

May 12, 2004

BY HAND-DELIVERY

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**Re: PROTEST OF COLORADO BLM MAY 13, 2004 LEASE SALE OF 29 PARCELS THAT INCLUDE LANDS WITHIN THE BIG RIDGE, COW RIDGE, DRAGON CANYON, HUNTER CANYON, AND OIL SPRING MOUNTAIN CITIZENS WILDERNESS PROPOSAL AREAS**

**INTRODUCTION**

On the behalf of Colorado Environmental Coalition (“CEC”), Western Colorado Congress (“WCC”), The Wilderness Society (“TWS”), and the Colorado Mountain Club (“CMC”)(hereinafter collectively referred to as “CEC” or “Protestors”) we respectfully protest the inclusion of 29 proposed lease sale parcels on Bureau of Land Management (“BLM”) lands in the Grand Junction and White River areas of Colorado and request that these parcels be withdrawn from the May 13, 2004 lease sale. This protest is filed pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3.

The BLM proposes to offer at the scheduled May 13, 2004 Competitive Oil & Gas Lease Sale certain parcels located in the BLM’s White River Resource Area and Grand Junction Resource Area. CEC protests inclusion of the following 29 parcels:

COC67553, COC67554, COC67555, COC67556, COC67557, COC67558,  
COC67559, COC67560, COC67563, COC67564, COC67565, COC67567,  
COC67568, COC67571, COC67574, COC67575, COC67576, COC67577,  
COC67578, COC67582, COC67583, COC67584, COC67585, COC67586,  
COC67587, COC67590, COC67591, COC67594, COC67595

These parcels contain significant portions of the Big Ridge, Cow Ridge, Dragon Canyon, Hunter Canyon, and Oil Spring Mountain Citizens Wilderness Proposal (CWP) areas for oil and gas development. *See*, Piceance Area Lease Sale Map (Exhibit A). Leasing would irretrievably and unlawfully commit these priceless Colorado wildlands to oil and gas development:

- The Citizens Wilderness Proposals submitted for these five proposed wilderness areas gave the BLM significant new information establishing the wilderness characteristics and other special surface values of these areas.
- Upon receipt, the BLM acknowledged that the comprehensive documentation of wilderness characteristics and other values constituted new information not previously considered by the agency in making its land use plans.
- Absent mandatory protective stipulations, leasing and subsequent surface development and road construction will render these lands unsuitable for future wilderness designation
- Nonetheless, the BLM approved the leasing of the disputed parcels without conducting new on-the-ground inventories or environmental analysis required by the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (NEPA) and the Federal Lands Policy and Management Act, 43 U.S.C. §§1701 *et seq.* (FLPMA).
- Accordingly, including the disputed parcels in the upcoming lease sale violates federal law.

Therefore, Protesters request that the BLM withdraw these parcels from leasing until the agency has fully complied with applicable law. In the alternative, the BLM should impose non-waivable no surface occupancy (NSO) stipulations and other protective measures designed to prevent irreparable damage to wilderness characteristics and other special features of the disputed parcels.<sup>1</sup>

## **PROTESTERS**

### **A. Colorado Environmental Coalition**

Colorado Environmental Coalition (“CEC”) is a Colorado-based environmental advocacy organization with three field offices in western Colorado and a main office in Denver. CEC has more than 4,000 individual members and over 70 affiliated organizations. CEC campaigns engage citizens in the protection of Colorado’s wild places, open spaces, wildlife and quality of life. CEC is a known and active participant in public land management in Colorado, with a demonstrated interest in energy development on Colorado’s BLM lands, including lands and resources managed by the Grand Junction Field Office. CEC is a member of the Colorado Wilderness Network. CEC members use

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<sup>1</sup> Recent BLM Instruction Memorandum 2003-233 recognizes that “in some areas the need for additional constraints may be identified.” Exhibit K at 2. NSO stipulations are clearly needed because BLM has acknowledged receipt of credible new information about wilderness characteristics.

the disputed lands for recreation and other purposes, and are concerned with protecting wildlife, scenery, water quality and other values.

#### **B. Western Colorado Congress**

Western Colorado Congress (“WCC”) is a non-profit organization composed of eight community groups united to address the issues facing western Colorado. These groups are membership-based and committed to a democratic process. WCC numbers 1,500 members, most of who make their homes and recreate in western Colorado. WCC has worked on wilderness protection for Colorado’s public lands since its inception in 1980, and helped pass several pieces of Colorado wilderness legislation in Congress. WCC is a member of the Colorado Wilderness Network. WCC members use the disputed lands for recreation and other purposes, and are concerned with protecting wildlife, scenery, water quality and other values.

#### **C. The Wilderness Society**

The Wilderness Society (“TWS”) is a national not-for-profit membership organization devoted to preserving wilderness and wildlife; protecting America's forests, parks, rivers, and shore lands; and fostering an American land ethic. TWS numbers more than 175,000 members nationwide, including over 5,700 members in Colorado. TWS members have a long-standing interest in the protection and management of our public lands, including BLM lands with wilderness characteristics, and are concerned about the impacts of mineral leasing and development on Colorado’s wildlands. TWS members use the disputed lease lands for hunting, fishing, hiking, backpacking, photography, wildlife viewing, and other recreational, aesthetic, and educational purposes. TWS is a member of the Colorado Wilderness Network.

