

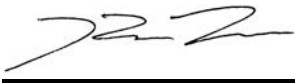
**BEFORE THE APPEAL DECIDING OFFICER, REGIONAL FORESTER OF THE
INTERMOUNTAIN REGION OF THE UNITED STATES FOREST SERVICE**

**In Re: Appeal of the Oil and Gas Leasing)
Analysis Final Environmental Impact)
Statement and Record Of Decision for)
the Fishlake National Forest)**

**WILDEARTH GUARDIANS,
WESTERN RESOURCE ADVOCATES,
GRAND CANYON TRUST,**

APPELLANTS

DATED this 16th day of December 2013

By 

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Introduction

NOTICE IS HEREBY GIVEN that WildEarth Guardians, Grand Canyon Trust and Western Resource Advocates (collectively, “appellants”) appeal pursuant to 36 CFR § 219.17(b)(3) to the Appeal Deciding Officer – Intermountain Regional Forester from the “Fishlake National Forest Oil and gas Leasing Analysis” Record Of Decision (ROD) and Final Environmental Impact Statement (EIS). The Record of Decision (ROD) was signed by Responsible Officials Fishlake Supervisor Allen Rowley and Dixie Supervisor Angelita Bullets on August 20, 2013. Notices of appeal opportunity have been provided under the authority and procedures of the 1980s version of the NFMA regulations, so this appeal is submitted consistent with and pursuant so such authority.¹ Notices were published in the newspaper of record for the first time on September 4, 2013. Due to factors associated with the 2013 federal government shutdown, a second appeal period was established via a second issuance of legal notices on October 30, 2013.

WildEarth Guardians (“Guardians”) is a non-profit corporation with membership of many thousands throughout the United States, including Utah. Guardians' mission is to protect and restore the natural biological diversity of forests in America's Southwest and Rocky Mountains, including forests in the Fishlake and Dixie National Forests. Members of Guardians engage in outdoor recreation, wildlife viewing and other activities in the Dixie and Fishlake National Forests and intend to continue to do so.

In November 2013 the Utah Environmental Congress (UEC) legally merged with WildEarth Guardians, and Guardians acquired all of UEC’s assets and liabilities. Guardians has more than 35,000 members and supporters. This includes UEC’s membership and supporter lists, as well as UEC’s standing concerning this and related projects and plans on these and other National Forests in Utah.²

Grand Canyon Trust (GCT) is a non-profit organization dedicated to protecting and restoring the spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude on the Colorado Plateau. GCT is focused on the Grand Canyon region of Northern Arizona and in the forests and red rock country of central and southern Utah. GCT represents 3,000 individual members throughout the U.S., including over 400 Utah members, some of whom recreate, photograph, study, and otherwise use the Dixie and Fishlake National Forests. Furthermore, GCT members have a direct interest in managing and conserving

¹ The legal notice published in the newspaper of record on 10/30/2013 that started this appeal period states appeals must be filed under the authority of the 1980’s edition of the NFMA regulations at 36 CFR 219.

² UEC was a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. UEC has an organizational interest in the proper and lawful management of National Forests located in Utah. UEC’s members, staff, and board members participate in a wide range of hunting, fishing and other recreational activities on the Fishlake and Dixie National Forests, including the area in and surrounding this project area. UEC represents 316 current individual members and a few thousand supporters, 25 organizations, and 59 businesses representing approximately 30,000 supporters, many of whom visit and use the two National Forests that have been and will be negatively impacted by the decision subject this appeal, and have a direct interest in the management of these two National Forests.

sustainable human uses and the native plants, animals, and habitats of the Dixie and Fishlake National Forests.

Appellants claim standing to participate in the public land decision-making process on the grounds that it has been involved in National Forest management issues for many years. Our members have hiked, fished, hunted and photographed the Dixie and Fishlake National Forests, including the area that would be affected by this project. Our collective membership includes professional photography businesses and freelance photographers that make their living in part by photographing National Forests in Utah. The procedural harm and direct physical impacts associated with this decision detract from the ability of our members to be involved in the decision-making process of our public lands, and impact the outstanding natural beauty and biodiversity that makes the lands in and adjacent to the area impacted by the decision so appealing to our members who are professional photographers, anglers, hunters, and recreationists who utilize these lands.

In addition, appellants' members are taxpayers that are required to pay for the activities discussed within the ROD. The irretrievable commitments of financial resources associated with this project are also borne by the American people as a whole. Appellants claim partial ownership of the public lands covered by this decision and consequently have legal standing to participate in the process and challenge those decisions it finds unacceptable and inconsistent with applicable laws and regulations.

Appellants participated in the comment process associated with this project. Appellants hereby incorporate by reference all earlier comments on this project. Appellants are appealing the ROD on the grounds the decision is arbitrary, capricious and legally indefensible. Appellants contend that the decision and action approved violated the National Environmental Policy Act ("NEPA"), the National Forest Management Act (NFMA), the Forest Plan/ LRMP, the Forest Service Manual/Handbook and policy, the Federal Onshore Oil and Gas Leasing Reform Act, the Clean Air Act (CAA), the Endangered Species Act (ESA), the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA), and the Administrative Procedures Act (APA).

The Appellants desire and will request relief in the form of a withdrawal or a remand of the decision signed by Responsible Officials.

Appellants look forward to opportunities to discuss options for resolution of this appeal and associated issues with the Supervisor and Forest Service staff in the course of this appeal process.

STATEMENT OF FACTS/ARGUMENTS
(Combined for clarity)

The EIS predicts 73 new oil and gas wells to be constructed on the Forest. EIS, p. 1-23.

A. The Forest Service Has Not Adequately Addressed the Federal Onshore Oil and Gas Leasing Reform Act Requirements.

In its decision document, the Forest Service states:

The purpose of this Record of Decision is to document Forest Service decisions regarding which lands will be administratively available for oil and gas leasing in accordance with 36 CFR 228.102(d) and **authorize the BLM to offer those specific lands for lease.**

ROD at 3 (emphasis added). Because the Forest Service has not complied with the statutory and regulatory requirements necessary to support authorizing BLM to offer any specific lands for lease, the agency may not do so without first adhering to these responsibilities. Said another way, the FEIS and the ROD do not and cannot support any authorization by the Forest Service to BLM to offer any specific lands for lease. As a result, no such authorization is permissible.

The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 et seq., which provides, *inter alia*, authority for oil and gas leasing on National Forest System lands, assigned primary responsibility for regulating leasing to the Secretary of the Interior, acting through the Bureau of Land Management (BLM). Id. § 226(a); 43 C.F.R. sub part 3100. In 1987, Congress amended the Mineral Leasing Act with the Federal Onshore Oil and Gas Leasing Reform Act (Reform Act) to give the Secretary of Agriculture, acting through the Forest Service, certain obligations relative to leasing on Forest lands. 30 U.S.C. § 226(g)-(h); 36 C.F.R. § 228 subpart E. As a result, the Forest Service and BLM now share responsibility for the issuance of leases in the National Forest System. 30 U.S.C. § 226(h). Ultimately, under the Mineral Leasing Act, the Forest Service and BLM must regulate actions undertaken on leased lands within the National Forest System in a manner that results in the conservation of surface resources. 30 U.S.C. § 226(g).

Under the Reform Act regulations, the leasing process for Forest lands consists of several steps, two of which are relevant to our present purposes. First, the Forest Service is responsible for determining which lands within – in this case, the Fishlake National Forest – are administratively available for oil and gas leasing. In undertaking this “leasing analysis,” the Forest Service must adhere to NEPA and its implementing regulations. 36 C.F.R. § 228.102(a)-(c). Once the “leasing analysis” is complete, the Forest Service will let the BLM know which lands, the Forest Service has found to be “**administratively** available for leasing.” 36 C.F.R. § 228.102(d) (emphasis added). The FEIS purports to undertake this leasing analysis and the accompanying NEPA review. ROD at 3.

Importantly, the steps described above, taken pursuant to section 208.102(a) through 102(d), are distinct from the next phase in any leasing of Forest Service lands for oil and gas development.

Under section 208.102(e) and if BLM proposes to lease specific tracts of available Forest Service lands, the Forest Service must decide whether to “**authorize** [BLM] to offer specific lands for lease” based on the results of three determinations. 36 C.F.R. § 228.102(e) (“*Leasing decisions for specific lands*. At such time as **specific lands are being considered for leasing**, the Regional Forester shall review the area or Forest-wide leasing decision and shall authorize the Bureau of Land Management **to offer specific lands for lease** subject to” 102(e)(1-3)) (emphasis added). Specifically, before authorizing BLM to offer any specific forest lands for lease, the Forest Service must determine that: 1) leasing is consistent with the applicable Forest plan and is adequately addressed in an appropriate NEPA document; 2) the conditions of surface occupancy have been included as stipulations in the leases; and, 3) oil and gas operations could be allowed somewhere on each proposed lease, unless stipulations prohibit all surface occupancy. *Id.* If there is significant new information or circumstances as defined by 40 C.F.R. § 1502.9 requiring further environmental analysis, the Forest Service must undertake additional environmental analysis before it makes a leasing decision for specific lands. *Id.* Plainly, neither the ROD nor the FEIS undertakes the section 288.102(e) analysis and therefore the present decision may not authorize specific forest lands for leasing. Most obviously, the Forest Service has **not** determined that, where there is no NSO stipulation, development could occur somewhere on each proposed lease. After all, at this point, there are no proposed leases on which to base this analysis.

However, although the FEIS is not sufficient to permit the Forest Service to offer specific forest lands for leasing, at times the Forest Service suggests in the ROD that the agency is authorizing BLM to offer specific lands for lease:

The purpose of this Record of Decision (ROD) is to document Forest Service decisions regarding which lands will be administratively available for oil and gas leasing in accordance with 36 CFR 228.102(d) **and authorize the BLM to offer those specific lands for lease.**

ROD at 3 (emphasis added); *see also id.* at 4 (“In this case, these recommendations involve decisions on the administrative availability and authorization of specific lands for leasing, and stipulations needed to protect surface and subsurface resources within the Forest.”). Such an approach is unlawful. As the FEIS does not undertake the section 288.102(e) analysis, the ROD may not purport to make any decisions authorizing BLM to offer specific lands for lease. Rather, the Forest Service must limit its decision to determining which Forest Service lands are “**administratively** available for leasing” under 36 C.F.R. § 228.102(d). Emphasis added.

Thus, as currently formulated, the ROD violates the Reform Act, NEPA and the Forest Service’s obligations to comply with the law and minimize the adverse impacts of oil and gas leasing and development on forest resources. To adhere to the law, the Forest Service must, at a minimum, restrict the scope of its decision making as reflected in the ROD to determining which Forest Service lands are administratively available for leasing.

B. Because the NSO Stipulations for Riparian Areas and Wetlands – NSO-03 and NSO-04 – Are Inconsistent, Misleading and Contrary to the ROD and FEIS, they Are Unlawful.

The Forest Service's reference to and understanding of the NSO – or “No Surface Occupancy” – stipulation the agency ascribes to riparian areas and jurisdictional wetlands are contradictory and misleading. Moreover, the details of these stipulations – NSO-03 and NSO-04 – conflict with the FEIS and ROD. Indeed, in discussing the NSO stipulation, including in the FEIS and ROD and in response to comments by the public, as well as other federal agencies, the Forest Service was sufficiently confusing and misleading to undermine the environmental analysis that purports to examine the potential impacts of applying NSO-03 and NSO-04 to riparian areas and wetlands.

