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EXHIBIT
SUWA 3

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INTERIOR BOARD OF LAND APPEALS
OFFICE OF HEARINGS AND APPEALS
UNITED STATES DEPARTMENT OF THE INTERIOR
4015 WILSON BLVD.
ARLINGTON, VA 22203

SOUTHERN UTAH WILDERNESS ALLIANCE,)

Appellant,)

v.)

SALLY WISELY, in her official capacity as)
Utah State Director, Bureau of Land)
Management and BUREAU OF LAND)
MANAGEMENT)

Respondents.)

IBLA No.)

NOTICE OF APPEAL)
STATEMENT OF REASONS)
REQUEST FOR STAY)

Re: Utah State Director Wisely's)
Decision Partially Denying Southern)
Wilderness Alliance's Protest)
of Inclusion of Certain Parcels in)
the May 22, 2001, Competitive Oil)
and Gas Lease Sale)

CLEAR REGULATORY COMMISSION

Docket No. _____ Official Ex. No. 3
In the matter of PFS
Staff _____ IDENTIFIED
Applicant _____ RECEIVED
Intervenor _____ REJECTED _____
Other SUWA WITHDRAWN _____
DATE 4-23-02 Witness _____
Clark Amo

Template = SECY-028

SECY-02

TABLE OF CONTENTS

	PAGE
INTRODUCTION.....	1
STATEMENT OF STANDING.....	2
BACKGROUND.....	3
STATEMENT OF REASONS.....	5
1. <u>Oil And Gas Leasing Constitute An Irretrievable Commitment Of Resources</u>	5
2. <u>BLM's Determinations Of NEPA Adequacy (DNAs) Are Flawed Because They Do Not Acknowledge "Changes in Resource Conditions Within the Affected Areas"</u>	8
a. <i>Standard of Review</i>	11
b. <i>Fish and Wildlife Service Has Listed Additional Threatened and Endangered Species Since BLM's Land Use Plans Were Completed</i>	11
c. <i>BLM Has Adopted Revised Animal and Plant Sensitive Species Lists Since its Land Use Plans Were Prepared</i>	15
3. <u>BLM's Land Use Plans Do Not Analyze For The Significant And Unique Impacts Of Coalbed Methane Extraction And Development</u>	18
a. <i>Oil and Gas Leasing Constitutes an Irretrievable Commitment of Resources</i>	18
b. <i>CBM Development and Extraction is Unique and has Significant, unevaluated Impacts</i>	18
c. <i>BLM's Suggestion that These Leases Will Not be Developed for CBM is Insufficient to Relieve it of the Responsibility to Either Prepare an EIS that Evaluates CBM Impacts Before it Issues the Leases or Issue the Leases as NSO</i>	20

4. <u>BLM Improperly Rejected SUWA's North Cedar Mountains Wilderness Proposal</u>	22
a. <i>North Cedar Mountains</i>	23
b. <i>FLPMA §§603 (c) and 202 WSAs</i>	25
c. <i>2001 Final Wilderness Inventory and Study Procedures Handbook</i>	27
d. <i>BLM's Determination That SUWA's North Cedar Mountains Proposal "Does Not Significantly Differ" From Prior BLM Inventories Must Be Set Aside</i>	30
1. <i>BLM failed to follow the 2001 WIH guidelines when it determined that SUWA's new and supplemental information did not significantly differ from previous BLM inventories</i>	31
2. <i>BLM did not determine whether there was a "reasonable probability" that a "significant portion" of SUWA's proposed North Cedar Mountains unit "may have" wilderness characteristics</i>	31
3. <i>BLM cannot rely on its 1980 intensive inventory to reject SUWA's North Cedar Mountains proposal when SUWA's proposal demonstrates that its new information significantly differs from prior BLM inventories</i>	33
4. <i>BLM arbitrarily chose not to evaluate SUWA's proposal Using the 2001 WIH and this decision must be remanded</i>	37
a. <i>SUWA can utilize the 2001 WIH to challenge BLM's previous inventories</i>	37

b. BLM's determination that SUWA failed to provide significant information must be remanded because it entirely failed to evaluate SUWA's analysis of the current conditions utilizing the 2001 WIH..... 38