#### **D. Colorado Mountain Club**

The Colorado Mountain Club (“CMC”) is a 90-year old outdoor organization with a current membership of 10,000. CMC members pursue non-motorized recreation throughout Colorado and in particular on BLM lands contained within the Citizens Wilderness Proposal areas, including those areas affected by the challenged decision, as individuals as well as in organized Club activities. Recreational pursuits include hiking, snowshoeing, skiing, and wildlife-watching. In addition, the CMC, since the organizations founding in 1912, has been active in preserving the natural and cultural resources in the Rocky Mountains. The CMC has been actively involved in working on Colorado BLM wilderness issues and working to conserve Colorado’s last best places on public land.

### **BACKGROUND**

The CWP areas impacted by BLM’s lease sale are included in Colorado Congresswoman Diana DeGette’s Colorado Wilderness Act of 2003, H.R. 2305, that was introduced in the U.S. House of Representatives in May of 2003. The Act would provide permanent

protection for Colorado's CWP areas from uses inconsistent with these areas' wilderness characteristics. However, if BLM proceeds with leasing the disputed parcels, they would be burdened with new mineral development rights and would lose wilderness characteristics as development occurred.

The majority of the 29 disputed parcels lack NSO or other stipulations critical for the protection of wilderness character in the CWP areas.<sup>2</sup> Except as noted, BLM did not analyze its ability to protect wilderness character and other surface resources through NSO stipulations.

The BLM's last wilderness inventory for Colorado was finished in November, 1980. *See*, BLM: Intensive Wilderness Inventory-Final Wilderness Study Areas (November, 1980). *See also*, BLM's Documentation of Land Use Conformance and NEPA Adequacy (DNA) for May 2004 Oil & Gas Lease Sale by Grand Junction Field Office at 3 (hereinafter, "GJFO DNA")(where the BLM acknowledges that the 1980 wilderness inventory was the BLM's last consideration of wilderness and other related values in the Hunter Canyon and Cow Ridge areas)(Exhibit B). For the 1980 study, BLM's inventories in Colorado were often conducted by air from airplanes or helicopters.

Since that time, in both 1994 and 2001, the public submitted significant new information to the agency establishing wilderness characteristics and other special values in the Big Ridge, Cow Ridge, Dragon Canyon, Hunter Canyon, and Oil Spring Mountain CWP areas. These submissions constituted inventories and evaluations of the areas using vastly improved inventory techniques and methods -- including compilation of comprehensive on-the-ground data, photographs, mapping, and extensive documentation of land conditions and values collected during extended visits, and research conducted subsequent to the BLM's 1980 wilderness inventory. This credible, substantiated new documentation refutes the agency's cursory findings and call into question the current validity of the BLM's 1980 wilderness inventory. *See e.g.*, BLM's Fact Sheet- Colorado Wilderness Review Process (2003)(citizens groups "had the opportunity to do a much more thorough inventory than [BLM] did in the 1970's, when the entire public lands in each state were being reviewed on a tight schedule. Some areas then were flown and little or no time was spent on the ground.")(attached as Exhibit L).

The Resource Management Plans ("RMPs") for the Grand Junction and White River Resource Areas, which were completed in 1987 and 1997, respectively do not address the significant new information establishing wilderness characteristics and other surface

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<sup>2</sup> Petitioners acknowledge that the following Hunter Canyon CWP parcels are subject to (at least in part of the CWP area) waiveable NSO stipulations: COC67576, COC67577, COC67578, COC67582, COC67583, COC67584, COC67585, COC67586, COC67587. Protesters expect these NSO stipulations to be fully observed and enforced in the event these parcels are leased. With regard to these Hunter Canyon parcels, Protesters request binding NSO stipulations to: (1) eliminate the possibility that future officials would waiver in their commitment to protection of these lands, and (2) fully inform prospective bidders of the rights conveyed under a lease.

values of the CWP areas proposed for leasing. *See*, Grand Junction Resource Management Plan (1987) (“GJRMP”) at 2-23 to 2-25 (Hunter Canyon and Cow Ridge); White River Resource Management Plan (1997) (“WRRMP”) at 3-20 to 3-21 (Big Ridge, Dragon Canyon or expanded portions of Oil Spring Mountain<sup>3</sup>).

## LEGAL REQUIREMENTS

### I. National Environmental Policy Act (“NEPA”)

#### A. The BLM violated NEPA by failing to take the required “hard look” at significant new information that questions the validity of its 1980 Colorado Wilderness Inventory

NEPA requires federal agencies to take a hard look at new information or circumstances concerning the environmental effects of a federal action even after an initial environmental analysis have been prepared. Agencies must supplement the existing environmental analyses if the new circumstances “raise [ ] significant new information relevant to environmental concerns.” Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 708-709 (9<sup>th</sup> Cir. 2000). Specifically, an “agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a ‘hard look’ at the environmental effects of [its] planned actions.” Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9<sup>th</sup> Cir. 2000).

