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Regional Solicitor, Rocky Mountain Region
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Re: Appeal of Grand Junction RMP ROD

Dear Sirs:

Please accept this correspondence and attachments as the statement of reasons and objections of the above Organizations with regard to the Record of Decision regarding the BLM Grand Junction Resource Management Plan ("ROD").

1. Executive Summary.

This statement of reasons involves three questions of law, which are: 1) May the BLM withhold relevant inventory information on the 966 cultural sites found ineligible for listing on the National Register; 2) Does the ROD and related documents properly balance of multiple usage of the 1,894 cultural sites identified for management when numerous factors to be balanced are simply never discussed; and 3) Is the economic analysis of the ROD sufficient to justify no change in cultural resource management when recreational economic contributions in the ROD were expanded to 7x original estimates? The Organizations vigorously submit each question must be answered in the negative and each question represents a separate basis to overturn the ROD and return it to the Field Office for resolution of these issues.

2. Information regarding ineligible historical sites has been illegally withheld from the public in the GJFO process and the FRMP must be reversed.

The Organizations submit that there is a preliminary question of law for this tribunal to resolve prior to proceeding to the substantive claims in the appeal. This question is: "May the BLM withhold as confidential relevant information on cultural resource sites found ineligible for listing on the National Register?" The Organizations submit the answer to this question is "NO".

This question is a matter of law and the Court may directly substitute its judgment for that of the agency. Federal regulations specifically retain jurisdiction of the Courts to determine pure questions of law as follows:

"to decide all relevant questions of law, interpret statutory provisions and determine the meaning and applicability of the terms"¹

The Organizations submit the release of this information is critical to addressing site specific impacts from mandatory closures of at least 100m around 966 ineligible cultural sites on the Field Office. The Organizations submit there is a strong relationship between cultural sites and recreational routes on the Field Office due to topographic limitations on travel. **Federal regulations mandate the release of information regarding the determination that a site is "ineligible" for listing on the National Register.**

These regulations specifically provide:

"(1) No historic properties affected. If the agency official finds that either there are no historic properties presentThe agency official shall.... make the documentation available for public inspection prior to approving the undertaking. "²

¹ See, 5 USC §706.

² See, 36 CFR 800.4(d)

The Organizations submit that as a matter of law the 966 sites identified as "ineligible for listing" on the National Register by Appendix I are no longer subject to confidentiality provisions of a §106 review and all inventory information regarding ineligible sites must be released to the public. While the GJFO chose to undertake a cultural inventory as part of their NEPA planning process, it does not alter that these are separate processes with separate legal requirements. This information simply has never been provided at any point in development of the ROD. The separation of a cultural inventory process from the general NEPA analysis has been clearly recognized by cultural resource experts who conclude:

"In this case you determine that no historic properties will be effected and give the SHPO/THPO and other consulting parties thirty days to comment, and if the SHPO/THPO does not object within the time, you are through with §106 review. You may have to deal with ineligible properties under NEPA but your §106 review is complete"³

Federal law clearly mandates the **automatic** release of inventory information on sites found ineligible for listing on the National Register. While no request is necessary, representatives of the Organizations have repeatedly requested supporting documentation to address the basis for mandatory closures of all historical sites, including those 966 sites found ineligible for listing on the National Register. These written requests were declined based on asserted confidentiality of all cultural inventory information and the documents being pre-decisional documents for NEPA. The Organizations submit that the information on historical sites was not pre-decisional as the cultural inventory process is entirely separate from NEPA and concludes with determinations regarding eligibility of sites as a matter of law. The Organizations also sought to obtain information in a more informal manner, such as requesting on site visits with staff to trails in historic areas during quarterly meetings. Even these informal site visits have been declined due to confidentiality issues.

³ See, Thomas King; *Cultural Resource Laws and Practice*; 4th Ed; 2013 Altamira Press at pg 153.

Instead of providing this inventory information, managers chose to create a simplistic summary worksheet which did not provide any inventory information and completely failed to address many factors to be analyzed in violation of regulations requiring the release of all information. Clearly management histories for ineligible sites could be released without violation of confidentiality requirements. The Organizations vigorously assert that the fact pattern in the **Block** decision, discussed subsequently, precludes this type of summary worksheet and withholding of underlying inventory information as part of the NEPA process. The mandatory public release of ineligible site information heightens the process violations already found unsatisfactory for general NEPA review in the **Block** decision. The Organizations submit application of cultural resource review confidentiality provisions in a manner that allows continued claims of confidentiality for ineligible sites is a direct violation of federal law. The Organizations vigorously assert this illegal withholding of information has directly and materially impaired the ability of the public to undertake site specific comments on route closures based on cultural resource concerns.

3a(i). Standard of review of NEPA analysis on appeal.

The second Question presented for the tribunal is : "Does the ROD properly balance multiple usage of the 1,894 cultural sites identified for management?"

The Organizations again vigorously assert the answer to this question is "NO". The Courts have consistently directly applied the NEPA regulations to EIS review both at the landscape and site specific levels under an arbitrary and capricious standard of review for agency actions. This standard is reflected as follows:

"...it required only that the agency take a "hard look" at the environmental consequences before taking a major action. *See, Kleppe v. Sierra Club*, 427 U. S. 390,427 U. S. 410, n. 21 (1976). The role of the courts is simply to ensure that the agency has

adequately considered and disclosed the environmental impact of its actions, and that its decision is not arbitrary or capricious. *See generally, Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 401 U. S. 415-417 (1971)."⁴

The Organizations submit the determination that 99.3% of the sites identified at the landscape level are found to be worthy of mandatory management is arbitrary and capricious as a matter of law and many factors to be balanced simply are never addressed. The arbitrary nature of this determination is most clearly reflected with the admission by managers that significant portions of these sites lack information necessary for multiple use management analysis. How can legally mandated balance of usages be achieved at sites that are clearly identified as needing data and analysis? The Organizations submit it cannot given the large number of factors that must be addressed in the management of cultural sites.

