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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

December 7, 2004

Jack G. Troyer  
Regional Forester  
Intermountain Region  
U.S. Forest Service  
324 25th Street  
Ogden, UT 84401  
**VIA FACSIMILE (801-625-5359) AND FEDERAL EXPRESS**

**Re: Consent to oil and gas leasing in Uinta National Forest Diamond Fork and Tie Fork Roadless Areas**

Dear Mr. Troyer:

The Natural Resources Defense Council, The Wilderness Society, the Utah Chapter of the Sierra Club, the Wasatch Mountain Club, Trout Unlimited, and Black Diamond Equipment, Ltd. formally request that you withdraw your consent for the U.S. Bureau of Land Management ("BLM") to offer for sale 9 oil and gas lease parcels, UT1204-286 through UT1204-294, in Uinta National Forest. The proposed leasing would convey oil and gas development rights affecting sensitive environments in the Uinta National Forest. Almost 17,000 of the approximately 20,000 acres in these leases are located in the Diamond Fork (418016) and Tie Fork (418017) Roadless Areas. *See* Map of Uinta NF Lease Parcels (Exh. 1). Development on these leases poses numerous threats to the resources of these inventoried roadless areas ("IRAs"), including: Diamond Fork and Tie Fork Creeks and their populations of Bonneville cutthroat Trout; habitat for numerous threatened, endangered and sensitive species including the northern goshawk, Colorado River cutthroat trout, and Canada lynx; and popular areas for hiking, hunting and fishing.

Unfortunately, the Forest Service has not taken the steps that are legally required to ensure that any oil and gas development in this area is compatible with protection of these important National Forest resources. As set forth below, your consent to the proposed leasing violates the National Forest Management Act ("NFMA"); the 2003 Uinta National Forest Land and Resource Management Plan ("Forest Plan"); the Roadless Area Conservation Rule, 36 C.F.R. § 294.10 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*; and the National Historic Preservation Act ("NHPA") 16 U.S.C. § 470 *et seq.*. To avoid the necessity for federal court litigation to address these legal violations, we ask that you immediately withdraw your consent to the proposed leasing.

## I. THE DIAMOND FORK AND TIE FORK ROADLESS AREAS AND THEIR RESOURCES

### A. Diamond Fork Roadless Area

All of the Uinta National Forest lease parcels proposed for the December sale overlap the Diamond Fork Roadless Area. In fact, the vast majority of these parcels' acreage, almost 17,000 acres out of a total of just over 20,000 acres, are in this inventoried roadless area. The Diamond Fork Roadless Area provides valuable fisheries, recreational opportunities and wildlife habitat.

#### 1. Fisheries

The Diamond Fork Roadless Area borders Diamond Fork creek, which "sustains a portion of a Bonneville Cutthroat Trout (FS sensitive/SE [State Endangered]) metapopulation." U.S. Forest Serv., Uinta National Forest Revised 2003 Land and Resource Management Plan Final EIS ("Uinta NF EIS") at C-113. However, the Forest Service has recognized Diamond Fork Creek is not meeting its beneficial use as a cold water fishery due to flow alteration, riparian habitat alteration, and stream habitat alteration. *Id.* at C-16. These flow alterations and habitat degradation were "caused by the excess amounts of water that are diverted into the stream from Strawberry Reservoir. Sixth Water Creek, a tributary to Diamond Fork River [is] affected by this also." Utah Dep't of Environmental Quality, Jordan River/Utah Lake Watershed Management Unit Water Quality Assessment, Fall 2002, at 3 <<http://waterquality.utah.gov/documents/jordanriverfactsheetinternet.pdf>> (visited November 30, 2004).

However, the UDEQ recognized that Diamond Fork Creek and its tributaries could be rehabilitated to meet their beneficial use as cold water fisheries once a pipeline project to carry the water diversions from Strawberry Reservoir is complete. "When the Diamond Fork pipeline project is completed, water will be piped downstream to the Spanish Fork River" rather than diverted through Diamond Fork Creek. *Id.* at 4. "When this occurs, it is expected that these streams can be rehabilitated and support their aquatic life beneficial use designation." *Id.*

According to the Central Utah Water Conservancy District, that pipeline project is now complete: Central Utah Water Conservancy District, Diamond Fork Start-up Information, <<http://www.cuwcd.com/operations/diamondfork.htm>> (visited December 2, 2004). With the completion of the pipeline, there is nothing to prevent Diamond Fork Creek and its tributaries from meeting their beneficial uses as cold water fisheries. Indeed, the Utah Division of Wildlife Resources ("UDWR") states that the completion of the pipeline "will make this a premiere area for Utah's anglers." Utah Division of Wildlife Resources, Blue Ribbon Fisheries, Ribbon Fishery Considerations, <<http://www.wildlife.utah.gov/blueribbon/considered.pdf>> (visited December 2, 2004) (emphasis added). At present, the UDWR lists the Diamond Fork and its tributaries as a "Potential" Blue Ribbon Fishery that possesses each and every positive "special feature" considered in making a Blue Ribbon designation. *Id.* And the Forest Service recognizes that "[w]ith full implementation of the Diamond Fork System by the Central Utah Project, it is likely that the stream will eventually be considered a Class 2, or even a Class 1, fishery." Forest Plan at 5-55.

Last, despite Diamond Fork creek's current non-attainment conditions, the Forest Service has recognized the importance of streams in the Roadless Area, placing 1,210 acres of the IRA under Aquatic and Terrestrial Management Prescription 3.3. Uinta NF EIS at C-111. Management Prescription 3.3 reads in part:

### **3.3 Aquatic and Terrestrial Habitat**

These areas are managed for quality habitat to contribute toward maintenance and/or recovery of plant and animal species. Resources are maintained or improved to achieve desired conditions for habitats of threatened, endangered, sensitive, and Management Indicator Species (MIS). Most, but not all, of the critical deer and elk winter range is included within this prescription. Vegetation management, including timber harvest, may be used to address vegetation needs for wildlife habitat, watershed improvement, and/or forest health needs.

Forest Plan at 3-3. In contrast, the Forest Plan EIS does not apply a Mineral Leasing Management Prescription to a single acre of the Diamond Fork Roadless Area. Uinta NF EIS at C-111.

## **2. Recreation**

In addition to the outstanding angling opportunities provided by the potential Blue Ribbon Fisheries of Diamond Fork and Sixth Water Creeks, the Diamond Fork IRA offers other opportunities for year-round recreation. "The Fifth Water Hot Springs attracts many visitors. Bathers hike or bike to the springs year-round using the Fifth Water Trail." Uinta NF EIS at C-108. In addition to the springs, "[d]ispersed recreation is heavy in this area. There are several hiking, biking, horse and ATV trails in this area." *Id.* at C-109. The Forest Service has also recognized the importance of recreation in the Diamond Fork Management Area, comprised in large part by the Diamond Fork IRA: "The proximity of the [Diamond Fork] drainage to the Wasatch Front lends itself to being a favorite place for recreationists. The area is rural in nature and offers a multitude of recreational activities." Forest Plan at 5-55.