NEPA’s implementing regulations further underscore an agency’s duty to be alert to, and to fully analyze, potentially significant new information. An agency “shall prepare supplements to either draft or final environmental impact statements if...there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §1502.9(c)(1)(ii)(emphasis supplied).

An agency must prepare a Supplemental EIS "if the new information is sufficient to show that the remaining action will ... 'affect the environment' in a significant manner or to a significant extent not already considered." Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851, 1859 (1989)(internal citations omitted). The Council on Environmental Quality (“CEQ”) regulations provide that, where either an EIS or Supplemental EIS is required, the agency "shall prepare a concise public record of decision" which "shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable," and (c) "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. § 1505.2.

CEQ NEPA guidance states that “if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new

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<sup>3</sup> While portions of Oil Spring Mountain are designated a Wilderness Study Area, the BLM has proposed leasing adjacent lands within the Oil Spring Mountain CWP.

circumstances or information] compel preparation of an EIS supplement.” *See*, 46 Fed. Reg. 18026 (1981)(Question 32).

This is supported by BLM Instruction Memoranda (“IM”). According to a 2000 IM from the Washington Office:

We are concerned about the maturity of some of our NEPA documents. In completing your [Determination of NEPA Adequacy or DNA], keep in mind that the projected impacts in the NEPA document for given activities may be understated in terms of the interest shown today for any given use. You need to take a “hard look” at the adequacy of the NEPA documentation.

IM No. 2000-034 (expired September 30, 2001)(Exhibit I).

In a subsequent IM, the Washington Office instructed field offices as follows:

If you determine you can properly rely on existing NEPA documents, you must establish an administrative record that documents clearly that you took a “hard look” at whether new circumstances, new information, or environmental impacts not previously analyzed or anticipated warrant new analysis or supplementation of existing NEPA documents...

The age of the documents reviewed may indicate that information or circumstances have changed significantly.

IM No. 2001-062 (emphasis supplied)(expired September 30, 2002)(Exhibit J).

When considering whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, the Interior Board of Land Appeals will be guided by the “rule of reason.” Bales Ranch, Inc., 151 IBLA 353, 358 (2000). “The query is whether the [BLM’s DNA] contains a ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences’ of the proposed action. Southwest Center for Biological Diversity, 154 IBLA 231, 236 (2001)(quoting California v. Block, 690 F.2d 753, 761 (9<sup>th</sup> Cir. 1982))(emphasis supplied). *See also*, Friends of the Bow v. Thompson, 124 F.3d 1210, 1213 (10<sup>th</sup> Cir. 1997)(to comply with NEPA’s “hard look” requirement an agency must adequately identify and evaluate, environmental concerns)(emphasis supplied).

The BLM failed to take a hard look at new information and new circumstances that have come to light since the BLM’s first generation wilderness inventories (24 years ago) and development of each field office’s land use plans. The 1987 Grand Junction RMP is 17 years old, and the 1997 White River RMP is seven years old. Both documents were finalized before the CWN submitted the 2001 CWP to BLM, Exhibit D. The DNAs prepared for the leasing action inadequately address the significant impacts of mineral development on the CWP areas. For this reason, BLM’s approval of the disputed lease parcels is arbitrary, capricious, contrary to law, and an abuse of discretion.

## 1. Cow Ridge and Hunter Canyon CWPs

All or parts of parcels COC67553, 554, 555, 556, 557, 558, 559, 560, 563, 564, and 565 are located within the Cow Ridge CWP.<sup>4</sup> *See* Exhibit A. The Cow Ridge CWP in the Grand Junction Resource Area consists of 15,668 acres of BLM lands with wilderness characteristics. Cow Ridge rises as a forested plateau out of the Roan Creek area of the Piceance Basin in western Garfield County. This undeveloped island of public land provides critical habitat for elk and deer, shelters several sensitive plant species and communities, and offers outstanding opportunities for unconfined, backcountry recreation and solitude.

All or parts of parcels COC67567, 571, 574, 575, 576, 577, 578, 582, 583, 584, 585, 586, and 587 are located within the Hunter Canyon CWP. *See* Exhibit A. The Hunter Canyon CWP in the Grand Junction Resource Area consists of 32,046 acres of BLM lands with wilderness characteristics. Hunter Canyon provides important wildlife habitat for Colorado's big game species, including critical and severe winter range, and winter concentration areas, for elk and deer and summer range for deer. The large tracts of undeveloped wild lands featuring canyons that climb from the salt-brush deserts on the flanks of the Bookcliffs, through mixed shrublands and up onto high plateaus forested with spruce and Douglas fir offer important, undisturbed security areas and wildlife migration routes between the Piceance Basin and Bookcliffs wildlands cluster.

In 1980, BLM found these areas to be natural and of sufficient size to be protected as a Wilderness Study Area ("WSA"), but disqualified the areas from further wilderness consideration because of a cursory finding of lack of solitude and opportunities for primitive recreation. *See* Exhibit B at 3.

Regarding Cow Ridge, the BLM's 1980 summary findings stated that:

Opportunities for solitude are not considered to be outstanding as a result of the relatively narrow configuration and lack of effective topographic screening. Opportunities for primitive recreation are limited by the extreme topography of the area, which confines the freedom of movement in the area. The unit's narrow configuration also reduces recreation opportunities.

