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U.S. Office of Surface Mining
 Denver Field Division
 P.O. Box 46667
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To: Pam Grubaugh-Littig	From: Howard E. Strand
Fax: 801-359-3940	Phone: 303-844-1400 ext. 1444
Date: September 19, 2006	Pages: 22 including this cover
Re: SUWA Revised LUM Petition	CC:

Urgent For Review Please Comment Please Reply Please Recycle

● **Comments:** Hi Pam – per my telephone message, attached is SUWA's September 12, 2006 revised Lands Unsuitable for Mining petition (sans the 30 exhibits). The "Administrative Completeness" section begins on page 5 and runs to the top of page 11 in the petition.

Please call or e-mail if you have any questions or need additional information.

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**Petition Before the U.S. Department of the Interior
Office of Surface Mining
to Designate Certain Lands in Utah
as Unsuitable for Coal Mining Operations
(revised)**

Submitted by:
Southern Utah Wilderness Alliance

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September 12, 2006

**Petition Before the U.S. Department of Interior
Office of Surface Mining**

Petition to Designate Lands as Unsuitable for Surface Coal Mining Operations

Introduction

Petitioner Southern Utah Wilderness Alliance (SUWA) on its own behalf and on behalf of its members, pursuant to section 522 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272, and 30 C.F.R. §769.12, respectfully petitions the United States Department of the Interior, Office of Surface Mining (OSM), to designate all lands lying within the zone of subsidence of the proposed Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations (referred to herein as the "petition area"). See Map – Proposed Lila Canyon Mine, Permit Area Map (attached hereto as Exhibit 1); Proposed Lila Canyon Mine, Subsidence Control Map (attached hereto as Exhibit 2).

In enacting section 522, Congress specifically recognized that in some circumstances "coal surface mining should give away [sic] to competing uses of higher benefit." U.S. House of Representatives Report No. 95-218 at 94 (1977). The circumstances existing in Lila Canyon, as shown by the evidence contained in this petition and accompanying materials, clearly fall within the congressional intent of "higher benefit" to the public that must be given priority over surface coal mining.

Under section 522(b) of SMCRA, the Secretary of the Interior is responsible for designating Federal lands in Utah as unsuitable for surface coal mining and if he determines that an area of Federal land is unsuitable for all or certain types of surface coal mining operations, he shall withdraw this area or condition mineral leasing so as to limit surface coal mining operations within this area. See 30 U.S.C. § 1272(b).

Additionally, the State of Utah has acknowledged that the authority to make determinations of unsuitability on Federal lands is reserved to the Secretary. See Utah Admin. Code, R645-103-221 (2006).

Section 522(c) of SMCRA allows any person having an interest which is or may be adversely affected by surface coal mining¹ to petition to have an area designated as unsuitable for surface coal mining operations. See 30 U.S.C. § 1272(c); 30 C.F.R. § 769.11 (any person having an interest which may be adversely affected by surface coal mining operations to be conducted on Federal lands may petition the Secretary to have the area designated as unsuitable for all or certain types of surface coal mining operations). That petition is submitted to the Director of the OSM Field Office responsible for that area where the Federal lands are located. 30 C.F.R. § 769.12.

Section 522(a)(3)(B) provides that "upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of coal mining operations if such operations will . . . affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems."² The term "historic lands" has been further defined to "include archeological sites, properties listed on or eligible for listing on a state or National Register of Historic Places . . . [and] properties having religious or cultural significance to Native Americans." 30 C.F.R. § 762.5 (emphasis added). See 16

¹ Section 701(28)(B) of SMCRA defines surface coal mining as "holes or depressions . . . resulting from or incident to such activities."

² Section 522(c)(3) of SMCRA provides that no surface coal mining operations shall be permitted "which will adversely affect any publicly owned . . . places included in the National Register of Historic Sites." In 1999, the Department of the Interior adopted Interpretive Rule Related to Subsidence Due to Underground Coal Mining which stated that subsidence due to underground coal mining is not included in the definition under section 701(28) of the Act and is therefore not prohibited in areas protected under section 522(e) of the act. See Citizens Coal Council v. Norton, 330 F.3d 478 (D.C. Cir. 2003) (upholding Secretary's interpretation of 522(e) as not prohibiting subsidence).