3a(ii). Multiple use management principals govern management of cultural sites.

A review of the statutory requirements for cultural sites management under NEPA is highly relevant to this appeal. The National Historic Preservation Act of 1966⁵ ("NHPA") provides an extensive process to be undertaken in order to identify and inventory cultural sites on public lands. The NHPA provides extensive guidance for the cultural site inventory process and general objectives, but the NHPA stops short of addressing management of these sites. The NHPA is largely procedural in nature and does not mandate a specific outcome in the management process.⁶ Congress clearly stated that cultural resources are a factor to be balanced as a multiple usage of public lands with the passage of FLPMA. The management of cultural resources on public lands is **specifically** addressed in FLPMA as follows:

⁴ See, Baltimore G& E Co v. NRDC; 462 US 87 (1983) at pg 98.

⁵ See, Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515 generally Title 54 of the United States Code

⁶ See, 54 USC 300101

"(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; ... and that will provide for outdoor recreation and human occupancy and use;"⁷

The Organizations submit that cultural resource management is a two step process: 1: creation of an inventory and allocation of sites to use categories; and 2: balancing protection of inventoried sites with multiple usages of these areas. The Organizations vigorously assert that the ROD clearly has placed the management of cultural resources ahead of all other multiple uses and has failed to balance impacts from cultural resource protections with other activities. The ROD management of each site as a trustee is evidenced by the fact that the only sites excluded from management were actually impossible to manage as they had been destroyed by fire or previously sold.

Numerous BLM manuals issued outline the process to properly balance multiple uses of cultural sites as follows:

"B. The BLM manager must make an affirmative effort to consult, and must consider tribal input fairly; but decisions are based on multiple-use principles and a complex framework of legal responsibilities, not on property principles and the obligations of the trustee to the trust beneficiary."⁸

C. Apart from certain considerations derived from specific cultural resource statutes, management of cultural resources on the public lands is primarily based on FLPMA (see .03H), and is governed by the same multiple use principles and the same planning and decision making processes as are followed in managing other public land resources."⁹

⁷ See, 43 USC §1701

⁸ See, BLM Manual 8120.1B

⁹ See, BLM Manual 8100. 06C

It is the Organizations position that challenges in site specific management can no more justify the ignoring of cultural resources in multiple use planning as it can justify the exclusion of all multiple uses from cultural resource areas. Again, the Organizations submit that the GJFO RMP manages cultural resources as a trustee would manage a trust rather than a balanced interest in multiple usage as directly evidenced by the fact that the only sites released from further management were either sold by BLM previously or destroyed by fire. All other sites are simply closed, without addressing basic questions such as the management history of the site.

3b. Analysis of cultural sites in order to balance multiple usages is highly site specific process.

The large number of trash scatters, open lithics and open camps on the inventory (95% plus of sites identified) make detailed site specific information and analysis highly relevant as a large number of these sites been excavated and inventoried in the GJFO planning area. As more specifically outlined later in this appeal, the results have not yielded information or resources that are neither important or significant. Cultural resource experts have provided the following outline of how to deal with trash scatters and dumping sites as follows:

"Good decisions about the importance of archeological data and about appropriate data recovery and analysis should be based on everything that we have learned to this time. Instead site significance and data recovery plans are too often treated as if these were the first sties of this type we have ever seen and the first ones we have dug. This means we end up not only reinventing the wheel but inventing the wheel over and over again." ¹⁰

As both these national experts clearly identify, the fact that there are artifacts in an area does not make it eligible for protection or management. The Organizations submit that these types of situations are exactly why the information regarding sites must be made public and why a balance of site specific uses

¹⁰ See, Jennifer Richman et al; *Legal Perspectives on Cultural Resources*; 2004 Rowan and Littlefield Publishers; at pg 11.

is critically important. Each site should not be treated as if it was the first site of this type ever identified.

Unfortunately, the ROD immediately determines that each site should be managed as if it was the first ever discovered as only 7 of the 1,894 sites are not subject to mandatory closures. The arbitrary and capricious nature of the cultural resource management standards is further evidenced by the fact that usages that created some of the sites is now prohibited from continuing as exemplified by the fact that routes created for or by multiple use are now closed to multiple use in order to protect the cultural values of the route. This position completely lacks any basis in law or fact.

The impacts from cultural management are significant. After 99.3% of sites are found eligible for management they are placed in 5 general categories, each of which mandates significant closures to all surface disturbing activities. These categories are broken down as follows:

<u>Category</u>	<u>Mandatory closure</u>	<u># of sites in Draft</u>	<u># of sites in Final</u>
Scientific	100m	1,574	1,574
Conservation	100m	4	4
Traditional	200m	135	135
Public usage	100m	95	95
Experimental	n/a	79	79
Discharge	n/a	7	7
TOTAL		1,874	1,874

Given that the management of these sites is functionally identical, the Organizations must question the value of the classification system and amount of site specific review that went into the placement of sites into categories. The concerns on this breakdown are compounded by the fact that 966 sites are

ineligible for the national register and another 530 need data or analysis. Many factors to be balanced in multiple use simply are never addressed in the inventory, such as the management history of the site.