*Id.* at 3.

Regarding Hunter Canyon, the BLM's 1980 summary findings stated that:

Although the unit is sufficient size and possesses naturalness, it was not recommended as a WSA because of its lack of outstanding opportunities for solitude or primitive and unconfined type of recreation. Configuration, steep slopes and dense brush greatly inhibited these opportunities. The unit's scenery

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<sup>4</sup> For convenience, the parcels will be referred to below only by the last three numbers of their official lease sale designation – i.e., "567" refers to parcel COC67567.

and geologic formations are considered significant but they alone do not provide outstanding opportunities for primitive recreation. Therefore, the unit is not recommended as a WSA.

*Id.*

In 1987, the Grand Junction Field Office completed its Resource Management Plan for the Resource Area. Only seven areas were evaluated or inventoried for suitability as wilderness study areas. GJRMP at 2-23 to 2-25. These seven areas did not include either Hunter Canyon or Cow Ridge. *Id.* Pursuant to the RMP, approximately 7,600 acres of Hunter Canyon became subject to waiveable No Surface Occupancy (NSO) stipulations to protect visual and recreation resources.<sup>5</sup> GJRMP at 2-7 to 2-11. No stipulations were put in place to protect wilderness resources.

Subsequently, a multi-year citizens' inventory and mapping efforts found that both areas retain their natural and wild characteristics, and documented for the BLM ample outstanding opportunities for solitude and for a range of recreation choices including hunting, back packing, and photography. The revised and expanded Citizens' Wilderness Proposal (CWP) for Colorado was submitted to the BLM Colorado State Director on July 24, 2001 (relevant portions attached as Exhibit D). The CWP was submitted by the Colorado Wilderness Network (CWN), a coalition of more than 280 conservation, religious, civic and recreational organizations, local governments and businesses committed to wilderness protection of Colorado's wild canyon country. According to CWN's cover letter for the revised and expanded CWP:

By submission of this proposal, we believe we have met the requirements set forth in the new BLM handbook, which state:

“In order for such request from the public to be considered, they should be accompanied by (a) a map which identifies specific boundaries of the area in question; (b) a detailed narrative that describes the wilderness characteristics of the area and documents how that information significantly differs from the information in prior inventories conducted by BLM regarding the wilderness values of the areas; and photographic documentation.”

*Id.* (emphasis supplied). *See also*, BLM Wilderness Inventory and Study Procedures Handbook (H-1630-1)(January 10, 2001)(*rescinded* by IM-2003-195, dated June 20, 2003).

On August 8, 2001, BLM officially responded to the Citizens' Wilderness Proposal:

The information you provided in narrative, map and photo form will be very useful in addressing current land use issues on the public lands in Colorado... [Because] the information meets the standards set for in the Bureau of Land

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<sup>5</sup>The Hunter Canyon CWP is 32,046 acres in size.

Management Handbook, we will apply our notification and review policies as referenced in your letter to the areas included in the Citizens' Wilderness Proposal.

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As you know, we will consider the information you provided, along with the status of our inventory data, land use planning, and NEPA documentation, in determining whether to approve an action or to first initiate inventory or land use planning and additional NEPA documentation to consider the action in relation to potential wilderness values.

Exhibit E, BLM Response to Citizens' Wilderness Proposal (emphasis supplied).

First, BLM's Response is a clear acknowledgement that the CWP submission includes useful new information. Second, the Response commits the agency to considering that information before approving any actions in the CWP areas. Thus, BLM recognized that additional NEPA analysis and documentation would be required with regard to future actions that could compromise wilderness character.

Additionally, the BLM acknowledged that the information submitted by the CWN meets the standards set forth in the now rescinded BLM Wilderness Inventory and Study Procedure Handbook (H-1630-1). This establishes that the information in the CWP significantly differed from the information compiled in any prior BLM wilderness inventories of these areas. Therefore, the CWP documentation constitutes significant new information triggering additional requirements before leasing can proceed.

Note further that previously, in response to CWP data, BLM initiated its own inventories to verify the roadless and wilderness character at Vermillion Basin, Roan Plateau, among others. All of BLM's inventories resulted in finding significant additional wilderness character lands as demonstrated by the CWP. This, too, proves that the CWP has provided significant new information concerning wilderness character sufficient to trigger supplemental NEPA analysis.

Subsequent to receiving the CWP, the BLM withdrew parcels from the Cow Ridge (and Grand Hog Back) CWP from lease sale on August 3, 2001 (days after receiving CWN's submission of new information). *See* Protest of lease of parcels in Cow Ridge by CEC and TWS, Exhibit F. The 2001 Protest argued that "[t]he Citizens' Wilderness Proposal constitutes significant new circumstances that—according to NEPA and substantial case law—must be considered prior to irretrievably committing the area for natural gas leasing." *Id.* The BLM subsequently withdrew the Cow Ridge parcels from the August, 2001 lease sale. *See* BLM's Notice of Addendum 2, Exhibit G. This establishes the BLM's concurrence that the CWP provided significant new information regarding the wilderness values of the areas.

