formalities of agency procedures. Thus, applying them necessarily requires a fact-specific inquiry.

*Otero Mesa*, 565 F.3d at 717-18 (citations omitted). When analyzing those two factors, the Tenth Circuit held that (1) environmental impacts were reasonably foreseeable at the leasing stage when exploration has already occurred in the area, and (2) that leasing constituted an irretrievable commitment of resources because oil and gas regulations entitle the leaseholder to drill. *Id.* at 718-19 (“we conclude that issuing an oil and gas lease without an NSO stipulation constitutes such a commitment.”). Thus, the Tenth Circuit held that the agency violated NEPA by failing to analyze site-specific impacts at the leasing stage. *Id.* at 718-19. *See also Pennaco*, 377 F.3d at 1160 (“Because the issuance of leases gave lessees a right to surface use, the failure to analyze CBM development impacts before the leasing stage foreclosed NEPA analysis from affecting the agency’s decision.”); *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1208 (D.Colo. 2011) (holding that DOE acted arbitrarily and capriciously for failing to analyze site-specific impacts in its EA). Here, as in *Otero Mesa* and *Pennaco*, actual drilling and site-specific impacts are reasonably foreseeable and must be analyzed prior to the lease sale.

Moreover, the Tenth Circuit further noted that its conclusion – requiring site-specific impacts analysis at the lease sale stage – is supported by internal BLM documents. BLM Handbook H-1624-1 provides: “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.” *Otero Mesa*, 565 F.3d at 718, n. 44. By specifically refusing to perform the site-specific analysis prior to the February 2013 lease sale, BLM is ignoring the explicit and unwavering direction of NEPA regulations, BLM Leasing Reforms, Tenth Circuit precedent, and even BLM’s own Handbook. BLM UFO’s conclusion is simply indefensible.

**b. BLM Impermissibly Relies on Mitigation Measures to Avoid a Finding of Significance, and has Predetermined its Outcome in Violation of NEPA.**

Although it is possible that “some or all of the environmental consequences of oil and gas development may be mitigated through lease stipulations, it is equally true that the purpose of NEPA is to examine the foreseeable environmental consequences of a range of alternatives *prior* to taking an action that cannot be undone.” *Montana Wilderness Ass’n v. Fry*, 310 F.Supp.2d 1127, 1145 (D.Mont., 2004) (citation omitted) (emphasis added); 40 C.F.R. § 1501.2. “[M]itigation measures, while necessary, are not alone sufficient to meet the [Agency’s] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved.” *Northern Plains Resource Council*, 668 F.3d at 1085 (emphasis in original). Consequently, if BLM discovers significant impacts at the APD stage, it may no longer be able to prevent them. BLM has acknowledged this truth, providing: “COAs cannot take away lease rights or prevent development.” Final EA at 34, 39.

Here, BLM has relied extensively on future mitigation to avoid a finding of significance, in violation of the agency’s NEPA mandate. BLM’s unsigned FONSI for the February 2013 lease sale provides: “impacts are not expected to be significant with the incorporation of mitigation measures and will be further analyzed in site specific environmental analysis documents at the development stage.” FONSI at 1-2. This statement summarizes BLM’s approach in its NEPA analysis of this lease sale, which is further evidenced throughout the Final EA. For example, with regard to air quality impacts, BLM states: “To mitigate any potential impact that oil and gas development emissions may have on regional air quality, Best Management Practice (BMPs) may be required for any development project.” Final EA at 34. This approach of describing *possible* mitigation that *may* be required is taken repeatedly in BLM’s discussion of resource impacts from future oil and gas development. *See, e.g.*, Final EA at 34, 77, 79-80, 105-08. Moreover, by failing to perform the necessary analysis, the agency, in effect, is presupposing that any site-specific impacts from oil and gas development can be mitigated without significant, unacceptable impacts at the APD stage before even knowing what those site-specific impacts are. The agency is also presupposing that oil and gas resources, if developed, outweigh non-oil and gas resources, like wildlife habitat, air quality, water quality protection, as well as maintaining the socio-economic character of the North Fork Valley.

As soon as BLM issues an oil and gas lease – particularly, as here, when the lease is sold without a no surface occupancy (“NSO”) stipulation – that sale confers a guaranteed right to the leaseholder, which includes the right of occupancy. Without analyzing impacts from the lease sale itself, any subsequent analysis intrinsically shifts from *preventing* impacts (and managing

lands for other resource values) to merely *mitigating* impacts (and allowing oil and gas lessees to exercise their surface use rights to the lease at the expense of other resource values). This approach is fundamentally incongruous with NEPA’s mandate. In *Northern Plains* the Ninth Circuit warned: “In a way, reliance on mitigation measures presupposes approval. It assumes that – regardless of what effects construction may have on resources – there are mitigation measures that might counteract the effect without first understanding the extent of the problem. This is inconsistent with what NEPA requires.” *Northern Plains*, 668 F.3d at 1084-85. In the present case, this presupposition is precisely what BLM has done in determining that actual NEPA analysis can wait until some future date while relying on future mitigation to avoid a finding of significance.

BLM, in making this predetermined conclusion, creates an unlevel playing field that benefits oil and gas leasing and drilling at the expense of other multiple use resources. There is a long line of cases that warn agencies against making a predetermined decision with respect to NEPA analysis. The Tenth Circuit has cautioned: “[I]f an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously.” *Forest Guardians*, 611 F.3d at 713 (citing *Davis v. Mineta*, 302 F.3d 1104 (10<sup>th</sup> Cir. 2002)). The Tenth Circuit further stated that “[w]e [have] held that ... predetermination [under NEPA] resulted in an environmental analysis that was tainted with bias” and was therefore not in compliance with the statute. *Id.* (citing *Davis*, 302 F.3d at 1112–13, 1118–26)).

While the threshold for finding agency predetermination is high – “occur[ing] only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis,” *Forest Guardians*, 611 F.3d at 714 (emphasis in original) – here, BLM’s misguided process has met that threshold. BLM made the express determination that an analysis of impacts is not necessary at the lease sale stage – a determination that is explicitly made throughout the Final EA. *See, e.g.*, Final EA at G-12 (“BLM cannot at this time provide site-specific analysis.”); Final EA at 8, 69, 72, 74, 78, 121 (providing, generally, that “site-specific analysis would be conducted at the APD stage to determine and to mitigate potential impacts”). This conclusion guarantees that a FONSI will be issued during the lease sale stage NEPA process. That FONSI is based not on any actual analysis of impacts, but rather on the predetermined decision to perform the necessary NEPA analysis at a later stage. Indeed, by not performing any genuine analysis, it is impossible to reach any conclusion other than a FONSI. By playing this shell game, BLM, at a minimum, creates an improper “inertial presumption” in favor of committing resources to oil and gas development before knowing the site-specific impacts. *Natl. Wildlife Fed. v. Morton*, 393 F.Supp 1286, 1292 (D.D.C. 1975).

By reaching, in effect, a predetermined decision – or at least creating a presumption in favor of oil and gas leasing and development – BLM not only violates NEPA, but also, by elevating development of oil and gas over other multiple use resources, violates the Federal Land Policy Management Act (“FLPMA”). As the Tenth Circuit has explained:

It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses... Development is a *possible* use, which BLM must weigh against other possible uses – including conservation to protect environmental values, which are best assessed through the NEPA process.

*Otero Mesa*, 565 F.3d at 710. BLM’s presupposition of outcome is a direct affront to both NEPA and FLPMA, and cannot be sustained.

#### **IV. BLM has Failed to Prepare an Environmental Impact Statement Prior to the February 2013 Lease Sale Despite Substantial Evidence that Significant Impacts Will Occur, in Violation of NEPA.**

As CHC has consistently maintained, an environmental impact statement (“EIS”) must be prepared before North Fork Valley parcels can be offered at a BLM oil and gas lease sale. *See* Draft EA Comments at 11-12, Scoping Comments at 10-11 (incorporated by reference). An EIS is required when a major federal action “significantly affects the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4. A federal action “affects” the environment when it “will or *may* have an effect” on the environment. 40 C.F.R. § 1508.3 (emphasis added); *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10<sup>th</sup> Cir. 1996) (“If the agency determines that its proposed action *may* ‘significantly affect’ the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.”) (emphasis added). Similarly, according to the Ninth Circuit:

We have held that an EIS *must* be prepared if ‘substantial questions are raised as to whether a project ... *may* cause significant degradation to some human environmental factor.’ To trigger this requirement a ‘plaintiff need not show that significant effects *will in fact occur*,’ [but instead] raising ‘substantial questions whether a project may have a significant effect’ is sufficient.

*Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9<sup>th</sup> Cir. 1998) (citations omitted) (emphasis original). Given the magnitude of the proposed action and impacts to the communities of the North Fork Valley that this lease sale will create, BLM’s FONSI is completely unsupported.