3c. The ROD violates Federal law requirements of protection of sites that are important or significant.

Of the 1,894 sites identified only 7 were released from further management as they were sold or destroyed by fire, meaning that 99.3% of the sites identified were found important or significant enough to warrant management. After a review of Appendix I, there is simply no mention of the possible importance or significance of sites even mentioned. The Organizations believe such a high acceptance rate for any activity in multiple use planning is an indication that the required balance of multiple use was badly out of balance. There is a significant difference between a site being "impossible to manage" and being "suitable to manage". This distinction is simply never addressed in the ROD as all sites are equally valued and subjected to mandatory closures.

Congress has mandated the requirements of "significance" or "importance" as an important factor in determining the proper levels of management and analysis of historical sites in the planning process. The Organizations are completely unable to challenge the importance or significance of any site in the GJFO as Appendix I provided to the public again fails to address these criteria and fails to provide information sufficient to allow the public to review these findings.

Cultural resource laws provide a specific inventory methodology to insure cultural resources are balanced in multiple usage decision making. Pursuant to the rules and regulations, the "significance" of each cultural site and resulting eligibility of each site for designation on the National Register is a **primary** factor in determining if there is required management to be addressed in planning. The CFR provisions specifically provide:

*"(c) Evaluate historic significance. (1) Apply National Register criteria. In **consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the***

Secretary's Standards and Guidelines for Evaluation, the agency official shall apply the National Register criteria (36CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible. **If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible.***¹¹

The need for findings regarding the "significance" or "importance" of a site to trigger mandatory management of historical sites are specifically outlined in the BLM manual in a manner that is consistent with federal law.¹²

While the lack of importance or significance does not preclude management, these factors clearly must relate to the level of management and multiple usage of sites. Logically lesser significant sites would be allocated to usage categories with lower levels of protection. In Appendix I, no information is provided on site specific importance rather all sites found equally important and significant and are subjected to mandatory management. As previously noted the findings of significance in the GJFO planning process are deeply inconsistent with the findings of significance by outside reviewers in the State of Colorado. No information is provided regarding the comparative value of sites or location of cultural sites due to

¹¹ See, 36 CFR §804c.

¹² See, BLM Cultural Resources Manual 8110 at 8110.32E.

confidentiality requirements making any public analysis impossible. Furthermore existing recreational usage of several sites is identified but not accounted for in planning.

Site specific summaries of 95 sites directly evidence an overly broad application of protection for sites that are neither significant or important including: old road and rail beds; recorded telegraph lines and abandoned power lines; irrigation ditches on adjacent private lands; buried pipes and abandoned irrigation ditches; fences of unknown origin; two track roads of unknown origin and trails. Any assertion these sites are each important or significant and previous management is not relevant to current management decisions would lack factual basis.

The imbalance in the analysis of importance and significance is directly evidenced by the fact the ROD plans to protect more sites in the Field Office than are currently on the National Register for the entire state of Colorado. The determination that each of the 1,894 sites is important or significant enough to warrant mandatory closures also fails to balance statements from cultural experts in and around Grand Junction finding that many of sites are marginally important and will simply never be excavated. These findings are more specifically noted in the appeal addressing wickiups.

The Organizations are aware there is no mandate that a site must be listed on the National Register of Historic Places to be managed, however the ineligibility of a site must be addressed balancing of multiple usage in planning. Only 398 of 1,894 (21%) are found "possibly eligible" for listing. The fact that 78% of sites were identified as not eligible or needing data weighs heavily against the mandatory levels of closures. As previously noted only 7 of the 1,894 sites inventoried were found not to need additional management as a result of their destruction or sale. Again a review of the suitability for management based on multiple usage cannot be based on the exclusion of the site from management only because it was destroyed or sold and impossible to manage.

4a. The ROD fails to address impacts of previous management and natural deterioration in cultural site management.

The determination that all 1,894 are sufficient for management fails to address impacts of natural deterioration, previous management decisions that may have degraded sites. The Organizations submit that the impacts of previous management decisions has directly and significantly impacted the scale and quality of cultural sites and are clearly identified in federal law as factors to be addressed in the multiple use management decision making process for these sites. Clearly, some percentage of the 1,894 sites to be closed for cultural resources were previously inventoried and found unsuitable for additional management. This type of information would be highly relevant in balancing multiple usages of sites, but again the public cannot address these site specific issues as they are not provided any analysis of the management history of each site.

Federal regulations explicitly provide previous management and natural deterioration of possible cultural sites must be balanced in multiple use planning for the site as follows:

"The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects."¹³

The need for site specific analysis of the management history of each site to address possible impacts of previous management decisions as part of the management of cultural sites is again repeatedly addressed with far more specificity in the BLM NEPA handbook. The NEPA handbook specifically provides as follows:

"Scientific, cultural, or historical resources, including those listed in or eligible for listing in the National Register of Historic Places (40 CFR 1508.27(b)(8)). This factor represents a specific sub-set of the factor, "unique characteristics of the geographic area."
Significance may arise from the loss or destruction of significant scientific, cultural, or

¹³ See, 36 CFR Part 800.4 (b)(1).

historical resources. For resources listed in or eligible for listing in the National Register of Historic Places, significance depends on the degree to which the action would adversely affect these resources."¹⁴

The BLM cultural resources manual specifically state the need to address possible impacts of previous management decisions in several other locations as follows:

"(5) The human uses of the land and resources through time, as evidenced in the prehistoric and historic record, and the ways that this knowledge of successful and unsuccessful past adaptations might apply to decision making for current land use proposals."¹⁵

The BLM cultural resources manual repeats this standard as follows:

"d. Environmental Factors. Past and present environmental factors ... are those that describe the geographic system of the study area:..... (6) The effects of human activity;(7) The effects of time...The factors are treated in terms of a dynamic, interactive system, and single-factor analyses are avoided."¹⁶

As repeatedly and specifically noted in the BLM cultural resources manual, the inventory of sites is required to address how the precluded action or usage would adversely impact the specific resource to be protected at the site taking into account previous management and natural deterioration Appendix I simply never addresses these factors.