It is also consistent with other actions taken by BLM field offices. For example, the Glenwood Springs Field Office, in January 10, 2002, stated that the BLM will “hold in abeyance any leasing decisions until we are able to do a complete and through job” evaluating the CEC’s submission of significant new information for the Grand Hogback CWP because “[t]hese values are not adequately addressed in current plans or NEPA...” See January 10, 2002 Internal BLM Memorandum from Anne E. Huebner, Field Manager to Ann Morgan, Colorado BLM State Director regarding Review of CEC’s Information Regarding the Grand Hogback CWP (Exhibit M). See also, April 15, 2002 Internal BLM Memorandum from the Grand Junction Field Manager to the Deputy State Director of Resource Services (where the BLM field office staff internally reviewed CEC’s information “to determine how that information significantly differs from the information in prior inventories conducted by the BLM regarding wilderness values of the area. In addition, a field review of the information was conducted...by key staff including the Field Manager generally following the same inventory route taken by the CEC.”)(Exhibit N).

The DNA prepared by the Grand Junction Field Office erred by failing to acknowledge or analyze the significant new information in the CWP. The unsupported assertion that “there is no new information that overrides BLM’s 1980 inventory” (GJDNA at 3, Exhibit B) ignores the substantive content of the CWP and the BLM’s prior recognition that the CWP constitutes new information triggering additional analysis and inventory requirements. It appears that the BLM performed no new field analysis or inventories between withdrawing certain Cow Ridge parcels in 2001 and re-offering these lands in 2004.

The CWN provided significant new information to the BLM regarding the wilderness characteristics of the Hunter Canyon and Cow Ridge CWP areas. The BLM previously acknowledged that this information significantly differed from the agency’s 1980 wilderness inventory.

The 17-year old GJRMP does not address the impacts of mineral leasing and development on wilderness characteristics or eligibility of the Hunter Canyon and Cow Ridge CWP areas.

The CWP paints a “seriously different picture of the likely environmental consequences of the proposed action” that has never been discussed in an environmental assessment or impact statement. State of Wisconsin v. Weinberger, 745 F.2d 412 (7<sup>th</sup> Cir. 1984); accord, Essex county Preservation Ass’n v. Campbell, 536 F.2d 956 (1<sup>st</sup> Cir. 1976)(where the court held that a Governor’s moratorium on the construction of new highways was significant new information that required preparation of a supplemental EIS). For this reason, the agency’s decision to lease parcels in the Hunter Canyon and Cow Ridge CWP in the absence of an environmental assessment which addresses the impacts of leasing for oil and gas development and demonstrably complies with the requirements of NEPA is arbitrary, capricious, contrary to law, and an abuse of discretion.

## 2. Big Ridge, Dragon Canyon and Oil Spring Mountain CWP

The Big Ridge, Dragon Canyon and Oil Spring Mountain CWP are located in the BLM White River Resource Area.

Parcel 568 includes lands within the Big Ridge CWP. *See* Exhibit A. The Big Ridge CWP totals of 24,951 acres. Big Ridge includes large tracts of winter range for elk and deer; and deer summer range. All of the proposed Big Ridge Wilderness is within the West Douglas Herd Management Area, specifically set-aside to provide habitat for a resident population of wild horses. Big Ridge was inventoried by the BLM in the late 1970's under the name of Philadelphia Creek but was not recommended for wilderness designation because the BLM claimed that the unit's vegetation, steep slopes and configuration prohibited outstanding opportunities for solitude and unconfined recreation.

Parcels 594 and 595 include lands within the Dragon Canyon CWP. *See*, Piceance Area Lease Sale Map (Exhibit A). The Dragon Canyon CWP totals 6,753 acres in Colorado, and the contiguous unroaded wildlands extend across the Utah state line into citizen proposed wilderness in Utah, documented by the Utah Wilderness Coalition. Dragon Canyon provides an important wildlife corridor connecting undeveloped lands in the Utah Bookcliffs with Colorado's Bookcliffs and the Piceance Basin. Dragon Canyon includes large tracts of winter range for elk and deer. Dragon Canyon was known as Whiskey Creek in the BLM's initial wilderness inventory. It was dismissed in 1979 with no explanation in the "initial" phase of the BLM's inventory.

Parcels 590 and 591 include lands within the Oil Spring Mountain CWP. *See* Exhibit A. The Oil Spring Mountain CWP totals 29,930 acres. Oil Spring Mountain comprises the Oil Springs-Texas Mountain roadless complex identified by the BLM for its important wildlife values. The proposed wilderness includes large tracts of winter range for elk and deer; deer summer areas and elk production areas. Much of the Oil Springs Mountain CWP area is within the East Douglas Herd Area, designated for its resident population of wild horses. The BLM's 1980 inventory recommended approximately 17,740 acres of Oil Spring Mountain was proposed as a WSA. Conservationists propose boundaries similar to the BLM's WSA boundary with a minor addition of 770 acres of land formerly owned by the Colorado Division of Wildlife and since acquired by the BLM.