BLM is required to make its threshold determination with respect to the significance of impacts based on a hard look at two factors: “context” and “intensity.” 40 C.F.R. § 1508.27. “Either of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.” *Natl. Parks & Conserv. Assn. v. Babbitt*, 241 F.3d 722, 731 (9<sup>th</sup> Cir. 2001). Indeed, many courts have held that the issuance of a federal oil and gas lease may require an EIS simply because of the effects on surface lands. *See WildEarth Guardians v. U.S. Forest Service*, 828 F.Supp.2d 1223, 1241 (D.Colo. 2011) (citing *Sierra Club v. United States Dep’t of Energy*, 255 F.Supp.2d 1177, 1186 (D.Colo. 2002) (the government’s actions in granting access to a federally-owned surface estate for the purpose of exploiting the mineral estate is a federal action under NEPA); *see also Sierra Club v. Peterson*, 717 F.2d 1409, 1413-15 (D.C. Cir. 1983) (concluding that the agency was required to conduct a site-specific analysis through an EIS

before it could authorize the issuance of oil and gas leases within two national forests). The circumstances of this lease sale require BLM to prepare an EIS.

Moreover, in the absence of an EIS, BLM UFO “must put forth a convincing statement of reasons’ that explains why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite ‘hard look.’ ” *Ocean Advoc. v. U.S. Army Corps of Engrs.*, 402 F.3d 846, 864 (9<sup>th</sup> Cir. 2005). Nowhere in BLM’s Final EA and unsigned FONSI does there exist a convincing statement explaining the insignificance of impacts from this sale. To the contrary, BLM suggests that any real analysis of impacts can be pushed off until the APD stage – which, as described above, is wholly deficient. If BLM proceeds in its refusal to perform an EIS, it must provide a detailed accounting of each NEPA significance factor, as provided in 40 C.F.R. § 1508.27, explaining why the project will impact the environment no more than insignificantly. The cursory and evasive manner in which BLM has addressed these significance factors in the unsigned FONSI is insufficient to meet the agency’s NEPA mandate.

**a. BLM has Failed to Perform a True Hard Look NEPA Analysis on Impacts from the Sale and Development of North Fork Valley Parcels.**

The haste with which BLM has pushed forward with its NEPA process has resulted in BLM UFO’s failure to take a “hard look” at impacts for the proposed February 2013 lease sale. NEPA instructs that an agency is required to “take a ‘hard look’ at the impacts of a proposed action.” *Citizens’ Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179 (10<sup>th</sup> Cir. 2008) (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10<sup>th</sup> Cir.1997)). This hard look promotes NEPA’s “sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of proposed agency action.” *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 371 (1989). NEPA achieves this focus through “action forcing procedures ... requir[ing] that agencies take a hard look at environmental consequences.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted). These “environmental consequences” include direct, indirect, and cumulative impacts. 40 C.F.R. §§ 1508.7, 1508.8; *Custer Co. Action Assn. v. Garvey*, 256 F.3d 1024, 1035 (10<sup>th</sup> Cir. 2001). NEPA’s hard look should provide an analysis of impacts that is pragmatic and useful to the decisionmaker and the public. *Nat. Resources Def. Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (hard look premised on providing “analysis useful to a decisionmaker in deciding whether, or how, to alter [a project] to lessen cumulative environmental impacts”). BLM’s Final EA falls woefully short of this bar. Indeed, BLM’s express determination not to perform any actual analysis at the lease sale stage – but rather delay this analysis until some future time – fundamentally and by definition fails to take a hard look at impacts. *See, e.g.*, Final EA at 32, 43, 45, 56, 61, 64, 69, 74, 77, 79, 82, 85, 90, 105, 115, 116, 124 (“the act of leasing the parcels would produce no impacts....”); Final EA at G-12 (“BLM cannot at this time provide site-specific analysis.”); Final EA at 8, 69, 72, 74, 78, 121 (providing, generally, that “site-specific analysis would be conducted at the APD stage to determine and to mitigate potential impacts”).

**b. BLM has Failed to Analyze the Cumulative Impacts of Oil & Gas Leasing and Development on the North Fork Valley.**

A cumulative impact is the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

While BLM provides a “cumulative effects” section when discussing specific resources of concern, the agency fails to actually conduct any cumulative *analysis* of the impacts identified therein. *See Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988) (providing that section headings without the “requisite analysis” are insufficient). In other words, while BLM lists impacts that may occur to a given resource, the agency fails to analyze those possible impacts respective to the proposed action – as discussed more specifically in the resource sections below. *See* 40 C.F.R. § 1508.27(b)(7) (BLM must consider whether the proposed action is related to other actions that together may have cumulatively significant *impacts*. “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”).

As noted above, the agency prefaces almost every discussion of environmental effects by saying that “the act of leasing the parcels would produce no impacts....” *See, e.g.*, Final EA at 32, 43, 45, 56, 61, 64, 69, 74, 77, 79, 82, 85, 90, 105, 115, 116, 124. BLM also recognizes that “COAs cannot take away lease rights or prevent development.” Final EA at 34, 39. Similarly, while it is technically true that the act of jumping off a cliff in itself would produce no impacts, the agency knows full well that once you hit the ground the impacts would be immediate and unavoidable. NEPA requires that BLM consider not just the act, but also the impact. Once a lease is issued, BLM cannot prevent development. The agency’s failure and blatant refusal to analyze the direct, indirect, and cumulative impacts of such development creates a fundamental error that cannot be overcome.

#### **V. By Failing to Analyze Impacts in its Final EA, BLM has also Failed to Establish Baseline Data from which Future Impacts can be Measured.**

CHC has previously warned that the evasive approach BLM has taken in delaying or averting its NEPA analysis – and instead relying on future mitigation – also fails to establish any baseline information from which a future impacts analysis can be measured. *See* Draft EA Comments at 15-16 (incorporated by reference). BLM has suggested that it *may* require baseline testing for certain resources, *see, e.g.*, Final EA at 106, however, this potential testing requirement alone does not satisfy the agency’s mandate. NEPA requires that the agency provide data on which it bases its environmental analysis. *See The Lands Council v. McNair*, 537 F.3d 981, 994 (9<sup>th</sup> Cir. 2008) (holding that an agency must support its conclusions with studies that the agency deems reliable). Such analysis must occur before the proposed action is approved, not afterward. *See LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9<sup>th</sup> Cir. 1988) (“[T]he very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.”) (citation omitted). “[O]nce a

project begins, the ‘pre-project environment’ becomes something of the past” and evaluation of the project’s effect becomes “simply impossible.” *Id.* See also *Sierra Club*, 848 F.2d at 1093 (holding that analysis must occur before the point of commitment) (overturned on other grounds). Possible baseline testing at the development stage cannot obviate the agency’s mandate to perform a NEPA hard look analysis now.

Moreover, baseline data and analysis is fundamental to public involvement and participation in the study process. NEPA § 102(2)(C) provides for broad-based participation. See 42 U.S.C. § 4332(2)(C). CEQ regulations implement this mandate by requiring that agencies “shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing [environmental] assessments [required by NEPA].” 40 C.F.R. § 1501.4(b). See *City of Aurora v. Hunt*, 749 F.2d 1457, 1465 (10<sup>th</sup> Cir. 1984). Public participation and involvement is also a central theme in BLM’s recently established leasing reform policy. See IM No. 2010-117. The Court in *Northern Plains* further provides:

NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. The use of mitigation measures as a proxy for baseline data does not further either purpose. First, without this data, an agency cannot carefully consider information about significant environmental impacts. Thus, the agency “fail[s] to consider an important aspect of the problem,” resulting in an arbitrary and capricious decision. Second, even if the mitigation measures may guarantee that the data will be collected some time in the future, the data is not available during the [NEPA] process and is not available for public comment. . . . The [NEPA] process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

*Northern Plains*, 668 F.3d at 1085 (citations omitted). “Without establishing baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” *Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci*, 857 F.2d 505, 510 (9<sup>th</sup> Cir. 1988). As federal courts have recognized, this requirement is “critical to” developing a reasonable range of alternatives, as more fully discussed below. *American Rivers v. F.E.R.C.*, 201 F.3d 1186, 1195 n.15 (9<sup>th</sup> Cir. 1999) (internal quotations and citation omitted).

“The purpose of NEPA is to ensure that federal agencies are fully aware of the impact of their decisions on the environment.” *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9<sup>th</sup> Cir. 1987). BLM’s EA fails to collect or study any baseline information, which is fundamental to reaching a reasoned decision under NEPA. This baseline data, even in the absence of a specific proposal to drill, may compel BLM to rethink its decision to offer the proposed leases for sale in February 2013, in particular relative to the pending revision of the Uncompahgre Basin RMP. Failing to conduct an honest NEPA analysis at the lease sale stage also circumvents any opportunity for the public to meaningfully participate – which makes the need for baseline data even more important. See 40 C.F.R. § 1501.4(b). In other words, while BLM identifies several resource values at stake in this action, it fails to identify or analyze what the impacts to those resources will be. NEPA’s informational purpose requires the agency to

identify impacts to resource values so that BLM and the public can make an informed decision about executing leases which commit oil and gas resources to development.

## **VI. Resources**

### **a. BLM has Failed to Sufficiently Analyze Impacts to Air Quality.**

BLM's Environmental Effects section on Air Quality begins: "The decision to offer the identified parcels for lease would not result in any direct emissions of air pollutants. While the act of leasing the parcels would produce no significant air quality impacts, potential future development of leases could lead to increases in local area and regional emissions." Final EA at 32. Thus, BLM dismisses the possibility of finding significant impacts before the agency ever analyzes what possible impacts may be.