In addition, "[t]he area is heavily hunted during the general deer hunt." *Id.* Given these opportunities, the "professional judgment of local district staff employees and specialists" in the Forest Service is that the Diamond Fork Roadless Area provides "high" value summer camping and hunting opportunities in addition to "high" value year-round hiking, resulting in the prescription that 2,770 acres of the area be managed for "Dispersed Recreation." Uinta NF EIS at C-112 and 111.

## **3. Wildlife**

The Diamond Fork Roadless Area also contains habitat that is important for many species:

Nesting habitat for the golden eagle historically existed within this area and two historic golden eagle eyries are found here. The area is currently used as a year-round foraging area by golden eagles and a wintering foraging area by bald eagles. Diverse vegetation provides habitats for a variety of game and non-game

wildlife. This area contains both winter and summer range for mule deer and elk and a portion of the area is classified by UDWR as High Value Winter Range for deer. This roadless area provides corridor habitat for large mammals, including black bears and cougars, moving from or into other areas such as the Manti-La Sal National Forest to the south or the Ashley National Forest to the southeast. The area also provides potential corridor habitat for mammals such as wolverines and Canada lynx.

Uinta NF EIS at C-109. With respect to big game, the Forest Plan clarifies that the Diamond Fork “management area provides critical and high value deer and elk winter range at lower elevations in addition to summer and transitional big game range.” Forest Plan at 5-54. In addition, the area contains habitat for and known populations of numerous threatened, endangered, and sensitive species, which led the Forest Service to assign the Diamond Fork Roadless Area the highest value for these resources:

**c. TESC Species and Species Evaluated for Viability (SE):**

*i) Animals:* The bald eagle (threatened/SE), the sandhill crane (state sensitive/SE), the Townsend’s big-eared bat and Bonneville cutthroat trout (both FS sensitive/SE), and the broad-tailed hummingbird, Virginia’s warbler, black-throated gray warbler, and Brewer’s sparrow (all state sensitive/PIF priority/SE) are known to inhabit the area. This area also provides habitat for the northern goshawk, peregrine falcon, flammulated owl, and spotted bat (all FS sensitive/SE), the western yellow-billed cuckoo (candidate/SE), the northern three-toed woodpecker (FS sensitive/PIF priority/SE), the Lewis’ woodpecker (state sensitive/PIF priority/SE), and the western red bat, rubber boa, Sonoran mountain kingsnake, and Utah milk snake (all state sensitive/SE). This area also contains potential secondary habitat for the Canada lynx (threatened/SE).

**d. Fish Metapopulations:** This area contains tributaries to Diamond Fork Creek, which sustains a portion of a Bonneville Cutthroat Trout (FS sensitive/SE) metapopulation. The metapopulation may extend into Sixth Water, which is within the boundaries of the roadless area.

Uinta NF EIS at C-113. Regarding the Bonneville cutthroat trout populations, the Forest Service has committed in its Forest Plan to “[p]rotect and maintain 10 conservation populations, 12 persistence populations, and one metapopulation (consisting of six waterbodies in the Diamond Fork drainage) of Bonneville cutthroat trout.” Forest Plan at 2-7. This goal is reflected in the related Guideline: “Within sub-watersheds containing a Bonneville or Colorado River cutthroat trout recovery stream, avoid management activities that would significantly reduce aquatic and riparian habitat or significantly retard its rate of recovery.” *Id.* at 3-2.

#### 4. Heritage Resources

Last, the Diamond Fork Management Area:

“contains a wide variety of archaeological and historic sites that reflect a number of themes important to Utah County history. There are ancient American Indian

sites in the management area. The area is also a known travelway for historic Ute peoples (those using the area in the last 150 years).... One of the sites of a skirmish between Mormon Settlers and Utes occurred in Little Diamond Creek in 1866; part of that culturally significant site is on National Forest System lands.”

Forest Plan at 5-56.

**B. Tie Fork Roadless Area**

One of the lease parcels, UT1204-293, overlaps both the Diamond Fork and the Tie Fork Roadless Areas. The 19,650-acre Tie Fork IRA, which lies on the north side of Spanish Fork Canyon, also boasts numerous valuable resources that could be degraded and destroyed by oil and gas exploration and development.

Like the Diamond Fork Roadless Area, the Tie Fork IRA provides an important wildlife corridor for large mammals moving between adjoining IRAs and between other portions of the Uinta, Ashley and Manti-LaSal national forests. Uinta NF EIS at C-116. The Tie Fork IRA also provides good summer and winter range for both mule deer and elk. *Id.* As such, the Forest Service has rated both the wildlife and hunting values of this area as “high.” *Id.* at C-118. The Forest Plan EIS recognizes that the Tie Fork IRA contains both known populations of and habitat for numerous threatened, endangered, and sensitive flora and fauna.

**c. TESC Species and Species Evaluated for Viability (SE):**

*i) Animals:* This area contains known nest sites and provides foraging habitat for the northern goshawk (FS sensitive/SE) and it contains known Colorado River cutthroat trout (FS sensitive/SE) populations. The broad-tailed hummingbird and Brewer’s sparrow (both state sensitive/PIF priority/SE) are also known to inhabit the area. The area provides potential habitat for the western yellow-billed cuckoo (candidate/SE), the Virginia’s warbler and black-throated gray warbler (both state sensitive/PIF priority/SE), and the rubber boa (state sensitive/SE). This area also contains potential secondary habitat for the Canada lynx (threatened/SE).

*ii) Plants:* Pohl’s milkvetch (SE) and Ute ladies’-tresses (threatened/SE) are located here. GIS analysis shows that the area contains suitable habitat for clay phacelia (endangered/SE) and for Utah fescue, Book Cliffs twinpod, and Skyline ground daisy (all proposed FS sensitive/SE), but these species have not been located in the area.

**d. Fish Metapopulations:** Tie Fork Creek is a tributary to Soldier Creek, which contains a portion of a Bonneville cutthroat trout (FS sensitive/SE) metapopulation. Soldier Creek is in close proximity to the southern boundary of the area.

*Id.* at C-119. To protect these values, the majority of the IRA has been assigned “Aquatic and Terrestrial” management prescription 3.3. *Id.* at C-117; *supra* at 3. And like the Diamond Fork IRA, not a single acre of the Tie Fork Roadless Area has been designated with a Mineral Leasing Management Prescription. *Id.*

Like the Diamond Fork IRA, the Tie Fork IRA provides trails for hiking, mountain biking, and horseback riding. *Id.* at C-115. “A portion of the Center Trail lies within this area. This trail runs from Spanish Fork Canyon north to Halls Fork and is a part of the Great Western Trail.” *Id.* In addition, the Forest Service recognizes that “[t]he area has a high natural appearance except where some timber harvest has occurred in the West canyon area” and that there exist “opportunities for solitude and primitive recreation in portions of the area.” *Id.* at C-116.