The overwhelming scope of proposed management changes is stark when compared to the 1985 RMP, which is being replaced. The 1985 RMP identifies all cultural resources are managed on only 8 sites in the field office.¹⁷ The Organizations believe the requirement of site specific analysis of

¹⁴ See, BLM NEPA Handbook 1790-1; January 2008 at pg 73.

¹⁵ See, BLM Cultural Resources Inventory Manual- Manual 8110 @ 8110.21a(5).

¹⁶ See, BLM Cultural Resources Inventory Manual- Manual 8110 @ 8110.21a

¹⁷ See, DOI BLM, Grand Junction Resource Area; *Resource Management Plan and Environmental Impact Statement* (November 1985) at pg 8.

previous management decisions is a major component in balancing multiple usage of these sites as closures simply will never improve a previously damaged cultural resource.

The ROD proposes to protect 236x the number of sites and close more than 5x the number of acres for cultural sites as was identified in the 1985 RMP. The Organizations are unable to find any information regarding the impacts of natural deterioration on the 1,894 new sites and the management history of the 1,894 sites. The Organizations submit that any assumption that previous management decisions have not significantly degraded these sites would lack factual or legal basis. Clearly some portion of these areas were reviewed previously and found unworthy of protection and other sites have become seriously degraded as a result of management or natural processes. Clearly the inventory could have identified if each of the 1894 site was currently subject to closures of surface disturbing activities or identified the level of deterioration at the site on a scale of 1 to 10. The Organizations are unable to even basically address these site specific concerns as Appendix I provides no information on natural deterioration or previous management at all. As these factors identified as critical are not mentioned in Appendix I, the Organizations submit that multiple usage was not properly balanced.

4a. Land managers admit that 520 cultural sites to be closed need data or have not been analyzed under the illegally narrow scope of factors in Appendix I.

After a summary of the eligibility analysis in Appendix I is prepared, additional concerns are immediately present regarding the balancing of multiple use factors as 520 (27%) of sites are identified needing analysis or needing data. That summary of appendix I eligibility provides the following conclusions:

<u>Eligibility of site for Listing</u>	<u>Draft</u>	<u>Final</u>
Actively on National Register	3(.1%)	3 (.1%)
Possibly eligible for listing	398 (21%)	398 (21%)
Lacking data/assessment	520 (27%)	520 (27%)
Not Eligible	966 (51%)	966 (51%)

Released from further	7 (.3%)	7 (.3%)
Total	1,894	1,894

As land managers admit 520 sites (27%) are found eligible for management are lacking critical information and analysis of factors this is an admission there was no attempt to balance usage on these sites. Even without data and analysis, each of these 520 sites is found to warrant mandatory closures of at least 100 meters to all usage. The development of the ROD took more than 7 years. How is it possible that 520 sites still need data and analysis after this time but are still subjected to closures?

As land managers admit 520 (27%) of sites closed to surface disturbing activity are lacking data or analysis of the limited factors identified in the ROD, this begs the question of how could a proper balance of multiple usage be insured under the mandatory closures required under the ROD. Each site is still applied the mandatory closure of at least 100 meters. Clearly the lack of data or analysis would warrant a higher percentage of these sites being in lower protection areas if balancing of usages had occurred. That simply did not happen.

4b. Summary worksheets that withhold required information are a per se violation of NEPA requirements of a full and public review and hard look.

The withholding of inventory information on the 966 ineligible sites and 520 sites found to need more information or analysis directly violate historic preservation laws and NEPA as numerous factors identified as critical to balancing multiple usage of cultural sites being ignored in the development of the ROD. Courts have routinely reversed NEPA decisions when there is a failure to provide supporting documents for public review. Courts clearly stated that when agencies seek to provide a worksheet instead of the underlying documentation do so at their peril. The Organizations submit Appendix I of the ROD is almost a mirror image of the Roadless worksheet struck down in the **Block** decision. The GJFO preparing such a worksheet was done at their peril and risk, and the Organizations submit this

worksheet is facially insufficient on numerous issues identified as critical to the balancing of multiple usage. This violation has directly and materially negatively impacted the public's ability to address site specific issues and routes on a precise level. This worksheet also notes admissions that 520 sites were closed with insufficient analysis and data.

In a NEPA proceeding, education and involvement of the public as to the basis and process of analysis utilized by the agency for decisions is one of the hallmarks of the proceeding. Courts reviewing NEPA analysis where critical inventory information has been withheld have uniformly held that the EIS and all data and documents on which EIS rely **must** be available and accessible to the public. The Courts have explicitly stated in matters addressing the intentional withholding of supporting NEPA documents that:

"... we conclude that the worksheets cannot be fairly considered as part of the RARE II Final EIS. **It is settled in this circuit that any supporting data or studies expressly relied upon in an EIS must be "available and accessible" to the public.** *Trout Unlimited, Inc.*, 509 F.2d at 1284. The WARS worksheets, however, are scattered all over the country in various Regional Foresters' offices, dooming any practical attempt to review comprehensively the worksheets. Given this inaccessibility, the worksheets may not be considered in determining the RARE II Final EIS's adequacy. "¹⁸

Courts have strictly required that all underlying NEPA documentation for determinations outlined in a worksheet must be made public, despite the worksheet being developed. In both the **Block** decision and ROD, site specific inventory information was withheld in favor of a worksheet style scoring summary of the illegally limited factors alleged to be used in balancing usages in the NEPA process. The **Block** Court decision directly addresses this policy as follows:

¹⁸ See, California v. Block, 690 F.2d 753, 765 (9th Circ, 1982) ; See also, Trout Unlimited v. Morton, 509 F2d 1276, 1284(9th Circ 1974).