SUWA MEETS THIS BOARD'S REQUIREMENTS FOR ISSUANCE OF A STAY..... 40

SUWA WILL SUFFER SIGNIFICANT HARM UNLESS ITS PETITION FOR A STAY IS GRANTED..... 40

SUWA WILL LIKELY SUCCEED ON THE MERITS..... 42

SUWA WILL SUFFER IMMEDIATE AND IRREPARABLE HARM IF A STAY IS NOT ISSUED..... 44

GRANTING A STAY IS IN THE PUBLIC INTEREST..... 45

CONCLUSION..... 47

reasonable to expect that human imprints will return or can be returned to a substantially unnoticeable level either by natural processes or by hand labor.

(Emphasis added). Thus, the WIH contemplates that BLM staff will review both the public generated proposal as submitted, or if necessary “a significant portion thereof.” for wilderness characteristics. See id. It is clear, though, that what the BLM cannot do is simply reject a public proposal out of hand, without considering whether “a significant portion” of the proposed wilderness unit “may have” wilderness characteristics.

d. *BLM’s Determination That SUWA’s North Cedar Mountains Proposal “Does Not Significantly Differ” From Prior BLM Inventories Must Be Set Aside*

1. BLM failed to follow the 2001 WIH guidelines when it determined that SUWA’s new and supplemental information did not significantly differ from previous BLM inventories.

In Committee for Idaho’s High Desert, 85 IBLA 54, 57 (1985), the Board discussed the standard of review for challenges to factual BLM determinations regarding the wilderness qualities of inventory units (i.e. naturalness, solitude, opportunities for primitive and unconfined recreation).

Suppose an appellant establishes that BLM failed to follow its guidelines, or otherwise creates doubt concerning the adequacy of BLM’s assessment, and the record does not adequately support BLM’s conclusions. In such a situation the BLM decision must be set aside and the case remanded for reassessment. We must point out that evidence of failure to follow guidelines alone is insufficient to require reassessment. An appellant must also point out how the errors affect the conclusions and show that a different determination might result from reassessment.

Id. (quoting Utah Wilderness Assoc., 72 IBLA 125, 129 (1983)) (internal citations omitted).

Though both the Committee for Idaho's High Desert and Utah Wilderness Association decisions are factually and procedurally distinct from this case -- both those decisions dealt with challenges to BLM decisions to drop lands from further consideration for wilderness after an intensive inventory -- the standard of review is generally appropriate for a challenge to BLM's alleged failure to comply with the WIH. As SUWA will demonstrate below, not only did BLM fail to follow the WIH guidelines in its assessment of SUWA's North Cedar Mountains proposal, but these failures had a real and immediate effect on BLM's decision not to further review and evaluate the North Cedar Mountains for their wilderness qualities.⁹ If remanded to BLM, with instructions to follow the WIH, it is likely BLM would determine SUWA's proposal requires a re-evaluation of the North Cedar Mountains' wilderness characteristics.

2. BLM did not determine whether there was a "reasonable probability" that a "significant portion" of SUWA's proposed North Cedar Mountains unit "may have" wilderness characteristics.

WIH 6310-1.06E requires that BLM staff reviewing an externally prepared proposal "make a preliminary determination whether the conclusion reached in previous BLM inventories that the area in question lacked wilderness qualities remains valid, or whether there is a reasonable probability that the area in question (or a significant portion thereof) may have wilderness characteristics." (Emphasis added). A plain reading of this requirement indicates that BLM

⁹The BLM's determination acknowledged that SUWA's North Cedar Mountains proposal met WIH H-6310-1.06E's requirements: a map which identifies specific boundaries; a detailed narrative that describes the suggested wilderness characteristics; and photographic documentation. See Vol. 2, Exhibit 4, at 2.

reviewers cannot only consider the proposal as presented by SUWA, but must also consider a "significant portion" of the unit, presumably if there are some minor intrusions that can be excluded. See e.g., Vol. 2, Exhibit 2, WIH 6310-1.13C (Boundary Adjustments) ("[w]here substantially noticeable human caused impacts occur within an inventory area, reviewers should consider the opportunity to adjust the area boundary to exclude the human impacts.") (emphasis added).