## **II. THE PROPOSED LEASING WOULD CONVEY A “RIGHT TO EXPLORE, DEVELOP AND PRODUCE OIL AND GAS UNDER THE TERMS OF THE LEASE.”**

At the outset, it is important to clarify the commitment that the U.S. Forest Service makes in consenting to the proposed leasing – a commitment that necessitates a comprehensive environmental analysis of the likely post-leasing impacts of oil and gas development on these leaseholds before any leases are issued. It is well-established that the position of the Forest Service is that issuance of a federal oil and gas lease commits the leased lands to oil and gas exploration and development at the election of the leaseholder, with only limited exceptions. A federal oil and gas lease conveys to the lessee “the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold.” 43 C.F.R. § 3101.1-2. This right is qualified only by:

Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed.

*Id.* In other words, unless drilling would violate an existing lease stipulation or a specific nondiscretionary statutory restriction, the Forest Service believes that it must be permitted once a lease is issued subject only to certain “reasonable measures.” However, all such “reasonable measures” must be “consistent with lease rights granted” – *i.e.*, the right to fully develop and extract the leased resource. *Id.*; *see also* BLM Form 3100-11, Offer to Lease and Lease for Oil and Gas, at 1 and 2 § 6 (conveying “exclusive right to drill for, mine, extract, remove and dispose of” oil and gas, subject to “reasonable measures ... consistent with lease rights granted”).

Thus, the Forest Service’s position is that surface exploration and development generally must be allowed, if requested by the leaseholder, once the lease is issued.. *See* Oil and Gas Resources, 55 Fed. Reg. 10,423, 10,430 (Mar. 21, 1990) (preamble to final Forest Service leasing regulations, stating “[t]his Department has determined that leases that are issued for National Forest System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease”). Moreover, any stipulations to protect resources must be attached to the lease itself. BLM Land Use Planning Handbook, App. C at 16 (2000) (“A determination that lands are available for leasing represents a commitment to allow surface use under standard lease terms and conditions unless stipulations constraining development are attached to leases.”). Absent protective stipulations at the lease stage, the “reasonable measures” agencies may take to protect other resources from development are extremely limited. According to BLM regulations

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governing surface use rights conveyed with a lease, such reasonable measures are “consistent with lease rights granted” only if “they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.” 43 C.F.R. § 3101.1-2.

The significance of this basic development right conveyed through oil and gas leasing, and an agency’s limited ability to attach further conditions to that right, is well established in federal court case law. In *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), the United States Court of Appeals for the District of Columbia Circuit addressed a Forest Service decision to authorize oil and gas leasing in the Bridger-Teton National Forest. The court specifically rejected the Forest Service’s contention “that leasing is a discrete transaction which will not result in any physical or biological impacts.” *Id.* at 1413 (internal quotations and citation omitted). The D.C. Circuit explained:

Even assuming, *arguendo*, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose “mitigation” measures upon a lessee who pursues surface disturbing exploration and/or drilling activities. None of the stipulations expressly provides that the [Interior] Department or the Forest Service can prevent a lessee from conducting surface disturbing activities. Thus, ... the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated....

*Id.* at 1414 (footnote omitted, emphasis in original); *see also id.* at 1414 n.7 (rejecting “district court’s unsupported conclusion that the Secretary can preclude ‘any development’ under the lease” and concluding that “once the land is leased the Secretary cannot preclude surface disturbing activities, in either the exploratory or the development stage”).<sup>1</sup>

The Forest Service’s position that leasing constitutes an irreversible decision whether to allow development is further confirmed by the agency’s statements regarding proposed leasing in the context of approving applications to drill on existing leases of National Forest System lands. In addressing such drilling proposals, the Forest Service has steadfastly maintained that oil and gas lease rights severely constrain the agency’s options to limit or prohibit development on an existing lease in the interest of other values. For example, in a recent Decision Notice authorizing drilling on federal oil and gas leases in eastern Wyoming’s Thunder Basin National Grassland, the Forest Service asserted that its discretion to select the “no action” alternative of denying development was “severely constrained by the contractual rights of the [lease holder] to develop its mineral leases as granted by the United States.” U.S. Forest Serv., Decision Notice and Finding of No Significant Impact, Big Porcupine Coal Bed Methane Project (“Big Porcupine Decision”), at 18 (Apr. 23, 2004) <<http://www.fs.fed.us/r2/mbr/projects/mineral/adobe/pdf/>

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<sup>1</sup> The *Sierra Club* court’s statement addressed only leases issued without NSO stipulations. *See* 717 F.2d at 1412.

[newporcupine/Decision.Notice.pdf](#)> (visited November 29, 2004). The Forest Service explained:

Although the BLM can deny approval of a particular APD [Application for Permit to Drill], it cannot deny, in general, occupancy of the surface for the exploration and development of federal minerals that have been leased, unless they were leased with a no surface occupancy stipulation. An oil and gas lease grants the lessee the “right to drill for, extract, remove, and dispose of all oil and gas deposits” from the leased lands, subject to the terms and conditions of the respective leases (BLM Form 3100-11). The denial of the right to develop a valid lease would violate the lessee’s contractual rights, as well as result in the loss of federal royalties.

*Id.* at 19. Similarly, the Forest Service explained in a recent Environmental Assessment for another project on the Thunder Basin National Grassland that it could not consider an option to designate new “NSO,” or “no surface occupancy,” areas to protect big game winter ranges, parturition areas, and migration routes within an existing federal oil and gas lease:

Designation of an NSO area on the surface of a previously leased parcel would violate an operator’s legal right to develop its leases, in accordance with its contractual agreement with the federal government. An oil and gas lease grants the lessee the “right to drill for, extract, remove, and dispose of all oil and gas deposits” from the leased lands, subject to the terms and conditions of the respective leases (BLM, 1992).

U.S. Forest Serv., Environmental Assessment, Lance Oil & Gas Co., Thunderhead Project, at 2-44 (May 2004) (“Thunderhead EA”) <[http://www.fs.fed.us/r2/mbr/projects/mineral/adobepdf/lance\\_oil\\_gas\\_thunderhead.pdf](http://www.fs.fed.us/r2/mbr/projects/mineral/adobepdf/lance_oil_gas_thunderhead.pdf)> visited November 29, 2004.

Thus the Forest Service has made its position clear that complete denial of operations on an existing federal oil and gas lease is permissible only in the extraordinary situation where the impacts from such operations would be so severe as to violate a substantive environmental law, by, for example, threatening the extinction of wildlife species in violation of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). *See* Big Porcupine Decision at 19. This reflects 43 C.F.R. § 3101.1-2’s provision subjecting lease rights to “restrictions deriving from specific, nondiscretionary statutes.” However, numerous situations may arise where oil and gas development threatens environmental impacts that, although significant, would not violate any substantive statutory prohibition.