In 1997, the White River Field Office completed its Resource Management Plan. Only six areas were evaluated or inventoried for suitability as wilderness study areas. GJRMP at 2-37. Neither Dragon Canyon nor Big Ridge was among these six areas. Oil Spring Mountain was evaluated and determined to be suitable as a wilderness study area. *Id.* However, subsequent to the RMPs development, the BLM acquired an additional 770 acres from the Colorado Division of Wildlife directly adjacent to the Oil Spring Mountain WSA. This acreage, which is now being proposed for lease, was not evaluated for wilderness suitability or inclusion in the Oil Spring Mountain WSA as part of the BLM's pre-leasing analysis.

Inventory data and documentation in the CWP found that Cow Ridge and Hunter Canyon retain their natural and wild character, offer ample outstanding opportunities for solitude and for a range of recreation choices including hunting, back packing, and photography. *See* Exhibit D. Despite recognizing the significant new information in the CWP, Exhibit E, the DNA prepared by the White River Field Office failed to address wilderness characteristics in its pre-leasing review of the Cow Ridge and Hunter Canyon parcels. *See* Exhibit C. In fact, the DNA does not even acknowledge the presence of the CWP areas despite having received the CWP. *See*, January 6, 2003, letter from Kurt Kunkle, CEC Field Inventory Director, to the White River Field Office providing “supplemental and new information” on the wilderness character of Dragon Canyon, Big Ridge and Oil Spring Mountain (attached as Exhibit H).

By neither analyzing nor acknowledging the new information, the BLM violated NEPA and FLPMA. Additionally, existing pre-leasing analysis in the RMP and dating to the 1980 inventory must be re-assessed prior to leasing the disputed parcels. Absent such updated analysis, leasing these lands is arbitrary, capricious, contrary to law, and an abuse of discretion.

**B. The BLM violated NEPA by failing to conduct site-specific pre-leasing analysis of mineral development impacts on the special public lands in the disputed parcels**

The BLM must analyze the impacts of subsequent development prior to leasing. The BLM has not analyzed Protesters’ documentation of special surface values that will be permanently compromised by future development. Therefore, the BLM cannot defer all site-specific analysis to later stages such as submission of Applications for Permit to Drill (“APDs”) or proposals for full-field development. Just as it is futile to bar the gate after the animals have escaped, law and common sense require the agencies to analyze the impacts to proposed wilderness areas before issuing leases. Because stipulations and other conditions affect the nature and value of development rights conveyed by the lease, it is only fair that potential bidders are informed of all applicable lease restrictions before the lease sale.

An oil and gas lease conveys “the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold.” 43 C.F.R. §3101.1-2. This right is qualified only by “[s]tipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed.” 43 C.F.R. § 3101.1-2.

Unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, the BLM argues lease development must be permitted subject only to limited discretionary measures imposed by the surface managing agency. However, moving a proposed wellpad or access road a few hundred feet will generally fall short of conserving wilderness characteristics unless the well was proposed for the very edge of

the proposed wilderness. Accordingly, the appropriate time to analyze the need for protecting site-specific resource values is *before* a lease is granted.

Sierra Club v. Peterson established the requirement that a land management agency undertake appropriate environmental analysis prior to the issuance of mineral leases, and not forgo its ability to give due consideration to the "no action alternative," 717 F.2d 1409 (D.C. Cir. 1983). This case challenged the decision of the Forest Service ("FS") and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The FS had conducted a programmatic NEPA analysis, then recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. Because the FS determined that issuing leases subject to the recommended stipulations would not result in significant adverse impacts to the environment, it decided that no EIS was required at the leasing stage of the proposed development. *Id.* at 1410. The court held that the FS decision violated NEPA:

Even assuming, *arguendo*, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases allowing surface occupancy] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

*Id.* at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision "when the decision-maker retains a maximum range of options" prior to an action which constitutes an "irreversible and irretrievable commitments of resources[.]" *Id.* (citing Mobil Oil Corp. v. F.T.C., 562 F.2d 170, 173 (2nd Cir. 1977)); *see also Wyoming Outdoor Council*, 156 IBLA 347, 357 (2002) *rev'd on other grounds by Pennaco Energy, Inc. v. US Dep't of Interior*, 266 F.Supp.2d 1323 (D. Wyo. 2003).

The court in Sierra Club specifically rejected the contention that leasing is a mere paper transaction not requiring NEPA compliance. Rather, it concluded that where the agency could not completely preclude all surface disturbances through the issuance of NSO leases, the "critical time" before which NEPA analysis must occur is "the point of leasing." 717 F.2d at 1414. This is precisely the situation for disputed CWP parcels.

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. None of the environmental documents previously prepared by BLM examine the site-specific impacts of mineral leasing and development to the CWP areas. The agency has not analyzed the new information, nor has it assessed what stipulations might protect special surface values.

This violates federal law by approving leasing absent environmental analysis as to whether NSO stipulations should be attached to the CWP lands.

Federal law requires performing NEPA analysis before leasing, because leasing limits the range of alternatives and constitutes an irretrievable commitment of resources. Deferring site-specific NEPA to the APD stage is too late to preclude development or disallow surface disturbances of CWP lands.

### **C. The BLM violated NEPA by failing to consider NSO and No-Leasing alternatives**

The requirement that agencies consider alternatives to a proposed action further reinforces the conclusion that an agency must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. §4332(C). CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. Environmental analysis must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after agency officials have bound themselves to a particular outcome (such as surface occupation within these sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e. no leasing or NSO stipulations).