In other words, there is enough discrepancy between the two applications of the NSO stipulation and the ROD, FEIS and response to comments that the FEIS cannot serve as an adequate basis for the decision to implement NSO-03 and NSO-04. The confusion created by the agency's inconsistent approach to the NSO stipulation and NSO-03 and NSO-04 specifically means that the Forest Service has not made a defensible decision. Thus, if for no other reason than the Forest Service applies and describes the NSO stipulation in a contradictory and misleading manner, the decision to implement NSO-03 and NSO-04 must be rejected as arbitrary and capricious.

As an initial matter, the NSO stipulation must and does prohibit any surface disturbance of any kind associated with oil and gas exploration and development. After all, the plain meaning of the “no surface occupancy” stipulation on an oil and gas lease is that the lessee will not be able to occupy the surface of the land in any manner associated with any oil and gas development on that lease. Occupying the land with a road or pipeline is no different than occupying the land with a well pad. Moreover, as the Forest Service admits, roads and road use present the potential for significant adverse impact to Forest resources. *See* Water Resources Report at 25-26 (“[R]oads are known to be one of the greatest contributors of sediment on national forests.”).

Importantly, at a basic level, the Forest Service uses the concept of the NSO stipulation as prohibiting all surface disturbance associated with oil and gas development, confirming that road building is not allowed when the NSO stipulation is in place. The agency defines the NSO stipulation as follows:

The NSO stipulation is intended for use only when other stipulations are determined insufficient to adequately protect the public interest. Where an NSO stipulation is in effect, **no ground disturbance is allowed**. **The suitability and acceptability of constructing a road, pipeline, or similar linear facility outside of the subject lease would be evaluated using Forest Plan standards and guidelines, the same as roads related to other resource uses.**

FEIS at 18 (emphasis added); *see also* FEIS at 29 (list of NSO stipulations under Alternative C). Thus, because the Forest Service defines the NSO stipulation as prohibiting any ground disturbance and as relegating roads and pipelines to areas **outside** a lease covered by the NSO stipulation, the agency must be held to this understanding of the stipulation.

Much of the time, the Forest Service adheres to its own definition of the NSO stipulation. When describing the NSO stipulation that it will apply to Drinking Water Source Protection Zones, the

Forest Service indicates that NSO-06 would not authorize road building associated with oil and gas exploration and development, explaining:

The impacts will be the same from Alternatives C and D because no surface acres will be disturbed **and no new roads associated with oil and gas development will occur under both proposed alternatives** within the drinking water protection zones.

FEIS at 133 (emphasis added). Similarly, the Forest Service states that NSO-06 will limit surface disturbances to the same degree that a “No Lease” or NL stipulation would:

Under Alternative D, drinking water protection zones will not be leased (NL), and would have the same effect as Alternative C when comparing the potential for roads, and surface acreages effects disturbed and hydrologically speaking would be better than Alternative B at preventing potential effects to water quality, or aquatic habitat.

FEIS at 133; *see also* FEIS at 132 (“There is the possibility for potential roads and disturbance under Alternative B within the DWSPZs,” where no NSO applies); ROD at 14 (“Drinking Water Source Protection Zones are delineated by the State of Utah. Protecting them is critical for maintaining clean safe water for human consumption. No surface occupancy will be allowed in Zones 1-3, and Transient (T) Zones T2 and T 4.”). The agency likewise explains that the NSO stipulation applied to sage grouse leks prohibits roads and transmission lines. FEIS at G-14 (“When the lek buffer is added to NSO for other resources, more than 80% of occupied sage-grouse habitat will be NSO. This means that ‘Facilities such as well pads, compressor stations, roads, and transmission lines’ will not be allowed on >80% of sage-grouse habitat and therefore no adverse impacts from oil and gas would occur on >80%.”); *see also* FEIS at G-17 (“NSO means no surface occupancy in the ENTIRE area delineated.”).

In addition, in its ROD, the Forest Service takes the position that the NSO stipulation that applies to IRAs – NSO-15 – also prohibits all surface occupancy related to oil and gas exploration and development, including road construction and use. ROD at 10 & 16; *see also* FEIS at 207 (prohibiting all surface disturbance within one mile of federal Threatened, Endangered and Proposed plant locations and within one mile of sensitive plant locations covered under a Conservation Agreement); FEIS at 211 (prohibiting all surface disturbance in Research Natural Areas); FEIS at 211-12 (prohibiting all surface disturbance in Quitcupah Canyon Cultural Area, Old Spanish Trail corridor and Paradise Valley Cultural Resource Site); FEIS at 212 (areas with high scenic integrity); FEIS at 213 (pygmy rabbit colonies).

Moreover, NSO-05, which applies to perennial streams, reservoirs, springs and lakes, prohibits all surface occupancy and properly underscores that there are no exceptions to the NSO stipulation, making it clear that NSO-05 does not allow any road building in association with oil and gas development. FEIS at 208 (indicating no exceptions, modifications or waivers to NSO-05); *see also* ROD at 13-14 (“NSO stipulations protect the following areas and within 300 feet of them: riparian areas, wetlands, lakes, reservoirs, perennial streams, and springs. Exploration and development activities on future leases will be evaluated at the APD stage, and **further protection** measures such as Conditions of Approval, BMPs, and provisions in the Standard Lease Terms can be used for **further protection** as appropriate.”) (emphasis added).

In stark contrast to this proper understanding of the NSO stipulation – that it does not allow for roads, pipelines and similar facilities associated with oil and gas development – in the NSO for riparian areas and wetlands, the Forest Service anticipates road building, describing the “purpose of” NSO-03 for “riparian areas” as follows: “Construction of roads, pipelines, and other similar facilities must comply with direction in the 1986 Fishlake and/or Dixie National Forest Land and Resource Management Plans.” FEIS at 208; *see also id.* (NSO-04 for delineated wetlands – same “purpose”). Yet, based on the agency’s explanation of the NSO stipulation in the context of protecting resources such as sources of drinking water, IRAs, sage grouse leks, perennial streams, reservoirs, springs and lakes, the Forest Service is being inconsistent and misleading when it describes as the “purpose of” NSO-03 and NSO-04 is to allow for the construction of roads, pipelines and other similar facilities. Therefore, because the NSO stipulation prohibits any surface occupancy associated with oil and gas development and because the Forest Service has employed the term appropriately to prohibit the construction of roads and pipelines, the agency may not suddenly describe the “purpose” of the NSO stipulation as authorizing that construction. Such confusion and inconsistency and such a misleading approach is the epitome of arbitrary and capricious action and may not serve as the basis for a defensible decision.

Finally, the Forest Service is prohibited from arguing that it is free to apply wildly different NSO stipulations in different situations.³ On occasion, the agency misconstrues the NSO stipulation, like NSO-03 and NSO-04 applied to riparian areas and wetlands, giving to it the purpose of road and pipeline construction. At other times, the agency sets forth the NSO stipulation, like NSO-15 applied to IRAs and NSO-16 applied to National Recreation Trails, in the ROD and the analysis of the FEIS as properly prohibiting all surface disturbance, including roads and pipelines, ROD at 10 & 16 (IRAs); FEIS at 151 (indicating that the Fish Lake *naiad Najas caespitosa* would be protected by the National Recreation Trail NSO – calling the plant a “Sensitive Species with NSO Protection.”), but then claims as a purpose of NSO-15 and NSO-16, the construction of roads. FEIS at 211 (IRAs) & 210 (National Recreation Trails). In still other instances, the Forest Service sets forth the NSO stipulation, like NSO-05 applied to perennial streams, reservoirs, springs and lakes, and NSO-17 applied to Research Natural Areas, as exactly what it purports to be – a ban on all surface disturbance, including roads and pipelines, within the boundaries of the lease. FEIS at 208 (water bodies) & 211(RNAs). Plainly, such an approach to the NSO stipulation, which is at the core of the Forest Service’s assurances that it will protect Forest resources from oil and gas development, cannot be maintained. For the same

³ Interestingly, when EPA specifically asked that the Forest Service clarify its NSO stipulation, requesting “that the Final EIS clarify whether construction of linear facilities (i.e., roads, pipelines, etc.) may still occur in this NSO area, and recommend[ing] avoidance of this area,” the agency merely added to the confusion, stating “[c]onstruction of roads, pipelines, and other similar facilities must comply with direction in the Fishlake and or Dixie National Forest Land and Resource Management Plans.” FEIS at G-34. This statement begs the question, is so general as to be meaningless and fails to give any clarity to the complex issue described herein. After all, where the construction of roads and pipelines is prohibited, Forest Plan direction is irrelevant.

reasons, such a capricious approach to the NSO stipulation prevents the public and the expert agencies from commenting on the proposed action and its alternatives in a meaningful fashion.

The degree of the confusion and inconsistency surrounding the NSO becomes even more evident when the Forest Service claims, in response to comments, that the NSO stipulation will protect other resources. For example, referring in part to NSO-15 and NSO-16, which have as their purpose the construction of roads and pipelines, the Forest Service states: “The potential for impacts to other plant species that are of concern to the FNF are minimized because of restrictions prescribed in order to protect other resources.” FEIS at 151 (referring in part to the IRAs and National Recreation Trails NSO); *see also* FEIS at 152 (“In Alternative C the potential impacts to TES plant species would be minimal. The NSO areas would prohibit **any** impacts to known locations.”) (emphasis added); FEIS at G-8 (“NSO designation for resources such as IRAs, slope and riparian areas benefit wildlife by restricting oil and gas activities. The area of the FNF under the NSO stipulation, and the amount of habitat **open to development**, increases from Alternative B (least) to D (most) and potential impacts from oil and gas activities would have a similar variation.”) (emphasis added). Therefore, these statements and the many more like them in the FEIS further underscore that the Forest Service presents the NSO stipulation as preventing all surface disturbance and, as a result, protecting Forest resource from roads and pipelines as well as other oil and gas facilities and activates. Therefore, the agency may not deviate from this definition of the NSO stipulation.

It is true that the Forest Service indicates that under some circumstances, a waiver, exception or modification to the NSO stipulation may be appropriate. FEIS at 29 (stating “[i]n some cases a waiver, exception, or modification may be granted.”). However, as the agency makes clear, waivers, exceptions or modifications are exactly that, deviations from the standard that are the exceptions to the rule, rather than an part and parcel of the NSO stipulation. After all, as the Forest Service defined the NSO stipulation, it constitutes a prohibition on all ground disturbing activity. Therefore, an appropriate exception to the NSO may be grounded on site specific information that the purpose of the NSO stipulation will not be undercut in any way and that the relevant resource will be protected to the same extent it would have been without the exception. Such deviations from the norm may be warranted in a few, unusual situations. However, this approach is a far cry from the suggestion that the purpose of the NSO stipulation is to allow for road and pipeline construction.

Thus, the NSO stipulation, as defined by the Forest Service, prevents all surface disturbance and any and all road and pipeline construction related to oil and gas development must be relegated, if it is to occur at all, to areas **outside** the relevant lease. This understanding and application of the NSO stipulation corresponds to the plain meaning of the provision, agrees with the agency’s own definition of the requirement and is in keeping with the agency’s explanation of the environmental benefits of the stipulation. Therefore, NSO-03 and NSO-04 must be revised so that they are in keeping with the Forest Service’s assurance that the NSO stipulation is exactly what it purports to be, a prohibition on all surface disturbing oil and gas activity and facilities, including roads and pipelines.