Understanding the commitment to development that occurs upon issuance of a federal oil and gas lease is critical because this commitment triggers the Forest Service’s duty to comply with federal environmental statutes before it consents to the issuance of leases. As the Forest Service itself stated in promulgating its oil and gas leasing regulations, the commitment to development that occurs upon lease issuance dictates “up-front NEPA compliance,” requiring “the Government to consider and disclose the reasonably foreseeable environmental impacts of operations that may be conducted on a lease when a decision is being made on lease issuance.”

55 Fed. Reg. at 10,433 (emphasis added). For the same reason, compliance with other federal environmental statutes must occur before the proposed leasing – not after. Accordingly, the Forest Service must evaluate the impacts of reasonably foreseeable oil and gas development before consenting to the proposed leasing.<sup>2</sup>

## **II. THE CONSENT TO LEASING VIOLATES THE NFMA AND THE UINTA NATIONAL FOREST PLAN WITH RESPECT TO MANAGEMENT INDICATOR SPECIES.**

The Forest Service’s consent to leasing violates the National Forest Management Act (“NFMA”) as well as the Uinta National Forest Plan. Both mandate the designation and population monitoring of “management indicator species” (“MIS”) to serve as bellwethers for the purpose of ascertaining the impact of forest development activities on wildlife populations. Here, however, the Forest Service has failed to implement the procedures required by the NFMA and the Forest Plan concerning MIS. These procedures are essential to ensure that oil and gas development that is irretrievably authorized at the point of lease issuance does not push Uinta National Forest wildlife populations past the threshold of viability. The Forest Service may not consent to the proposed leasing absent compliance with the MIS requirements imposed by the NFMA and the Forest Plan.

“The National Forest Management Act directs the Forest Service to develop Land and Resource Management Plans (‘Forest Plans’) by which to manage each National Forest under principles of ‘multiple use’ and ‘sustained yield.’” *Colorado Env’tl. Coalition v. Dombeck*, 185 F.3d 1162, 1167 (10<sup>th</sup> Cir. 1999) (quoting 16 U.S.C. § 1604). Among other things, Forest Plans must “provide for diversity of plant and animal communities based on the suitability and capability of

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<sup>2</sup> Notably, the Forest Service’s oil and gas regulations, as originally proposed, called for inclusion of a “standard stipulation” in every lease giving the agency broad post-leasing authority to preclude all lease operations if necessary to avoid environmental harms. *See* Oil and Gas Resources, 54 Fed. Reg. 3,326, 3,329, 3,333 (1989) (proposed rule § 228.103(c)). The Forest Service explained that such a stipulation “would have allowed the Forest Service to engage in ‘staged’ NEPA compliance,” which the agency described as an approach that

permits the Government to defer environmental analysis of lease operations when a decision is being made on issuing a lease provided that the Government retains both (1) the authority to preclude all surface disturbing activities pending the submission of site-specific operating proposals and (2) the authority to prevent all proposed operations if their environmental consequences are unacceptable.

*Id.* at 10,433. In its final regulations, the Forest Service decided to omit this “standard stipulation,” but recognized that the omission of such a stipulation would necessitate “comprehensive compliance with environmental statutes” at the leasing stage. *Id.* The Forest Service thus stated that “the final rule will not allow specific lands to be leased until after an appropriate environmental review indicates that development is possible somewhere on the lease (unless a no-surface-occupancy stipulation is used).” *Id.*

the specific land area in order to meet overall multiple-use objectives.” *Id.* at 1168 (quoting 16 U.S.C. § 1604(g)(3)(B)).

In order to fulfill this statutory mandate, the NFMA requires the Forest Service to adopt regulations “specifying guidelines” for the Forest Plans. *Id.* § 1604(g)(3), (h). Those regulations are codified at 36 C.F.R. part 219.<sup>3</sup> With respect to the “fish and wildlife resource,” they provide:

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. ... (1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species ... . These species shall be selected because their population changes are believed to indicate the effects of management activities. ... (6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined.

36 C.F.R. § 219.19(a) (emphases added). Thus, as the United States Court of Appeals for the Tenth Circuit has recently explained,

[I]n order to effectuate its MIS monitoring duties under the language of its regulations, the Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes.

*Utah Envtl. Congress v. Bosworth*, 372 F.3d 1219, 1227 (10<sup>th</sup> Cir. 2004) (footnotes omitted); *see also id.* at 1226 (“§ 219.19 requires the Forest Service to use actual, quantitative population data to effectuate its MIS monitoring obligations”). Before approving a site-specific project, the Forest Service must gather population data for MIS and analyze MIS population trends within the project area. *Utah Envtl. Congress*, 372 F.3d at 1224-25; *Sierra Club v. Martin*, 168 F.3d 1, 6 (11<sup>th</sup> Cir. 1999); *Inland Empire Public Lands v. United States Forest Service*, 88 F.3d 754, 760 n. 6 (9<sup>th</sup> Cir. 1996); *Colorado Wild v. U.S. Forest Service*, 299 F.Supp.2d 1184, 1188 (D. Colo. 2004); *Utah Environmental Council v. Zieroth*, 190 F.Supp.2d 1265, 1270 n.1 (D. Utah 2002) (noting “[t]he one issue that . . . [all] courts agree upon is that Section 219.19 applies at the site specific level for proposed projects”); *Forest Guardians v. United States Forest Serv.*, 180 F.Supp.2d 1273, 1280 and 1282 (D. N.M. 2001) (finding duty to monitor MIS applies “to site-specific projects” and “before rendering a decision on the project”). Once it has gathered this data and performed this trend analysis, the agency must use this data and analysis to ensure that

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<sup>3</sup> The Forest Service has undertaken recent efforts to revise its NFMA forest planning regulations. However, the regulations discussed in the text above were in effect when the Forest Service consented to the proposed leasing and therefore govern the challenged leasing decision. *See Utah Envtl. Congress v. Bosworth*, 372 F.3d 1219, 1221 n.1 (10<sup>th</sup> Cir. 2004).

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the proposed activity does not these MIS populations past the threshold of viability. 36 C.F.R. § 219.19(a).