There is absolutely nothing in the record demonstrating that BLM considered excluding areas in SUWA's proposal it believed lacked wilderness character, or that it evaluated a smaller unit. See Vol. 2, Exhibit 4, at 3. For example, though BLM disputed the use of a different southern boundary for the UWC's North Cedar Mountains unit (the unit uses Lee's Canyon, rather than Hastings Pass - the original southern boundary to the BLM's 1980 intensive inventory) as "new information," there is no reference whatsoever to whether BLM considered if a smaller North Cedar Mountains unit "may have" a "reasonable probability" of containing wilderness characteristics. See id. See also Vol. 2, Exhibit 2, WIH H-6310-1.06E.¹⁰

Because this error demonstrates that "BLM failed to follow its guidelines, or otherwise creates doubt concerning the adequacy of BLM's assessment," and SUWA has demonstrated that a different determination might result on remand, "the BLM's decision must be set aside and remanded for reassessment." Utah Wilderness Assoc., 72 IBLA at 129.

¹⁰In addition, BLM's suggestion that disqualifying intrusions north of the unit, including "quarries, livestock trails, motorcycle paths, heavy sheep grazing, and other minor intrusions of 'ways' used primarily by 4x4 vehicles," is simply a cut and paste from the 1980 intensive inventory. See Vol. 2, Exhibit 1, Attachment D, at 3. There is no evidence that BLM re-evaluated the presence or absence of these impacts today, and as noted infra at 34-35, BLM did not respond to SUWA photographs depicting the unnoticeable condition of some of these impacts.

- 3 BLM cannot rely on its 1980 intensive inventory to reject SUWA's North Cedar Mountains proposal when SUWA's proposal demonstrates that its new information significantly differs from prior BLM inventories.

BLM largely dismissed the new information SUWA provided in its North Cedar Mountains Proposal as "disagree[ing] with a prior BLM wilderness inventory," and "repeatedly suggest[ing] that BLM's 1980 intensive inventory was flawed. BLM is wrong. The agency is merely continuing to "defend" its earlier wilderness inventory based on a twenty year old document and the revised WIH directs BLM to do otherwise. SUWA's "new information" is precisely the type of information the WIH anticipates receiving: "D. Other Public Lands That May Require a Wilderness Inventory: This includes . . . lands within externally generated proposals that document new or supplemental information regarding resource uses and condition of the lands not addressed in current land use plans and/or prior wilderness inventories." WIH H-6310-1.06D (emphasis added). See id. H-6310-1.06E (new information should "significantly differ[] from the information in prior inventories conducted by BLM regarding the wilderness values of the area").

This Board has recognized for years that "[t]he proper scope of the wilderness inventory conducted under sections 201 and 603 of FLPMA, 43 U.S.C. §§ 1711 and 1782 (1988), involves a determination of whether the land inventoried is possessed of the wilderness characteristics defined by Congress so as to require a designation as a WSA. In conducting the wilderness inventory, BLM has been guided by [the] WIH and its amendments." The Wilderness Soc'y et al., 119 IBLA at 172 (citation omitted). It would be nonsensical for BLM to continue clinging to its 1980 inventory of the North Cedar Mountains as a basis to reject SUWA's proposal without

first evaluating the proposal to determine if it contained significant "new information."¹¹

First and foremost, SUWA provided uncontested photo documentation depicting current conditions of various intrusions that were documented in BLM's 1980 intensive inventory. In particular, SUWA Photograph 4 (reclaimed vehicle way); Photograph 9 (reclaimed and vegetated dike); Photographs 18&19 (reclaimed and revegetated vehicle way); and Photograph 25 (successful BLM reseeding that appears "natural" to the casual viewer)¹² provide comparative photos to intrusions BLM identified in its 1980 intensive inventory. See Vol. 2, Exhibit 1. BLM's determination, rejecting SUWA's proposal, wholly fails to acknowledge or address the on-the-ground changes SUWA's photographs demonstrate. This is precisely the type of "new information" that an externally generated proposal must provide, and yet BLM ignored or otherwise chose not to respond to evidence of changed (namely rehabilitated) on-the-ground conditions. This failure alone casts considerable doubt on BLM's determination that SUWA's proposal does not contain significant new information.