BLM goes on to list impacts to air quality that would result from exploration and development, which, incidentally, the agency has recognized are certain to occur once a lease is issued. Final EA at 34, 39. These impacts include emissions of inhalable particulate matter (specifically PM<sub>10</sub> and PM<sub>2.5</sub>), criteria pollutants such as volatile organic compounds ("VOCs") and nitrogen oxides (NO<sub>x</sub>), as well as non-criteria pollutants such as "carbon dioxide, methane and nitrous oxide, air toxics (e.g., benzene), total suspended particulates (TSP), increased impacts to visibility, and atmospheric deposition). Final EA at 32-33. While these emissions will "elevate potential for the deterioration of air quality in the North Fork Valley" and "will result in a cumulative increase" of emissions, BLM nevertheless fails and refuses to analyze those impacts at the lease sale stage. Final EA at 33 (providing that "[i]mpacts resulting from future lease development will be determined at the time of APD submittal."). This approach has not changed from BLM's Draft EA, and violates the agency's NEPA mandate. *See* Draft EA Comments at 16-18 (incorporated by reference); *see also Otero Mesa*, 565 F.3d at 718 (assessment of all "reasonably foreseeable" impacts must occur at the earliest practicable point).

BLM also fails to address concerns that CHC raised regarding a substantial number of Class I air quality areas that may be directly impacted by any development in the North Fork Valley. *See* Draft EA Comments at 16-17 (incorporated by reference). CHC's earlier comments pertain to congressionally adopted visibility provisions in the CAA to protect visibility in these "areas of great scenic importance." H.R. Rep. No. 294, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. at 205 (1977). *See e.g., State of Maine v. Thomas*, 874 F.2d 883, 885 (1<sup>st</sup> Cir. 1989) ("EPA's mandate to control the vexing problem of regional haze emanates directly from the CAA, which 'declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in Class I areas which impairment results from manmade air pollution.'"). While the body of the Final EA is again devoid of any analysis of possible impacts to Class I areas, Attachment G does recognize BLM's responsibility air quality monitoring. However, rather than analyze possible impacts, BLM simply says that the agency is "shifting to a proactive/adaptive ... air resource management strategy ... that will serve as a template guide for how BLM will protect air resources." Final EA at G-4. Although CHC is appreciative that BLM has recognized this responsibility, recognition absent any action or analysis does nothing to satisfy the agency's obligations under NEPA and the Clean Air Act ("CAA"), 42, U.S.C. § 7401 *et seq.* (1970).

BLM's Final EA also fails to address the myriad impacts that oil and gas development can have on human health. CHC has previously submitted extensive comments on human health impacts from deteriorated air quality. *See* Draft EA Comments at 17-18; Supplemental Information at 12-13 (incorporated by reference). Yet again, these concerns are not brought forward for analysis or discussed in the Final EA. BLM's Attachment G provides a cursory response in which the agency provides: "BLM does not have the scientific expertise in industrial hygiene to conduct risk assessments for potential human health hazards associated with exposure to known or potentially toxic agents resulting from lease exploration and development," Final EA at G-5, and later continues: "[o]zone transport, transformation, and fate would be important factors to consider in any regional exposure analysis, but difficult to assess. For these reasons, BLM does not conduct regional assessments for potential exposure risks." Final EA at G-5. Recognition of a problem does not absolve BLM of the responsibility to analyze those impacts. *See* 40 C.F.R. § 1502.22(a) ("If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives ... the agency shall include the information in the environmental impact statement.").

#### **b. BLM has Failed to Sufficiently Analyze Impacts to Climate Change.**

CHC has repeatedly raised concerns regarding impacts to climate change that would result from the additional leasing and development of public lands for oil and gas. *See* Draft EA at 18-25; Scoping Comments at 29-39; Supplemental Information at 9-11 (incorporated by reference). The agency's consistent refrain regarding climate change, repeated here, is that "while BLM actions may contribute to the climate change phenomenon, the specific effects of those actions on global climate are speculative given the current state of the science." Final EA at 37. However, as the courts have warned, "[r]easonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labelling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n.9 (9<sup>th</sup> Cir. 1984 (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973))). NEPA merely requires "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" to "foster both informed decision-making and informed public participation." *Ctr. for Biological Diversity v. Natl. Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9<sup>th</sup> Cir. 2008) (quotations and citations omitted). Yet again, BLM attempts to avoid the required analysis by claiming: "Leasing the subject tracts would have no direct impacts to climate change as a result of GHG emissions. Any potential effects to air quality from [the] sale of the lease parcel would occur at such a time that the lease was developed." Final EA at 37. Failing to perform this analysis is a fatal omission in BLM's Final EA, denying both the agency and the public necessary information.

The omission of this analysis is made increasingly stark by the agency's subsequent recognition of climate change and the dramatic impacts that will ensue if no action is taken. For Example, BLM provides: "Through complex interactions on a global scale, GHG emissions cause a net warming effect of the atmosphere," and that "industrialization and burning of fossil carbon sources have caused GHG concentrations to increase." Final EA at 38. BLM further recognized that "temperatures in Colorado increased by approximately 2° F between 1977 and 2006," and that "climate change effects within Colorado have included:"

- shorter and warmer winters with a thinner snowpack and earlier spring runoff;
- less precipitation overall with more falling as rain;
- longer periods of drought;
- more and larger wildfires;
- widespread beetle infestations;
- rapid spread of West Nile virus due to higher summer temperatures.

Final EA at 39. Again, these are impacts already being experienced in Colorado. The agency went on to describe that “climate models project that Colorado will warm 2.5° F by 2025, and 4° F by 2050,” and that “[f]uture predicted climate change impacts on Colorado include:”

- more frequent and longer lasting heat extremes that stress electrical utility demands;
- longer and more intense wildfire seasons;
- midwinter thawing and earlier melting of snowpack;
- lower river flows in summer months;
- water shortages for irrigated agriculture;
- slower recharge of groundwater aquifers;
- mitigation of plant and animal species to higher elevations;
- more insect infestation in forests.

Final EA at 39. Despite this recognition, BLM fails to perform any analysis or draw any connection between these acknowledged impacts of climate change and the agency’s decision to sell public lands in the North Fork Valley for oil and gas development – a decision that BLM admits will cause GHG concentrations to increase. Rather, the agency says it will “evaluate potential emissions of regulated air pollutants (including GHGs) associated with the development of the oil and gas resources in a subsequent analysis at the APD stage of the lease life cycle.” Final EA at 39. A point at which the agency further admits it “cannot take away lease rights or prevent development.” Final EA at 34, 39. It is impossible to determine how the agency reconciles this implicit contradiction while maintaining that it has satisfied its mandate under NEPA. BLM cannot wait until development is guaranteed before analyzing the impacts of agency action.

**i. BLM has Failed to Address Concerns Regarding GHG Emissions and Methane Waste.**

BLM’s Final EA provides: “It is currently beyond the scope of existing science to predict climate change on regional or local scales resulting from specific sources of GHG emission.” Final EA at 38. Yet, the agency earlier admitted: “industrialization and burning of fossil carbon sources have caused GHG concentrations to increase.” Final EA at 38. As CHC has previously provided to BLM, “[e]nergy-related activities contribute 70% of global GHG emissions; oil and gas together represent 60% of those energy-related emissions through their extraction, processing and subsequent combustion.” Supplemental Information Exhibit 63.

Even if science cannot isolate the contribution from each additional gas well to these overall emissions, this does not obviate BLM’s responsibility to consider oil and gas leasing and

development in the North Fork Valley separate from the cumulative impacts of the oil and gas sector. In other words, BLM cannot ignore the larger relationship that oil and gas management decisions have to the broader climate crisis that we face. If we are to stem climate disaster – the impacts of which we are already experiencing, as discussed above – the agency’s leasing and development decisionmaking cannot be seen or treated as separate, and must be reflective of this acknowledged reality. *See* Supplemental Information at 9-11 (incorporated by reference). To say, as BLM does here, that oil and gas wells drilled in the North Fork Valley only “represent an incremental contribution to the total regional and global GHG emission levels,” and that therefore the agency need not consider the contributions from these wells that cumulatively result in 198.0 MMTCO<sub>2</sub>E (million metric tons of carbon dioxide equivalent) of emissions from oil and gas production, is to circumvent the intent of NEPA and lock us to a disastrous climate reality through death by a thousand cuts. *See* Scoping Exhibit 48; Draft EA Comments at 21-24; Scoping Comments at 29-39 (incorporated by reference); *see also* U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2010* (April 15, 2012) (providing EPA’s latest GHG Inventory) (attached as Exhibit 9). As steward of our public lands, with responsibility for over 700 million acres of federal onshore subsurface minerals, and “account[ing] for approximately 23% of total U.S. GHG emissions and 27% of all energy-related GHG emissions,” certainly more is required of BLM than the dismissive approach offered here. *See* Draft EA Exhibit 13.

Moreover, despite CHC having raised consistent concerns regarding methane waste, BLM has failed to provide any mention of waste as an issue in its Final EA or applied stipulations to lease parcels. *See* Draft EA Comments at 22-24; Scoping Comments at 31-39 (incorporated by reference). This omission is deeply troubling and must be addressed prior to the sale of public lands in the North Fork Valley for oil and gas development. Every ton of methane emitted to the atmosphere from oil and gas development is a ton of natural gas *lost*. Every ton of methane lost to the atmosphere is therefore a ton of natural gas that cannot be used by consumers. Methane lost from federal leases may also not pay royalties otherwise shared between federal, state, and local governments. This lost gas reflects serious inefficiencies in how BLM oil and gas leases are developed. Energy lost from oil and gas production – whether avoidable or unavoidable – reduces the ability of a lease to supply energy, increasing the pressure to drill other lands to supply energy to satisfy demand. 40 C.F.R. §§ 1502.16(e)-(f). In so doing, inefficiencies create indirect and cumulative environmental impacts by increasing the pressure to satisfy demand with new drilling. 40 C.F.R. §§ 1508.7, 1508.8(b).