The Uinta Forest Plan and EIS identified five MIS – the Bonneville and Colorado River cutthroat trout for aquatic communities, the Northern goshawk for aspen/conifer communities, the Three-toed woodpecker for conifer communities, and the American beaver for riparian communities. Uinta NF EIS at B-37. The Forest Plan EIS states that the Diamond Fork and Tie Fork Roadless Areas contain habitat and/or known populations of three of these five MIS. The Diamond Fork IRA “provides habitat for the northern goshawk” and “contains tributaries to Diamond Fork Creek, which sustains a portion of a Bonneville Cutthroat Trout (FS sensitive/SE) metapopulation. The metapopulation may extend into Sixth Water [creek], which is within the boundaries of the roadless area.” FEIS at C-113. The Tie Fork IRA “contains known nest sites and provides foraging habitat for the northern goshawk ... and it contains known Colorado River cutthroat trout ... populations.” *Id.* at C-119. In addition, “Tie Fork Creek is a tributary to Soldier Creek, which contains a portion of a Bonneville cutthroat trout (FS sensitive/SE) metapopulation.” *Id.*

Despite the presence of these MIS populations and habitat, the Forest Service’s decision consenting to lease these lands offers no indication that the Forest Service made any attempt to assess whether population and trend data have been collected for any of these species in the areas to be leased. *See* Letter from Jack G. Troyer, Regional Forester, to Ms. Sally Wisely, Utah State Director, Bureau of Land Management, authorizing leasing of 7 parcels (“Consent Letter”) (Exh. 2). Given this apparent lack of monitoring data that would allow the agency to estimate the impacts of oil and gas development on wildlife population trends in the areas to be leased, the Forest Service has violated its legal duty to “monitor population trends of the MIS in order to evaluate the effects of forest management activities on the MIS and the viability of desired fish and wildlife populations in the forest more generally.” *Utah Envtl. Congress*, 372 F.3d at 1226. Furthermore, given the absence of any discussion of these MIS, the agency’s consent to lease these lands does not “[p]rovide that habitat for species chosen under § 219.19 is maintained and improved to the degree consistent with multiple-use objectives established in the [Uinta National Forest] plan.” *Id.* at 1225 (quoting 36 C.F.R. § 219.27).

Absent compliance with the MIS requirements imposed by the NFMA regulations and the Uinta Forest Plan, the Forest Service may not lawfully consent to the challenged oil and gas leasing. As reflected in the Forest Service’s own discussion of the Thunderhead project quoted above, the Forest Service’s position is that it will lack discretion to impose stipulations in the interest of protecting MIS wildlife and their habitats once drilling is proposed on an existing lease. *See* Thunderhead EA at 2-44. In this regard, the Forest Service stated in promulgating its oil and gas leasing regulations that standard lease stipulations to protect surface resources were unnecessary because “[s]ite-specific resources and values warranting protection are readily identified prior to leasing so that appropriate stipulations can be developed.” 55 Fed. Reg. at 10,433 (emphasis added). In this case, however, wildlife resources warranting protection have not been “identified prior to leasing,” *id.*, because the Forest Service has not taken the basic steps necessary to determine what wildlife in the leased areas may require protection, or what stipulations may be appropriate. Pursuant to the NFMA regulations and the Forest Plan, the Forest Service may not authorize activities in these environments absent “actual, quantitative population data” on MIS

that are associated with these environments. *Utah Env'tl. Congress*, 372 F.3d at 1226; *see also id.* at 1228-30, 1232 (finding Forest Service’s authorization of timber sale “arbitrary and capricious” because agency “has not complied with its duties under Forest Service regulations to monitor several of the relevant management indicator species”). For this reason alone, the Forest Service’s consent to leasing is invalid and must be withdrawn.

**III. THE CONSENT TO LEASING VIOLATES THE NFMA AND THE UINTA NATIONAL FOREST PLAN BECAUSE IT IS INCONSISTENT WITH THE 2003 REVISED UINTA FOREST PLAN.**

The proposed leases also violate the NFMA’s consistency requirement. Under the NFMA, all permits, contracts “and other instruments for the use and occupancy of National Forest System lands” such as oil and gas leases “shall be consistent” with Forest Plans. 16 U.S.C. § 1604(i). The Uinta Forest Plan reiterates this requirement and further states that “whether or not a project is consistent with the Forest Plan is based on whether or not the project complies with all applicable standards.” Forest Plan at 1-3.

These leases are not consistent with and do not conform to the Forest Plan. Uinta Forest Plan Mineral and Energy Resource Management Standard M&E-13 states: “For all new leasable mineral operations, leasing stipulations will be applied according to the Recreation Opportunity Spectrum (ROS) class of the area as listed in Table 3-1, and any specific resource areas as listed in Table 3-2. If there is a conflict between the two tables, the most restrictive stipulation will apply.” Uinta Forest Plan at 3-6 (emphasis added). Table 3-2, reads:

**Table 3-2. Leasing Stipulations by Resource Area**

Resource Area	Stipulation
Watershed resources	
Geologic hazards/unstable soils	NSO
Steep slopes >35 percent	NSO
Riparian/wetlands >40 acres	NSO
Wildlife and Plant Species	
Greater sage grouse breeding habitat in the Vernon and Strawberry Reservoir Management Areas	TL
Critical elk winter range	TL
Critical deer winter range	TL
Critical elk calving range	TL
Critical elk year-long range	TL
Lynx Analysis Units	TL
Presence of threatened or endangered species	LN
Presence of a Forest Service sensitive species	CSU
Research Natural Areas (RNAs)	NSO
Developed campgrounds	NSO
Visual resources	
Preservation (subject to valid existing rights)	NL
Retention and Partial Retention	CSU

Modification	SLT
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*Id.* at 3-6.

None of these stipulations from the 2003 Revised Uinta Forest Plan have been incorporated into the lease notice for the parcels at issue, as required by Forest Plan Standard M&E-13 and the NFMA. For example, with respect to northern goshawk and Bonneville Cutthroat trout, MIS found in both the Diamond Fork and Tie Fork Roadless Areas, the EIS states under the heading “Effects of Wildlife Management on Leasable Minerals”:

Examples of CSU or TL stipulations that may be applied under all alternatives would be restricting access 30 to 180 acres around northern goshawk nests and complete avoidance of greater sage grouse leks. The same stipulations (though primarily TL) would apply to the habitat of fish species such as Bonneville and Colorado River cutthroat trout.

Uinta NF EIS at 115-116. Yet these CSU and TL stipulations have not been applied to the leases at issue. Instead, as stated in the Consent Letter, the Forest Service has entirely ignored the 2003 Revised Plan’s goals, standards, guidelines and stipulations, and instead has relied upon stipulations contained in the 1997 Western Uinta Basin Oil and Gas Leasing EIS. *See* Exh. 2; Bureau of Land Management, Utah State Office, December 10, 2004 Oil and Gas Lease Sale, Final Sale List, at <http://www.ut.blm.gov/MineralsAdjudication/DECEMBER%202004/Dec.04.FINAL%20LIST.htm> (visited November 28, 2004) (demonstrating that stipulations on leases are from the 1997 Western Uinta Basin Oil and Gas Leasing EIS rather than the 2003 Revised Uinta Forest Plan). The Forest Service’s failure to apply lease stipulations in a manner consistent with the 2003 Forest Plan thus violates NFMA.