C. NSO-15 Is Illegal and Inconsistent with the ROD.

Consistently with the Roadless Rule, the Forest Service states in the ROD that no surface disturbance and roads associated with oil and gas development will be allowed in IRAs. For example, in explaining that its decision to choose Alternative C would indeed protect IRAs from road building, the agency states:

Thus, in Alternative C, we used a NSO stipulation that restricts surface occupancy, while still allowing for exploration in the IRAs **without the use of roads** and potential development outside the IRAs to extract oil and gas from under the surface of the IRAs. With the NSO stipulation, we are able to allow directional drilling under IRAs from outside those designated areas.

ROD at 10. Similarly, acknowledging that Alternative D does not allow leasing in IRAs, ROD at 16, the Forest Service noted that “Alternative C provides the same protection for inventoried roadless areas as Alternative D but our decision allows access to the subsurface resource,” ROD at 16, thereby evidencing its intention to prohibit any surface disturbance, including road building, in IRAs. Indeed, such an approach is required by the Roadless Rule. 36 C.F.R. § 294.12.

Again, in contrast to its duty under the Roadless Rule and inconsistently with the ROD, the NSO applicable to IRAs – NSO-15 – provides as the “purpose” for the stipulation that: “Construction of roads, pipelines, or other facilities must comply with direction in the appropriate Forest Plan.” FEIS at 211. Plainly, this statement of purpose is inconsistent with the ROD and the Roadless Rule. Rather, NSO-15 may **not** allow for the construction of any road or pipeline associated with oil and gas development in an IRA, regardless of the direction in the relevant Forest Plan. See 36 C.F.R. § 294.12; ROD at 10 & 16.

Therefore, NSO-15 is unlawful as it is inconsistent with the Roadless Rule and the ROD and must be declared invalid. To comply with the law and to be consistent with the ROD, NSO-15 must be amended so that it plainly prohibits any and all surface disturbance associated with oil and gas development in IRAs, including roads and pipelines.

D. By Not Addressing Potential Impacts to Cultural Resources, the Forest Service Has Failed its NEPA and NHPA Obligations.

In its FEIS, the Forest Service deems the potential impacts to “cultural resources” from oil and gas development a “non-key issue” that does not warrant environmental analysis. FEIS at 14. As a result, the agency has failed to meet its NEPA and National Historic Preservation Act (NHPA) obligations to determine the direct, indirect and cumulative impacts of the proposed action **and its alternatives** on cultural resources. A legally adequate analysis must extend to consideration of the effects of the various alternative leasing scenarios on cultural resources. Without this information, neither the Forest Service nor the public has any basis on which to evaluate the various alternatives presented in the FEIS.

Importantly, the National Park Service, the expert agency in cultural and historic properties, likewise found the EIS inadequate to meet the Forest Service's legal obligations, stating:

NPS believes that the FEIS should analyze the serious direct, indirect, and cumulative adverse effects of oil and gas development to all cultural resources in the FEIS. The analysis of these effects should go into determining whether any action alternatives proposed under this DEIS should be approved. NEPA applies to all resources that may be adversely affected by a federal undertaking. [The NPS] do[es] not believe that the EIS adequately addresses the NEPA requirement to "take into account" these effects on cultural resources. NPS respectfully requests that the FNF prepare a supplemental DEIS with a complete analysis of the effects of this undertaking on natural and cultural resources, including the Old Spanish National Historic Trail.

FEIS at G-21 to G-22.

As the Park Service found, rather than securing the analysis necessary to make a well-informed decision, the Forest Service has wrongly assumed, without basis in the record, that impacts to cultural resources will be mitigated and will not vary by alternative. Furthermore, by dismissing the issue, the agency has completely neglected to address indirect and cumulative impacts of oil and gas development on cultural sites. *See* FEIS at 14. This is particularly true given that the proposed lease stipulation does not secure protection for cultural sites. FEIS at 219 (stating that "[m]itigation may include relocation of proposed facilities, testing, salvage, and recordation or other protective measures.").

Significant damage to cultural sites will almost certainly occur as a result of oil and gas exploration and development. The agency may not argue that, because archeological sites may be identified and avoided or that harm to these sites may be mitigated prior to any ground disturbing activities, the proposed action and its alternatives do not have the potential to harm or destroy cultural resources. This is because, while impacts may be lessened, these consequences will not necessarily be eliminated or even reduced to a *de minimis* level. Moreover, indirect impacts to cultural sites may not be preventable.

For example, even if they can be avoided, historic and cultural sites might be harmed and destroyed by dust, erosion or vibration or because new roads facilitate access by looters or careless members of the public. Moreover, mitigation may be inadequate or non-existent where sites cannot be avoided and must be moved, thereby losing important contextual information, or damaged, if left in place. In addition, inadequate surveys may lead to inadvertent damage to sites, particularly where the Forest Service fails to require suitably rigorous surveys.

Therefore, the Forest Service must adhere to its NEPA and NHPA obligations and fully consider the impacts to cultural resources that will occur if and when these adverse effects are not avoided, as well as when harms are merely mitigated but not eliminated. In addition, as these impacts will vary relative to the various leasing scenarios addressed in the FEIS, this analysis must occur relative to each proposed alternative, as well as the **no action alternative**. Because the Forest Service failed to acknowledge, much less address the potential for direct, indirect and cumulative adverse impacts on cultural sites and because the agency did not consider that the various alternative actions could result in different consequences, the Forest Service has not met its legal obligations.

Second, in adopting its “one size fits all” approach, the Forest Service is neglecting to consider both indirect and cumulative impacts – analysis which is required under both NEPA and NHPA. For example, NHPA Section 106 regulations require the Forest Service to identify and evaluate these impacts, and to determine whether they are adverse. 36 C.F.R. § 800.5(a)(1). NEPA regulations define indirect impacts as those which are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Here, even though cultural sites may be avoided and impacts to them mitigated, the resources will not be immune to indirect impacts. Indeed, these indirect impacts promise to have significant adverse impacts on cultural resources.

For example, it is reasonable to expect that the ground disturbing and other development activities related to the various leasing scenarios will lead to: 1) erosion; 2) vibration; 3) air pollution; 4) blowing dust; and, 5) increased disturbance to cultural sites. These impacts, both individually and cumulative, would result in significant adverse impacts on cultural sites. Indeed, examination of site forms and other impact analyses establish that cultural resources **are** damaged by exactly these types of consequences that result from oil and gas exploration and development and associated road building.

Finally, the proposed lease stipulation is inadequate. Initially, it does not guarantee, as the Forest Service claims, that oil and gas development will have no impact on cultural resources:

Under SLT&C oil and gas facilities or activities may be moved by up to 200 meters (656 feet) to avoid impacts to those cultural resources that warrant this. As a result, impacts to general cultural resources on the FNF would be avoided or mitigated at or prior to the construction phase.

FEIS at 14. Initially, as already established, avoiding cultural sites does not guarantee there will be no impacts to these resources. Air pollution, dust, soil erosion and increased human disturbance – all necessary results of oil and gas development – have the potential to have adverse impact on cultural sites. Moreover, these impacts are not necessarily avoided by moving oil and gas facilities and activities.

In addition, the stipulation does not require that adequate surveys be conducted prior to ground disturbing activities, but instead states only that a cultural resources specialist will “conduct any necessary cultural resource inventory of the area of proposed surface disturbance,” without specifying exactly what “class” of inventory would be required. FEIS at 219. Nor does the Forest Service require that the inventory be extended beyond the area of surface disturbance were significant impacts to cultural and historic properties may still be felt. The level of survey will also necessarily determine how thorough the search for cultural sites will be. Without a requirement that sufficiently rigorous surveys be conducted, the Forest Service may not claim, as it does, that adverse impacts to resources will be avoided. Moreover, while the FEIS states that “oil and gas facilities or activities may be moved by up to 200 meters,” FEIS at 14, no such notice is provided in the lease stipulations. What is more, given other restrictions imposed by stipulation – such as requirements to avoid steep slopes and riparian areas – there is no assurance that cultural sites can be avoided without compromising other protected resource values. As a result, not only is the lease stipulation inadequate, but so is the NEPA analysis that relies on it.

Finally, the Forest Service states:

There are known pieces of land that contain culturally important resources deemed appropriate for protection under a lease stipulation. These parcels of land are the Old Spanish Trail, the Paradise Valley area, and the Gooseberry area. These areas have all been placed under a NSO stipulation.

FEIS at 14. However, as discussed above, the Forest Service's application of the NSO stipulation is inconsistent and misleading and therefore cannot be relied upon to protect these cultural sites.

Thus, the FEIS and ROD do not meet the Forest Service's obligations to evaluate impacts to and protect cultural resources. As a result, the decision must be remanded to the agency and the Forest Service required to analyze the direct, indirect and cumulative impacts that the proposed project will have on cultural resources and compare those impacts to those that the project alternatives will have. Only with such an analysis can the Forest Service make a defensible decision, properly determine lease stipulations and other requirements necessary to meet its NHPA obligations and otherwise protect these invaluable Forest resources.

E. The Forest Service Decision to Implement NSO-5 Without Exception is Necessary to Meet the Agency's Obligations Under the Clean Water Act and Utah Water Quality Standards.

Nothing is more important to sustaining and restoring Forest resources than water. Surface and ground water encompassed by the Fishlake National Forest are crucial to nearby communities that use this water to meet municipal and agriculture demands. Moreover, water is crucial to wildlife, wildlife habitat, recreation and scenic beauty. As the Forest Service summarizes:

The majority of streams and reservoirs on the Forest provide water for domestic and agricultural uses, cold-water fisheries, recreation, and wildlife. Maintaining the quality of these waters is becoming increasingly important as the demand for water increases with the growing urban population next to the Forest.

FEIS at 124. Importantly, by deciding to implement NSO-5, applicable to perennial streams, reservoirs, springs and lakes, without exception, waiver or modification, the Forest Service has gone a long way to meeting its Clean Water Act obligations and complying with the Utah Water Quality Standards.

The objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To this end, the Clean Water Act authorizes each state to develop water quality standards for the state's waters. 33 U.S.C. §§ 1311(b)(1)(C), 1313. Water quality standards consist of designated uses, criteria, and an anti-degradation policy. 40 C.F.R. §§ 131.10 - 131.12.

Under the Clean Water Act, the Forest Service must establish that its actions are consistent with Utah water quality standards. *E.g.* 33 U.S.C. § 1323(a) (providing that federal agencies must comply with state water quality standards). Importantly, section 1323 mandates that federal entities comply with the substantive requirements of state law and makes that requirement

applicable to any federal activity, including the exercise of federal administrative authority “resulting, or which may result, in the **discharge or runoff**” of pollutants. 33 U.S.C. 1323(a)(2) (emphasis added). Thus, this requirement applies to activities that lead to both point source discharges as well as runoff. *Id.* The Forest Service must also abide by its substantive duty under NFMA to protect water resources. *E.g.* 36 C.F.R § 219.1 (citing the Clean Water Act as a principal authority “governing the development and the management of the National Forest System.”).

Utah has classified all waters within the Fishlake National Forest as High Quality Waters, Category 1. Utah Admin Code R317-2-12.1(a) (designating “all surface waters geographically located within the outer boundaries of U.S. National Forests whether on public or private lands” as High Quality Waters, Category 1, with exceptions not relevant here). In Utah, “[w]aters of high quality which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or National resource requiring protection, shall be maintained at existing high quality through designation, by the Board after public hearing, as High Quality Waters - Category 1.” Utah Admin. Code R317-2-3.2.