The MLA, as amended, obligates BLM to prevent waste in oil and gas operations, functioning as a corollary to FLPMA’s unnecessary or undue degradation duties. *See infra* (discussing FLPMA’s mandate to prevent unnecessary or undue degradation). The MLA requires that “[a]ll leases of lands containing oil or gas ... shall be subject to the condition that the lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land....” 30 U.S.C. § 225; *see also* 30 U.S.C. § 187 (“Each lease shall contain...a provision...for the prevention of undue waste....”). The MLA’s legislative history notably provides that “conservation through control was the dominant theme of the debates.” *Boesche v. Udall*, 373 U.S. 472, 481 (1963) (citing H.R.Rep. No. 398, 66th Cong., 1st Sess. 12-13; H.R.Rep. No. 1138, 65th Cong., 3d Sess. 19 (“The legislation provided for herein...will [help] prevent waste and other lax methods....”).

Critically, whether to guard against climate change or conserve the mineral resource, it may be necessary to require emissions reductions beyond what is economically viable or, even, where inefficiencies are too great, not to lease lands, period. BLM cannot make an informed decision on this front, however, if it does not take a hard look at methane emissions – and other emissions from oil and gas development – as not only a climate problem, but, separately, as a waste problem and, even, as an unfixable inefficiency problem that may warrant keeping the mineral resource in the ground, unleased. BLM’s failure to mention methane waste, much less take a hard look at impacts and inefficiencies of waste, results in a fundamental oversight in the agency’s NEPA analysis. BLM has a basic obligation – not only pursuant to NEPA – but under federal law to provide a reasoned and informed basis demonstrating that its decisions comply with federal law that can be tested through judicial review. 5 U.S.C. §§ 706(2)(A), (C), (D).

As provided in detail in CHC’s earlier comments, preventing GHG pollution and waste is particularly important in the natural gas context, where there is an absence of meaningful lifecycle analysis of the GHG pollution emitted by the production, processing, transmission, distribution, and combustion of natural gas. For example, EPA’s mandatory GHG reporting rule for the oil and gas sector determined that several emissions sources were projected to be “significantly underestimated” based on existing emissions factors, and more than doubled previous GHG emissions estimates for oil and gas production. *See* Scoping Exhibit 48. In this context, EPA has provided a revised emissions factor of 9,175 Mcf per well of gas wasted to the atmosphere. *Id.*, at Appendix B. Moreover, recent peer-reviewed science demonstrates that methane is actually 33 times as potent as carbon dioxide over a 100-year time period, and 105 times as potent over a 20-year time period. *See* Scoping Exhibit 47. This information suggests that the near-term impacts of methane emissions have been underestimated by several orders of magnitude. *See* 40 C.F.R. § 1508.27(a) (requiring consideration of short and long term effects). In evaluating GHG emissions, BLM must account for methane’s warming potency over both 100 and 20-year time horizons, on the basis of the most recent global warming potentials for methane provided by peer-reviewed science. As previously noted, however, BLM’s Final EA fails to evaluate methane waste altogether. This absence of analysis, and, perhaps more troubling, BLM’s failure to include proven and commercially available methane emissions reduction technologies as stipulations for lease parcels, is simply unacceptable. *See, e.g.*, Draft EA Exhibit 14 (Susan Harvey, et al., *Leaking Profits: The U.S. Oil and Gas Industry Can Reduce Pollution, Conserve Resources, and Make Money by Preventing Methane Waste* (March 2012)).

## **ii. BLM has Failed to Address Concerns Regarding Resiliency.**

As provided in BLM’s Final EA: “[t]he impact of climate change on BLM resources depends upon the location of the affected resource, its vulnerability and resiliency to change, and its relationship to the human environment.” Final EA at 39. BLM continued, noting that, “[i]n general, the larger and faster the changes in climate are, the more difficult it will be for human and natural systems to adapt.” *Id.* Despite this recognition, BLM has done nothing to address the resiliency of the North Fork Valley to climate change and, in fact, is proceeding in a manner that is actively undermining human and natural systems ability to adapt. The North Fork Valley has become a leader in sustainable agriculture and is home to the largest concentration of organic farms in the Rocky Mountains. The Valley produces 77 percent of Colorado’s apples, 71 percent

of the state's peaches, and supplies food all over Colorado – from the Western Slope to the central mountains, and even to Front Range restaurants and groceries. Originally, BLM specifically excluded the North Fork's abundant farmlands from its NEPA analysis, *see* Draft EA at 24, a position the agency has come to amend here. *See, e.g.*, Final EA at 48. Nevertheless, BLM fails to analyze the continued viability and success of these farmlands within the context of the Valley's ability to adapt and remain resilient to the noted impacts of climate change. *See* Final EA at 39.

Congress has specifically recognized the value that farmlands play in the welfare of people and our communities. *See* 7 U.S.C.A. §§ 4201(a)(1) (“the Nation’s farmland is a unique natural resource and provides food and fiber necessary for the continued welfare of the people of the United States”); (a)(3) (“continued decrease in the Nation’s farmland base may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs”); and (a)(5) (“Federal actions, in many cases, result in the conversion of farmland to nonagricultural uses where alternative actions would be preferred”). Any action taken that undermines a community’s welfare and capacity to provide for itself in the face of recognized changes to climate – such as recklessly allowing for oil and gas development without even analyzing those impacts to farmland – is not only impermissible under NEPA, but also indefensible pursuant to BLM’s mandate to act as stewards of our public lands.

### **c. BLM has Failed to Analyze Impacts from Hydraulic Fracturing.**

CHC has offered extensive comments on the threats and impacts posed by hydraulic fracturing, or fracking. *See, e.g.*, Scoping Comments at 15-14, 42-47 (incorporated by reference). Yet, the only mention of a BLM response to these concerns is that the agency will “[f]ollow COGCC rules for fracking operations and disclosure.” Final EA at 92, 106, 108. This dismissive reference is followed up by equally paltry mention of fracking in the context of water depletions. *See, e.g.*, Final EA at 102.

Yet again, BLM’s Attachment G provides some additional response to concerns raised by commenters, and regarding threats from hydraulic fracturing the agency dismissively states that these concerns are addressed through “mitigation measures to prevent contamination of groundwater in concert with the existing Federal regulations (43 CFR Part 3160),” as well as compliance with “[COGCC] Rules [that] require design standards for hydraulic fracturing to prevent contamination, including protective casing programs and design standards to ensure well integrity.” Final EA at G-14. Of course, BLM goes on to provide that “[a] complete site-specific analysis of impacts [from fracking] would be completed at the Application for Permit to Drill (APD) stage.” *Id.* The agency’s dismissive shell-game approach does not satisfy BLM’s NEPA mandate requiring that the agency analyze “all ‘reasonably foreseeable’ impacts . . . at the earliest practicable point,” which “must take place before an ‘irretrievable commitment of resources’ is made.” *Otero Mesa*, 565 F.3d at 717-18.

The use of fracking is both reasonably foreseeable and expected by BLM. The agency recognizes that “[t]he area is seeing an increase in development, [and that] [a]ctivity increases are due to changes in technology for the drilling and development of the conventional mancos shale wells.” Final EA at 27. In other words, the increased activity in this area is due in large part

to the development of hydraulic fracturing technology. Indeed, seven of the 15 pending APDs in this area are for shale well permits – wells that inherently employ fracking for gas extraction. *See* Final EA at 26. When addressing water resource impacts associated with oil and gas activities, BLM notes that “[d]evelopment requires the use of water in many phases including ... hydraulic fracturing.” Final EA at 102.

BLM has recognized that once leases are issued, the agency “cannot take away lease rights or prevent development.” Final EA at 34, 39. As established above, NEPA requires that the agency must fully analyze impacts before an irretrievable commitment of resources is made. 42 U.S.C. § 4332(2)(C)(v). BLM’s failure to analyze impacts from hydraulic fracturing prior to the sale of North Fork Valley parcels at the February 2013 lease sale represents a blatant violation of the agency’s NEPA mandate, and cannot be maintained.

**d. BLM has Failed to Sufficiently Analyze Impacts to Farmlands.**

Unlike BLM’s Draft EA, which specifically excluded North Fork Valley farmlands from any mention or analysis, BLM’s Final EA does recognize that “there are portions of approximately 112 acres on private property within the proposed lease parcels that are farmlands classified as Prime, Unique or of Statewide Importance.” Final EA at 48; *see also* Draft EA Comments at 25-26 (incorporated by reference). This identification apparently excludes farmlands adjacent to or nearby lease parcels, farmlands not classified as Prime or Unique, or farmlands that would otherwise qualify but are currently not irrigated. In this regard, BLM provides: “The soils classified by the NRCS as Prime, Unique or of Statewide Importance that occur on BLM lands are generally situated above the existing irrigation system in the valley or are not irrigated.” Final EA at 49. This limited and narrow focus violates NEPA, which requires BLM to take a hard look at the cumulative impacts on the *affected geographic area*. *See Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 342 (D.C. Cir. 2002) (emphasis added).

