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DEPT. OF INTERIOR
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UNITED STATES
DEPARTMENT OF
AGRICULTURE

RE: PROTEST OF UTAH BLM FEBRUARY 19, 2008 LEASE SALE OF 44 PARCELS THAT INCLUDE LANDS THAT COULD SIGNIFICANTLY IMPACT MULE DEER, ELK, AND PRONGHORN CRUCIAL WINTER RANGES OR DESIGNATED MULE DEER, ELK, AND PRONGHORN MIGRATION ROUTES, WILD TROUT, AS WELL AS AREAS WITH SAGE GROUSE HABITAT OR WITHIN 2 MILES OF SAGE GROUSE LEKS.

INTRODUCTION

On the behalf of the Theodore Roosevelt Conservation Partnership (hereinafter referred to as "TRCP" or "Protestors") I respectfully protest the inclusion of 44 proposed lease sale parcels on lands administered by the Bureau of Land Management ("BLM") within the state of Utah and in Rich, Piute, Sevier, Wayne, Sanpete, Emery, Uinta, and San Juan counties and request that these parcels be withdrawn from the February 19, 2008 lease sale. This protest is filed pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3.

Complete List of Protested Lease Sale Parcels

UTU85941; UTU85942; UTU85943; UTU85944; UTU85945; UTU85946; UTU85947; UTU85948; UTU85949; UTU85950; UTU85951; UTU85952; UTU85953; UTU85954; UTU85955; UTU85956; UTU85957; UTU85958; UTU85959; UTU85960; UTU85961; UTU85962; UTU85963; UTU85967; UTU85968; UTU85969; UTU85970; UTU85971; UTU85972; UTU85973; UTU85974; UTU85975; UTU85976; UTU85977; UTU85980; UTU85982; UTU85983; UTU85984; UTU85985; UTU85986; UTU85987; UTU85992; UTU85994; UTU85996.

These parcels contain significant portions of designated mule deer, elk or pronghorn crucial winter ranges or migration routes, are within the important Bear River and Sevier River watersheds, or contain sage grouse habitat and/or fall within 2 miles of a sage grouse lek. The leases as proposed lack adequate planning and necessary management guidelines and will irretrievably and unlawfully commit these priceless Utah lands to oil and gas development.

TRCP specifies the following points:

- The most recently updated information on designated big game crucial winter ranges and migration routes, and sage grouse strutting and nesting areas developed by the Utah Division of Wildlife Resources (UTDWR) has provided the BLM with significant new information establishing the important characteristics of these and other special surface values of these areas.
- Recent research conducted on the impacts of oil and gas development on crucial winter range has concluded that development has an immediate and significant effect on mule deer and elk use and population of winter ranges.

- A recent decision by the United States District Court for the district of Idaho made a decision that the US Fish and Wildlife Service review the potential listing of sage grouse under the Endangered Species act. The BLM should take no action that will further harm grouse until FWS has made its listing determination on remand. The species may be listed and, if so, some of that habitat may be designated as crucial habitat under the ESA. This is pursuant with the new information provided from numerous studies on the impacts of oil and gas development on sage grouse that has been supported by the BLM (see Naugle and Malloran).
- Current stipulations and conditions-of-approval are not adequate to protect and manage crucial big game winter ranges and migration routes and sage grouse nesting and strutting areas and have a history of being waived in many BLM field offices.
- Absent comprehensive habitat management planning for mule deer, elk, pronghorn, and wild trout populations and how BLM is supposed to meet the requirement to manage habitats to meet UT DWR objectives for populations, leasing and subsequent surface development and road construction will render these lands unsuitable for management of mule deer, elk and pronghorn crucial winter range and migration routes and important trout fisheries.
- The Executive Order 13443, Facilitation of Hunting Heritage and Wildlife Conservation Sec 2 c. states that federal agencies must, "Manage wildlife and wildlife habitats on public lands in a manner that expands and enhances hunting opportunities, including through the use of hunting in wildlife management planning."
- The BLM is not following the recommendations of the Western Governors' Associations Policy Resolution 07-01, which ask for the protection of wildlife migration corridors and state wildlife agency designated crucial habitats.
- BLM has not conducted new on-the-ground inventories or environmental analysis required by the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (NEPA) and the Federal Lands Policy and Management Act, 43 U.S.C. §§1701 *et seq.* (FLPMA).
- Accordingly, including the disputed parcels in the upcoming lease sale violates federal law.