U.S.C. § 470f (National Historic Preservation Act); 36 C.F.R. Part 800 (Advisory Council on Historic Preservation regulations implementing NHPA Section 106).

SUWA respectfully urges the Secretary to designate the petition area as unsuitable for surface coal mining operations because that area is either known to contain or likely to contain a significant number of historic and prehistoric sites. These sites contribute important information about prior cultures, like the Fremont of nearby Range Creek Canyon, who are believed to have utilized the area for seasonal hunting and gathering, and who traveled through the area. While many important historic and prehistoric sites have been identified within the subsidence zone, many undiscovered sites likely exist and could be lost or damaged if the mine is approved. As explained below, SUWA and its members visit the permit area for aesthetic, educational, spiritual, and recreational opportunities. Accordingly, mining operations within the petition area will harm SUWA and its members by damaging important cultural, scientific and aesthetic resources currently enjoyed and appreciated by SUWA.

Petitioner's Contact Information

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Identification of the Petitioned Area

Included with this petition are the Proposed Lila Canyon Mine, Permit Area Map (Exhibit 1) and the Proposed Lila Canyon Mine, Subsidence Control Map (Exhibit 2). The Permit Area Map reflects the 5,544 acres contained within the six Federal leases

currently held by UtahAmerican Energy, Inc (UEI). The permit area is comprised of Permit Area B, which is the proposed Lila Canyon Mine extension of the Horse Canyon Mine (Permit Area A).

As noted above, the petition area is the "zone of subsidence" depicted on the Proposed Lila Canyon Mine, Subsidence Control Map.

Procedural Background

UEI currently has six Federal leases consisting of 5,544.01 acres (Permit Area B) which it purchased from Intermountain Power Agency in June 2000. These leases are in the South Lease-North Block LMU filed May 1996.

On July 27, 2001, the Utah Division of Oil, Gas and Mining (DOG M) issued UEI a permit for the Lila Canyon Coal Mining Project. DOGM's decision to grant the permit was challenged by SUWA on September 4, 2001, and came before the Utah Board of Oil, Gas and Mining (the "Board") on December 4, 2001. See Southern Utah Wilderness Alliance v. Division of Oil, Gas & Mining, Docket No. 2001-027/Cause No. C/007/013 at 2 (2001).

In its December 14, 2001, Finding, the Board remanded the permit decision to DOGM and directed that DOGM, before granting a permit, make a finding of no adverse impact when mining development exists within 100 feet of an intermittent stream. Id. at 14 (citing Utah Admin. Code R645-301-731.610). Additionally, the Board held that the record failed to disclose the qualifications of the personnel who collected the biological data under the requirements of R645-301-300. Id. at 14-15. Finally, the Board directed DOGM, based on Utah Admin. Code R645-303-222, to process the permit as a new permit rather than as a significant revision. Id. at 15-16.

SUWA has consistently argued to DOGM that the Lila Canyon Extension to the Horse Canyon Mine permit application package (PAP) is not administratively complete. DOGM's repeated determinations to the contrary are arbitrary and capricious and do not withstand scrutiny. Because DOGM's most recent determination that the PAP is administrative complete (made on March 26, 2004 and restated in September 2005) is erroneous, OSM may not rely on 30 C.F.R. § 769.14(g) to decline to process this non-frivolous Petition. See Letter from James Fulton, OSM to Stephen Bloch, SUWA (August 24, 2006) (attached hereto as Exhibit 3) (invoking 30 C.F.R. § 769.14(g) and declining to process SUWA Petition).