**IV. THE CONSENT TO LEASING VIOLATES THE ROADLESS AREA CONSERVATION RULE.**

The proposed leasing also violates the Roadless Area Conservation Rule, 36 C.F.R. §§ 294.10 *et seq.* Of the just over 20,000 acres of National Forest land proposed for leasing, almost 17,000 acres are within inventoried roadless areas (“IRAs”). Any road development in these areas would violate the Roadless Area Conservation Rule. That rule prohibits road construction for oil and gas development in inventoried roadless areas except in connection with leases already in existence as of the effective date of the rule, or in connection with the renewal or extension of “a mineral lease on lands that are under lease by the Secretary of the Interior as of January 12, 2001.” 36 C.F.R. § 294.12(b)(7). In other words, the Roadless Area Conservation Rule permits road construction for oil and gas development only on lands that were already under lease when the rule became effective. *See* Special Areas, Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,256 (2001) (preamble to Roadless Area Conservation Rule explaining application to roads needed for mineral leasing). Yet here the Forest Service apparently seeks to convey surface development rights – including the right to build roads – in inventoried roadless areas that were not under lease when the rule became effective.

In consenting to this leasing, the Forest Service may be relying on the decision of the Wyoming district court in *Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), which purported to enjoin the application of the Roadless Area Conservation Rule nationwide. First, the Forest Service may disregard that ruling outside of Wyoming. Second, as the Forest Service well knows, that ruling is now on appeal to the U.S. Court of Appeals for the Tenth Circuit. The proposed leasing authorizes surface development in inventoried roadless areas that would be illegal if the appeal is successful. Stay proceedings in the Tenth Circuit may be required to prevent such leasing if the Forest Service insists on moving forward. In the alternative, the Forest Service could avoid conflict between the proposed leasing and the Roadless Area Conservation by subjecting all inventoried roadless area leases to a NSO stipulation.

## V. THE CONSENT TO LEASING VIOLATES THE ESA.

The Forest Service has also failure to consider the impacts of post-leasing development on federal threatened and endangered species. This failure violates the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2). Section 7(a)(2) of the ESA provides that, “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). Courts have recognized that oil and gas leases are federal actions that may affect listed species or critical habitat, and that they therefore may not proceed without completion of the consultation process. *See* 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Conner v. Burford*, 848 F.2d 1441, 1455 (9<sup>th</sup> Cir. 1988) (BLM could not issue oil and gas leases until FWS analyzed consequences of all stages of leasing plan in Biological Opinion).

While it is true that the court in *Conner* addressed a Biological Opinion rather than a Biological Assessment, the fundamental teaching of that case is true in either situation: the relevant agency action for purposes of the ESA “**entails not only leasing but leasing and all post-leasing activities through production and abandonment.**” 848 F.2d at 1453. Prior to selling oil and gas leases, the ESA requires the agency to assess the potential effects of the action on threatened or endangered species. 50 C.F.R. § 402.12(a).

*Montana Wilderness Assoc. v. Fry*, 310 F.Supp.2d 1127, 1449-50 (D. Mont. 2004) (emphasis in original).

According to the Uinta EIS, numerous endangered and threatened species inhabit the lands targeted for leasing. “The bald eagle (threatened/SE)[is] known to inhabit the [Diamond Fork Roadless] area.” Uinta NF EIS at C-113. In addition, the area “contains potential secondary habitat for the Canada lynx (threatened/SE).” *Id.* The Tie Fork Roadless Area likewise “contains potential secondary habitat for the Canada lynx (threatened/SE).” *Id.* at C-119. In addition, the Tie Fork Roadless Area contains known populations or habitat for two listed plants: “Ute ladies’-tresses (threatened/SE) are located here. GIS analysis shows that the area contains suitable habitat for clay phacelia (endangered/SE).” *Id.* The population of Ute ladies’-tresses is particularly important. According to the Forest Plan “[t]he Diamond Fork/Spanish Fork River

population [of Ute-ladies' tresses] is the largest along the Wasatch Front, and one of the largest, most concentrated occurrences throughout the species' range." Forest Plan at 5-52.

The Forest Service's letter of consent for the proposed leasing does not offer any indication that the Forest Service has consulted with the U.S. Fish and Wildlife Service regarding the proposed leases' effects on these listed species. Absent such consultation, the Forest Service's consent to leasing violates the ESA. This letter provides the statutorily required 60 days notice of the Forest Service's ESA violation. See 16 U.S.C. § 1540(g)(2).

## **VI. THE CONSENT TO LEASING VIOLATES THE NHPA.**

The National Historic Preservation Act ("NHPA") requires, prior to any federal undertaking, that a federal agency "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" and "afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking." 16 U.S.C. § 470f. The NHPA requires a federal agency to make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of an "undertaking" on any eligible historic properties found, 36 C.F.R. §§ 800.4, 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5, 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9. Additional NHPA provisions apply to Indian tribes: "In carrying out its responsibilities under Section 106, a Federal Agency shall consult with any Indian Tribe ... that attaches religious and cultural significance to properties described in Subparagraph (A)." 16 U.S.C. § 470a(d)(6)(B).

Once a historic property has been identified, the agency must "[s]eek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." 36 C.F.R. § 800.4(a)(3). Consulting parties are defined as including Indian tribes, 36 C.F.R. § 800.2(c)(2), and the public. 36 C.F.R. § 880.2(d) ("The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties....").

The NHPA is a procedural statute that has been characterized as a "stop, look and listen" provision. *Muckleshoot Indian Tribe v. U.S. Forest Svc.*, 177 F.3d 800, 805 (9<sup>th</sup> Cir. 1999). In order to effectuate its purposes, an agency must comply with the NHPA's provisions before selling oil and gas leases. *Montana Wilderness Assoc.*, 310 F.Supp.2d at 1153 ("The plain language of NHPA requires consultation once an agency embarks on an undertaking. The sale of oil and gas leases is an undertaking. I am therefore granting Plaintiffs' motion for summary judgment that BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the leases herein.").

In the Diamond Fork Roadless Area, only 580 acres of the area's 35,230 acres, or less than 2% of the area, has been surveyed for heritage resources. Uinta NF EIS at C-110. Even in that small

percentage, a historic water diversion site has been located, which resulted in the Diamond Fork Roadless Area being given the highest rating for “Heritage resources.” *Id.* at C-113. In addition, the EIS recognizes that there exists “potential for locating homesteading sites, livestock herding sites, and American Indian campsites in this area.” *Id.* at C-110.

The situation is similar in the Tie Fork Roadless Area, where only 850 acres of the total 19,650, or 4.3 %, has been inventoried for cultural resources. *Id.* at C-116. As in the Diamond Fork, the Tie Fork Roadless Area has been found to contain numerous cultural resources in the small portion that has been surveyed, including “16 known historic charcoal preparation, logging, herding and American Indian campsites.” *Id.* at C-119. And as with the Diamond Fork, the EIS recognizes that there exists a chance of finding more of these sites and gives the area the highest rating for heritage resources based on those already found. *Id.* at C-116 and 119.