When lands with wilderness characteristics are proposed for leasing, the IBLA has held that, "[t]o comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed." Sierra Club, 79 IBLA at 246. Therefore, formal NEPA analysis is required unless the BLM imposes non-waivable NSO stipulations.

Here, the BLM has not analyzed alternatives to the full approval of the leasing nominations for the CWP, such as NSO and no-leasing alternatives. 42 U.S.C. § 4332(2)(C)(iii). Federal agencies must, to the fullest extent possible, use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. 40 C.F.R. § 1500.2(e). "For all alternatives which were eliminated from detailed study," the agencies must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Wyoming Outdoor Council held that the challenged oil and gas leases were void because BLM did not consider reasonable alternatives prior to leasing, including whether specific parcels should be leased, appropriate lease stipulations, and NSO stipulations. The Board ruled that the leasing "document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite pre-leasing NEPA document for these parcels." 156 IBLA at 359 *rev'd on other grounds by Pennaco*, 266 F.Supp.2d 1323 (D.Wyo., 2003)(holding that when combined NEPA documents analyze the specific impacts of a project and provide alternatives, they satisfy NEPA). The reasonable alternatives requirement applies to the preparation of an EA

even if an EIS is ultimately unnecessary. *See Powder River Basin Resource Council*, 120 IBLA 47, 55 (1991); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 US 1066 (1989). Therefore, the BLM must analyze reasonable alternatives under NEPA prior to leasing.

Here, lease stipulations must be designed to protect the important wilderness resources in the CWP areas. The agency, at a minimum, must perform an alternatives analysis to determine whether or not leasing is appropriate for these parcels given the significant resources to be affected and/or analyze whether or not NSO restrictions are appropriate. In this case, Protestors believe that the proposed lease sale parcels cannot lawfully proceed unless NSO stipulations are added for all parcels within these sensitive areas. Thus, the BLM's failure to perform an alternatives analysis to determine the appropriateness of such restrictions in advance of leasing is arbitrary, capricious, and an abuse of discretion.

**D. The BLM violated NEPA by failing to analyze the unique environmental impacts of CBM development.**

All of the disputed parcels lie within the Piceance Basin, one of the largest known CBM reservoirs in North America. Thus, all parcels have potential for future CBM development. Parcels 547-550 and 553-560 are located in the vicinity of active CBM wells or fields, and thus have an especially strong likelihood of being targeted for CBM development.

The BLM must withdraw the disputed parcels, because the BLM has not conducted NEPA analysis of the unique environmental impact of coalbed methane ("CBM") development for these lands. *See e.g. Pennaco Energy*, 266 F.Supp.2d 1323 (D.Wyo., 2003); *Wyoming Outdoor Council*, 156 IBLA 347 (2002). NEPA requires the BLM to evaluate the unique impacts of CBM development before issuing leases. *Id.* Specifically, in *Pennaco Energy, Inc. v. U.S. Department of Interior*, 266 F.Supp.2d 1323 (D.Wyo., 2003) the court held that the BLM meets its NEPA burden if it supplements an RMP with an EIS that evaluates the specific impacts of CBM development. Existing NEPA documents covering mineral leasing and development are inadequate if they lack CBM-specific analysis in areas where known CBM resources make future CBM development foreseeable at the time of leasing.

Unlike the BLM office in *Pennaco*, the Grand Junction and White River field offices have not conducted an environmental analysis evaluating the specific impacts of CBM development. Accordingly the BLM has not met its NEPA burden here and must suspend offering these parcels in the lease sale. In the alternative BLM may stipulate that the leases are limited to oil and conventional natural gas, and do not convey any rights to develop CBM.

## II. Federal Lands Policy and Management Act (“FLPMA”)

### A. The leasing decision violated FLPMA’s requirement to prevent undue or unnecessary degradation of CWP areas

“In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. §1732(b). In the context of FLPMA, by using the imperative language “shall”, “Congress [leaves] the Secretary no discretion” in how to administer the Act. NRDC v. Jamison, 815 F.Supp. 454, 468 (D.D.C. 1992).

The BLM’s duty to prevent unnecessary or undue degradation (“UUD”) under FLPMA is mandatory, and BLM must, at a minimum, demonstrate compliance with the UUD standard. See, Sierra Club v. Hodel, 848 F.2d 1068 (10<sup>th</sup> Cir. 1988)(the UUD standards provides the “law to apply” and “imposes a definite standard on the BLM.”). In this case involving proposed leasing of CWP areas, the agency is required to demonstrate compliance with the UUD standard by showing that future impacts from development will be mitigated and thus avoid undue or unnecessary degradation of wilderness resources. See e.g., Kendall’s Concerned Area Residents, 129 IBLA 130, 138 (“If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.”).

BLM’s obligation prevent UUD of the CWP areas is not “discretionary.” “[T]he court finds that in enacting FLPMA, Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary...is undue or excessive.” Mineral Policy Center v. Norton, 292 F.Supp. 2d 30, 43 (D.D.C., 2003)(emphasis supplied). “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible...operation because the operation though necessary...would unduly harm or degrade the public land.” *Id.* at 40 (emphasis supplied). In the case at bar, BLM has a statutory obligation to demonstrate that leasing in CWP areas will not result in UUD.