I. **2002-03: DOGM Determined that the PAP Was Not Administratively Complete**

Following the Board's 2001 decision remanding DOGM's permit decision, on February 11, 2002 UEI resubmitted its PAP for the proposed Lila Canyon mine. On February 25, 2002 DOGM determined that the PAP was administratively complete, a decision which SUWA immediately challenged as without basis. See Determination of Administrative Completeness for the Lila Canyon Extension, Utah American Energy, Inc., Horse Canyon Mine, C/007/0013 (February 25, 2002) (attached hereto as Exhibit 4). Specifically, on April 22, 2002 SUWA filed timely comments contesting the determination. See Letter from W. Herbert McHarg, SUWA to Mary Ann Wright, DOGM (April 22, 2002) (attached hereto as Exhibit 5). In its April 22, 2002 letter, SUWA specifically noted that pursuant to Utah Admin. Code R645-100-200, a PAP must contain all information addressing each application requirement of the State Program, and all information necessary to initiate processing and public review and that the UEI application failed those tests. Id. SUWA argued that DOGM's February 25, 2002

determination that the PAP was administratively complete was in error and requested, per Utah Admin. Code R645-300-123.120, that DOGM conduct an informal conference so that SUWA could explain why it believed DOGM's determination of administrative completeness to be in error. Id. SUWA's April 22nd letter noted multiple deficiencies in DOGM's determination that the PAP was administratively complete, including:

- Incomplete water baseline information relating to both surface and subsurface water resources relating to both water quality and quantity;
- Confusing and inconsistent references or information relating to the type, location, extent, treatment and testing of coal mine waste;
- Inadequate information relating to the mine water discharge;
- A flawed water monitoring plan resulting from a lack of ground water baseline data;
- A flawed Probable Hydrologic Consequences determination and an inadequate Cumulative Impact Area determination directly resulting from a lack of ground water baseline data;
- A problematic and insufficient Engineering Plan that contained outdated or clearly erroneous estimates;
- The PAP used insufficient topsoil reclamation standards;
- The required biology baseline provided inadequate vegetative and wildlife information;
- The land use portion of the PAP failed to adequately address wilderness, cultural or air quality concerns;
- The permit as submitted exceeded the parameters provided for an extension and was required to be submitted as a new permit;
- The coal haul road was not included as part of the permit area;
- Various legal issues remained unresolved; and
- The proposed permit area was unsuitable for mining.

On May 21, 2002 DOGM held an informal conference to discuss SUWA's concerns. See DOGM's Findings, Conclusions and Order (June 18, 2002) (attached hereto as Exhibit 6). On July 19, 2002 DOGM notified UEI that the company's application had been denied in part because it was not considered to be technically adequate. See Letter from Mary Ann Wright, DOGM to Jay Marshall, UEI (July 19, 2002) (attached hereto as Exhibit 7). In response to DOGM's determination that the PAP was deficient, UEI submitted additional information which was reviewed by DOGM and resulted in yet another finding of deficiency in April 2003. See Letter from Mary Ann Wright, DOGM to Jay Marshall, UEI (April 9, 2003) (attached hereto as Exhibit 8). Because of the delay in UEI's response to the technical deficiencies noted by DOGM – over 10 months – and because it is DOGM's "practice to consider 'inactive' any application that has been on our shelves for longer than 90 days and [return the application to the applicant] . . . [DOGM] [] require[d] UEI to publish again for public comments." See Letter from Pamela Grubaugh-Littig, DOGM to Jay Marshall, UEI (February 6, 2004) (attached hereto as Exhibit 9).

II. 2004-06: Revised PAP Still Not Administratively Complete

On February 26, 2004 UEI submitted its revised PAP to DOGM and on March 26, 2004 DOGM determined that the revised PAP was administratively complete and noted that a technical review of UEI's plan had been initiated. See Determination of Administrative Completeness for the Lila Canyon Extension, Utah American Energy, Inc., Horse Canyon Mine, C/007/0013 (March 26, 2004) (attached hereto as Exhibit 10). Once again, SUWA protested DOGM's finding of administrative completeness and requested that DOGM hold an informal conference on the matter. See Letter from W.