These critically important waters are, in turn, protected under Utah’s antidegradation rule as follows:

New point source discharges of wastewater, treated or otherwise, are prohibited in such segments after the effective date of designation. . . . Other diffuse sources (nonpoint sources) of wastes shall be controlled to the extent feasible through implementation of best management practices or regulatory programs.

Discharges may be allowed where pollution will be temporary and limited after consideration of the factors in R317-2-3.5.b.4., **and** where best management practices will be employed to minimize pollution effects.

Utah Admin. Code R317-2-3.2 (emphasis added). Utah Admin. Code R317-2-3.5.b.4 in turn provides:

As general guidance . . . activities of short duration, will be deemed to have a temporary and limited effect on water quality where there is a reasonable factual basis to support such a conclusion. Factors to be considered in determining whether water quality effects will be temporary and limited may include the following:

- (a) Length of time during which water quality will be lowered.
- (b) Percent change in ambient concentrations of pollutants of concern
- (c) Pollutants affected
- (d) Likelihood for long-term water quality benefits to the segment (e.g., dredging of contaminated sediments)
- (e) Potential for any residual long-term influences on existing uses.
- (f) Impairment of the fish spawning, survival and development of aquatic fauna excluding fish removal efforts.

In addition, the beneficial uses of the waters in the Fishlake National Forest are protected by Utah's water quality standards and the narrative standard. The narrative standard reads:

It shall be unlawful, and a violation of these regulations, for any person to discharge or place any waste or other substance in such a way as will be or may become offensive such as unnatural deposits, floating debris, oil, scum or other nuisances such as color, odor or taste; or cause conditions which produce undesirable aquatic life or which produce objectionable tastes in edible aquatic organisms; or result in concentrations or combinations of substances which produce undesirable physiological responses in desirable resident fish, or other desirable aquatic life, or undesirable human health effects, as determined by bioassay or other tests performed in accordance with standard procedures.

Utah Admin. Code R317-2-7.2. As the Forest Service summarized:

Some key feature of the [Utah] anti-degradation policy is that discharge will not be allowed into the Category I waters and that BMPs are crucial in the protection of Category I waters. Utah's anti-degradation policy prohibits the degradation of water quality of in streams on NFS lands. Additionally, the policy requires that alternative management options and the environmental and socioeconomic benefits of proposed projects are made available to concerned stakeholders. The Forest is currently and will continue to comply with this policy as part of oil and gas Leasing and subsequent development to maintain the quality and uses of Forest waters.

FEIS at 130.

The FEIS and its supporting documents include many examples of the manner in which oil and gas development related roads in the proximity of streams and other waters will adversely impact water quality and beneficial uses, including cold water fisheries and spawning habitat. *E.g.* FEIS at S-9 ("For fish, land clearing in the vicinity of an occupied stream can increase the potential for delivery of organic molecules, sediments, nutrients, salts, and heavy metals or surface water runoff because vegetation is no longer present to block or dilute such introductions. Roads are often located closer to streams than well pads and are more likely to cause erosion or provide a channel for delivery of hazardous substances. These occurrences can degrade habitat and ecosystem functioning, which may affect fish habitat (e.g., water temperature, stream bank vegetation, large woody debris)."); FEIS at S-13 ("Increased sediment inputs are likely to occur from newly constructed roads near waters, stream crossings and pads where sediment can be washed into waterways. Such sediment inputs decreases water quality, negatively impacts aquatic insect populations, that are critical food for resident trout, and silts over gravel spawning beds negatively impacting reproduction."); FEIS at 131 ("Roads with their attendant diversion ditches and culverts often alter natural drainage patterns, concentrate flows and redistribute runoff, often increasing it on a local level."); FEIS at 130 ("Facility construction, maintenance, and use could increase the potential for surface erosion, which could contaminate surface water and adversely impact stream channels and aquatic habitats. Water from exploration and production facilities could become contaminated with chemical pollutants used at the facilities and flow from the disturbed areas to adjacent surface waters. Springs, streams, lakes and

reservoirs, and wetlands are particularly vulnerable to pollution and increased sediment loads.”); FIES at 131 (“For all of these reasons given above, it is only possible to estimate adverse sediment-related water quality impacts from the connected actions on surface water in a general manner. Although they would most likely be temporary or short-term in duration, their magnitude could range from negligible to major, depending upon the location of the activity, the effectiveness of the environmental protections measures, and the occurrence of accidental releases.”); FEIS at 136 (“Potential effects of post-leasing oil and gas activities could include erosion or mass wasting, sedimentation, hydrocarbon mud pit failures, hazmat spills, decreased water quality due to increased erosion and stream bank disturbance during construction of road-stream crossings, loss of riparian habitat due to removal for reconstruction of existing roads or construction of new roads or road-stream crossings, and loss of riparian habitat through erosion or lowered water tables. Additionally, there is potential for chronic problems with degraded aquatic habitat and water quality due to stream instability and channel adjustments such as down-cutting, lateral migration or meander abandonment, changes in the amount and/or timing of runoff and sediment produced by a watershed, which brings about cumulative impacts within aquatic and riparian ecosystems.”); FEIS at 137 (“These combined effects cause changes in the amount and/or timing of runoff and sediment produced by a watershed, which brings about cumulative impacts within aquatic and riparian ecosystems.”); FEIS at 141 (“Increased sediment inputs are likely to occur from newly constructed roads near waters, stream crossings and pads where sediment can be washed into waterways. Such sediment inputs decreases water quality, negatively impacts aquatic insect populations, that are critical food for resident trout, and silts over gravel spawning beds negatively impacting reproduction.”); FEIS at 145 (“The primary potential for impacting aquatic macro invertebrates would be from the introduction of fine sediment to the streams due to road or pad construction and increased use on nonpaved roads.”); FEIS at 147 (“Increased sediment inputs are likely to occur from newly constructed roads near waters, stream crossings and pads where sediment can be washed into waterways. Such sediment inputs decreases water quality and negatively impacts aquatic insect populations that are critical food for leatherside chub.”); Water Resources Report at 25-26 (“[R]oads are known to be one of the greatest contributors of sediment on national forests.”); Dixie National Forest Oil and Gas EIS at 4-123 (section 4.7.4.6 stating that “[g]iven the amount of disturbance that could occur within riparian areas under SLT, including roads (Table 4.7-3, *Measurement Indicator #5*), impacts would range from negligible to minor for seismic activity and minor to moderate for roads and well pads. Impacts would be both long and short term as changes in hydrology and stream channel conditions would be difficult to reverse in the short term.”).

Moreover, as the Forest Service admits, prohibiting roads in streams and other waters will prevent adverse impacts to water quality and protect beneficial uses, including cold water fisheries and spawning habitat:

Toxic chemical spills into watercourses containing trout can have major adverse impacts to fish populations; however, it is difficult to predict toxic spills and their severity to resident trout populations at the programmatic leasing level. Logically, the wider the riparian buffer protection and the more complex it is, the less likely toxic spills would make it into the perennial waterway and impact fish.

FEIS at 143. Similarly, the agency states that adverse impacts from roads are preventable to the extent roads are banned from the buffers around streams and other waters:

the likelihood of road miles and acres disturbed with associated effects would be higher for alternative B, less for alternative C and would most likely only be from necessary stream crossings, and even slightly less for alternative D and would be likely only be from necessary streams crossings.

FEIS at 132; see also FEIS at S-12 (“Both the quantity of the eroded material and the percentage of the material that makes its way to a stream are wholly dependent upon very site-specific factors including . . . distance between the disturbance and the stream [and] buffers to the stream”); FEIS at 130 (same); FEIS at 127 (“Wetlands and riparian areas typically occur as natural buffers between uplands and adjacent water bodies. Loss of these systems allows for a more direct contribution of nonpoint source pollutants to receiving waters.”); FEIS at 127 (“Thus, wetlands and riparian areas buffer receiving waters from the effects of pollutants or they prevent the entry of pollutants into receiving waters. It is important to consider that degradation of wetlands and riparian areas can inhibit their ability to treat pollution.”); FEIS at 137 (“There is a greater likelihood of riparian, hydrologic, and aquatic resources including water quality being impacted from Alternative B, than from both Alternatives C and D. This is primarily because of the buffers proposed from the different alternatives.”); FEIS at 142 (“Alternatives C and D each provide a NSO stipulation in a riparian buffer of a given distance, which allows analysis of an area which would be excluded from oil and gas development disturbance.”); FEIS at 143 (“Under alternative C all perennial waters would be protected by a 300 foot riparian NSO buffer from the water’s edge.”); *id.* (“Therefore, a 300 foot riparian buffer is capable of controlling overland sediment flows on most slopes and would therefore adequately protect resident trout and their habitat from overland sediment movement resulting from new roads built for oil and gas development.”); FEIS at 143 (“Belt and O’Laughlin (1992) found extensive literature on the effect of buffer strips on water temperature. They found that a multitude of factors relating to the shading, density and complexity of the riparian buffer zone moderate solar energy heating of the stream.”); FEIS at 144 (“While some impact may still occur, Alternative C includes a 300 foot riparian NSO buffer, which would help protect waters from increases in sedimentation, toxic spills and micro-climate effects from alterations to the riparian vegetation.”); FEIS at 145-46 (“Adverse effects from alternative C (moderate resource protection) and alternative D (high resource protection) will likely be negligible on aquatic macroinvertebrates. Under alternative C all perennial waters would be protected by a 300’ riparian NSO buffer from the water’s edge.”); FEIS at 148 (“While some impact may still occur, the 300’ riparian buffer included in Alternative C would help protect waters from increases in sedimentation, toxic spills and micro-climate effects from alterations to the riparian vegetation.”).

Therefore, the Forest Service’s decision to apply NSO-05 without exception, modification or waiver to 300 feet of all perennial streams, reservoirs, springs and lakes, FEIS at 208, represents what the Forest Service considers to be the only manner in which the agency can secure compliance with the Clean Water Act and the Utah Water Quality Standards. *See e.g.* FEIS at S-9; S-13; 130, 131, 136, 137, 141 & 145. After all, the purpose of NSO-05 is the “protection of water quality in surface water resources.” FEIS at 208.

F. The U.S. Forest Service Failed to Appropriately Address Air Quality Impacts

It is inappropriate for the USFS to use the Uinta Basin Air Quality Study (UBAQS) for NEPA analysis in the Fishlake EIS. *See* EIS at 173-82. This study only predicted air quality concentrations through 2012, making it completely unhelpful for an analysis intended to predict conditions from 2013 into the foreseeable future. The Environmental Protection Agency and USFS have already declared that the UBAQS analysis does not meet the provisions of NEPA. Ironically, the USFS incorrectly characterizes this study. UBAQS actually predicted exceedances of the relevant ozone standard under the Clean Air Act.

The Fishlake EIS relies on UBAQS for analysis of potential air quality impacts on ozone levels and fine particulate matter levels (referred to as “PM_{2.5}”). *See* EIS at 173-82. It was prepared in 2009 by the oil and gas industry trade group formerly known as the Independent Petroleum Association of Mountain States. *See* Uinta Basin Air Quality Study, Cover (UBAQS) (June 30, 2009) (attached). Although the EIS acknowledges that there are some “shortcomings” with this model, it uses the data anyway to state that pollution levels for ozone and PM_{2.5} would not be a problem in the project area. *See* EIS at 175, 182.