The Forest Service’s Consent letters do not indicate that the agency made the requisite reasonable and good faith effort to identify historic properties in the vast majority of either the Diamond Fork or Tie Fork Roadless Areas, 36 C.F.R. § 800.4(b); that it determined whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; that it assessed the effects of the proposed oil and gas leasing on any eligible historic properties found, 36 C.F.R. §§ 800.4, 800.5, 800.9(a); that it determined whether those effects would be adverse, 36 C.F.R. §§ 800.5, 800.9(b); or that it has avoided or mitigated any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9. Nor do the letters indicate that the Forest Service has consulted with either the public or Native American tribes regarding the potential effects that oil and gas leasing and associated exploration and development could have on cultural resources that have been located to date. 16 U.S.C. § 470a(d)(6)(B); 36 C.F.R. § 800.4(a)(3). Absent such identification and consultation, the Forest Service’s consent to leasing violates the NHPA.

## **VII. THE CONSENT TO LEASING VIOLATES NEPA.**

Last, the Forest Service’s consent to the proposed leasing violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* NEPA requires federal agencies to take a “hard look” at the environmental consequences of their actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). In the oil and gas leasing context, this means that the Forest Service must assess the environmental impacts of reasonably foreseeable post-leasing oil and gas development before any leases are issued. *See Pennaco Energy, Inc. v. U.S. Department of the Interior*, 377 F.3d 1147 (10<sup>th</sup> Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9<sup>th</sup> Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d at 1409.

### **A. The Forest Service Has Ignored The 2003 Revised Uinta Forest Plan in Consenting to Lease.**

As discussed *supra* at 12-13, the Forest Service relied only the 1997 Western Uinta Basin Oil and Gas Leasing EIS (“Western EIS”), published 6 years prior to the 2003 Forest Plan and EIS that now controls decisions on the Uinta National Forest, to authorize these leases. *See* Exh. 2. The agency’s failed to consider the direction, standards and guidelines in the 2003 Revised Uinta Forest Plan in authorizing this leasing. *Supra* at 12-13. This failure resulted in a further failure to attach the protective stipulations to these leases mandated in the 2003 Revised Forest Plan, the

operative document that controls activities on the Uinta National Forest. The agency's reliance on the 1997 Western EIS that pre-dates the current Forest Plan by six years fails to satisfy NEPA's "hard look" requirement in connection with the proposed leasing.<sup>4</sup>

**B. The 2003 Revised Uinta Forest Plan Mandates Further NEPA Analysis Prior to Leasing.**

Even had the Forest Service had attempted to rely on the 2003 Revised Uinta Forest Plan for its consent, that still would not provide the requisite hard look either. The Forest Plan EIS explicitly and repeatedly recognized that its forest-wide analysis is not sufficient to provide the basis for oil and gas leasing, and that site-specific leasing decisions would require further site-specific analysis. The EIS states that "before leasing decisions ... could be made, a more detailed site-specific analysis must be conducted." Uinta NF EIS at 3-102 (emphasis added).<sup>5</sup> The EIS repeatedly states that these site-specific analyses are necessary so that the agency can apply additional stipulations to the leases for the purpose of protecting resources considered and made priorities in the revised forest plan:

- Site-specific analysis conducted for leasing decisions under Alternatives B, C, D, E, G, and H would incorporate standards and guidelines that met the needs for resource impact mitigation. *Id.* at 3-103.
- Leasing decisions associated with the high and moderate potential areas may require some level of modification to address resource concerns and apply resource management direction as specified in the revised Forest Plan. *Id.* at 3-103
- Alternative H includes opportunities that will allow mineral activities to occur, especially areas for leasing of oil and gas and other leasables. More site-specific analysis by the Forest line officer will be required at the time proposals are received. *Id.* at 3-107 (emphasis added).

This requirement is reiterated in the Forest Plan: "However, before any project level decisions are made, additional environmental analysis and site-specific disclosure of environmental effects are required according to NEPA procedures." Forest Plan at 1-4.

As these excerpts demonstrate, the Forest Service explicitly recognized that site-specific analyses were necessary prior to leasing in order to study what additional stipulations protective of wildlife, including threatened and endangered species, native cutthroat trout, and big game,

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<sup>4</sup> Although the following analysis focuses on the Forest Service's failure to comply with NEPA, these failures are equally attributable to the Bureau of Land Management, which must make its own discretionary determination whether to lease in the Uinta National Forest, and, if so, under what conditions. *See* 43 C.F.R. § 3101.7-2(a), (b).

<sup>5</sup> This applies to, among others, Alternative H, which the Forest Service ultimately adopted as its "Revised Plan for the Uinta NF." *See* Record of Decision for the Final Environmental Impact Statement and Revised Land and Resource Management Plan (Revised Plan), Uinta National Forest ("ROD") at ROD-3.

should be applied in order to effectuate the Forest Plan's goals, objectives, standards and guidelines providing for the protection of these species and their habitats.

But the Forest Service also recognized in its EIS that even these recent standards and guidelines incorporated into the 2003 Revised Plan might have to be modified to protect the forest's resources:

- For Alternatives B, C, D, E, G, and H, the stipulations identified in the standards and guidelines in the revised Forest Plan would be subject to additional detailed analysis for site-specific leasing decisions. *Id.* at 3-104 (emphasis added).
- New research has furthered knowledge about wildlife requirements, such as habitat needs for species survival. As a result, the TL stipulation for many wildlife species would change and may require site-specific timing and distance restrictions to address wildlife concerns. This would occur on a case-by-case basis depending on the plant and animal species affected. *Id.* at 3-107 (emphasis added).

These site-specific analyses are especially important here for two reasons.

**C. The 2003 Revised Uinta Forest Plan Mandates Never Considered Leasing In The Diamond Fork and Tie Fork Roadless Areas Or The Extent of The Proposed Leasing Anywhere In The Forest.**

First, the 2003 Forest Plan EIS did not analyze the effects of any mineral leasing development in either the Diamond Fork or Tie Fork Roadless Areas, assigning no acreage to Mineral Development in either area. Uinta NF EIS at C-111 and C-117

Second, the 2003 Forest Plan EIS never analyzed the vast acreage in the Uinta National Forest that BLM is both proposing to lease in the upcoming December 2004 sale and has leased in the September 2004 sale. According to the 2003 Forest Plan EIS, the reasonably foreseeable development ("RFD") scenario for oil and gas leasing predicts that only one well would be drilled "sometime during the next decade." Uinta NF EIS at 3-106. This RFD is the same as that included in the 1997 Western Uinta Basin Oil and Gas EIS, which projected that a total of 6.9 acres of land, including only 4.92 acres of road construction, will be disturbed on the Uinta National Forest pursuant to oil and gas development. Draft Western Uinta Basin Oil and Gas EIS at 4-51 to 52. Based on this projection of a single well disturbing only 6.9 acres of the Forest, the EIS justifiably concluded: "At present, along with historical interest in oil and gas on the Forest, no cumulative effects are anticipated over the next decade as a result of decisions made in the revised Forest Plan." Uinta NF EIS at 3-116

That conclusion is no longer valid. BLM in September of this year leased over 119,000 contiguous acres of the Forest, most in Roadless Areas, immediately adjacent to the over 20,000 more acres contained in these leases proposed for the upcoming December sale. Exh. 1. The unanalyzed effects of this enormous increase in oil and gas leasing on the forest threatens numerous resources in the Diamond Fork and Tie Fork Roadless Areas and requires a comprehensive NEPA analysis before it may go forward.