Therefore, Protesters request that the BLM withdraw these parcels from leasing until the agency has fully complied with applicable law. |

PROTESTERS

A. Theodore Roosevelt Conservation Partnership

The Theodore Roosevelt Conservation Partnership is a national non-profit conservation organization (501-3c) that is dedicated to guaranteeing every American places to hunt and/or fish. TRCP accomplishes its goal through three areas of concern: access to public lands, funding for natural resource agencies, and conservation of fish and wildlife habitat. In cooperation with various partners, TRCP has formed a Fish, Wildlife, and Energy Working Group, which is collectively comprised of some of the country's oldest and most respected hunting, fishing, and conservation organizations. With over 100,000 individual members in the U.S. and over 1000 individual members in Utah, TRCP is working hard to ensure that the development of oil and gas resources on public lands in the West is balanced with the needs of fish and wildlife resources. It is of great concern that the rapid pace of energy development has precluded the

BLM from managing wildlife and fish resources for the future. We are especially concerned with the fate of mule deer and the recreational opportunities they provide to TRCP members, TRCP affiliates, and tens of thousands of other sportsmen each fall in UT. Without comprehensive habitat management planning that is coordinated with the UT Division of Wildlife Resources, leasing and development of crucial mule deer winter ranges and migration routes will have a devastating effect.

BACKGROUND

The BLM has identified in its Resource Management Plans that big game, sage grouse, and fisheries are a resource that is "important," recognizing the sensitive nature of winter ranges, migration routes, leks, nesting habitat, and water quality and subsequently applying lease stipulation and activity restrictions to prevent loss of these areas for these purposes.

The majority of the 44 disputed parcels lack NSO or other stipulations critical for the protection of essential habitat characteristics of these areas for big-game use in migration or in winter, or sage grouse habitats and leks, or important wild trout watersheds. BLM did not analyze its ability to protect the habitat function of big game crucial winter range, migration routes, sage grouse habitat and leks.

The BLM has used timing stipulations and conditions-of-approval to prevent impacts from human disturbance on crucial winter ranges since the early 1980's. The BLM did not analyze the impacts that habitat fragmentation, loss, and other factors, both indirect and cumulative, associated with energy field development within their Resource Management Plans. It only made a determination that leasing was suitable and any specific analysis was deferred to the specific project level. Subsequent NEPA analysis for development does not include analysis on the impacts from operation and maintenance of oil or gas wells and related infrastructure which has proven to impact wildlife resources.

Since that time and as recently as 2006, significant new information about the impact to crucial winter ranges and migration routes has led to the BLM adjusting, and in some instances significantly changing, the winter range boundaries for mule deer, elk, pronghorn, and sage grouse.

UTDWR and researchers have continued to study big game behavior and have been able to identify new information about migration routes and crucial habitats used by wildlife that was not available at the time of RMP development. These submissions constituted inventories and evaluations of the areas using vastly improved inventory techniques and methods – including compilation of comprehensive on-the-ground data, photographs, mapping, and extensive documentation of land conditions and values collected during extended visits, and research conducted subsequent to the BLM's RMP development. This credible, substantiated new documentation refutes the agency's cursory findings and calls into question the current validity of the BLM's RMPs analysis of impacts to mule deer, elk, pronghorn, and sage grouse.