In addition, SUWA's proposal points out that its proposed North Cedar Mountains unit utilizes Lee's Canyon as its southern boundary, not Hastings Canyon, the boundary utilized by the BLM's 1980 intensive inventory. See Vol. 2, Exhibit 1, at 6-8. Though BLM discounts this

¹¹The fact that over twenty years has passed since BLM's prior intensive inventory took place, and that SUWA's proposal has been submitted under the 2001 WIH is itself sufficient new information to trigger a re-evaluation of the North Cedar Mountain's wilderness characteristics.

¹²See Vol. 2, Exhibit 2, WIH H-6310-1.13B.2(b)(1) ("Apparent naturalness refers to whether or not an area looks natural to the average visitor who is not familiar with the biological composition of natural ecosystems versus human-affected ecosystems in a given area. The presence or absence of naturalness (i.e., do the works of humans appear to be substantially unnoticeable to the average visitor?) is the question the Wilderness Act directs the review to assess.").

information as "not new," its determination lacks any supportable foundation. Specifically, BLM states that it "inventoried both canyons as part of the intensive inventory and found intrusions along both routes. In fact, the majority of intrusions lie north of Lee's Canyon and include quarries, livestock trails, motorcycle paths, heavy sheep grazing, and other minor extensions of "ways" used primarily by 4x4 wheeled vehicles." Vol. 2, Exhibit 4, at 2. The 1980 intensive inventory, however, in no way considered making the Lee's Canyon "way" the southern boundary of the unit: "Lee's Canyon 'way' follows a drainage and cuts a six mile path through the North Cedar unit. This bisects the unit into a third." Vol. 2, Exhibit 1, Attachment D, at 3 (emphasis added). Furthermore, there is no support in the 1980 inventory for BLM's assertion that today "the majority of intrusions lie north of Lee's Canyon," and in fact the text of the inventory (along with photographs and maps) suggests that the intrusions BLM identified in 1980 are found primarily "along the access route," and not north into the unit. See id. Regardless, even if these "intrusions" were located north of Lee's Canyon, BLM did not consider whether a "significant portion" of SUWA's proposed unit qualified for a more intensive review. See supra at 31-32.

Finally, SUWA identified the presence of wild horses as a supplemental value and new information that was not considered in BLM's 1980 intensive inventory. See Vol. 2, Exhibit 1, at 16. In response, BLM claims that, though never mentioned in the intensive inventory, wild horses were noted in an earlier land use plan (the 1976 Skull Valley-Lakeside Management Framework Plan), which was incorporated by reference, in its entirety, in the 1980 intensive inventory. See Vol. 2, Exhibit 4, at 2. Incredibly, BLM is suggesting that it can incorporate a complex document, hundreds of pages long, by vague reference, and without any notation to a specific provision concerning wild horses. BLM is mistaken. The fact of the matter is -- there is not a

single direct reference to wild horses in the 1980 intensive inventory, nor any indication that the presence of wild horses was considered a "supplemental value" or an aspect of "primitive and unconfined recreation."¹³ Moreover, BLM's own 1999 wilderness inventory of the Cedar Mountains, immediately south of the North Cedar Mountains, specifically identified viewing wild horses as an "outstanding opportunity for primitive and unconfined recreation, that supported BLM's conclusion that the area has wilderness qualities. See Vol. 2, Exhibit 1, Attachment C. Additionally, while SUWA provided BLM's own 2001 estimate of the number of wild horses utilizing the North Cedars (350 according to the Salt Lake field office wild horse specialist), BLM's determination did not mention how many wild horses were present in 1980, and if the current figure is more or less than the historic figure. In short, because there is no evidence, whatsoever, that BLM considered the presence of wild horses in its 1980 intensive inventory, BLM cannot now reject SUWA's information regarding wild horses as "not new information."