"Second, little explanation is given to justify the numerical values given these variables. The Final EIS, for instance, offers no explanation of how resource output levels were assigned to each area. The EIS states that the levels "may appear to have been arbitrarily selected but, in fact, represent a realistic establishment of acceptable resource trade-offs to provide various alternative approaches." RARE II Final EIS at 21. The Final EIS, however, does not explain what the tradeoffs were or why they were considered acceptable or realistic. *California v. Bergland*, 483 F.Supp. at 490. **Rather than utilizing the Final EIS as an instrument for airing the issue of resource demand, the Forest Service instead shrouded the issue from public scrutiny behind the claim of administrative expertise.**¹⁹

While the worksheet in the **Block** decision did address each factor to be balanced in the Roadless inventory process, Appendix I of the ROD fails to address numerous factors to be balanced in cultural site management, making this situation even more egregious than that struck down by the **Block** Court. The critical factors omitted from Appendix I worksheet would include natural deterioration, previous management, possible importance or significance of resources at the site or inventory information on sites found ineligible for listing. After reviewing the Appendix I worksheet the public simply would have no idea how the tradeoff was made to justify management in the ROD. Appendix I simply assigned each site a number and a two word summary of the site without recognizing the many other factors to be balanced, even in an arbitrary manner. Managers merely asserted the same administrative expertise in preparing the worksheet as was found insufficient in the **Block** decision and forced the public to rebut this expertise. The Organizations vigorously assert that when the evidence available to support a claim of a proper balancing of usages and justify mandatory closures of all sites to multiple use is "open camp" or "open lithic" that "needs data or assessment" this is neither acceptable or realistic as a matter

¹⁹ See, **Block** at 767.

of law. The ROD must be reversed and returned to the Field office for a full and fair public process to be provided regarding the areas ineligible for listing on the national register and a proper review of all factors to be balanced in the multiple usage of each area.

5. The term surface disturbing activity is never defined, making meaningful site specific analysis impossible.

The lack of critical public information necessary to review the balance of uses in management of cultural sites is not limited to site specific geographic information, as critical management standards are never defined in the ROD. The cumulative impacts of failures to provide basic information on ineligible sites and failures to define management terms critical to the management of these areas, precludes meaningful balancing of multiple uses and completely precludes public comment on any portion of the decision making process.

The critical term never defined in the ROD is "surface disturbing activity" that is precluded around all 1,894 cultural sites. In the ROD 1,486 cultural sites are subjected to a minimum 100m exclusion of all surface disturbing activity²⁰ and another 135 sites are governed under a 200m mandatory closure to surface disturbing activity.²¹ Clearly the term "surface disturbing activity" is critical to balancing multiple uses on these sites but it is simply never defined in the ROD. Without a definition of this term, implementation of the standard will be arbitrary and capricious.

The "surface disturbing activity" is defined in and has been the basis for active and vigorous discussions in Greater Sage Grouse management efforts. In the Sage Grouse proceedings vigorous discussion occurred regarding the economic impacts between a 3% and 5% surface disturbance cap and certain exclusions in these calculations, such as the eventual exclusion of natural surface roads and trails in the calculation of the cap. The definition of this term was identified as critical to balancing multiple usage of Sage Grouse habitat, causing the Organizations to believe the definition is equally critical in these

²⁰ See, FRMP page 2-130-

²¹ See, FRMP pages 2-132

proceedings. In the ROD, a complete exclusion of surface disturbance around cultural sites is provided for without any public input or discussion of the critical nature of the term in other processes. This is a strong indication of faulty process in the development of the ROD.

While the same terms are applied in the ROD for the management of cultural sites at no point has the definition been made public in the ROD development. NEPA requirements mandate that basic information such as this be provided to the public and the definition of this term has been identified as critical to balancing usages at Sage Grouse habitat areas. Cultural sites may be managed under agency discretion, the definition of this term is equally critical to the balance of multiple usage of cultural sites as it was for Grouse habitat. The failure to define surface disturbing activity compounds complete lack of site specific information and resulting in a facial violation of the public process required by NEPA.

6a. The mandatory exclusion of all surface disturbing activities from cultural sites directly conflicts with national DOI standards for utilization of cultural sites.

In §6 of this statement of reasons, the Organizations identify the direct conflict between the complete exclusion of surface disturbing activity in the ROD and national Department of Interior ("DOI") standards and programs for the multiple usage and protection of cultural sites. The Organizations submit that the exclusion of surface disturbing activity has precluded implementation of any phase of these programs, and directly evidences the fault of the ROD. Clearly these national programs represent reasonable alternative for the management of these areas, yet these programs are not even mentioned in the ROD as an alternative excluded from further review. When implemented the complete exclusion of surface disturbing activity will prohibit application of these DOI programs at any site on the GJFO.