Mule Deer, Elk, Pronghorn and Sage Grouse

The Utah Division of Wildlife Resources (UTDWR) has stated in its *Statewide Management Plan for Mule Deer* that "Mule deer are the most important game animal in Utah" and that the state has received a consistently high demand for annual mule deer harvest tags. The UTDWR has also stated in its *Statewide Management Plan for Elk* that "Maintaining a diverse and high quality elk hunting program is important to Utah sportsmen. Hunter demand for opportunity to hunt mature bulls is high and increasing."

Crucial habitats and features are essential to mule deer, elk, and sage grouse population survival. The quantity and quality of mule deer and elk habitat is identified by UTDWR as the primary determiner of the health and size of mule deer and elk herds. UTDWR also identifies energy development as a main

source of "loss or degradation of mule deer habitat," meaning these habitats should retain their qualities in order to sustain populations over time (*Utah Division of Wildlife Resources Statewide Management Plan for Mule Deer Nov. 13, 2003*).

In addition, the UTDWR *Strategic Management Plan for Sage Grouse 2002*, identifies the effects of coal bed methane, gas/oil drilling on sage grouse habitat as a key "issue." The sage grouse habitat can potentially be listed critical habitat under the Endangered Species Act. The BLM has identified in its Resource Management Plans that big game and sage grouse are a resource that are "important," recognized the sensitive nature of winter ranges, migration routes, sage grouse habitat, and subsequently has applied lease stipulation and activity restrictions to prevent loss of these areas for those purposes. However, if BLM proceeds with leasing the disputed parcels, it would be burdened with new mineral development rights and would lose the essential "vital" characteristics as development occurred

Again, the UTDWR *Statewide Management Plan for Elk* states that "Crucial elk habitat is continuously being lost in many parts of Utah and severely fragmented in others due to human expansion and development. Urbanization, road construction, OHV use, and energy development have all impacted elk habitat." Energy development is associated with increased fragmentation, human expansion and development, road construction, increased OHV use through new roads, and the actual energy development footprint itself.

Wild Trout Fisheries

Leasing without upfront planning along the Otter Creek, Big Creek, and Woodruff Creek watersheds that are all a part of the Bear River watershed, and leasing along the Sevier River in southern Utah may have serious impacts on wild trout fisheries. The Bear River drainage contains the Bear River (or Bear Lake) cutthroat trout, a minor subspecies of the Bonneville Cutthroat trout found native only in the Bear River watershed. The Sevier River is historically a Bonneville Cutthroat stream, with significant populations of Bonneville cutthroats still inhabiting upper reaches of the watershed and brown and rainbow trout being the predominate fish at lower reaches, with some Bonneville Cutthroats. Trout provide quality fishing as far down the Sevier River as Marysvale Canyon.

Currently, the Bonneville Cutthroat trout is being reconsidered as an endangered species by the US Fish and Wildlife Service. Lease parcels in the Bear River and Sevier River watersheds should undergo upfront conservation planning to ensure that energy development is done in a way that seeks to minimize impacts on Bonneville cutthroat trout and other wild trout fisheries that are important to anglers and the public.

Surface disturbances resulting from gas and oil development activities such as road building, well pad and pipeline construction can result in increased runoff and erosion. This increased runoff and erosion increases water temperature, reduces dissolved oxygen, and contributes additional sediment that impedes natural reproduction and causes declines of the macro invertebrates that trout feed on.

Additionally, the U.S. Geological Survey has noted that with the increase in the amount of ground water development for industrial purposes, impacts to ground water levels will result in significant declines to fisheries. In fact, it was noted that in many areas of the West, ground water levels have declined 300 feet or more in the past 10 years. The over-pumping of ground water negatively affects fisheries and wildlife habitat by diminishing the surface water flows. Surface flows in the forms of rivers, streams, playas, and wetlands, provide important wildlife and fisheries habitat. Associated oil and gas development use vast quantities of water to assist in the extraction of the oil or gas product. Currently in Wyoming, coalbed methane (CBM) development is having a profound effect on water extraction. One well can produce

17,280 gallons per day and 6,307,200 gallons per year. This staggering amount of water extraction should be considered for proposed lease areas in the Bear River and Sevier River watersheds¹.