Herbert McHarg, SUWA to Mary Ann Wright, DOGM (May 26, 2004) (attached hereto as Exhibit 11). In its May 26, 2004 letter SUWA argued that the PAP failed to contain all the information required under the administrative rules and that DOGM had itself recognized that the PAP fell short in a number of categories. Id. SUWA further argued that DOGM's determination that the PAP was technically adequate was incorrect and noted that UEI had failed to submit all the data required for DOGM to make such a determination. Id. SUWA's May 26th letter specifically noted a number of deficiencies, the list of which mirrors the list of deficiencies noted by SUWA in its April 2002 letter. Id.

In the July 7, 2004 informal conference SUWA reiterated the deficiencies noted in its comment letter and emphasized that SUWA challenged both the administrative completeness and that technical adequacy of the PAP. See Transcript of Hearing in the Matter of Lila Canyon Extension (July 7, 2004) at 60-61 (excerpts attached hereto as Exhibit 12). SUWA argued that if hydrologic data required under the rules – among other required items – was missing, then DOGM erroneously determined that the PAP was administrative complete and the agency's determination was arbitrary and unsupportable. Id.

Following the July 2004 informal conference, DOGM sent UEI a Letter of Deficiency delineating 79 separate deficiencies and requested that UEI respond to the deficiencies by March 1, 2005. See Letter from Pamela Grubaugh-Littig, DOGM to Jay Marshall, UEI (November 30, 2004) (attached hereto as Exhibit 13).

On February 24, 2005 and March 23, 2005, UEI submitted additional documentation in response to the November 2005 Letter of Deficiency. See Letter from

Jay Marshall, UEI to Pamela Grubaugh-Littig, DOGM (February 24, 2005) and Letter from Wilson Martin, SHPO to D. Wayne Hedberg, DOGM (March 22, 2005) (transmitted to DOGM on March 23, 2005) (attached hereto as Exhibits 14 and 15). On May 20, 2005, DOGM issued UEI yet another deficiency letter, noting that the company's PAP contained 49 deficiencies, of which 19 are for issues that had been deficient in the past. See Letter from Pamela Grubaugh-Littig, DOGM, to Jay Marshall, UEI (May 20, 2005) (attached hereto as Exhibit 16). DOGM requested that UEI respond to these deficiencies by August 20, 2005. Id.

Based on UEI's response, DOGM finalized its review for the TA and found that the PAP was technically adequate. See Letter from Pamela Grubaugh-Littig, DOGM to Jay Marshall, UEI (September 21, 2005) (attached hereto as Exhibit 17). On October 11, 2005 SUWA sent a letter to DOGM commenting on the TA and arguing that DOGM had yet again incorrectly determined the PAP to be administratively complete and technically adequate, and requesting that DOGM hold another informal conference. See Letter from Stephen Bloch to Pamela Grubaugh-Littig, DOGM (October 11, 2005) (attached hereto as Exhibit 18).

In a letter dated November 8, 2005 submitted in conjunction with the informal conference, SUWA challenged DOGM's "erroneous conclusions" that the PAP was administratively complete and technically accurate. See Letter from Stephen Bloch, SUWA to John Baza, DOGM (November 8, 2005) (attached hereto as Exhibit 19). In its letter, SUWA noted a number of discrepancies that it had raised in its previous challenges to DOGM's determinations of administrative completeness and that had resulted in DOGM agreeing with SUWA and finding that UEI's PAP contained deficiencies and was

otherwise incomplete. On November 8, 2005 DOGM held an informal conference and SUWA raised these issues of DOGM's arbitrary determination of administrative completeness and technical adequacy. See Copy of Transcript, Informal Conference (November 8, 2005) (excerpts attached hereto as Exhibit 20).

Subsequent to the November 8, 2005 conference, on November 23, 2005 DOGM issued a letter to UEI requiring that company to supply supplemental information. See Letter from Pamela Grubaugh-Littig, DOGM to Jay Marshall, UEI (November 23, 2005) (attached hereto as Exhibit 21). In this letter, DOGM directed UEI to submit additional information for the 22 deficiencies that the company still had failed to address. Id. On January 17, 2006 DOGM issued a Stipulation to Amend [the November 2005 Informal Conference] Order, noting that DOGM had determined that UEI's PAP did not meet the requirements of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 et seq. See Stipulation to Amend Order, Cause No. C/007/013, DOGM (January 18, 2006) (attached hereto as Exhibit 22). The Order further stated that DOGM would be unable to issue definitive Findings to the November 2005 informal conference until UEI had fully complied with the NHPA. DOGM has undertaken initial efforts to comply with NHPA Section 106, though that process has not been completed. See Letter from Steven Alder, Assistant Attorney General to Denise Dragoo, Snell & Wilmer (Jan. 12, 2006) (attached hereto as Exhibit 23).