However, there are significant problems with this reliance. Among the most significant problems is that UBAQS was prepared in 2009 and only predicted air quality concentrations through 2012. *E.g.* UBAQS at Cover, ES-1. It makes no predictions or forecasts regarding the time period actually applicable to the Fishlake EIS oil and gas leasing analysis, which was not authorized until August of 2013. EIS at ROD-23.

Another impediment to the USFS relying on this analysis is that the agency itself has already rejected this study as inadequate for NEPA purposes. The U.S. Environmental Protection Agency (EPA) wrote that the “EPA, the National Park Service, and the Forest Service, recognized that there were important shortcomings in the UBAQS modeling protocols that will need to be improved to meet the provisions of NEPA.” Letter from Larry Svoboda, EPA, to Bill Stringer, Bureau of Land Management (BLM) 2 (Oct. 16, 2009) (attached).

The EPA has identified a substantial list of flaws as to why UBAQS cannot provide NEPA analysis, even if it were applicable to the time horizon evaluated in the Fishlake EIS. *See* Letter from Svoboda to Stringer at 7-11. Those critiques are adopted and incorporated here. Among other shortcomings, the model used a resolution that the EPA found unreliable, it contained major unresolved performance inaccuracies, and it did not identify why certain pollutants were exceeding federal air quality standards. *See id.*

UBAQS did not predict or evaluate winter ozone levels in the Uinta Basin—the region for which this study was prepared—that were measured well above federal standards; UBAQS is inconsequential and meaningless for that reason alone. As identified in UEC’s comments on the draft Fishlake EIS, wintertime ozone in the Uinta Basin is a significant problem. The winter ozone monitoring data for 2010 through 2013 has been posted on the EPA’s AirData website. *See* EPA, AirExplorer, http://www.epa.gov/airdata/ad_rep_mon.html (results for 2010 through 2013 attached, Uinta Basin monitors located in Uintah and Duchesne counties). The ozone pollution limit established by the federal and state air quality standards, is 75 parts per billion. *See* 40 C.F.R. § 50.15. As this data demonstrates, the comparable level in the Uinta Basin is

above 100 parts per billion. *See* EPA, AirExplorer, http://www.epa.gov/airdata/ad_rep_mon.html. Ozone levels in the Uinta Basin are among the worst in nation, comparable with Los Angeles County, California. Neither UBAQS nor the Fishlake EIS have dealt with this issue.

Ironically, UBAQS actually predicted exceedances of the ozone limits for portions of the Fishlake National Forest in 2012. *See* UBAQS TS-10, TS-28 to -29; EIS at 177. If meteorological conditions in 2012 had been the same as in 2005 then UBAQS predicted that portions of the Fishlake National Forest in Sevier and Beaver counties would see levels of ozone above 75 parts per billion, the state and federal limit. EIS at 177 (Figure 3.12-4). The remainder of the forest was generally predicted to see levels of ozone right at the federal and state limit. *See id.* UBAQS does not satisfy the USFS's NEPA obligation and is not a satisfactory analysis of cumulative impacts. All of these factors demonstrate that the Fishlake EIS should not rely on UBAQS to rectify shortfalls in cumulative impacts air quality analysis.

Even if the USFS were to suggest that despite these flaws, UBAQS provides the most helpful analysis available, that would be incorrect. *See, e.g.,* EIS at 175-76. The BLM recently released an environmental impact statement in the Uinta Basin that included an ozone modeling analysis that covered the same area as the UBAQS analysis. *See generally* BLM, Greater Natural Buttes Air Quality Technical Support Document (March 2012) (attached). Although flawed, this analysis does extend into the future (i.e. the time horizon actually applicable to the Fishlake EIS) and was part of a NEPA document. *See, e.g., id.* at ES-1 (indicating that forecasting covered 2017, 2018, and 2026). UBAQS cannot claim either of these characteristics. Clearly, it was inappropriate and a violation of NEPA's hard look requirement to rely on UBAQS here.

G. The Forest Service Failed to Properly Address Deficiencies in EIS for Air Quality in Accordance with NEPA Procedures

After the preparation and circulation of the DEIS, as well as the subsequent preparation and circulation of the air quality report prepared in support the DEIS, the Forest Service prepared an additional analysis and assessment of air quality impacts. This analysis and assessment, which was finalized in September 2012—more than six months after the close of the comment period on the air quality report—addressed the impacts of the proposed oil and gas leasing to the 1-hour nitrogen dioxide (“NO₂”) and 1-hour sulfur dioxide (“SO₂”) national ambient air quality standards (“NAAQS”). *See* JBR Environmental Consultants, “Fishlake National Forest Oil and Gas Leasing Final Environmental Impact Statement, Supplemental Air Quality Modeling Report: 1 hr NO₂ and 1 hr SO₂,” prepared for U.S. Forest Service (Sept. 2012). According to the Forest Service's response to comments, this analysis and assessment was completed in response to concerns raised by Utah Environmental Congress, *et al.*, as well as the U.S. Environmental Protection Agency (“EPA”), that the DEIS failed to adequately address impacts to the NO₂ and SO₂ NAAQS. FEIS at G-38 and G-50.

Although Appellants appreciate that the Forest Service recognized the need to address impacts to the 1-hour NO₂ and 1-hour SO₂ NAAQS, unfortunately, the Service's chosen method for addressing deficiencies in the DEIS failed to comply with NEPA, ultimately depriving

Appellants and the public the opportunity to be notified and to comment on the analysis and assessment to ensure its scientific integrity and accuracy under NEPA.

Under the National Environmental Policy Act, where a DEIS is deficient, the Forest Service has three options for addressing the deficiencies: (1) The Forest Service may make “simple corrections” with an errata sheet, Forest Service Handbook (“FSH”) 1909.15, 18.2(1); (2) The Service may “supplement” the draft EIS, either due to new circumstances or information relevant to environmental concerns or whenever the “agency determines that the purposes of the [National Environmental Policy] Act will be furthered by doing so,” 40 C.F.R. §§ 1502.9(b)(1)(ii) and (b)(2), FSH 1909.15, 18.2(2); or (3) If the draft EIS is so inadequate as to preclude meaningful analysis, the Forest Service must “prepare and circulate a revised draft of the appropriate portion.” 40 C.F.R. § 1502.9(a), FSH 1909.15, 18.2(3). There are no other procedures under NEPA to address deficiencies in DEISs.

Here, the Forest Service does not refer to the 1-hour NO₂ and 1-hour SO₂ analysis as an “errata,” but rather refers to it as both an “amendment” to the DEIS and as a supplemental information report (“SIR”). *See* FEIS at G-38. Neither regulations implementing NEPA nor the FSH provide for “amendments” to a DEIS. Furthermore, under the FSH, “A SIR is not a NEPA document and therefore cannot be used to fulfill the requirements for a revised or supplemental EA or EIS. A SIR cannot repair deficiencies in the original environmental analysis or documentation[.]” FSH 1909.15, 18.1.

The failure of the Forest Service to remedy deficiencies in the DEIS in accordance with NEPA is not a trivial matter. For one thing, the Agency deprived Appellants of the opportunity to scrutinize and comment on the 1-hour NO₂ and 1-hour SO₂ analysis. In reviewing of the analysis, for example, Appellants note that background NO₂ concentrations from sources of air pollution within and near the project area were not taken into account when modeling potential impacts from the proposed oil and gas development. Furthermore, the analysis recommends that cumulative impacts analyses occur for drilling proposals only in the context of proximity to Class I areas, yet the 1-hour NO₂ NAAQS apply everywhere, not just in Class I areas. The report thus fails to ensure that cumulative impacts have been or will be adequately addressed under NEPA in the face of drilling proposals.

Certainly, the Forest Service has discretion in preparing an FEIS to “supplement, improve, or modify its analysis” in response to public comment. 40 C.F.R. § 1503.4(a)(3). In this case, however, the Forest Service did not “supplement, improve, or modify” its analysis in response to comments over the lack of an adequate analysis of 1-hour NO₂ and 1-hour SO₂ impacts.

Indeed, the Forest Service clearly did not supplement the DEIS as it did not follow NEPA procedures regarding supplementation. Furthermore, the Forest Service did not improve or modify its analysis as the Agency entirely failed to prepare an analysis of 1-hour NO₂ and 1-hour SO₂ impacts in the first place. It is one thing to improve or modify an existing analysis; it is another thing to prepare an entirely new analysis. Here, the September 2012 analysis is new. It does not constitute an “improvement” or “modification” of a previous analysis, and in fact the Forest Service itself states that it was meant to “supplement” or “amend” the DEIS. To this end,

the Agency was required to either supplement the DEIS or revise it to address the deficiencies. It did neither.

The Forest Service’s failure to remedy deficiencies in the DEIS regarding impacts to the 1-hour NO₂ and 1-hour SO₂ NAAQS in accordance with NEPA raises serious concerns over whether the Agency made an informed decision that “protect[s], restore[s], and enhance[s] the environment.” 40 C.F.R. § 1500.1(c). The Agency’s decision must be reversed.

H. The Forest Service Failed to Analyze Impacts to PM_{2.5} Increment Standards Under the Clean Air Act

In spite of the Forest Service’s efforts to analyze and assess impacts to air quality, the Agency overlooked the potentially significant impacts to increment standards for particulate matter less than 2.5 microns in diameter, or PM_{2.5}. As the FEIS notes, “increment” standards specify the allowable increase in pollution “over and above the existing air quality ‘baseline’ pollution levels” in Class I areas, including National Parks, and Class II areas, which include all other areas. FEIS at 158. In comments, Appellants explicitly identified the need for the Agency to analyze and assess impacts to the PM_{2.5} increment standards, which were adopted by the U.S. Environmental Protection Agency (“EPA”) in 2010 (*see* 75 Fed. Reg. 64864-64907 (Oct. 10, 2010) and established 24-hour and annual increment limits for Class I and Class II areas. *See* UEC, et al. comments on Proposed Fishlake National Forest Oil and Gas Leasing Analysis DEIS at 20-21 (April 12, 2012).

In the FEIS, there is no mention at all of the PM_{2.5} increment standards. In fact, the FEIS asserts that PM_{2.5} standards are “[n]ot established.” FEIS at 158. This is confusing, to say the least, given that the increment standards were adopted in 2010 and explicitly established increment limits for PM_{2.5} on an annual and 24-hour basis for both Class I and Class II areas. *See* Table below.

PM_{2.5} Increment Standards Adopted by EPA in 2010 (*see* 75 Fed. Reg. 64864, 64865)

Pollutant	Period	Class I increment (micrograms/cubic meter)	Class II increment (micrograms/cubic meter)
PM _{2.5}	24-hour	2	9
PM _{2.5}	Annual	1	4

In response to Appellants’ comments on this issue, the Forest Service responded, “Effects of the proposal on NAAQS, PM_{2.5} and PM₁₀ are disclosed in Appendix D & E.” FEIS at G-50. However, neither Appendix D nor Appendix E even mention PM_{2.5}, let alone analyze and assess impacts to PM_{2.5} increment standards.

The failure to analyze and assess impacts to PM_{2.5} increment standards is of concern given that the FEIS discloses both annual and 24-hour PM_{2.5} impacts will exceed the Class II increment standards. This is significant because for every other air pollutant of concern where there are applicable Class II increment standards, including for NO₂, SO₂, and PM₁₀, the FEIS indicates

that Class II increments will not be exceeded. As the FEIS claims, “Results predicted no potential compliance problems if the receptor was in a Class II airshed.” FEIS at S-14.