BLM's determination identifies several "intrusions and developments" in the North Cedar Mountains that it apparently points to as evidence that the area does not have wilderness characteristics. See Vol. 2, Exhibit 4, at 3. These intrusions include: drill seeding in 1983 and 1984, "[n]on-native vegetation occurring due to emergency fire rehabilitation project," wildlife guzzler and maintenance route, and several mining claims. Id. What BLM fails to do, however, is point out that the WIH "naturalness" section addresses human impacts, and their effect on overall wilderness qualities: "An area may include some human impacts provided they are substantially

¹³In particular, the BLM's 1980 intensive inventory section on the North Cedar Mountains' opportunities for "primitive and unconfined recreation" mentions, by name, several wildlife species present in the North Cedar Mountains, but does not include wild horses. See Vol. 2, Exhibit. 1 at Attachment D, at 6.

unnoticeable in the area as a whole. Examples of man-made features that may be substantially unnoticeable in certain cases are: . . . wildlife enhancement facilities . . . and spring developments.” Vol. 2, Exhibit 2, WIH H-6310.13.B(2)(a)(2). The naturalness section continues by noting that “[a]pparent naturalness refers to whether or not an area looks to be natural to the average visitor who is not familiar with the biological composition of natural ecosystems versus human-affected ecosystems in a given area.” *Id.* WIH H-6310.13.B(2)(b)(1). In short, many of the “intrusions” baldly cited by BLM as support for its argument that the North Cedar Mountain’s lack of wilderness character do not necessarily disqualify the area from additional evaluation. *See id.* These baseless assertions, made without any reference to the WIH, and without any additional documentation, cannot support BLM’s determination that SUWA’s proposal does not offer significant new information.

BLM’s failure to “follow its guidelines” directly affected its faulty conclusion that SUWA did not provide sufficient “new information” to establish a reasonable probability that the North Cedar Mountains may have wilderness characteristics, a low threshold that SUWA has clearly met. *See Utah Wilderness Assoc.*, 72 IBLA at 129. A remand is therefore appropriate because a different result might occur from BLM’s reexamination of SUWA’s proposal.

4. BLM arbitrarily chose not to evaluate SUWA’s proposal using the 2001 WIH and this decision must be remanded.
 - a. SUWA can utilize the 2001 WIH to challenge BLM’s previous inventories.

Even if SUWA’s North Cedar Mountains proposal is cast as a challenge to BLM’s 1980 intensive inventory using the 2001 WIH criteria, this Board has previously recognized this type of

claim.¹⁴ In Sierra Club, 61 IBLA 329,333-34 (1982), appellant Sierra Club challenged BLM decisions to exclude certain parcels from WSA status, arguing, among other things, that the agency's decision making process failed to comply with amendments to the WIH and organic act directives that were made after BLM had completed its review. The Board's Sierra Club opinion discussed the appropriate standard of review for this type of claim:

The mere fact that BLM employees were not sufficiently prescient to anticipate that future actions by the BLM Directorate might prohibit actions they were taking is insufficient, in the absence of an affirmative showing by appellant that a different determination would result if the subsequent directions were implemented, to invalidate an evaluation process which has already occurred.

(Emphasis added). See Wilderness Soc'y et al., 119 IBLA at 173 (reviewing Sierra Club and restating standard of review: "where an appellant establishes that BLM failed to follow its guidelines and also shows affirmatively that such failure caused BLM to reach an incorrect conclusion, reversal of the BLM decision is required."); see also Committee for Idaho's High Desert, 85 IBLA at 57 ("a party challenging [a] decision . . . must show that if the new guidelines were followed, a different determination would result.").

- b. BLM's determination that SUWA failed to provide significant new information must be remanded because it entirely failed to evaluate SUWA's analysis of the current conditions utilizing the 2001 WIH.

In this instance, BLM rejected SUWA's proposal out-of-hand, arguing that it "primarily disagrees with a prior BLM wilderness inventory," and stating that SUWA "reinterprets the 1980

¹⁴The 2001 WIH anticipates that externally generated proposals, like SUWA's may provide "new or supplemental information regarding resource uses and condition of the lands not addressed in current land use plans and/or prior inventories." See Vol. 2, Exhibit 1, WIH H-6310-1.06D (emphasis added).

intensive inventory results by assuming the inventory should have been conducted according to the 2001 [WIH], a manual which was developed 21 years after the public comment period closed on the intensive inventory." Vol. 2, Exhibit 4, at 3. This, however, is exactly the type of situation addressed and analyzed in Sierra Club, and subsequent cases, where appellants argued that revised and amended WIH standards should apply to an earlier BLM decision making process. See e.g., Sierra Club, 61 IBLA at 333.