The agency goes on to provide that “[t]his lease sale, when combined with the past, present and reasonably foreseeable actions, could elevate the potential for deterioration of soil health and specifically soils classified by the NRCS as Prime, Unique or of Statewide Importance. Surface disturbance associated with oil and gas activities could magnify other impacts from activities on private and federal lands in the watershed.” Final EA at 49. BLM then concludes that “[t]he cumulative effect of all impacts in the watershed could contribute to decreased soil health.” *Id.* Without further addressing or analyzing these impacts, BLM points to mitigation measures proposed for soils that would also be applied to these NRCS classified farmlands. *Id.* This is a demonstrably flawed approach to NEPA compliance. *See Northern Plains*, 668 F.3d at 1084-85 (holding that “reliance on mitigation measures presupposes approval. It assumes that – regardless of what effects construction may have on resources – there are mitigation measures that might counteract the effect without first understanding the extent of the problem. This is inconsistent with what NEPA requires.”). However, even if BLM’s apparent reliance on mitigation measures were permissible, it still doesn’t explain why the agency has offered no analysis of impacts to farmlands. Identifying the effects of agency action is not the same as analyzing those impacts to a specific resource.

**e. BLM has Failed to Sufficiently Analyze Impacts to Land Resources.**

**i. BLM Provides No Analysis of Impacts to Soil, Slopes, and Vegetation.**

BLM's Final EA identifies the problematic soil formations in the North Fork Valley – Mancos Shale – which is “naturally high in dissolved salts and selenium.” Final EA at 50. Shale is generally highly erodible, but “[s]teep slopes and sparse vegetation contribute to making the adobe hills vulnerable to elevated rates of erosion.” Final EA at 51. “Slopes of greater than 30 percent pose concerns for reclamation and long-term soil health and productivity.” Final EA at 58. Development of lease parcels would lead to surface disturbance and increased intensity of soil impacts, which the agency admits could include:

- Disturbance of the soil profile, resulting in the mixing of soil horizons and compaction.
- Removal of vegetation, exposing the soil to wind and water erosion.
- Increased sediment transport, through erosion processes such as sheet, gully, rill erosion, and mass movement.
- Disturbance on steep slopes, requiring cut and fill.
- Soil contamination with drilling and production fluids.
- Difficulty in reclamation associated with loss of soil productivity.

Final EA at 56.

The high selenium content of North Fork soils is particularly problematic, where “[u]pon saturation, selenium is leached into nearby waterways.” Final EA at 53. The agency then continues, describing that “[i]n the larger rivers, [selenium] becomes concentrated and accumulates,” and can then “bioaccumulate[] in fish tissue.” *Id.* “The increase in selenium concentrations could impact downstream resources including endangered fish.” Final EA at 56. Moreover, BLM acknowledges that “[t]his lease sale, when combined with the past, present and reasonably foreseeable actions, could elevate the potential for deterioration of soil health. Surface disturbance associated with oil and gas activities could magnify other impacts from activities on private and federal lands in the watershed.” *Id.*

Regarding vegetation, BLM provides that “33% of the total lease parcel area has vegetation issues that are *sufficient to cause concern*,” and that an “additional 33% of the area has *problems so serious* that the function, production, and habitat quality of the vegetation is *very compromised*.” Final EA at 61 (emphasis added). The agency then recognizes that potential impacts to vegetation from oil and gas activities include:

- Destruction and removal of native vegetation.
- Damage to vegetation adjacent to disturbed sites through dust and sediment deposition, and erosion from altered site hydrology.
- Increased vulnerability to weed infestation.
- Altered wildlife use patterns and the secondary impacts to vegetation.
- Increased amounts of young age class vegetation and introduction of reclamation species and genetics from non-local populations.

- Impacts from weed control on non-target plants.

Final EA at 61.

Despite all of these impacts to soil, slopes and vegetation, BLM defaults back to its shell game approach to NEPA compliance and provides that “the act of leasing the parcels would produce no impacts,” and that the “scope and extent of the impacts from exploration and development would be analyzed in accordance with NEPA when proposed in an Application for Permit to Drill (APD).” Final EA at 56, 61. The agency further relies on mitigation measures to “reduce the potential environmental effects” of oil and gas activity on these resources. *See* Final EA at 57, 62. Once leases to the North Fork parcels are issued, BLM “cannot take away lease rights or prevent development.” Final EA at 34, 39. In other words, regardless of possible mitigation that may be applied, the possible impacts that BLM describes above will become a reality upon lease issuance. As CHC has established above, BLM’s failure to analyze the impacts of agency action at the lease sale stage is an unequivocal violation of NEPA, and this approach cannot be maintained.

## **ii. BLM Fails to Acknowledge Possible Impacts from Seismicity.**

CHC has previously offered extensive comments regarding the link between oil and gas drilling activity and triggered seismic events. *See* Scoping Comments at 22-24; Draft EA Comments at 27-28 (incorporated by reference). Despite the considerable evidence provided, BLM has failed to identify seismicity as an issue worthy of remark; providing only, generally, that “[l]easing would not have impacts to geology or minerals,” and that “specific geologic formations and mineral resources would be identified and analyzed at the APD stage.” Final EA at 127.

Yet again, BLM’s response to concerns raised by CHC is relegated to Attachment G, where the agency provides: “Analyzing the interaction among hydraulic fracturing, related seismicity, and any manmade structure such as a coal mine is beyond the scope of the leasing decision in this EA; [and] rather it would be addressed at the APD level.” Final EA at G-8. BLM later responds that it found these concerns “to be non-substantive,” and that “injection wells located in the North Fork area [have] not been linked to earthquakes in the surrounding area.” Simply because an impact has not occurred in the past does not mean it is non-substantive. To the contrary, scientists are increasingly certain about the link between oil and gas activities and triggered earthquakes. For example:

USGS scientists had been equivocal about links between drilling and chronic seismic activity near Trinidad, Colo., punctuated by a magnitude-5.3 convulsion in August 2011. According to an abstract for this week’s conference, they have now concluded that most, if not all, of the quakes ‘have been triggered by the deep injection of wastewater related to the production of natural gas from the coal-bed methane field here.’

Mike Soraghan, *Earthquakes: Scientists link Colo., Okla. Temblors to drilling activities*, ENERGYWIRE, Dec. 3, 2012 (attached as Exhibit 10). For BLM to dismiss the possibility of seismic impacts out of hand is both irresponsible and impermissible under NEPA.

**f. BLM has Failed to Sufficiently Analyze Impacts to Wildlife.**

Protest comments regarding Endangered Species Act listed species and habitat are provided *infra*.

As the agency has throughout the Final EA, BLM continues to advance its shell game approach with regard the impacts to wildlife. Similarly, CHC's previously raised concerns regarding wildlife species have not been addressed. *See* Draft EA Comments at 32-33, Bull Mountain Comments at 25-26 (incorporated by reference). BLM provides: "Although the proposed action of leasing itself has no direct effects on wildlife in the area, future potential drilling could impact wildlife species and their habitat," and thus, yet again, defer any analysis until the APD stage. Final EA at 77, 79. Likewise, the agency recognizes that "[b]oth elk and mule deer have crucial winter habitat within the project area," Final EA at 76, and that "development of leases may have impacts on wildlife," including big game displacement and "unavoidable adverse impacts" that "are considered extreme" under certain well density conditions. Final EA at 77. BLM also identifies impacts to aquatic species, but yet again defers any analysis of impacts until the APD stage. Final EA at 80. As consistently established throughout this protest, BLM's refusal to analyze impacts until after development is guaranteed to occur cannot satisfy the agency's NEPA mandate.

**g. BLM has Failed to Sufficiently Analyze Impacts to Water Resources.**

CHC has consistently provided concerns regarding impacts to water resources from the leasing and development of North Fork Valley parcels, which must also be considered in this protest. *See* Scoping Comments 24-29 (incorporated by reference).

**i. BLM has Failed to Sufficiently Analyze Impacts to Groundwater.**

BLM recognizes that the shallow alluvial aquifer serving many domestic drinking water wells in the North Fork Valley is of excellent quality, and that there are "approximately 124 domestic wells located on private property within 1000' of the Lease Parcels." Final EA at 87-88. CHC has previously expressed concerns regarding the protection of the North Fork Valley's groundwater resources. *See* Draft EA Comments at 28-29 (incorporated by reference). The agency admits that this lease sale "will elevate the potential for deterioration of groundwater quality," Final EA at 91, and further identifies known impacts to groundwater associated with oil and gas activities, including:

- Loss of drilling fluids to groundwater during drilling operations.
- Cross contamination of aquifers across geologic formations from poorly sealed well bores.
- Contamination of unintended aquifers from hydraulic fracturing.
- Deep aquifer contamination from injection wells.

- Contamination of the shallow alluvial aquifer from spills of chemicals collected or stored on the well pad or in transit to the well pad.
- Seepage of produced water, stimulation fluids or cuttings stored in reserve pits into shallow aquifers.

Final EA at 90. BLM also acknowledges that “[i]f contamination of aquifers from oil and gas development occurs, changes in groundwater quality could impact downstream users diverting water from groundwater sources such as municipal and public wells, domestic wells, springs, and surface water diversions that communicate with groundwater.” Final EA at 91.