The FEIS’s claims are belied by the fact that the analysis discloses the 24-hour Class II increment of 9 micrograms per cubic meter will be exceeded during exploration activities (with concentrations reaching 12.4 micrograms per cubic meter, *see* FEIS at 164) and during production (with concentrations reaching 25.0 micrograms per cubic meter, *see* FEIS at 167), and that the annual Class II increment of 4 micrograms per cubic meter will be exceeded during production activities (with concentrations reaching 6.25 micrograms per cubic meter, *see* FEIS at 167). These discrepancies are all-the-more disturbing given that, while the ROD and FEIS prescribe some mitigation to address the impacts of exploration and production to Class I areas (for example, stipulation CSO-03), they specify no mitigation whatsoever to address impacts to Class II areas.

Although the FEIS projects impacts to PM_{2.5} concentrations, it does not analyze or assess what these projected concentrations mean in the context of the increment standards. This is a fatal flaw in the FEIS, especially given the Forest Service’s own acknowledgement of the importance of protecting increment air quality standards in and near the Fishlake National Forest. The Agency’s decision must therefore be reversed.

I. The Forest Service Failed to Ensure Protection of Air Quality Standards in Accordance with the Fishlake National Forest Land and Resource Management Plan

The Fishlake National Forest Land and Resource Management Plan (“LRMP”) requires the Forest Service to “Comply with state and federal air quality standards” and provides that the Agency must “Meet applicable state air quality standards” as a Standard and Guideline. LRMP at IV-49. Despite these substantive requirements, the Forest Service’s oil and gas leasing decision fails to ensure compliance with the LRMP because it allows applicable federal and state air quality standards to be exceeded. By failing to ensure compliance with the LRMP, the Forest Service violated the National Forest Management Act’s (“NFMA’s”) mandate that “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands...be consistent with the land management plans”). *See* 16 U.S.C. § 1604(i).

The exceedances of federal and state air quality standards are not in dispute. The Forest Service’s own FEIS discloses that that for exploration activities, Class I increment standards for annual NO₂ and 24-hour PM₁₀, as well as Class I and II increment standards for annual and 24-hour PM_{2.5}, will be exceeded at distances of 5 or more kilometers. *See* FEIS at 164. The FEIS also discloses that for development and production activities, Class I increment standards for 3-hour and annual SO₂ and annual NO₂, as well as Class I and II increment standards for annual and 24-hour PM₁₀ and PM_{2.5}, will be exceeded at distances of 10 or more kilometers. *See* FEIS at 167. All of these increment standards are not only set forth in federal regulation (*see* 40 C.F.R. § 52.21(c)), but they are also incorporated by reference in Utah’s air quality regulations at Utah Administrative Code R307-405-6, and therefore are applicable state and federal air quality standards.

In response to comments on this issue, the Forest Service did not deny that the LRMP requires compliance with state and federal air quality standards, but rather responded that, “The Forest Service analyzed and documented the effects of the proposal on air quality and will comply with all laws, rules and regulations.” FEIS at G-50—G-51. Apparently in support of this assertion, the Forest Service points to stipulation CSU-03. CSU-03 requires that if exploration projects are within 5 kilometers of a Class I area and if development and production projects are within 60 kilometers of a Class I area, “an air impact analysis would be required prior to any field activity to demonstrate that proposed operations and associated mitigating measures will not result in an exceedance of the air standards as outlined in the most recent FLAG [Federal Land Managers’ Air Group].” FEIS at H-31.

Although we appreciate the Forest Service’s establishment of CSU-03, unfortunately this stipulation falls short of ensuring compliance with air quality standards. Notably, the stipulation does not actually limit oil and gas development if Class I increment standards will be exceeded. Instead, it simply requires additional analysis and does not actually prohibit development that may exceed the increment standards. Furthermore, it does not protect the Class II increment standards for PM_{2.5}. As explained above, the FEIS discloses that Class II increments for both 24-hour and annual PM_{2.5} increments will be exceeded, although the FEIS does not disclose this impact in accordance with NEPA. CSU-03 contains no limit on development in or near Class II areas and thus does not ensure that the PM_{2.5} increments will be protected.

The Forest Service’s decision must be reversed. If the Agency decides to pursue another decision to authorize oil and gas leasing on the Fishlake National Forest, it must comply with the LRMP and NFMA and impose stipulations that clearly and definitely prohibit development that will not comply with federal and state air quality standards, including increment standards.

J. EIS and ROD treatment of Sage Grouse Inadequate Under NEPA, APA, ESA, as well as NFMA/LRMP/USFS Sage Grouse Policy.

1. Background on Species population trend and viability on this National forest

The EIS and supporting wildlife BE rely upon population monitoring data for sage grouse that dates from 2007 to 2011. There is no evidence of population data being gathered, presented, or used for sage grouse for the last two years. Nevertheless, the 5 year period of data collection is informative. The graph below is from page 45 of the final wildlife report/BE/BA:

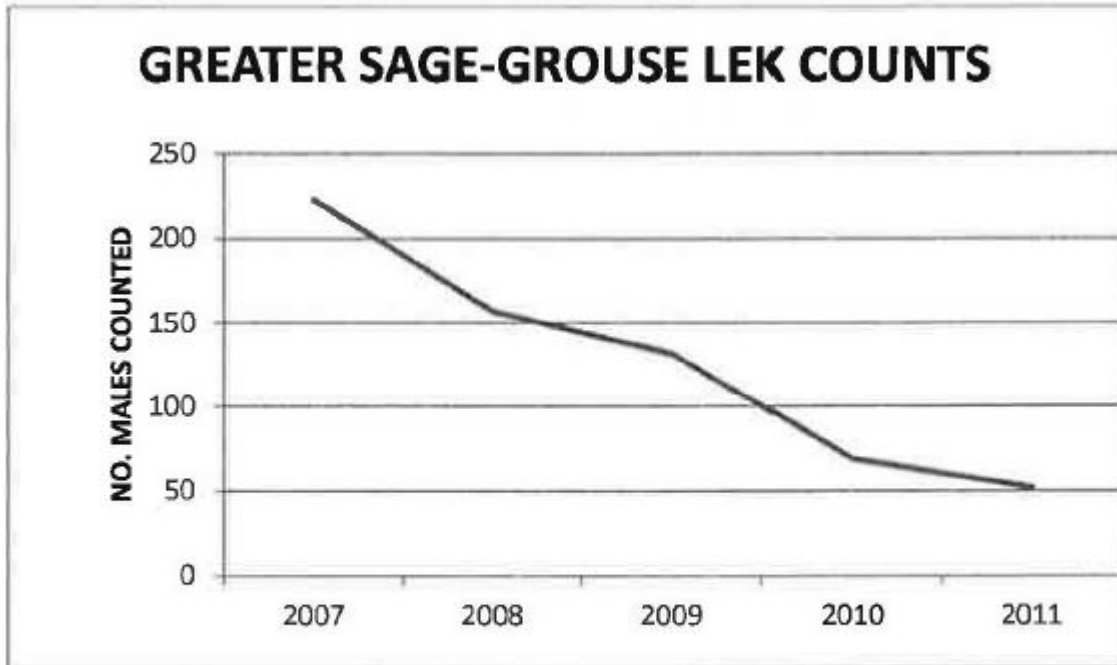


Figure 6-1. Trend in the number of male sage-grouse counted on leks on or within 2 miles of the Fishlake National Forest, 2007-2011 (UDWR, unpublished)

The population of 225 active leks in 2007 consistently shrank every year until it reached about 50 leks two years ago, the last year data was collected. Page 44 of this report notes that habitat factors specific to the Fishlake National Forest “make sage grouse on the forest particularly vulnerable to habitat loss and at least one model (Aldridge et al. 2008) predicted only a low to moderate probability of persistence if current trends continue.” In other words, if no action is taken the predicted continued viability of the population of sage grouse on the Forest is just low to moderate. This is an alarmingly serious status quo even for no action.

Among factors compounding such concerns is the newly emerged cumulative effect on this National Forest: West Nile virus (WNV) has arrived in this area of central Utah, and throughout the rest of the state of Utah. “West Nile virus is spread by mosquito, and is now found throughout Utah (Utah Bureau of Epidemiology 2010). In 2005 one sage-grouse mortality was attributed to the virus. The construction of ponds associated with oil and gas development could increase larval mosquito habitat and may facilitate the spread of WNV to sage-grouse populations on the forest.” Wildlife report, p. 45. As will be outlined below, the action approved (alternative C) allows for about 22% of presently occupied sage grouse habitat on the Forest to incur oil and gas developments of one form or another. More than 22% of occupied habitat will be open to such oil/gas developments if the exceptions contemplated in NSO-8 (alternately named NSO-9) for sage grouse leks are invoked. The exceptions include but are not limited to instances where Forest and state of Utah staff determine that vegetation or topography inside the 4 mile NSO buffers for leks would effectively screen proposed oil/gas facilities from breeding habitat, then they may be so permitted inside such 4 mile NSO lek buffers.

2. Policy background

Sage grouse is a USFS Sensitive species, and is a Candidate for listing under the ESA.

Forest Service Sensitive species policy is largely found in FSM 2600. Additional direction is provided at the regional office level. This policy requires, among other things, that a Biological Evaluation (BE) addressing sage grouse be finalized, approved, and included in the project record for this project. Policy states this may be combined with a BA or wildlife report.

It is additionally important to note that the Forest Service Intermountain region direction on greater sage grouse states that if there is any impact to sage grouse due to a proposed action, then the determination of “may adversely impact individuals of the species and is likely to result in a loss of viability in the planning area, and/or cause a trend toward Federal listing” is required. Greens Hollow plant and wildlife BE, pp. 32-33. PDF copy enclosed.

The ROD approved EIS alternative C. Appellants’ SMUA is reflected in alternative D. Alternative C allows 38,560 acres, or “22.1% of the total occupied sage grouse habitat on the FNF would be open to some form of oil and gas development.” EIS, p. 92. This is the occupied sage grouse habitat that is in some form of controlled surface use or CSU. The remaining 78% would receive the NSO stipulation for leks found on EIS p C-84 (alternately labeled NSO 08 and/or NSO 09). Disturbingly, there is an exemption put in bold type that creates a loophole in future leases that is designed to be big enough to fit oil and gas wells through it. Therefore the assumption of more than 22.1% of total occupied sage grouse habitat being potentially open to some form of oil and gas development is uncertain at best, and could well be understating the potential extent of development in occupied habitat. (After all, if that was not the case, than there was no point in adding the language in the stipulation’s exemption in the first place.) At the least there may be adverse impacts not accounted for in the EIS or supporting report. We believe in reality the evidence point to the fact that this alternative may or indeed is likely to result in adverse impacts to sage grouse and the viability of its population on the Forest. We argue the level of protection for sage grouse population and its viability represented here is not adequate to meet legal standards imposed by the LRMP and NFMA for Candidate and USFS Sensitive species, under the ESA, and under USFS Sensitive species policies. Under NEPA this represents the “straw that broke the camel’s back” triggering unacceptable and disclosed levels of significant impacts under NEPA concerning the viability of sage grouse, and its population on this Forest.

Appellants will argue and conclude that alternative D’s direction for NL in priority habitats (not yet leased-which is generally the status quo Forest-wide) such as sage grouse lek areas with 4 mile buffers is what is needed to be adopted – at the minimum- to work towards resolution of issues and arguments presented in this sage grouse-focused portion of this appeal.