Newly released CEQ guidance documents address the relationship of NEPA informational requirements and historic preservation statutes. These guidance documents clearly identify the range of alternatives and data quality for cultural resources to be provided in an EIS as follows:

"The CEQ regulations require agencies to describe the environment, including cultural resources, likely to be affected by the proposed action and alternatives,**Data and analysis vary depending on the importance of the impact, and the description should be no longer than necessary to understand the effects of the alternatives, with less important material summarized, consolidated, or referenced.**"²²

The Organizations are deeply concerned that the ROD addressed cultural resource protection by adding 15 new standards for the management of sites.²³ Each is exactly the same for every alternative, causing the Organizations to believe there was simply no intent to balance usages as there was 45 different opportunities to balance usage and none were ever taken. These standards simply manage these areas as trustee would manage a trust. At no point is there any language that even references possible flexibility for balancing of multiple uses or the National BLM standards for utilization of these areas.

The Organizations submit that there are clearly Alternatives for management of cultural resources that have not been explored in NEPA analysis as the determination was made early in the management process that cultural resources would be managed under standards of a trustee managing a trust rather than as a balanced usage.

6b. National BLM standards for OHV usage in cultural sites provide a wide range of management alternatives.

The Organizations submit that the arbitrary and capricious nature of the RODs complete prohibition of surface disturbing activity in association with all possible cultural resource sites is immediately evidenced by the conflicts with national BLM guidance for the use of OHV's in association with cultural resource sites. The national BLM guidance issued to supplement manual 8110 specifically provides for a

²² See, 40 CFR 1506.6(f) at pg 16.

²³ See, FRMP at pgs 2-134 to 2-136

wide range of management alternatives to allow for continued OHV usage around these areas.²⁴ This usage simply is not possible under the complete prohibition of surface disturbing activities.

National BLM guidance starts by identifying the value of existing usage and management in cultural resource sites as follows:

"Potential for Adverse Effect: The potential effects of proposed designations differ according to the extent of anticipated change in OHV use. A. Proposed designations that will not change or will reduce OHV use are unlikely to adversely affect historic properties and will require less intensive identification efforts. These include designations that (1) allow continued use of an existing route; (2) impose new limitations on an existing route; (3) close an open area or travel route; (4) keep a closed area closed; or (5) keep an open area open."

In addition to the above landscape level discussion of alternatives for these areas, the National BLM guidelines continues with an extensive discussion of the relationship of travel management standards to the value of the historic site and alternatives that are available to avoid closures of routes.²⁵

Given that 40% of the GJFO remains managed under an open area designation and the remaining 60% has routes that could be kept open, the Organizations submit that there are clearly alternatives that could have been developed to preserve access on the wide range of sites now managed to preclude surface disturbing activity. No site specific analysis or discussion is ever provided as to why these alternatives were found insufficient to protect cultural resource sites. Such alternatives would be highly viable in areas that lack data or are ineligible for listing on the National Register, which encompasses

²⁴ See, BLM Instruction Memorandum No 2007-030; *Clarification of Cultural Resource Considerations for Off Highway Vehicle (OHV) designation and travel management; Program areas: Cultural resources; Recreation; Planning* ; Dated December 15, 2006 A copy of this memorandum is available here http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-030__.html .

²⁵ See, BLM memo 2007-030; supra note 32.

78% of the sites identified in the inventory. The management alternatives provided in national BLM memorandum clearly could have been reflected under one alternative of the 15 new categories of management. This simply was not done.

The Organizations submit that any position asserting mitigation of impacts by rerouting, reconstruction and limitations was not possible at all of the 1,894 sites identified in the inventory clearly lacks factual or rational basis especially in light of the large number of sites that need information or analysis. These are areas where moving to a designated route system represents a viable management alternative that provides for a more balanced usage.

6c. Mandatory closures of all possible cultural sites conflicts with DOI national objectives for the utilization of historical sites.

The Organizations submit that the mandatory closures of all historical/cultural sites to surface disturbing activities in the ROD directly conflicts with DOI efforts to solicit usage and occupancy of historical sites. This type of a programmatic conflict directly evidences serious failures in the landscape level management decisions of the ROD. In contrast to the ROD mandatory closures of all cultural sites to surface disturbing activity, the website for the National Register of Historic Places actively identifies 9,495 sites nationally that are vacant and solicits usage as these sites "which may be an ideal location for your next home or business."²⁶

Additionally, the National Trust for Historic Preservation provides links to specialized realtors who specialized in connecting homes on the National Register with potential buyers.²⁷ The states of New Hampshire, Arkansas historic preservation offices actively facilitate the purchase of historic homes as primary residences. The Organizations would be remiss if they did not note that residing in a historic property is a surface disturbing activity that would now be prohibited under GJFO management standard. These programs directly evidence that there alternatives for the management of these

²⁶ <http://www.nationalregisterofhistoricplaces.com/>

²⁷ <http://historicrealestate.preservationnation.org/>

areas and the ROD decision to exclude all surface disturbing activities was arbitrary and capricious. Again these programs are rendered irrelevant with the application of a prohibition of surface disturbing activity.

6d. There is simply no relationship between the proposed closure of several historic sites and the historic basis of the site.