LEGAL REQUIREMENTS

I. National Environmental Policy Act ("NEPA")

A. The BLM violated NEPA by failing to take the required "hard look" at significant new information that questions the validity of its current RMPs.

NEPA requires federal agencies to take a hard look at new information or circumstances concerning the environmental effects of a federal action even after an initial environmental analysis have been prepared. Agencies must supplement the existing environmental analyses if the new circumstances "raise [] significant new information relevant to environmental concerns." Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708-709 (9th Cir. 2000). Specifically, an "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look' at the environmental effects of [its] planned actions." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000).

NEPA's implementing regulations further underscore an agency's duty to be alert to, and to fully analyze, potentially significant new information. An agency "shall prepare supplements to either draft or final environmental impact statements if...there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii)(emphasis supplied).

An agency must prepare a Supplemental EIS "if the new information is sufficient to show that the remaining action will ... 'affect the environment' in a significant manner or to a significant extent not already considered." Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851, 1859 (1989)(internal citations omitted). The Council on Environmental Quality ("CEQ") regulations provide that, where either an EIS or Supplemental EIS is required, the agency "shall prepare a concise public record of decision" which "shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable," and (c) "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. § 1505.2.

CEQ NEPA guidance states that "if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new circumstances or information] compel preparation of an EIS supplement." See, 46 Fed. Reg. 18026 (1981)(Question 32).

¹
USGS. Ground water Atlas of the United States. 2002. Available at:
<http://capp.water.usgs.gov/gwa/gwa.html>

Trout Unlimited. Gone to the Well Once Too Often. April 2007. Available at:
http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/ground%20water%20ed_lores.pdf

This is supported by BLM Instruction Memoranda ("IM"). According to a 2000 IM from the Washington Office:

We are concerned about the maturity of some of our NEPA documents. In completing your [Determination of NEPA Adequacy or DNA], keep in mind that the projected impacts in the NEPA document for given activities may be understated in terms of the interest shown today for any given use. You need to take a "hard look" at the adequacy of the NEPA documentation.

IM No. 2000-034 (expired September 30, 2001).

In a subsequent IM, the Washington Office instructed field offices as follows:

If you determine you can properly rely on existing NEPA documents, you must establish an administrative record that documents clearly that you took a "hard look" at whether new circumstances, new information, or environmental impacts not previously analyzed or anticipated warrant new analysis or supplementation of existing NEPA documents...

The age of the documents reviewed may indicate that information or circumstances have changed significantly.

IM No. 2001-062 (emphasis supplied)(expired September 30, 2002).

When considering whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, the Interior Board of Land Appeals will be guided by the "rule of reason." Bales Ranch, Inc., 151 IBLA 353, 358 (2000). "The query is whether the [BLM's DNA] contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the proposed action. Southwest Center for Biological Diversity, 154 IBLA 231, 236 (2001)(quoting California v. Block, 690 F.2d 753, 761 (9th Cir. 1982))(emphasis supplied). See also, Friends of the Bow v. Thompson, 124 F.3d 1210, 1213 (10th Cir. 1997)(to comply with NEPA's "hard look" requirement an agency must adequately identify and evaluate environmental concerns)(emphasis supplied).

The BLM failed to take a hard look at new information and new circumstances that have come to light since the BLM's original boundaries for mule deer crucial winter range and migration routes and development of each field office's land use plans. Recent updates to the seasonal boundaries and migration routes for mule deer have been completed after most of the RMPs were completed or revised. The DNAs prepared for the leasing action inadequately address the significant impacts of mineral development on the crucial mule deer winter range and migration routes. For this reason, BLM's approval of the disputed lease parcels is arbitrary, capricious, contrary to law, and an abuse of discretion.