Nevertheless, and in unfortunately typical fashion, the agency states that “the act of leasing the parcels would produce no impacts,” and that “[t]he scope and extent of the impacts would be analyzed in accordance with NEPA at the time of exploration and development and would be proposed in an application for permit to drill (APD).” Final EA at 90. BLM also provides a list of mitigation measures that *may* be required to “ensure protection of Municipal Watersheds and Pubic Water Supplies.” Final EA at 91. Although CHC has learned to expect such ambivalence when it comes to the agency’s execution of its NEPA responsibilities, it is particularly troubling and hard to accept when it involves a resource that truly is the lifeblood to this community and its citizens. As exhaustively provided above, a hard look analysis of possible impacts must take place before an irretrievable commitment of resources is made, which in the oil and gas context occurs at lease issuance. *See Otero Mesa*, 565 F.3d at 717-18. When, as here, the “proposed action *may* ‘significantly affect’ the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.” *Airport Neighbors Alliance*, 90 F.3d at 429. The sale of North Fork Valley parcels cannot take place until this analysis is performed.

## **ii. BLM has Failed to Sufficiently Analyze Impacts to Surface Water.**

Equally troubling is the agency’s approach to potential surface water impacts from oil and gas leasing and development. BLM recognizes that agency actions must meet effluent limits set under the Clean Water Act (“CWA”), as administered in Colorado by the Water Quality Control Act, including compliance with CWA section 303(d) and Total Maximum Daily Load Assessments (“TMDL”). *See* Final EA at 93-95. These standards – as discussed by CHC in earlier comments, *see* Draft EA Comments at 29-32 (incorporated by reference) – require BLM actions to meet the state’s water quality classifications and numeric standards. In addition, BLM is also subject to a Memorandum of Understanding (“MOU”) with the Bureau of Reclamation, State of Colorado, and local irrigation companies, to assist in the development and implementation of a Selenium Management Program to address the recovery of endangered fish species. Final EA at 97. As recognized by BLM, selenium is easily mobilized and can bioaccumulate in fish species reaching potentially toxic levels. *Id.*

As with other resources, BLM identifies known impacts to surface water that are associated with oil and gas activities, including:

- Surface compaction leading to increases in runoff and peak flows;

- Increased sediment transport, through erosion processes such as sheet, gully, rill erosion, and mass movement;
- Changes to downstream channel morphology with increased flow and sediment;
- Alteration of floodplains at road and pipeline crossings;
- Changes in surface water/groundwater recharge from artificial interception of storm waters in ditches and berms associated with roads and well pads;
- Surface water contamination from spills or leaks from the well pad or reserve pits;
- Water depletions from hydraulic fracturing of wells, road dust abatement, and hydrostatic pipeline testing;
- Increases in selenium and salinity concentrations in water features due to surface disturbance and reduced flows resulting from oil and gas depletions.

Final EA at 105. In the North Fork Valley, there are approximately 66 public water systems located on lease parcels that are directly exposed to the impacts discussed above. *See* Final EA at 101. As BLM has with every other resource, the scope and extent of these impacts will not be analyzed until the APD stage, until it is too late for BLM to prevent oil and gas development. *See* Final EA at 105. And, yet again, BLM rests with its troubling dependence on mitigation measures to avoid these impacts, which the agency provides *may* be required to protect Municipal Watersheds and Public Water Supplies. *See* Final EA at 106. The application of possible mitigation measures is no substitute for a hard look NEPA analysis of impacts to surface waters. *See Northern Plains*, 668 F.3d at 1084-85. This analysis must occur prior to the sale of public lands in the North Fork Valley.

### **iii. BLM has Failed to Sufficiently Analyze Impacts to Wild and Scenic Rivers.**

CHC has provided earlier comments regarding impacts to Wild and Scenic Rivers in the North Fork Valley. *See* Draft EA Comments at 32 (incorporated by reference). BLM has recognized that a segment of Deep Creek has been determined eligible for inclusion in the National Wild and Scenic River System (“NWSRS”), and crosses lease sale parcel COC75860 (6619). Final EA at 41. As it did in the Draft EA, BLM provides that “[t]he lease sale itself creates no on-the-ground changes, and therefore would have no effect on the free-flow of the segment, its water quality, or its ORV.” Final EA at 43. Elsewhere, however, the agency acknowledges that once issued, BLM “cannot take away lease rights or prevent development.” Final EA at 34, 39. Moreover, oil and gas leases confer “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.” 40 C.F.R. § 3101.1-2. In other words, lease issuance does create on-the-ground changes, and therefore may impact Deep Creek and its eligibility as a Wild and Scenic River. Accordingly, BLM’s failure to analyze potential impacts to Deep Creek is not just a violation of NEPA, but also violates the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*

### **h. BLM has Failed to Sufficiently Analyze Impacts to Transportation, Recreation, Visual Resources, and Socio-Economics.**

The character of land in the North Fork Valley truly is remarkable. “The nominated lease parcels are within areas that are sparsely populated which allows for dispersed recreational

opportunities.” Final EA at 120. Nominated parcels are directly adjacent to Paonia State Park, and include recreational opportunities such as “sightseeing tours, boating, big game and small game hunting, mountain lion hunting, Off-Highway Vehicle (OHV) riding, mountain biking, horseback riding, fishing, and hiking.” *See id.* Recent marketing efforts in the North Fork Valley have focused on “community quality of life and quality of recreational opportunities such as participation programs (e.g. organic farming, picking grapes for wine making, and art centers), farmer markets, wine tasting and tours, local festivals and farm dinners, and recreational, boating and sightseeing opportunities on nearby West Elk Loop Byway and public lands.” Final EA at 120-21. The West Elk Byway is “known for its history, showcasing towns of varied lifestyles, and natural beauty,” and provides access to the “White River and Gunnison National Forests, the Black Canyon of the Gunnison National Park, Gunnison Gorge National Conservation Area, Curecanti National Recreation Area, and Crawford and Paonia State Parks.” Final EA at 123. The North Fork Valley is also known for its natural night skies, which throughout the proposed lease parcels BLM identifies as “notably dark due to the absence of development.” Final EA at 122.

Nevertheless, BLM provides that for transportation, recreation, and visual resources, “[u]nder the proposed action, there are no impacts that can be identified until site-specific analysis for proposed development is conducted.” *See, e.g.,* Final EA at 113, 121, 124. The agency also states that “[c]oncerns could possibly be mitigated through Conditions of Approval (COAs) at the time a site specific action is analyzed.” Final EA at 121. Yet, for each of these resources, BLM also acknowledges major impacts. For transportation, the agency states that “[d]evelopment intensity, terrain, and proximity to main travel corridors, towns, and recreation facilities will *greatly influence* transportation impacts.” Final EA at 113 (emphasis added). BLM also admits that “[d]evelopment intensity, terrain, and proximity to main travel corridors, towns, and recreation facilities, etc. will *greatly influence* recreation impacts,” and further states that in “areas being development for oil and gas, tourism would probably decrease due to likely degradation of the natural settings which in turn would affect visitor expectations for high quality recreational opportunities.” Final EA at 121 (emphasis added). Finally, regarding visual impacts, BLM provides that “[d]evelopment intensity, terrain, and proximity to visual receptors (e.g., main travel corridors, towns, recreation facilities, etc.) will *greatly influence* visual impacts,” also recognizing that “post-lease industrial development could result in portions of or all of a [visual resource management] area to be downgraded to a lower classification.” Final EA at 124 (emphasis added).

These primary resources of the North Fork Valley – and the threat posed by oil and gas development – directly influence the Valley’s socio-economics. BLM recognizes that the “impression of the North Fork Valley as a source of healthful, natural agricultural products has helped the area to develop specialized, often organic, small farms.” Final EA at 129. “These farms are heavily dependent on the positive impression that many consumers possess of the valley as a natural, relatively undisturbed area.” *Id.* The agency continues, noting that “[m]any of the tourists to the area are drawn by the natural amenities, participating in dispersed camping, hunting, and other outdoor activities.” *Id.* BLM also admits that lease development could have negative impacts, including: “(1) decrease in recreational character of the area, (2) reduced scenic quality, (3) increased dust levels, (4) increased traffic, (5) increased noise, and (6)

increased demand for local services.” Final EA at 130. Moreover, and as BLM also provided in the Draft EA:

Broader negative economic impacts could occur as a result of a loss of the region’s reputation of environmental amenities and quality. Even if the environmental negatives from well development are short-term, they would likely affect consumer’s perceptions about the area in the long-term, serving to negatively impact local agriculture, tourism, and the attraction to retirees.

Final EA at 131.

However, conspicuously missing from the Final EA, but provided earlier, BLM recognized that “[t]hese impacts could result in significant economic costs to the North Fork Valley that may or may not outweigh the benefits derived from well development.” Draft EA at 110. Indeed, BLM’s prior analysis is in-line with what previous commenters have raised. For example, CHC member and North Fork Valley real estate business owner, Bob Lario, stated that the mere threat of leasing lands in the North Fork for oil and gas development has already had a significant impact on the socio-economics of the areas real estate. As provided in Mr. Lario’s scoping comment letter to the BLM UFO: “We have already lost potential property sales to some who have heard of the proposed [August 2012] lease sale.” *See* Lario Scoping Comments (attached as Exhibit 11). Nevertheless, BLM states that none of these dramatic socio-economic factors mentioned above will be analyzed until the APD stage – which, elsewhere, the agency has admitted will be too late to prevent development. *See* Final EA at 131, 34. Therefore, once the North Fork leases are issued, BLM will not be able to prevent the impacts described above.