The Organizations submit that the application of mandatory closures to all historical sites fails to address the historical nature and usage of each site and yields site management that is arbitrary as a matter of law and completely lacking any logical relationship to the site. The BLM cultural resources manual repeats the need to address the full history of the site and how it relates to the management standard proposed.²⁸ The limited site specific summaries (95 of 1,894) other than open camp or open lithic directly evidence an overly broad application of mandatory exclusion standards for protection for sites to the historical usage. Mandatory exclusions are applied to: old road and rail beds; recorded telegraph lines and abandoned power lines; irrigation ditches on adjacent private lands; buried pipes and abandoned irrigation ditches; fences of unknown origin; and two track roads of unknown origin and trails. The Organizations submit that the mandatory closure of old roads, trails and rail beds to multiple use recreation is arbitrary and capricious as a matter of law as the mandatory closure interferes with the historical usage and basis for the value in the site.

The Organizations further submit that mandatory closures for recorded telegraph line interests and buried pipes is arbitrary and capricious as a matter of law. The Organizations are unsure what historical value a recorded interest could be present and how mandatory closure protects an interest that is merely recorded in the county clerk's office. The Organizations further submit that mandatory closure of areas over buried irrigation pipes simply has no basis in law or fact.

²⁸ See, BLM Cultural Resources Inventory Manual- Manual 8110 @ 8110.21a

7. Wickiups are relied on for mandatory closures despite the limited importance and seriously deteriorated nature of these sites.

While wickiups are only mentioned briefly in the RMP,²⁹ the Organizations believe that the management of these structures and associated areas are highly relevant to our concerns regarding the lack of significance and importance of sites. 95% of sites are related to open camps or open lithics, which clearly could include wickiups, are identified for mandatory closures moving forward. These sites allow for concrete examples of locations where management alternatives represent real solutions for protection of sites that simply are never even reviewed in the ROD. These examples are exceptionally limited given the lack of information on cultural sites.

As 95% of cultural sites are associated with wickiups, there has been significant closures to motorized access in the GJFO relative to protection of these sites. The Organizations vigorously assert most of the wickiup sites on the GJFO are wholly insufficient to support designation on a Historic Register, and the overall poor condition must weigh heavily against landscape level closures of access in the vicinity of these sites. The Organizations believe that a definition of a wickiup is very relevant to concerns regarding importance and significance and the balancing of multiple uses, as most of the public simply is not aware of what a wickiup even is. Photos of a wickiup site are even more helpful in understanding what a wickiup site is as most people simply are not familiar with the term and are not able to form an accurate picture of what is being discussed from the definition. Often the public believes that wickiup sites are far more significant structures than they really are. Below is a well preserved juniper wickiup and a well preserved collapsed wickiup:

²⁹ See, FRMP 2-136.



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Given these pictures of "well preserved" wickiups, merely identifying a wickiup can be a significant concern. The Organizations are aware there are multiple volumes published to address wickiup research and provide a significant discussion of the deteriorated condition and limited value items that are frequently identified at wickiup sites.³¹ Researchers are also provided a series of hints to allow wickiup sites to be located if pictures are taken by researchers.³² In addition to be hard to locate, deteriorated wickiup sites often are simply not subjected to scientific review.³³

A review of the items found during excavation of wickiup sites finds many items of limited importance from a historical perspective, explaining why recovery is rare. The following photo reviews items commonly found after excavation of a wickiup site:

³⁰ *Id* photographic plate at pgs 56 and 70.

³¹ See, Rand A. Greubel, *Strategies and Methodologies for Investigating Wickiup Sites*; Presented at the Colorado Council of Professional Archaeologists Annual Meeting, March 5, 2005, Grand Junction, Colorado; at pg 1.

³² See, Colorado Wickiup Project *supra* note 158 at pages 64-69.

³³ See, Gruebel *supra* note 39; at pg 2.



The Organizations have to believe that the fact that most wickiup sites are not locatable by the public and probably will not be reviewed by scientists has to place these structures low on the priority list when compared with other multiple uses in the vicinity of the wickiup. The artifacts recovered at these sites clearly are less than significant or important. The Organizations submit that this research directly evidences the serious imbalance of multiple uses that results from prohibiting surface disturbing activity. Again, the ROD must be returned to the field office for the development of management standards that reflect the many factors of cultural resource management and provide for a truly balanced multiple usage of these areas.

8. Recreational economics simply have not been properly balanced in cultural resource management standards.

The Organizations submit the third question presented is as follows: "Is the economic analysis of the ROD sufficient to justify no change in cultural resource management when recreational economic contributions in the ROD were expanded to 7x original estimates?"

Courts have consistently held agencies to a much tighter level of review of economic benefits in the NEPA process, as Courts make their own conclusions regarding the accuracy of review without

³⁴ See, Martin et al; *The Colorado Wickiup Project Volume V: Test Excavation of The Ute Hunters' Camp (5RB563) and the Documentation of Five Additional Aboriginal Wooden Feature Sites in Rio Blanco County, Colorado*; September 2010 plate 7

deference to agency findings. Relevant court rulings addressing economic analysis and benefits have concluded:

"an EIS serves two functions. First, it ensures that agencies take a hard look at the environmental effects of proposed projects. Second, it ensures that relevant information regarding proposed projects is available to members of the public so that they may play a role in the decision making process. Robertson, 490 U.S. at 349, 109 S.Ct. at 1845. For an EIS to serve these functions, it is essential that the EIS not be based on misleading economic assumptions."³⁵

The Court discussed the significance of economic benefits and analysis in planning as follows:

"Misleading economic assumptions can defeat the first function of an EIS by impairing the agency's consideration of the adverse environmental effects of a proposed project. *See, South La. Env'tl. Council, Inc. v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir.1980). **NEPA requires agencies to balance a project's economic benefits against its adverse environmental effects.** *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C.Cir.1971). "³⁶

The accuracy standard for a hard look at economic analysis applied by the Court in the Hughes River decision is significant as the Hughes River Court invalidated an EIS based on an error in economic contribution calculations of approximately 32%.³⁷ In the ROD development, economic contributions of recreational usage and related jobs expanded to more than 7x original estimates between the draft and final RMP. While a major multiple use factor expanded to more than 7x original estimates, the management of the 1,894 sites identified for cultural resource management simply never changes. The Organizations submit that any assertion that a 7x expansion of recreational spending and jobs would

³⁵ Hughes River Watershed Conservancy v. Glickman; (4th Circ 1996) 81 F3d 437 at pg 442; 42 ERC 1594, 26 Env'tl. L. Rep 21276.