In sum, DOGM's own records conclusively demonstrate that UEI's PAP for the Lila Canyon mine has never warranted a finding of Administrative Completeness. As stated in Utah Administrative Code R645-100-200, a PAP must contain all information addressing each application requirement of the State Program, and all information

necessary to initiate processing and public review, in order to be considered administratively complete. Because the Lila Canyon PAP has never risen to this standard, and because SUWA has timely and consistently protested DOGM's Administratively Complete determinations, it would be unfair, highly prejudicial, and inconsistent with the rules and the preamble language to 30 C.F.R. Part 764 for OSM to deny processing of SUWA's non-frivolous Petition based on 30 C.F.R. §769.14(g).

Demonstration of Petitioner's Interest and Description of How Mining of the Area May Adversely Affect those Interests

Petitioner SUWA, based in Salt Lake City, Utah, has more than 15,000 members, many of whom reside in Utah. SUWA's mission is the preservation of the outstanding wilderness and other sensitive public lands in Utah and the management of these lands in their natural state for the benefit of all Americans. SUWA promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect Utah's wild places within the National Park and National Wilderness Preservation System or by other protective designations where appropriate; builds support for such initiatives on both the local and national level; and provides leadership within the conservation movement through uncompromising advocacy for wilderness preservation.

SUWA members and staff enjoy hiking, viewing cultural resources (pre-historic and historic), camping, birdwatching, study, contemplation, solitude, photography, and other activities in the public lands that make up the lands at issue in this petition. See generally Declaration of Ray Bloxham (attached hereto as Exhibit 24). SUWA staff and members' health, recreational, scientific, spiritual, educational, aesthetic, informational, and other interests will be directly affected and harmed by a decision by DOGM to issue

the Lila Canyon Extension to the Horse Canyon Mine permit and authorize mining beneath the zone of subsidence because of the devastating effect such operations will or may have to historic properties.

SUWA members and staff also participate in information gathering and dissemination, education and public outreach, commenting upon proposed government actions, and other activities relating to the management of and impacts on public lands, including those at issue here. Federal and state agencies frequently solicit SUWA's input and participation in the land use planning process for a variety of resource decisions, and SUWA actively participates in all levels of federal and state agency decision-making processes. Since 2000, SUWA has actively participated in DOGM's permitting process for the Lila Canyon Extension to the Horse Canyon Mine permit and SUWA is a "consulting party" in DOGM's efforts to comply with Section 106 of the NHPA. See Letter from Mary Ann Wright, DOGM to Stephen Bloch, SUWA (Jan. 13, 2006) (attached hereto as Exhibit 25). See also 36 C.F.R. § 800.2.

SUWA members and staff benefit from DOGM's strict compliance with the terms of federal environmental and historic preservation laws, including the NHPA, which is designed to foster fully-informed agency decision making. SUWA and its members are directly harmed by DOGM's failure to conform its actions to the terms of the NHPA because DOGM's noncompliance is frustrating SUWA's mission – the preservation of wilderness quality and sensitive public lands and the protection of natural and historic resources in Utah.

SUWA members and staff frequent Utah's canyon country, including the area within and abutting the proposed Lila Canyon mine subsidence area. Recent discoveries

(and related media accounts) of the literal treasure trove of historic properties located in the Range Creek Canyon area has significantly increased both the general public and professional archaeological community's interest in this important area. Because the Range Creek area was so recently discovered by archaeologists, research into the nature, density and distribution of prehistoric phenomena in the area is only just beginning. It is widely believed that thorough investigation of Range Creek Canyon and the surrounding area will offer significant insight into prior desert cultures, in particular how aboriginal people used the area for hunting, food processing, travel and commerce. See Declaration of Jerry Spangler, ¶ 5 (attached hereto as Exhibit 26). The proposed Lila Canyon Mine is likely home to a large and unknown number of historic and archeological sites. Id. ¶ 6.