3. ROD rationale and basis for selection of approved alternative C over another (e.g. Alt. D) is arbitrary and capricious and without basis; Failure to meet NEPA and APA standards (Potential ESA failure as well)

The basis, rationale and conclusions supporting the Supervisors' decision to select alternative C over others (such as alternative D) presented in the ROD constitutes arbitrary and capricious failure to meet legal standards imposed by the APA and NEPA. In regards to sage grouse protection afforded by alternative, this inaccuracy rises to the level of public deception. There is an unfortunate appearance of dishonesty. Appellants argue this while maintaining very high levels of respect for the Responsible Officials and IDT members. We refuse to believe deliberate duplicitous intent as we respect integrity of staff involved in the EIS, but the effective result of what has happened is unfortunate. After reading the ROD, for example, Kevin Mueller was embarrassed for some time that the alternative (D) based on comments he helped coordinate on behalf of several conservation organizations sadly afforded no protections to the Candidate and USFS Sensitive sage grouse, and therefore, the Forest Services proposed action number C had to be chosen because it afforded the greatest protection of all action alternatives to sage grouse.. But it turned out that the ROD's basis for selecting alternative C over (the environmental coalition's) alternative D because D didn't include even minimum requisite sage grouse protections ... was completely bogus – according to the Forest Service's own EIS and specialist report. When relatively complex actors are successfully misled it is sure that the average public is as well. From our review of the ROD it remains possible if not likely that the Responsible Officials who signed the ROD were, similarly, misled. Examples of claimed arbitrary and capricious basis of the decision to select alternative C over other action alternatives are provided below.

Sage grouse is central key issue in the section of the ROD titled “**Environmental Issues Considered.**” It starts, “In the spring of 2010, the US Fish and Wildlife Service found that greater sage-grouse were warranted for listing under the Endangered Species Act, but precluded due to other species having higher priority. We factored this finding into our decision and chose Alternative C, because it provides the most protection for sage-grouse and their habitat, while still allowing for oil and gas leasing opportunities.” ROD, p. 11. (Emphasis added.) Close reading of the several hundred page EIS and the supporting wildlife specialist report exposes this statement to be explicitly false and deceptive. Before diving into such details appellants will point to a key subsequent or second conclusion in the ROD that is substantively misleading and false.

In the section of the ROD titled “**Conclusion of Rationale for Our Decision**” the final important reason given for selecting alternative C over alternative D is as follows, “Alternative D did not place any protection on sage-grouse habitat. We did not feel this was adequate protection given the recent finding by U.S. Fish and Wildlife Service that greater sage-grouse were [sic] warranted but precluded from listing under the Endangered Species Act.” ROD, p. 16. (Emphasis added.)

Given alternative D is based on the SMUA alternative that appellants submitted (all appellants are leading conservation organizations), appellants and take particular offense to the ROD's justification to select EIS alternative C and not alternative D because alternative D provides no (let alone lesser) protection for this Candidate species that admittedly should be listed on the ESA. The ROD here arbitrarily and capriciously deceived and fooled almost everyone who has read it. It would seem that the responsible officials who signed their ROD might have been similarly misled.

The fact is that alternative D affords the greatest level of protection for sage grouse to a significant degree, compared to both of the other action alternatives. On pages 92 and 93 of the EIS one finds a notable set of conclusions concerning the different degrees of impacts to sage grouse among alternatives studied in detail. EIS table 3.5-10 summarizes conclusions adequately enough to expose the arbitrary and capricious nature of the ROD’s basis for selecting alternative C instead of action alternative D:

Table 3.5-10, Potential greater sage-grouse habitat subject to oil and gas activity

	ALTERNATIVE			
	A	B	C	D
Potential habitat open for development (acres)	0	189,877	35,860	0
% of total potential habitat subject to development	0%	100%	22%	0%

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Alternative C, which was selected in the ROD in no small part due to it having lesser impacts to sage grouse compared to alternative D, is listed as opening 22% of the sage grouse habitat to oil/gas development, while alternative D would open 0% to oil/gas development. The text above this table in the EIS provides detail and important context, “Under alternative C, nearly 78% of occupied sage-grouse habitat would be NSO to protect sage grouse and other resources. The remaining 38,560 acres, or 22.1%, of the total occupied sage-grouse habitat on the FNF would be open to some form of oil and gas development.” EIS, p. 92. (Emphasis added.) This is about occupied habitat, not just (implicitly unoccupied or not relevant) “potential” sage grouse habitat. The 22% in the chart is not just “potential habitat” but is occupied habitat opened up to oil gas development activities.

The EIS continues, “Alternative C would subject 22% of sage-grouse habitat to development and could possibly result in habitat loss similar to Alternative B (SLT&C) if all oil and gas activities were to occur in sage-grouse habitat open to development.” EIS, p. 93. (Emphasis added.) Alternative B is accompanied with an “adverse impacts” determination for sage grouse. *Given Alternative C could result in habitat loss similar to B, not only does this detail buried in the EIS show that the ROD’s selected alternative involves very large and measurable impacts to sage grouse, but they may be equivalent to that of the most destructive action alternative that explicitly results in illegal adverse impacts. Therefore the reality is that alternative C should be accompanied with an “adverse impacts” determination for the Candidate species sage grouse ... and it is a no-brainer that alternative D is in reality preferable on this issue.*

It is preferable because “Under Alternative D all sage-grouse habitat would be No Surface Occupancy (NSO).” EIS, p. 92. Therefore, “Alternative D will have no effect on sage-grouse populations or greater sage-grouse habitat. Under this alternative all sage-grouse habitat on the forest would be NSO and would not be subject to energy development.” EIS, p. 93. These facts are repeated on pages 46-47 of the supporting wildlife report that addresses BE/BA duties for

sage grouse.⁴ The ROD's basis and rationale for selecting alternative C and not alternative D because C has less impact to sage grouse than D fails to meet the APA's arbitrary and capricious standard. Under NEPA, this level of explicitly inaccurate deception rises to the level that this constitutes clear failure to meet its duties to ensure accuracy, honesty and transparency with the public in its Environmental Documents and supporting reports.

4. ROD claims of using best scientific recommendations arbitrary and capricious

This argument is somewhat related to the one above. After dishonestly claiming alternative C provides greater protection for sage grouse than alternative D and that this was a factor in selecting alternative C over D, page 10 of the ROD continues claiming, "The stipulations in Alternative c protect all greater sage grouse habitats with NSO and timing limitation stipulations. Sage grouse leks will have the NSO stipulation applied to a distance of 4 miles from the lek. This 4 mile buffer is in accordance with the most current scientific recommendation..." This was then implied to be the best science sourced from from the U.S. FWS sage grouse EIS process. In this sub-argument appellants argue that is not so.

The 4 mile NSO buffer for sage grouse leks is associated with that process. It comes from the science-based National Technical Team (NTT) recommendations, to which the ongoing PEIS for LRMPs and RMPs in Utah for sage grouse conservation is a response. This report is enclosed with this appeal, as appellants were not successful in locating it in the current project record. Significantly however, the NTT's recommendations for a 4 mile NSO buffer around leks complete with exemptions comes directly from the NTT's recommendations for PREVIOUSLY EXISTING oil and gas leases ... not future leasing. Specifically, it says:

"Do not allow new surface occupancy on federal leases within priority habitats, this includes winter concentration areas (Doherty et al. 2008, Carpenter et al. 2010) during any time of the year. Consider an exception:

⁴ Appellants observe an inconsistency in the EIS regarding NSO verses NL for alternative D. EIS chapter 2 notes more correctly that all habitats for Candidate species like sage grouse are assigned NL for all habitats in alternative D. The impacts analysis in chapter 3 turns alternative 4's NL into NSO for this species. This appeal point does not turn on this matter because the results of either effects analysis for this wildlife issue would be the same: no impacts to sage grouse with alternative D, be it NL or NSO. But this must be observed. Further, the Sean Kelly memo found in the project record dating to June 30 between DEIS and FEIS stages in this process shows Forest Service awareness of this issue. (See project record subfolder 05Resources/Wildlife). His third comment, which is a correction for the EIS, notes that the NSO for all sage grouse habitat for alternative 4 in the DEIS should be turned to NL or No Leasing in order to accurately reflect intent of alternative 4 for species with this Candidate status. It is clear IDT members as well as the authors of the EIS and wildlife report were aware that alternative C has much greater impacts to sage grouse than alternative D, be it with NSO or NL for all sage grouse habitat. The point in this section of the appeal is that the ROD arbitrarily and capriciously based its decision to select alternative C over alternative D based on false basis that the analysis showed greater protections for sage grouse under alternative C, but no protections for the Candidate species under alternative D.

- o If the lease is entirely within priority habitats, apply a 4-mile NSO around the lek, and limit permitted disturbances to 1 per section with no more than 3% surface disturbance in that section.
- o If the entire lease is within the 4-mile lek perimeter, limit permitted disturbances to 1 per section with no more than 3% surface disturbance in that section. Require any development to be placed at the most distal part of the lease from the lek, or, depending on topography and other habitat aspects, in an area that is less demonstrably harmful to sage-grouse.”

NTT report, enclosed.

For sage grouse lek areas not yet leased (as is the case for all leks of concern in this EIS), the NTT’s scientific recommendation is “no future leasing.” In the language of this EIS, that would be NL for all leks because there functionally is no existing leasing in such areas. This NTT recommendation for NL in sage grouse habitats such as within 4 miles of active leks is 100% consistent with appellants’ alternative D. It is not consistent with the Forest’s selected alternative C, which instead includes a significantly lower bar of NSO with explicit exemptions for new oil/gas facilities and infrastructure construction inside the 4 mile NSO buffer that are available to state of Utah staff and Forest-level USFS line officers, with no U.S. FWS involvement.

Furthermore, the NSO in alternative C does not include additional priority habitat components additionally specified for NL in the NTT recommendations for areas not yet leased for oil and gas. The Draft PEIS action alternatives B and C for LRMPs and RMPs in Utah for which a comment period is open until January 29th 2014, both include no leasing for all “priority habitats”, which includes but is not limited to the 4 mile NSO buffer for occupied leks. The ROD’s selected alternative (EIS alternative C) fails to meet both the NTT’s scientific recommendations as well as minimum bars of protection included in action alternatives B and C for the Fishlake N.F. in the draft PEIS currently out for comment. The ONLY action alternative that is consistent with the NTT’s recommendations (as well as the PEIS for LRMPs and RMPs in Utah) is alternative D because, as explained supra and in the footnote in the section above, it is the only action alternative that allows some oil and gas leasing on other parts of the Forest while assigning NL to areas including the “priority habitats” for sage grouse that have not already been leased.

Because the ROD inaccurately gets everything backwards or otherwise incorrect on this matter, and then uses those inaccuracies as the basis for choosing alternative C (over alternative D) it constitutes failure to meet the APA’s arbitrary and capricious standards. Because the ROD inaccurately leads the reader to think alternative C is the only action alternative consistent with these recommendations for sage grouse when the EIS and the record plainly demonstrate the opposite, this constitutes failure under NEPA to ensure the accuracy and scientific integrity of NEPA’s Environmental Documents (which includes the ROD and EIS).

5. Demonstration of failure to meet conservation (recovery) duties of ESA

Most immediately, the above involves failures to meet duties imposed by the APA and NEPA. However taken in a larger context this serves as a new compelling case-in-point illustrating a new way where reliance upon local NFMA/FLPMA-sourced and management plan-level direction over ESA authorities will be inadequate to ensure conservation (i.e. recovery) of sage grouse populations and habitats. To that extent and to the degree the challenged ROD's alternative C direction is relied upon or otherwise implemented, this will demonstrate failure to meet duties established by the ESA.