As CHC has stated throughout this protest, and as CHC warned in previous comments, BLM’s failure to analyze *any* impacts from oil and gas leasing and development until after the sale of North Fork Valley parcels is unlawful – as held by the Tenth Circuit and stated in CEQ regulations and NEPA itself. *See Otero Mesa*, 565 F.3d at 717-18; 40 C.F.R. § 1502.22; 42 U.S.C. § 4332(2)(C)(v); *see also* Draft EA Comments at 33-35; Scoping Comments at 42-47 (incorporated by reference). Additionally, the agency’s repeated assertion that it will rely on future and undefined mitigation to avoid impacts is both insufficient, and equally improper. *See Northern Plains*, 668 F.3d at 1084-85. This explicit authority requires the agency to perform site-specific analysis now, not later.

## **VII. BLM has Failed to Consider a Full Range of Reasonable Alternatives.**

As stated by CHC in earlier comments, a properly drafted EA must include a discussion of appropriate alternatives to the proposed project. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10<sup>th</sup> Cir. 2002) (citing 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b)); *see also* Draft EA Comments at 35-39 (incorporated by reference). Even where impacts are “insignificant” – which, here, they are decidedly not – BLM must still consider alternatives. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9<sup>th</sup> Cir. 1988) (agency’s duty to consider alternatives “is both independent of, and broader than,” its duty to complete an environmental analysis); *Greater Yellowstone*

*Coalition v. Flowers*, 359 F.3d 1257, 1277 (10<sup>th</sup> Cir. 2004) (duty to consider alternatives “is operative even if the agency finds no significant environmental impact”). Moreover, the treatment of alternatives must be measured against the standards in 42 U.S.C. § 4332(2)(E) and 40 C.F.R. § 1508.9(b) (requiring the agency to study, develop and discuss appropriate alternatives and to briefly describe those alternatives). *Davis*, 302 F.3d at 1120. Consideration of reasonable alternatives is necessary to ensure that the agency has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project. NEPA’s alternatives requirement, therefore, ensures that the “most intelligent, optimally beneficial decision will ultimately be made.” *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). This reflects the agency’s multiple use and environmental protection responsibilities imposed by FLPMA.

“Clearly, it is pointless to ‘consider’ environmental costs without also seriously considering action to avoid them.” *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971). “[T]he heart” of an environmental analysis under NEPA is the analysis of alternatives to the proposed project, and agencies must evaluate all reasonable alternatives to a proposed action. *Colorado Environmental Coalition*, 185 F.3d at 1174 (quoting 40 C.F.R. § 1502.14). An agency must gather “information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned.” *Greater Yellowstone*, 359 F.3d at 1277 (citing *Colorado Environmental Coalition*, 185 F.3d at 1174); *see also Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 (10<sup>th</sup> Cir. 1992). Thus, agencies must “ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors, and to make a reasoned decision.” *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 (D.C. Cir.1981) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)).

Here – despite earlier comments by CHC recommending alternatives for BLM to consider – the agency considers only three alternatives: (1) the Proposed Action consisting of 22 parcels and 29,506 acres; (2) the Preferred Alternative recommending 20 parcels and approximately 20,555 acres; and (3) the No Action Alternative which would withdraw the lease parcels from the February 2013 lease sale. *See* Final EA at 14-19; *see also* Draft EA Comments at 35-39 (incorporated by reference). Moreover, throughout the Final EA, BLM’s discussion of the Preferred Alternative was generally limited to a statement that “[t]he direct and indirect effects of the Preferred Alternative on [the resource in question] would be similar to those described under the Proposed Action.” *See, e.g.*, Final EA at 34, 40, 43, etc. Similarly, for the No Action Alternative, BLM typically states: “There would be no impacts to [the resource in question] from the No Action Alternative.” *See, e.g.*, Final EA at 34, 40, 43, etc.

As frequently identified above, BLM’s Final EA expressly rejects the notion that the agency is required to perform any analysis of impacts or alternatives at the lease sale stage and, instead, the agency chooses to defer such analysis until the APD stage – a decision, parenthetically, which is in direct conflict with settled Tenth Circuit precedent. *See Otero Mesa*, 565 F.3d at 717-19; *Pennaco*, 377 F.3d at 1160. Based on this decision, and essentially by admission and definition, BLM has failed to take a “hard look” at the environmental impacts associated with the February 2013 lease sale. *See Sierra Club*, 848 F.2d at 1093 (agencies are to perform hard look NEPA analysis “before committing themselves irretrievably to a given course

of action so that the action can be shaped to account for environmental values”). Arising from BLM’s void of analysis, the EA’s discussion of the three alternatives is similarly perfunctory. In the absence of any true analysis of alternatives, it is impossible for the BLM to make the type of reasoned decision on this proposal that is required under NEPA – even under the minimal requirements for an EA. Operating in concert with NEPA’s mandate to address environmental impacts, BLM’s fidelity to alternatives analysis helps “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14. For each of the alternatives, the agency must “[d]evote substantial treatment to each alternative ... including the proposed action so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b). As noted above, such *substantial treatment* to each alternative is categorically absent from BLM’s discussion of resource impacts.

Moreover, NEPA does not exempt an agency from its duty to consider alternatives simply because impacts are cumulative. *See NRDC*, 865 F.2d at 299 (a “hard look” is premised on providing “analysis useful to a decisionmaker in deciding whether, or how, to alter [a project] to lessen cumulative environmental impacts”). Indeed, NEPA, by mandating consideration of cumulative impacts, rejects that very notion, acknowledging the complexity of the environment, and humanity’s interactions with that environment; alternatives are expressly designed to help address “unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E), and, thus, as noted above, to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decision maker and the public,” 40 C.F.R. § 1502.14.

In addition, CEQ regulations require agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action in comparative form, so as to provide a “clear basis for choice among the options.” 40 C.F.R. § 1502.14. For example, in earlier comments CHC requested that BLM evaluate an additional three such reasonable alternatives, including: (1) an alternative that affirmatively removed parcels from further consideration, pursuant to FLPMA; (2) an alternative that applied a NSO stipulation to all lease parcels; and (3) an alternative that applied best management practices (“BMPs”) for oil and gas as stipulations applied to all lease parcels. *See* Draft EA Comments at 35-39 (incorporated by reference). Not only did BLM fail to consider these additional reasonable alternatives in its Final EA, the agency is needlessly pushing forward this lease sale while relying on lease stipulations “identified in the 1989 UBRA RMP.” Final EA at 16. Such blatant disregard of the agency’s NEPA responsibilities – and its obligation to the public, pursuant to BLM’s multiple use mandate, to advance the agency’s role as steward of our shared public lands – is both unlawful and unconscionable given the remarkable resource values at stake in the North Fork Valley.

#### **VIII. BLM has Violated FLPMA and its Obligation to Prevent Unnecessary or Undue Degradation.**

As CHC explained in earlier comments, pursuant to the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.*, BLM must “take any action necessary to prevent ‘unnecessary or undue degradation’ (“UUD”) of the [public] lands.” 43 U.S.C. § 1732(b); *see also* Draft EA Comments at 45-46 (incorporated by reference). Written in the disjunctive, BLM must prevent degradation that is “unnecessary” and degradation that is “undue.” *Mineral Policy Ctr. v. Norton*, 292 F.Supp.2d 30, 41-43 (D. D.C. 2003). FLPMA’s

UUD standard should be considered in light of its overarching mandate that the Bureau employ “principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). While these obligations are distinct, they are interrelated and highly correlated. The Bureau must balance multiple uses in its management of public lands, including “recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.” 43 U.S.C. § 1702(c). The agency must also plan for sustained yield – “control [of] depleting uses over time, so as to ensure a high level of valuable uses in the future.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004).

“Application of this standard is necessarily context-specific; the words ‘unnecessary’ and ‘undue’ are modifiers requiring nouns to give them meaning, and by the plain terms of the statute, that noun in each case must be whatever actions are causing ‘degradation.’ ” *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011) (citing *Utah v. Andrus*, 486 F.Supp. 995, 1005 n. 13 (D. Utah 1979) (defining “unnecessary” in the mining context as “that which is not necessary for mining” – or, in this context, “for oil and gas development” – and “undue” as “that which is excessive, improper, immoderate or unwarranted.”)); *see also Colorado Env’t Coalition*, 165 IBLA 221, 229 (2005) (concluding that in the oil and gas context, a finding of “unnecessary or undue degradation” requires a showing “that a lessee’s operations are or were conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not undertake the action pursuant to a valid existing right.”). This protective UUD mandate applies to BLM’s planning and management decisions. *See Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1136 (10<sup>th</sup> Cir. 2006) (finding that BLM’s authority to prevent degradation is not limited to the RMP planning process). Here, that action is the development required to extract oil and gas resources from the North Fork Valley. The inquiry, then, is whether BLM has taken sufficient measures to prevent degradation unnecessary to, or undue in proportion to, the development the Final EA and unsigned FONSI permits. *See Theodore Roosevelt Conservation Partnership*, 661 F.3d at 76. Accordingly, resource impacts may cause “undue” degradation, even if the activity causing the degradation is “necessary.” Where those impacts are avoidable, it is “unnecessary” degradation. 43 U.S.C. § 1732(b).