**D. The Forest Service Must Take A Hard Look At The Effects The Proposed Leasing Will Have On Important Resources.**

**1. Wildlife**

Exploration and development of these leaseholds threatens to degrade and fragment wildlife habitat in these areas, but the Forest Service has failed to take a “hard look” at the wildlife impacts of the proposed leasing. The Forest Service has never addressed the consequences of the proposed leasing for endangered, threatened, MIS, and big game species in the Diamond Fork and Tie Fork Roadless Areas. The agency has not even attempted to determine the likely impacts that these projected wells and attendant roads, drill pads, and human activity will have on the Colorado River and Bonneville cutthroat trout, northern goshawk, or other species. The agency’s consent to lease makes no effort to examine the impacts of oil and gas drilling and extraction that will result directly from the proposed leasing. Exh. 2. As a result of this failure, the leases do not contain NSO, CSU, or TL stipulations designated by the 2003 Forest Plan to protect wildlife. *Supra* at 12-13. Furthermore, the agency has failed to consider, as stated in the Forest Plan EIS, whether modifications to these Forest Plan stipulations or additional stipulations are necessary to avoid harms to wildlife in light of oil and gas development.

**2. Recreation**

The Forest Service has likewise failed to consider the effects of lease exploration and development on the “multitude of recreational activities” that people enjoy on these lands. Forest Plan at 5-55. For example, oil and gas development in the Diamond Fork Roadless Area puts the Potential Blue Ribbon Fisheries of Diamond Fork Creek at risk. “Activities such as . . . development projects, road construction . . . and . . . oil and gas exploration have the potential to negatively impact” water quality “by altering the rates of runoff, surface erosion, and sediment delivery to the streams.” Uinta NF EIS at C-16. “Direct affects [of oil and gas development] to aquatic and semi-aquatic species include the potential loss or displacement of individuals or habitats of species from construction activities. Indirect effects from ground disturbing activities are water quality problems as a result of sediment entering rivers and streams. . . .” *Id.* at 3-231. Oil and gas development would only worsen the condition of the Diamond Fork Creek and its tributaries, which only now that the Diamond Fork project is completed have a chance to recover.

Nor has the Forest Service assessed effects on hunting and game in the area. The Forest Plan recognizes that the Diamond Fork area contains “critical and high value deer and elk winter range at lower elevations in addition to summer and transitional big game range,” Forest Plan at 5-54, and that “[t]he area is heavily hunted during the general deer hunt.” *Id.* at 5-55. The Forest Service’s failure to consider the effects that oil and gas development would have on that “critical” range and extensive hunting is compounded by its failure to attach a standard timing limitation (TL) stipulation from the 2003 Plan to protect UDWR-designated “High Value Winter Range for deer.” Uinta NF EIS at C-109.

The Forest Service also failed to consider the effects that oil and gas development will have on

hikers and cyclists in this area, including the “many visitors” who hike and bike to the Fifth Water Hot Springs year-round. *Id.* at C-108.

### 3. Water Quality

Last, the Forest Service’s failure to conduct a site-specific analysis means it has not considered whether lease exploration and development could be accomplished without violating Utah’s water quality standards. “Under the Clean Water Act, all federal agencies must comply with state water quality standards, including a state’s antidegradation policy.” 33 U.S.C. § 1323(a).” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9<sup>th</sup> Cir. 1998). The federal antidegradation policy requires that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12.

The State of Utah has designated that the beneficial use of Diamond Fork Creek is “Class 3A - Protected for cold water species of game fish and other cold water aquatic life, including the necessary aquatic organisms in their food chain.” Utah Dep’t of Environmental Quality, Division of Water Quality, Jordan River/Utah Lake Watershed Water Quality <[http://waterquality.utah.gov/watersheds/jordan/water\\_quality.htm](http://waterquality.utah.gov/watersheds/jordan/water_quality.htm)> and <[http://waterquality.utah.gov/resources/benifical\\_use\\_table.htm#3A](http://waterquality.utah.gov/resources/benifical_use_table.htm#3A)> (visited December 1, 2004). This beneficial use requires that water quality standards for numerous pollutants not be exceeded.

Furthermore, Diamond Fork and Sixth Water creeks are designated 303(d) streams. Uinta NF EIS at C-113. According to the State of Utah, Sixth Water creek’s designation is due to “flow alteration, riparian habitat alteration, [and] stream habitat alteration.” Utah Dep’t of Environmental Quality, Division of Water Quality, Jordan River/Utah Lake Watershed Water Quality <[http://waterquality.utah.gov/watersheds/jordan/water\\_quality.htm](http://waterquality.utah.gov/watersheds/jordan/water_quality.htm)> (visited December 1, 2004).

The Forest Service knows that oil and gas exploration and development poses threats to water quality through sedimentation and habitat degradation. “Potential adverse effects of oil and gas exploration on the soil resources include accelerated erosion and mass wasting, gully development, decreased slope stability, and long-term loss of site productivity....” Uinta NF EIS at 3-34; *see also id.* at 3-18 (“Sediment from [unsurfaced road] erosion, however, often affects water quality”). Given that the Forest Service has apparently not considered the effects that this exploration and development will have on the creeks in the Diamond Fork and Tie Fork areas, it cannot possibly guarantee that subsequent development of these leases would not violate state and federal antidegradation standards.

### REQUEST FOR RELIEF

For the foregoing reasons, we hereby request that you withdraw your consent to offer oil and gas leases UT1204-286 through UT1204-294 in the Uinta National Forest until all legal requirements for such leasing are satisfied. We also request an opportunity to meet with you and Forest Service staff to discuss this matter further. I appreciate your prompt consideration of this request.

Uinta National Forest Roadless Area Oil and Gas Leasing Letter

Respectfully submitted on this 13<sup>th</sup> day of November, 2003,

On Behalf of Natural Resources Defense Council, The Wilderness Society, Utah Chapter of the Sierra Club, Wasatch Mountain Club, Trout Unlimited, and Black Diamond Equipment, Ltd.

BY:

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