1. Crucial Winter Ranges, Migration Routes, and Sage Grouse Habitat

All or parts of parcels UTU85941; UTU85942; UTU85943; UTU85944; UTU85945; UTU85946; UTU85947; UTU85948; UTU85949; UTU85950; UTU85951; UTU85952; UTU85953; UTU85954; UTU85955; UTU85956; UTU85957; UTU85958; UTU85959; UTU85960; UTU85961; UTU85962; UTU85963; UTU85967; UTU85968; UTU85969; UTU85970; UTU85971; UTU85972; UTU85973; UTU85974; UTU85975; UTU85976; UTU85977; UTU85980; UTU85982; UTU85983; UTU85984; UTU85985; UTU85986; UTU85987; UTU85992; UTU85994; UTU85996 of public land provide crucial habitat and migration routes for mule deer, pronghorn, elk, and sage grouse, and crucial habitats are considered a "primary determiner" by the UTDWR for the survival and sustainability of wildlife populations. BLM found these habitats to be important enough to identify them in some existing RMPs and provides the use of timing stipulation to prevent unwanted impacts. This information has not been

analyzed in existing NEPA documents, particularly with the subsequent development that leasing causes. Therefore, this important mule deer documentation constitutes significant new information, triggering additional requirements before leasing can proceed.

The BLM has also identified in their Memorandum of Understanding with the UTDWR and agreed to "Practice those forms of land and resource management that will benefit wildlife and fisheries as full as practicable and give emphasis to establishing wildlife management areas for critical wildlife habitat management in coordination with the requirements of other uses and values." The BLM has agreed to consult with the UTDWR "about plans for any construction projects that may affect or influence fish and wildlife." The BLM has also agreed in this MOU that it is the objective of both agencies to "provide recognition of fish and wildlife and their habitat as priority resources giving attention equal to that of other recognized resources." This information has not been analyzed in existing NEPA documents, particularly with the subsequent development that leasing causes. Therefore, this important wildlife documentation constitutes significant new information, triggering additional requirements before leasing can proceed.

Note, BLM has funded and served as advisors on specific research in Wyoming (Sublette WY Mule Deer Study) to evaluate impacts on mule deer from development in winter range. The most recent findings, including published literature, reported finding significant impacts to mule deer use of winter range, with 27% being attributed to energy development. This, too, proves that there is significant new information concerning impacts to crucial mule deer winter range and migration routes sufficient to trigger supplemental NEPA analysis.

This requested action is consistent with other actions taken by BLM field offices in other states. For example, the Glenwood Springs Field Office, in January 10, 2002, stated that the BLM will "hold in abeyance any leasing decisions until we are able to do a complete and thorough job" evaluating a submission of significant new information for the Grand Hogback Citizens Wilderness Proposal because "[t]hese values are not adequately addressed in current plans or NEPA..."

Additionally, in recent Wyoming lease sales (December 2006) the Wyoming Game and Fish (WGF) requested that certain parcels within Sublette County (Webb Draw) that contained new information be precluded from leasing at the time because there were no management actions in place to ensure that they would not be significantly impacted by leasing. The BLM subsequently withdrew the two lease parcels from the December lease sale. This establishes the BLM's concurrence that the state fish and wildlife agency and research provided significant new information regarding the importance of mule deer values of the areas.

It is also consistent with other actions taken by BLM field offices in other states. For example, the Glenwood Springs Field Office, in January 10, 2002, stated that the BLM will "hold in abeyance any leasing decisions until we are able to do a complete and thorough job" evaluating a submission of significant new information for the Grand Hogback Citizens Wilderness Proposal because "[t]hese values are not adequately addressed in current plans or NEPA..."