Therefore, although leaseholders have a statutory right to develop oil and gas resources, drilling activities may only go forward as long as unnecessary and undue environmental degradation does not occur. This is a *substantive* requirement, and one that BLM must define and apply in the context of oil and gas development in the North Fork Valley. In other words, BLM must define and apply the substantive UUD requirements in the context of the specific resource values at stake – an application that can be found nowhere in the Final EA, but which is required before the February 2013 lease sale can proceed.

Further, these UUD requirements are distinct from requirements under NEPA. “A finding that there will not be significant impact [under NEPA] does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur.” *Ctr. for Biological Diversity*, 623 F.3d at 645 (quoting *Kendall’s Concerned Area Residents*, 129 I.B.L.A. 130, 140 (1994)). In the instant case, BLM’s failure to specifically account for UUD in its Final EA – which is distinct from its compliance under

NEPA – is also actionable on procedural grounds and must occur before the February 2013 lease sale can proceed.

## **IX. BLM has Violated the Endangered Species Act.**

BLM’s discussion of threatened and endangered species is both deeply troubling and expressly in violation of the agency’s obligations under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* As CHC expressly provided in earlier comments, the ESA imposes two obligations upon BLM: the first is *procedural* and requires that agencies consult with the FWS to determine the effects of their actions on endangered or threatened species and their critical habitat, *see id.* § 1536(b); the second is *substantive* and requires that agencies insure that their actions not jeopardize endangered or threatened species or their critical habitat, *see id.* § 1536(a)(2); *see also* Draft EA Comments at 46-48; Scoping Comments at 47-50 (incorporated by reference). These ESA requirements are triggered by “any ‘agency action’ which may be likely to jeopardize the continued existence of the species or its habitat.” 16 U.S.C. § 1536(a). In other words, an agency proposing to take an action must inquire whether any endangered or threatened species “may be present” in the area of the action *before* such action is taken. When there exists a chance that such species *may be present*, the agency must conduct a biological assessment (“BA”) to determine whether or not the species *may be affected* by the action. *See* 16 U.S.C. § 1536(c) (emphasis added). Moreover, section 1536(a)(2) requires federal agencies, when considering the effect of their actions on a species’ critical habitat, to consider the effect of those actions on the species’ recovery. *See Center for Native Ecosystems v. Cables*, 509 F.3d 1310, 1322 (10<sup>th</sup> Cir. 2007).

The EA identifies several listed and candidate species that potentially occur or have habitat in the vicinity of lease parcels, including Canada lynx, greenback cutthroat trout, Colorado hookless cactus, and Gunnison sage grouse. Final EA at 65. In response to earlier CHC comments – where BLM previously ignored the following species altogether – BLM identifies but dismissively states that the following species are “not expected within the planning area: Mexican spotted owl, Yellow-billed cuckoo, Black-footed ferret, Gunnison’s prairie dog, North American wolverine, humpback chub, Colorado pikeminnow, razorback sucker, bonytail chub, and Clay-loving wild buckwheat,” and then providing that “[n]o further discussion of these species will follow.” *Id.* Specifically BLM’s failure to discuss possible impacts to the four Colorado River fish species, which include the Colorado pikeminnow (*Ptychocheilus lucius*), Humpback chub (*Gila cypha*), Bonytail chub (*Gila Elegans*), and Razorback sucker (*Xyrauchen texanus*), is particularly troubling. In fact, earlier BLM analysis – prepared for an area that is further removed than the North Fork parcels – included a discussion of these species and their critical habitat. *See* Scoping Exhibit 57 (the 16-Well EA completed for an area just north of Paonia Reservoir identified these species and their critical habitat). Occupied habitat for these endangered species includes the lower Gunnison River, where previous BLM NEPA analysis has identified razorback suckers and Colorado pikeminnows as present and potentially impacted. *See* Scoping Exhibit 57, at 28 (citing USFWS 1994). This stretch of river is also identified as “critical habitat” for these two fish species. *Id.*; *see also*, Memorandum from U.S. FWS, Comments on August 2012 Lease Sale (Feb. 8, 2012) (“FWS Comments”) (attached as Draft EA Exhibit 23). BLM’s failure to identify such a significant number of listed and candidate species utterly fails to meet the requirements of the ESA.

As noted above, when listed species may be present – as expressly identified in the Final EA and by the FWS – the ESA requires BLM to conduct, at minimum, a BA to determine impacts. Nevertheless, BLM asserts in the EA that “[t]he proposed action of leasing the proposed parcels has No Effect to any Federally listed species or critical habitat.” Final EA at 69. Moreover, BLM specifically refuses to analyze impacts to these species, providing: “[s]ite-specific analysis would be conducted at the APD stage to determine and to mitigate potential impacts,” and later continues: “[s]ite-specific biological resource surveys would be required at the APD stage, and depending on the location and nature of the proposed development and results of the surveys, Endangered Species Act Section 7 consultation with USFWS would be required if development would impact Federally listed species.” *Id.* However, BLM also states that “[d]evelopment of the lease parcels would increase surface and vegetation disturbance, may increase weed spread, decrease habitat suitability and cause additional areas to either not meet or show problems meeting land health standards.” Final EA at 72. As BLM itself recognized elsewhere, once a lease is issued, the agency “cannot take away lease rights or prevent development.” Final EA at 34, 39. Therefore, the impacts BLM describes will become realized once lease parcels are issued. All ESA obligations – including consultation – must be satisfied *before* BLM can proceed with the sale of North Fork Valley parcels, and cannot wait until the APD stage, as the agency suggests.

CHC agrees with the conclusions drawn by FWS when it stated: “If new stipulations cannot be added, or existing stipulations be modified, sufficient to protect federally listed species, we recommend deferring those parcels where listed species or suitable habitats occur until adequate stipulations are established.” Draft EA Exhibit 23 at 6 (providing, also, that a “parcel may be deferred pending completion of a RMP revision due to a potential change in resource condition objectives or a potential change in lease stipulations that were identified in the draft preferred alternative.”). Neither NEPA nor the ESA can sustain BLM’s unsupported approach.

By their terms, an EA and FONSI are actions that have legal consequences. The regulations interpreting the ESA define an “action” as “all activities or programs or any kind ... carried out, in whole or in part, by Federal agencies ... Examples include, but are not limited to ... (b) the promulgation of regulations; [and] (c) the granting of licenses, contracts, leases, [etc.]” 50 C.F.R. § 402.02. A “final agency action” occurs when two conditions are satisfied: (i) the action in question must mark the “consummation” of the agency’s decisionmaking process – that is, it is neither tentative nor interlocutory in nature; and (ii) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). According to ESA implementing regulations, “[e]ach federal agency shall review its actions at the *earliest possible time*” to determine whether an action may affect protected species, and, if so, to engage in the appropriate level of conferral. 50 C.F.R. § 402.14 (emphasis added). Regulations further provide that “[f]ormal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.” Because the Final EA explicitly defers any NEPA analysis until some later stage, and fails to even mention conducting a BA, the agency thus cannot engage FWS in consultation until that analysis is performed.

BLM's choice is at odds with FWS recommendations, which provide: "Based on the information above, we would like to point out that Section 7 consultation would be appropriate for the proposed action." Draft EA Exhibit 23 at 8. In a direct affront to FWS advice, as well as the requirement of the ESA, BLM states that it will not consult until the APD stage. *See* Final EA at 69. "BLM's duty to confer with the FWS arises as of the time that it was possible for the two agencies to engage in meaningful conference regarding the decision to be made," which in the instant case is at the lease sale stage – and as provided by FWS. *The Wilderness Society v. Wisely*, 524 F.Supp.2d 1285, 1301 (D. Colo. 2007) (holding that BLM had violated ESA by failing to engage in formal consultation with FWS regarding oil and gas leasing's effects on listed species prior to its decision in the EA to resume oil and gas leasing); *see also Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1220-21 (D. Colo. 2011) (holding the agency "acted arbitrarily and capriciously by failing to consult with FWS prior to or immediately following the issuance of the EA, in violation of the ESA."). It cannot be conveyed firmly enough that BLM's shell game approach to analysis is irreconcilable with its mandate under the ESA. BLM is required to conduct a BA and engage in consultation before the February 2013 lease sale can proceed.

CHC also agrees with FWS that the endangered species stipulation (CO-34) – relied on by BLM to protect listed species (*see* Final EA at 71) – "essentially notifies lessees of the potential for federally listed and other sensitive species to occur in the subject parcels ... [and] does not identify the means to avoid or minimize effects on listed species or habitat and, therefore, provides no assurances that those resources will be protected." Draft EA Exhibit 23 at 5. "If new stipulations cannot be added, or existing stipulations be modified, sufficient to protect federally listed species, we recommend deferring those parcels where listed species or suitable habitats occur until adequate stipulations are established." *Id.* at 6. Yet again, BLM has ignored the sound advice of FWS in irresponsibly pushing forward with the sale of North Fork Valley parcels.

## X. Conclusion

Given the aforementioned issues associated BLM's Final EA and unsigned FONSI – not least of which is BLM's explicit refusal to perform any analysis of the myriad impacts until the APD stage – CHC requests that the BLM Colorado State Office take action pursuant to this Protest to prevent the BLM from proceeding with the unlawful sale of North Fork Valley parcels at the February 2013 lease sale and to further initiate an EIS to analyze the significant impacts to these public lands. The approach that the agency has adopted cannot be sustained by either law or good-conscience, and must be abandoned.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



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