The potential for archaeological sites to be located within the subsidence area to contribute to a better understanding of past lifeways will be an important factor enhancing the eligibility of these sites for nomination to the National Register of Historic Places under Criterion D. Id. ¶ 9. See 36 C.F.R. Part 60 (National Register of Historic Places); <http://www.cr.nps.gov/nr>. Commencing mining operations within the zone of subsidence may place at risk significant archeological and historical data, the loss of which would adversely affect and injure SUWA and its members.

SUWA members and staff use and enjoy the public lands, and natural resources on BLM lands for many health, recreational, spiritual, educational, aesthetic, and other purposes and have used and enjoyed for these same purposes the public lands at issue in this petition. SUWA members and staff take great pleasure from their visits to this area and intend to return as often as possible, but certainly within the next year.

Allegations of Fact and Supporting Evidence

I. **Under Section 522(a)(2), the Secretary Must Designate the Petition Area as Unsuitable for Surface Coal Mining Operations Because Reclamation of Lila Canyon Historic and Archeological Sites is not Technologically and Economically Feasible.**

Reclamation of historic and archeological sites located within the zone of subsidence for the Lila Canyon mine is neither technologically nor economically feasible and thus the Secretary must designate the petition area as unsuitable for surface coal mining operations.

As discussed by UEI in its Horse Canyon Mine-Lila Canyon Extension permit, subsidence from underground longwall mining may result in surface fissures that could facilitate erosion, alter ground slope and destabilize slopes and cliffs. See Permit Application, UEI Horse Canyon Extension Lila Canyon Mine – Part “B”, Chapter 5, Section 525.120 (excerpts attached hereto as Exhibit 27). If and when fissures bisect open campsites, rockshelters, etc., associated cultural materials exposed by the fissure would inevitably be lost to subsequent erosion. See Spangler Dec. ¶ 10a. Depending on the depth and width of these fissures, it is highly unlikely that eroded cultural materials could be recovered after the fissures occur, and it is probable that such materials would never be recovered within the stratigraphic context required for appropriate scientific analysis. *Id.* ¶ 10b. Furthermore, fissures that compromise the stability of cliffs and slopes could disturb the stratigraphic integrity of cultural deposits found in rockshelters, and result in the partial or total collapse of topographic features such as rockshelters with intact deposits or cliff faces with aboriginal rock art. *Id.* ¶ 10c. While the recovery of archaeological data subsequent to collapse is technically feasible, it most likely would not be economically practical to remove the overburden without damaging cultural deposits

below. Id. ¶ 10d. It is also possible that the integrity of intact cultural deposits in all contexts would be comprised by shifting, splitting and/or erosion of the ground surface. Id. ¶ 10e.

Federal agencies have recognized that subsidence creates a substantial risk to prehistorically occupied caves and rockshelters and to rock art sites, which are typically located at the base of cliffs that are prone to collapsing during episodes of subsidence. See e.g., Memorandum of Agreement Between The USDA Manti-La Sal National Forest, the Utah State Historic Preservation Officer, Canyon Fuels Company, L.L.C., and Utah Division of Oil, Gas, and Mining Regarding the SUFCO Mine (Agreement No. 00-MU-11041000-017 ¶¶ 6-8 (2000) (acknowledging potential for adverse effects) (attached hereto as Exhibit 28). Recently, the subsidence associated with underground coal mining at the SUFCO mine in Utah's Manti La Sal National Forest precipitated slope failure that resulted in the sloughing down slope of a rockshelter with known cultural deposits, and the burial of remaining deposits by rock debris from above. See Spangler Dec. ¶ 10f. As a result of subsidence at SUFCO, at least eight rock shelters that were eligible for listing on the National Register of Historic Places were either damaged or destroyed, all of which contained potentially significant cultural materials. Id. It was clearly anticipated in the memorandum of agreement signed by the Utah State Historic Preservation Officer, the U.S. Forest Service and others that subsidence could potentially cause damage to eligible cultural resources, and mitigation measures were mandated. See SUFCO Memorandum of Agreement, ¶¶ 6-8.