³⁶ *See, Hughes River* Supra note 2 at pg 442 .

³⁷ *See, Hughes River*, Supra note 2 at pg 442.

not impact these issues would completely lack factual and legal basis. No additional information or analysis is provided to justify the continued application of mandatory closures of all cultural sites and cannot be defended under the heightened De Novo standard applied by courts on economic analysis.

If there was a balance of usages in the draft RMP, the significant recalculations of economic contributions and jobs from recreational activity undertaken between the draft and final RMP should have impacted cultural resource management standards and allocations. These changes were insufficient to trigger any recalculation or reallocation of cultural sites to be managed. Not only is this a violation of multiple usage requirements, it is a per se violation of the higher standards of review that courts apply to agency determinations on economic benefits in the NEPA process.

The draft RMP summarized the total recreational economic contributions to the Grand Junction planning area in 2029 as follows:

"Recreation would generate nearly \$7.2 million in total spending, \$4.4 million in total value added and 90 full-time equivalent jobs by 2029." ³⁸

There was significant public outcry from local governments and many other groups regarding the undervaluation of recreation in the draft RMP. In the FRMP significantly more accurate analysis of both local spending (Mesa and Garfield Counties) and out of region recreational spending was provided. The FRMP provides the following analysis of recreational spending and recreational jobs from outside the planning region³⁹ and those in Garfield and Mesa Counties⁴⁰ as follows:

Table 4-98
2010 (Year 1): Compare Economic Impacts from Recreation
by Alternative (2014 dollars) Using NVUM Values

Impact	Alternative A	Alternative Proposed	Alternative C	Alternative D
Total Output (Spending)	\$ 23,690,421	\$ 23,927,322	\$ 23,288,986	\$ 23,685,495
Total Value Added (Income)	\$ 13,881,208	\$ 14,020,017	\$ 13,639,908	\$ 13,875,737
Employment	256.6	259.2	252.4	256.6

Source: IMPLAN calculations from BLM and NFS data

³⁸ DRMP at pg 2-247

³⁹ See, FRMP at pg 4-478

⁴⁰ See, FRMP at pg 4-479

Table 4-101
2010 (Year 1): Compare Economic Impacts from Recreation
by Alternative (2014 dollars) for Mesa and Garfield Counties Using NVUM Data

Impact	Alternative A	Alternative Proposed	Alternative C	Alternative D
Mesa County				
Total Output (Spending)	\$ 23,394,419	\$ 23,628,360	\$ 22,997,826	\$23,389,480
Total Value Added (Income)	\$ 13,693,155	\$ 13,830,085	\$ 13,454,935	\$13,687,678
Employment	254.5	257.1	250.3	254.5
Garfield County				
Total Output (Spending)	\$296,002	\$298,962	\$291,160	\$296,015
Total Value Added (Income)	\$188,052	\$189,933	\$184,974	\$188,059
Employment	2.1	2.1	2.1	2.1

Source: IMPLAN calculations from BLM and NFS data

When totaled, the FRMP concludes that 516 jobs are related to recreational usage of GJFO lands and more than \$47.5 million in spending flows to the Colorado state economy which represents an increase of estimates to more than 7x original estimates. Despite expansion of recreational spending to 7x, cultural resource management simply did not change in terms of total number of sites to be protected (1,894) or allocation of the sites to usage categories. These usages are summarized as follows:

<u>Use Category</u>	<u>Mandatory closure</u>	<u># of sites in Draft</u>	<u># of sites in Final</u>
Scientific	100m	1,574	1,574
Conservation	100m	4	4
Traditional	200m	135	135
Public usage	100m	95	95
Experimental	n/a	79	79
Discharge	n/a	7	7
TOTAL		1,874	1,874

The failure to balance multiple uses in cultural resource management is directly evidenced by the failure to change any aspect of cultural resource management after the economic contribution of recreation activity has expanded to more than 7x original estimates. No explanation has ever been provided to explain how the ROD determined there is no relationship between recreational access and cultural

resource management closures. Such a position fails to satisfy the Court's requirement that misleading economic assumptions must not be relied on in the NEPA process.

13. Conclusion.

This statement of reasons involves three questions of law, which are: 1) May the BLM withhold relevant inventory information on the 966 cultural sites found ineligible for listing on the National Register; 2) Does the ROD properly balance of multiple usage of the 1,894 cultural sites identified for management; and 3) Is the economic analysis of the ROD sufficient to justify no change in cultural resource management when recreational economic contributions in the ROD were expanded to 7x original estimates? The Organizations vigorously submit each question must be answered in the negative and each question represents a separate basis to overturn the ROD and return it to the Field Office for resolution of these issues.

Please feel free to contact Scott Jones at 518-281-5810 or via email at scott.jones46@yahoo.com or via USPS mail at 508 Ashford Drive, Longmont, CO 80504 if you should wish to discuss any of the concerns raised further.

Respectfully Submitted,



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