The majority of current RMPs do not address the impacts of mineral leasing and development (including operation and maintenance) on crucial winter ranges and migration routes or sage grouse habitat. The information provided by mule deer and sage grouse research in Sublette County paints a "seriously different picture of the likely environmental consequences of the proposed action" that has never been discussed in an environmental assessment or impact statement. State of Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); *accord*, Essex county Preservation Ass'n v. Campbell, 536 F.2d 956 (1st Cir. 1976)(where the court held that a Governor's moratorium on the construction of new highways was significant new information that required preparation of a supplemental EIS). For this reason, the

agency's decision to lease parcels that could significantly impact crucial winter range, migration routes, and sage grouse habitat in the absence of an environmental assessment that addresses the impacts of leasing for oil and gas development and demonstrably complies with the requirements of NEPA is arbitrary, capricious, contrary to law, and an abuse of discretion.

In addition, on December 4, 2007, the Federal District Court for the District of Idaho rebuked the U.S. Fish and Wildlife Service for failing to consider the best available science when it refused to list greater sage-grouse as "threatened" or "endangered" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* *Western Watersheds Project v. U.S. Forest Service* ___ F. Supp. 2d ___, 2007 WL 4287476 (D. Idaho Dec. 4, 2007). The court reversed and remanded the agency's 12-month "not warranted" decision issued in 2005. The court explained the perilous condition of the sage-grouse and the impact suffered by its habitats to date:

While the rate of decline has recently slowed, the sage-grouse's habitat is being subjected to accelerating threats from invasive weeds, fires, *energy development*, and livestock grazing. About one-half of the original area occupied by the sage-grouse is no longer capable of supporting sage-grouse on a year-round basis.

Id. at *1 (emphasis supplied). Further elaborating on the current state of grouse habitat according to the experts, the court noted: "Nowhere is sage-grouse habitat described as stable. By all accounts, it is deteriorating, and that deterioration is caused by factors that are on the increase." *Id.* at *12.

The court specifically focused on the impact of oil and gas development on grouse habitat as identified by an independent expert team:

Additional long-term problems were expected to be caused by increased oil and gas development. Existing development "influenced 28% of the sagebrush habitats within the [Assessment] study area," and caused a "direct loss of habitat." *Id.* at 7-40, 7-42. Increases in demand for oil and gas have led to increased demand for drilling permits. For example, in the Powder River Basin (extending through sage-grouse range in Montana and Wyoming), while 15,811 wells have been approved, an additional 65,635 "are being considered . . ." *Id.* at 7-42; Fig. 7-30. This was no isolated instance: "[T]he [BLM] anticipates receiving large numbers of applications for permits to drill." *Id.* at 13-7. The CA noted that because 96% of all drilling permit applications are approved, "the frequency and extent of oil and gas development on sagebrush ecosystems are likely to increase . . ." *Id.*

Id. at *5. Quoting from an independent conservation assessment, the court noted:

In summary, "the western landscape has been subjected to a new suite of intense, frequent, or continuous disturbances." *Id.* at p. 13-6. It is the "cumulative impacts of the disturbances, rather than any single source, [that] may be the most significant influence on the trajectory of sagebrush ecosystems." *Id.* at p. 13-8. And that "trajectory," in the opinion of the experts who drafted the Assessment, is headed in a negative direction . . .

Id. Finally, the court noted that there was "a singular lack of data on measures taken by the BLM to protect the sage grouse from energy development, the single largest risk in the eastern region." *Id.* at *14.

In light of the obvious concerns expressed by the court about the state of sage grouse and grouse habitat, as well as the acute recognition of the impact of oil and gas development on grouse and the inadequacy of information concerning BLM efforts to mitigate the same, TRCP contends it is simply not prudent to lease lands containing documented sage grouse habitat pending further consideration by the Fish and Wildlife Service of the grouse's status under the ESA. Indeed, if the species were listed and protected under the ESA, that law requires that certain "critical habitats" also be defined. 16 U.S.C. § 1533. It is possible that the very lands BLM now intends to lease will be so designated. At a minimum, regardless of the Fish and Wildlife Service's obligations, the court's findings certainly warrant additional NEPA review by BLM prior to leasing.