Because only about 20 percent of the Lila Canyon project area has been investigated, and only a small number of sites have been identified, it is probable that

many eligible historical sites exist within the project area which have yet to be identified. See supra at 8. The general sparseness of identified prehistoric sites and diagnostic artifacts is likely attributable to a paucity of problem-oriented survey strategies, inadequate survey techniques and the limited scope of previous surveys that were focused on small areas of direct impact. See Spangler Dec. ¶ 4.

The identification of additional eligible sites in the Lila Canyon area offers significant potential to contribute valuable information on prehistoric hunting and gathering activities in close proximity to Fremont farming sites both in Range Creek Canyon to the east and along the Price River to the west and south. Id. ¶ 7. Hunting and gathering are considered by Fremont scholars to be an integral part of Fremont "farmer-forager" lifeways, and a more comprehensive view of Fremont adaptive strategies (e.g., hunting, gathering, foraging) in the broader Tavaputs Plateau and San Rafael Swell is critical to an understanding of coexistent farming in the canyon bottoms. Id. ¶ 8.

II. The Criteria Set Forth in Section 522(a)(3) Warrants the Secretary's Designation of the Petition Area as Unsuitable for Surface Coal Mining Operations Because such Operations Would Affect Historic Lands Resulting in Significant Damage to Important Historic and Cultural Values Within the Meaning of that Section.

The discussion set forth in Part I, supra, is hereby incorporated by reference.

OSM's SMCRA regulations define "historic lands" as "areas containing historic, [or] cultural . . . resources. Examples of historic lands include archeological sites, properties listed on or eligible for listing on a State or National Register of Historic Places, National Historic Landmarks, properties having religious or cultural significance

to Native Americans or religious groups, and properties for which historic designation is pending." 30 C.F.R. § 762.5 (emphasis added).

There exists within the petition area an abundance of lands that qualify as "historic lands" as defined by OSM that may be significantly damaged by surface coal mining operations. Indeed, surface mining operations in the petition area could adversely affect important historic and archeological resources.

Archaeological research in the Lila Canyon area has been sporadic and the region remains poorly understood. See *A Class I Analysis of Previous Archeological Research, Lila Canyon Area, Emery County, Utah*, Jerry Spangler, November 2005, p. 3 (attached hereto as Exhibit 29). Because of the scarcity of permanent water and the absence of large permanent-resident archeological sites in the area, the Lila Canyon area has been largely ignored by researchers who have instead focused on the more abundant sites in nearby Nine Mile Canyon and Range Creek Canyon. Id. Archeologists did not pay attention to this area until Federal law in the 1960's and 1970's mandated consideration of potential impacts on these properties. Id. The mostly small-scale surveys that have been conducted over the last 25 years have all been associated with proposed hydrocarbon and telecommunications projects. Id. Those surveys have resulted in identification of at least 15 archeological sites, including two rockshelters with intact deposits of major significance. Id.

The first surveys in this area occurred in the late 1970's and early 1980's and involved examination of a number of drill sites and the access roads to those sites. Spangler Report, at 3.³ These surveys suggested short-term occupation of the area by

³ Most of the previous archaeological surveys conducted in the project area were small-scale studies conducted between 1979 and 1981 that did not utilize currently acceptable survey techniques. The

hunter-gatherers over a long period of prehistory. Id. Subsequent to those surveys, more extensive surveys, including a Class III survey in all primary impact areas, were conducted in the early 1980's in the area to the north of Lila Canyon permit area in anticipation of a then-proposed long-wall mining operation (the now-defunct Horse Canyon Mine). Id. at 3-4. This survey identified eleven sites. Id. at 4. These surveys represent the only significant archaeological research conducted in the petition area to date. Id.