SUWA's North Cedar Mountains proposal, attached as Vol. 2, Exhibit 1, includes over 50 pages of text and photographs, as well as numerous attachments, and provides not only significant new information, see supra, at 33-37, but also analyzes current on-the-ground conditions with those in 1980, and applies the new WIH to that analysis. See Vol. 2, Exhibit 1, at 3-20. SUWA's proposal also addresses the "naturalness" and "outstanding opportunities for solitude or a primitive and unconfined type of recreation" criteria, and provided numerous photographs that highlighted some of the intrusions identified in BLM's 1980 intensive inventory that are now faded and insignificant human impacts. See id. at 21-32. SUWA's proposal concludes that the current conditions, when analyzed under the 2001 WIH, indicate there is a reasonable probability that the proposed North Cedar Mountains wilderness unit may have wilderness characteristics, and should be fully re-evaluated by BLM.

BLM, however, refused to consider or address any aspect of SUWA's proposal, which the agency considered an attempt to revisit the earlier inventory. As highlighted above, such a proposal can be brought under the WIH, and SUWA has done so here. BLM's cursory dismissal of SUWA's proposal provides nothing for this Board to defer to or review, while on the other hand SUWA's proposal demonstrates that a reassessment of the North Cedar Mountains'

where the wilderness issue has been fiercely debated over the past twenty years, the public has a clear and undeniable interest in rigorous agency compliance with the WIH. See also West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971) (holding public interest organization interest in protecting wilderness was aligned with public's interest, and preliminary injunction should issue).

On the other hand, the BLM will not and cannot demonstrate that a stay is not in the public interest. To the contrary, BLM compliance with the law "invokes a public interest of the highest order," and here there is little question that the agency has flaunted NEPA and the WIH. See e.g., Public Serv. Co. of Colorado v. Andrus, 825 F. Supp. 1483, 1509-10 (D. Idaho 1993) (agency's failure to comply with the law "invokes a public interest of the highest order") (citations omitted); Fund for Animals v. Espy, 814 F. Supp. at 142, 152 (D.D.C. 1993) (basing grant of injunction in part on the "strong public interest in meticulous compliance with the law by public officials").

CONCLUSION

SUWA requests that this Board remand BLM's May 22, 2001, decision partially denying SUWA's protest and direct BLM to comply with NEPA and the WIH before re-offering these leases.

In the meantime, SUWA requests that the Board issue a temporary stay against the effect of BLM's May 22, 2001 decision until a final decision is rendered in this matter. If a stay is not issued, substantial and irreparable harm to SUWA's interests and the environment will occur before this Board issues a decision.

For all the reasons set forth above, SUWA is entitled to a stay of oil and gas leasing on these parcels and, ultimately, a remand of BLM's decision. The balance of harms tips decidedly in SUWA's favor. This Stay Petition raises significant and credible questions concerning the legality of BLM's behavior, on which SUWA is likely to succeed on the merits. Only SUWA will suffer irreparable harm if BLM is permitted to continue engaging in irretrievable commitments of resources, and the public interest swings decidedly in SUWA's favor.

Dated this 21st day of June, 2001.

SOUTHERN UTAH WILDERNESS ALLIANCE



Stephen H.M. Bloch
Attorney
Southern Utah Wilderness Alliance

March 18, 2001

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Private Fuel Storage, a Limited Liability
Company;

(Independent Spent Fuel Storage
Installation).

Docket No. 72-22
ASLBP No. 97-732-02-
ISFSI

CERTIFICATE OF SERVICE

I hereby certify that I served copies of TESTIMONY OF DR. JAMES C. CATLIN ON THE WILDERNESS CHARACTER OF THE NORTH CEDAR MOUNTAINS, CONTENTION SUWA B, on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this March 18, 2002.

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