Specifically, BLM must demonstrate that leasing will not result in future mineral development that causes UUD by irreparably damaging the wilderness character of the CWP lands. Further, the agency is required to manage the public’s resources “without permanent impairment of the productivity of the land and the quality of the environment...” 43 U.S.C. §1702(c). See also, Mineral Policy Center v. Norton, 292 F.Supp. 2d at 49.

Existing analysis has not satisfied the BLM’s obligation to comply with the UUD standard and prevent permanently impairment of the wilderness qualities of these public lands. Proceeding with leasing would be arbitrary, capricious, and an abuse of discretion.

### III. The Mineral Leasing Act gives the BLM discretion over whether to lease the disputed parcels

BLM has broad discretion in leasing federal lands. The Mineral Leasing Act (“MLA”) provides that “[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.” 30 U.S.C. § 226(a). In 1931 the Supreme Court found that the MLA “goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare.” U.S. ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A later Supreme Court decision stated that the MLA “left the Secretary discretion to refuse to issue any lease at all on a given tract.” Udall v. Tallman, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325. Thus, the BLM has discretionary authority to approve or disapprove mineral leasing of public lands.

When a leasing application is submitted and before the actual lease sale, no right has vested for the applicant or potential bidders--and BLM retains the authority not to lease. “The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.” Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966). *See also* Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (“[R]efusing to issue [certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior”); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) (“While the [MLA] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory”); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975) (“[T]he Secretary has discretion to refuse to issue any lease at all on a given tract”); Pease v. Udall, 332 F.2d 62 (C.A. Alaska) (Secretary of Interior has discretion to refuse to make any oil and gas leases of land); Geosearch, Inc. v. Andrus, 508 F. Supp. 839 (D.C. Wyo. 1981) (leasing of land under MLA is left to discretion of the Secretary of Interior). Similarly, IBLA decisions consistently recognize that BLM has “plenary authority over oil and gas leasing” and broad discretion with respect to decisions to lease. *See* Penroc Oil Corp., et al., 84 IBLA 36, 39, GFS (O&G) 8 (1985), and cases cited therein.

Withdrawing the protested parcels from the lease sale until proper pre-leasing analysis has been performed is a proper exercise of BLM’s discretion under the MLA. BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law.

## CONCLUSION

For the reasons stated above, the disputed CWP parcels are inappropriate for mineral leasing and development. Existing pre-leasing analysis does not comply with NEPA, FLPMA or other applicable law. Colorado citizens have raised substantial concerns about surface impacts to wilderness resources and the need for NSO restrictions for these parcels. Protesters respectfully request that the State Director withdraw these disputed parcels from the May 13, 2004 competitive lease sale. In the event that the BLM

proceeds to offer these parcels, all prospective bidders should be informed of the pending protest.

Respectfully submitted,

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Mike Chiropolos, Lands Program Director  
Brad A. Bartlett, Staff Attorney  
Western Resource Advocates

cc: Honorable Congresswoman, Diana DeGette  
Honorable Congressman, Scott McInnis  
Honorable Congressman, Mark Udall

## EXHIBIT LIST

- Exhibit A Piceance Area Lease Sale Map (prepared by Doug Pflugh, Earthjustice Research Assistant and GIS expert), May 2004
- Exhibit B BLM's Documentation of Land Use Conformance and NEPA Adequacy (DNA) for May 2004 Oil & Gas Lease Sale by Grand Junction Field Office
- Exhibit C BLM's Documentation of Land Use Conformance and NEPA Adequacy (DNA) for May 2004 Oil & Gas Lease Sale by White River Field Office
- Exhibit D Colorado Wilderness Network's "Citizens' Wilderness Proposal for Colorado", submitted to the BLM Colorado State Director on July 24, 2001 (relevant excerpts)
- Exhibit E BLM Response to Citizens' Wilderness Proposal, July 24, 2001
- Exhibit F CEC and TWS Protest of lease of parcels in Cow Ridge, 2001
- Exhibit G BLM's Notice of Addendum 2 (withdrawing parcels within the Cow Ridge CWP), August 3, 2001
- Exhibit H January 6, 2003, letter from CEC the BLM White River Field Office (providing supplemental and new information on the wilderness character of Dragon Canyon, Big Ridge and Oil Spring Mountain)
- Exhibit I BLM Instruction Memorandum No. 2000-034
- Exhibit J BLM Instruction Memorandum No. 2001-062
- Exhibit K BLM Instruction Memorandum 2003-233
- Exhibit L BLM's Internal Fact Sheet entitled "Colorado Wilderness Review Process" prepared by Erik Finstick (2003)
- Exhibit M January 10, 2002 Internal BLM Memorandum from Anne E. Huebner, Field Manager to Ann Morgan, Colorado BLM State Director regarding Review of CEC's Information Regarding the Grand Hogback
- Exhibit N April 15, 2002 Internal BLM Memorandum from the Grand Junction Field Manager to the BLM Deputy State Director of Resource Services