These later surveys demonstrate that some areas contiguous to the petition area contain a significant number of historic and prehistoric sites. Spangler Report, at 4. The historic sites include log structures associated with ranching and mining from the late 1880's and the prehistoric sites indicated hunting and gathering activities during Formative and Protohistoric times. Id. These surveys suggest that the petition area has a potential for significant sites. Id.

Prior archaeological investigations in the Lila Canyon area have been largely small-scale surveys that focused on direct impact sites and most lands with the petition

issue of whether or not to require resurveys of previously surveyed areas has been the focus of considerable debate among state and federal agencies, and there is little intra- or interregional uniformity in those standards. See Todd C. McMahon, Reexamination or New Survey: A Study on Cultural Resource Management Investigation Activities in Colorado, Colorado SHPO, Denver (Manuscript 2006).

The Utah SHPO policy on resurveys is informal, and any decision on whether resurvey is required is left to the various state and federal agencies under which the project is initiated. Other SHPOs, however, take the position (formally or informally) that agencies should resurvey parcels if the previous surveys were conducted more than 20 years ago. The Arizona SHPO has a position statement that surveys conducted more than 10 years ago may be inadequate. Likewise, the Colorado SHPO has an informal policy wherein agencies are encouraged to require resurvey if the original survey was conducted more than 10 years ago. In New Mexico, administrative rules have been established defining strict survey standards intended to ensure quality control; surveys conducted 10 or 20 years ago – like those near Lila Canyon – likely do not meet these strict standards, and thus resurvey would be required. See N.M. Admin. Code 4.10.15.10C (2006). A recent study by the Colorado SHPO determined that resurveys of previously investigated areas will result in the identification of additional cultural resources, including a greater number of National Register eligible sites (McMahon 2006). Therefore, it is realistic to conclude that a thorough examination of all lands within the Lila Canyon project area would result in the identification of additional properties eligible for the National Register, both on un-surveyed and previously surveyed parcels within the zone of subsidence; properties that would be lost if SUWA's petition is not granted and the petition area is not declared unsuitable for surface mining operations.

area have not been subjected to archaeological surveys of any kind. Spangler Report, at 9. Because of the proximity of the petition area to Range Creek and the intense Fremont occupation in that area from 900 to 1300 A.D., there is a high probability that the petition area was an integral part of coexistent Fremont hunting and gathering strategies. Id. Some archaeologists believe that as many as 1000 Fremont lived in Range Creek Canyon at the peak of their occupation. See Brett Prettyman, Hidden Treasures, SALT LAKE TRIBUNE, June 1, 2006 (attached hereto as Exhibit 30). Duncan Metcalfe, a leading Range Creek researcher, has said that while only 8 to 10 percent of the canyon has been surveyed, 350 individual sites have been discovered. Id. These discoveries range from unsealed granaries to massive Petroglyph panels to quivers of arrows tucked in cracks in a cliff wall. Id.

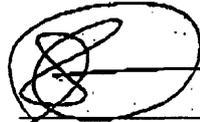
It is anticipated that additional remnants of prehistoric subsistence will be documented through additional surveys. Spangler Report, at 9-12. Specifically, the eastern, upland portion of Lila Canyon, within the zone of subsidence, should have a higher potential for site density than elsewhere in the area. Id. at 10. Previously recorded sites in the petition area offer the potential to contribute valuable information on Fremont prehistoric hunting and gathering activities within the area. Id. at 11. Fremont scholars consider these activities to be an integral part of Fremont lifeways and a more comprehensive view of Fremont adoptive strategies in this area is critical to an understanding of coexistent farming in the canyon bottoms. Id. at 12. Because of its location to major Fremont populations, the petition area offers significant research potential in understanding how geographically isolated groups interacted with groups in distant areas. Id.

Conclusion

WHEREFORE, SUWA requests that:

- (1) the petition area be designated as unsuitable for surface mining operations; and
- (2) no permit be issued for surface mining operations in the petition area while this petition is pending.

Respectfully submitted,



Stephen Bloch
Staff Attorney
Southern Utah Wilderness Alliance