6. Failure to comply with LRMP and NFMA duties Regarding Sage Grouse

The Fishlake LRMP requires annual population monitoring and reporting for "T & E and Sensitive Animals." Fishlake LRMP, p. V-6. The Sensitive and Candidate sage grouse is one such animal. The LRMP Standard attached to this annual monitoring requirement is "no decrease attributed to management activities." Id. By failing to ensure the gathering and reporting of such annual monitoring data for sage grouse for each of the last two years and by failing to present and/or use that data for the last two years in this Forest wide action involving LRMP amendments ... the Forest has failed to meet this annual requirement for each of the last two years. This failure is particularly substantive and ripe in this case because the annual monitoring data for each of the prior 5 years showed significant annual population decreases; the population of about 51 active leks in 2011 was just 22% of what it was in 2007 (about 225 active leks).

The corresponding standard of "no decrease attributed to management activities" will, additionally, not be complied with due to approval of alternative C over other alternatives including action alternative D. This is not just due to the significant and steady population crash documented for the 5 year period before monitoring and reporting stopped two years ago. It is rational and reasonable to expect failure to comply with this standard because the population crash has been occurring as background to the approval of alternative C, which openly allows oil gas development to occur on 22% (or more when exceptions are invoked) of presently occupied sage grouse habitat, much of which is priority habitats under the framework of the sage grouse NTT.

Furthermore the developments allowed in this occupied habitat are known to result in adverse impacts on sage grouse populations, so says the EIS and supporting wildlife report for sage grouse. The wildlife report concedes, for example, on page 45 that the Forest is aware that WNV spread substantially and adversely impacts sage grouse populations, and that the construction of ponds associated with oil and gas developments (e.g. that allowed in the 22% of occupied habitat) is known to increase larval mosquito habitat and can facilitate spread of WNV to sage grouse populations across this Forest. The report additionally concedes the Forest is aware that the developments themselves, when done in occupied sage grouse habitat, more directly cause lower annual grouse survival and cause population declines. This monitoring plan standard requiring "no decrease attributed to management activities" for the sage grouse population on the Forest cannot be met with approval of the decision subject this appeal.

This monitoring plan standard is not the only component of the LRMP (and therefore NFMA) that would be violated if approval of alternative C is not reversed. Many other components and requirements in the LRMP for both the Dixie and Fishlake National Forests do not allow approval of practices that negatively affect sage grouse (as it is USFS Sensitive and is a Candidate species). Forest-wide management direction found on page IV-19 of the Fishlake LRMP directs, “Do not allow activities or practices that would negatively impact endangered, threatened, or sensitive plant or animal species.” Sections V and VI of the LRMP ROD are explicit in stating that such management direction and related duties included in chapter IV of the LRMP “are to be adopted and enforced.” It is arbitrary and capricious to add new LRMP direction via approval of alternative C that conflicts with and contradicts such legal commitments.

7. Failure to Comply with NFMA at 36 CFR 219.19, 219.26, and 219.27.

Lastly, as this appeal is filed under the authority of the 1980’s version of the NFMA implementing regulations, and as the LRMP amendments embodied in the challenged alternative C are under said 1980’s NFMA regulations, appellants observe that review of the challenged decision must be under said regulations. The alternative chosen in the challenged ROD fails to ensure continued maintenance of a viable population of sage grouse on the Forest (the planning area). The NFMA regulations include explicit population viability duties and regulatory standards that apply to sage grouse that this EIS and ROD fail to meet. 36 CFR 219.19 has a duty to “maintain viable populations of existing native and desired non-native vertebrate species in the planning area” that constitutes a regulatory standard the decision subject this appeal fails to meet. The selected alternative and challenged ROD similarly fail to comply with NFMA’s diversity standards established at 36 CFR 219.26 and corresponding management requirements imposed by 36 CFR 219.27.

K. Research Natural Areas (RNA): ROD Approval of Alternative C Results in Failure to comply with RNA Plan Direction, LRMP, NFMA

The Fishlake National Forest and its LRMP related direction include commitments for at least 4 RNAs:

- Bullion Canyon (Beaver RD)
- Upper Fish Creek (Beaver RD)
- Partridge Mountain (Fillmore RD – Canyon Mtns)
- Old Woman Cove (Richfield RD – roughly 6 miles SSW of Wildcat Knolls)

A google earth layer concerning these and the many other RNAs in the intermountain region is enclosed with this appeal. It was downloaded from <http://www.fs.fed.us/rmrs/research-natural-areas/> (no longer available)

The Fishlake LRMP has management direction that required decisions like the one subject this appeal make RNA NL or No Lease areas, aka withdrawn from mineral entry. LRMP direction to this effect is below:

“Management Prescription 10A (RNAs)

General Direction:

1. Withdraw from mineral entry in conformance with Section 204 of FLPMA of 1976 (PL 94-579)

2. Until the area is withdrawn, use No Surface Occupancy stipulations in any new leases covering the RNA's”

The action approved in the ROD did not assign NL or otherwise withdraw from mineral entry any RNA on the Forest. Instead the all are opened to leasing with a NSO stipulation. There is a significant difference, particularly in terms of private rights associated with access to such subsurface minerals. The decision to approve a decision in the challenged ROD that does not include NL or its legal equivalent, and to instead open to leasing all RNA with NSO stipulations, constitutes failure to comply with LRMP/NFMA direction for RNA preservation (not just protection), USFS policy mandating preservation of all RNA and to not open it to any form of mineral entry, and related management direction, policy and plans associated with each such RNA. This may be rectified by changing the decision approved to NL designation for all RNAs.

L. The FEIS Presentation of Alternative D fails to meet NEPA and APA Duties.

The FEIS fails to explain or justify eliminating all monitoring elements of the Sustainable Multiple Use Alternative that is said to be embodied in alternative D. Alternative D is supposed to include the following Monitoring Elements:

- Water quality and quantity upstream and downstream of mines.
- Air quality in mine vicinity.
- Number of leases issued and retired.
- Success of reclamation to native, natural condition.
- Number of miles and locations of oil, gas, and mining roads constructed and decommissioned.
- Areas of Forest available and not available for mineral operations.

Mon. 1 Identification and measurement of all effects to water flow and quality are required downstream of the site.

Mon. 2 Before any exploration, leasing and development activities related to mineral extraction begin, all historic properties within the area of potential effects are identified in cooperation with all consulting parties. Where eligible sites are found, measures are

developed and implemented to avoid any adverse effects of the undertaking, in cooperation with all consulting parties.

Mon. 3 Before any exploration, leasing and development activities related to mineral extraction can occur, all listed, candidate, Sensitive, Management Indicator and species of conservation concern, and vulnerable plant and animal species are identified within the affected area. Where such species are found, measures to avoid negative effects to local population/individuals are developed and implemented. Monitor effectiveness of such measures.

Mon. 4 The efficacy of special stipulations relative to wildlife are assessed. Once 10,00 acres subject to special stipulations are developed, whether and how the special stipulations are adequately protecting the wildlife and habitat the designed to protect is assessed within two years. If the assessment does not occur within the two years, the agency will not allow development on additional areas subject to special stipulations.

Not one of these monitoring elements crucial to the SMUA are found in alternative D.

The EIS similarly fails to provide any justification for striking any and all of these critical monitoring elements. This constitutes failures to meet duties imposed by NEPA and the APA

M. EIS is Inadequate under NEPA and LRMP/NFMA Regarding Insufficient Assessment of Environmental Consequences on Sensitive Plant Species, as well as Inadequate Protections for USFS Sensitive plants

Only five sensitive plant species (of a total of 23 Fishlake NF sensitive plant species) are covered by a Conservation Agreement (Table 3.11-2): *Pediocactus despainii*, *Townsendia aprica*, *Erigeron maguirei*, *Gilia caespitosa*, and *Cymopterus beckii*. Apparently only the known occupied habitat of these species is subject to NSO, though “knowledge about [other locations] of these species is still being gathered” (p. 151).

The FEIS gives examples of what surface oil and gas activity will be allowed in occupied habitat of sensitive plant species not covered by a Conservation Agreement (i.e., Tables 3.11-3 and 3.11-4).

For instance, Bicknell thelesperma (*Thelesperma subnudum* var. *alpinum*), apparently has 33% of its known locations within high development potential, and only one third of such locations are within a NSO (p. 152), and yet the FEIS lists it in Table 3.11-2 as a “Sensitive species with NSO Protection.” There are failures under NEPA and USFS Sensitive species policy and legal requirements that result from the remaining 66% of the known locations of this USFS Sensitive species that the decision subject this appeal opened up to leasing that permits oil/gas developments harming this species.

There are only eight known locations of Elsinore buckwheat (*Eriogonum batemanii* var. *ostlundii*) on the Fishlake, and seven of these sites fall within the high development potential area, and fifty percent of those locations are within surface occupancy areas (p. 152). The remaining fifty percent are in areas assigned leasing designations permitting various surface occupancy that may and will negatively impacts this USFS Sensitive plant species. There are failures under NEPA and USFS Sensitive species policy and legal requirements that result from this decision to open up to this 50% of occupied locations of this Sensitive species to leasing involving oil gas developments that would and will negatively affect this Sensitive species.

This situation is the same for several other USFS Sensitvie plant species, including:

- Sixty-four percent of Little Penstemon (*Penstemon parvus*) locations lie within moderate potential areas, apparently all of which are within surface occupancy areas.

- Eighty percent of Ward beardtongue (*Penstemon wardii*) are in the high development potential area and the majority (52%) of those locations are in surface occupancy areas.

- Sixty-six percent of Sevier townsendia (*Townsendia jonesii* var. *lutea*) known sites are in the high development potential area with 50% of those locations in surface occupancy areas.

The LRMP/NFMA and USFS Sensitive species policy prohibit allowing leasing that grants private rights to develop oil/gas resources that negatively harms or impacts any of these USFS Sensitive species. EIS analysis of the impacts is, similarly, inadequate under NEPA.

In terms of cumulative impacts to sensitive species lying within both within potential surface oil and gas activity areas and areas grazed and wallowed by exotic Rocky Mountain Goats, the FEIS does not mention that the Forest Service has not been tracking impacts the Rocky Mt Goats may already be having on these sensitive species. It almost certainly has not been tracking livestock impacts or the indirect livestock impacts of exotic pasture grasses to these species. The FEIS fails to describe the percent of oil and gas surface activity areas that will be grazed by livestock. (Only one allotment in all of the Fishlake is not grazed). And yet, the FEIS simply claims the Preferred Alternative (Alternative C) impacts (e.g., surface occupancy within known sensitive species habitat), “when added to the past, present and foreseeable future actions” leads to no cumulative effect (p. 154). This is not credible.

Further, the FEIS fails to indicate what monitoring will be done that would have the power to detect impacts to any of these sensitive species due to oil and gas surface activities.

Request for Relief

Due to the violation of the NEPA, NFMA, the Clean Air Act, the ESA, FOOGLRA, USFS policy and directives, the APA, appellants assert that this project cannot be considered legal. The appellants request relief in the form of a remand or a withdrawal of the decision.

Appellants look forward to opportunities to discuss options for resolution of this appeal and associated issues with the Supervisor and Forest Service staff in the course of this appeal process.