In light of the significant new information highlighted above, the agency's decision to lease parcels that could significantly impact crucial mule deer winter range and migration routes and grouse habitat without further evaluating the impacts of leasing is unsupportable. Any Documentation of NEPA Adequacy ("DNA") prepared for the proposed lease sale is arbitrary, capricious, contrary to law, and an abuse of discretion.

B. The BLM violated NEPA by failing to conduct site-specific pre-leasing analysis of mineral development impacts on the special public lands in the disputed parcels

The BLM must analyze the impacts of subsequent development prior to leasing. The BLM has not analyzed Protesters' documentation of special surface values that will be permanently compromised by future development. Therefore, the BLM cannot defer all site-specific analysis to later stages such as submission of Applications for Permit to Drill ("APDs") or proposals for full-field development. Just as it is futile to try and put Humpty-Dumpty back together again, law and common sense require the agencies to analyze the impacts to crucial mule deer winter range and migration routes areas before issuing leases. Because stipulations and other conditions affect the nature and value of development rights conveyed by the lease, it is only fair that potential bidders are informed of all applicable lease restrictions before the lease sale.

An oil and gas lease conveys "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. §3101.1-2. This right is qualified only by "[s]tipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed." 43 C.F.R. § 3101.1-2.

Unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, the BLM argues lease development must be permitted subject only to limited discretionary measures imposed by the surface-managing agency. However, moving a proposed wellpad or access road a few hundred feet generally will fall short of conserving mule deer habitat and other special habitats. Additionally, no analysis of the impacts from operation and maintenance is included and has proven to cause significant impacts from human activities in sensitive habitats.

Accordingly, the appropriate time to analyze the need for protecting site-specific resource values is *before* a lease is granted. *Sierra Club v. Peterson* established the requirement that a land management agency undertake appropriate environmental analysis prior to the issuance of mineral leases, and not forgo its ability to give due consideration to the "no action alternative," 717 F.2d 1409 (D.C. Cir. 1983). This case

challenged the decision of the Forest Service ("FS") and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The FS had conducted a programmatic NEPA analysis, then recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. Because the FS determined that issuing leases subject to the recommended stipulations would not result in significant adverse impacts to the environment, it decided that no EIS was required at the leasing stage of the proposed development. *Id.* at 1410. The court held that the FS decision violated NEPA:

Even assuming, *arguendo*, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases allowing surface occupancy] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

Id. at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision "when the decision-maker retains a maximum range of options" prior to an action which constitutes an "irreversible and irretrievable commitments of resources[.]" *Id.* (citing *Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)); see also *Wyoming Outdoor Council*, 156 IBLA 347, 357 (2002) *rev'd on other grounds* by *Pennaco Energy, Inc. v. US Dep't of Interior*, 266 F.Supp.2d 1323 (D. Wyo. 2003).

The court in *Sierra Club* specifically rejected the contention that leasing is a mere paper transaction not requiring NEPA compliance. Rather, it concluded that where the agency could not completely preclude all surface disturbances through the issuance of NSO leases, the "critical time" before which NEPA analysis must occur is "the point of leasing." 717 F.2d at 1414. This is precisely the situation for disputed crucial elk, mule deer, pronghorn, and sage grouse parcels.

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. None of the environmental documents previously prepared by BLM examine the site-specific or cumulative impacts of mineral leasing and development to the crucial winter ranges, migration routes, sage grouse habitats and leks. The agency has not analyzed the new information, nor has it assessed what stipulations, other than timing restrictions, might protect special surface values. This violates federal law by approving leasing absent environmental analysis as to whether NSO stipulations should be attached to the crucial mule deer winter ranges and migration routes lands.

Federal law requires performing NEPA analysis before leasing, because leasing limits the range of alternatives and constitutes an irretrievable commitment of resources. Deferring site-specific NEPA to the APD stage is too late to preclude development or disallow surface disturbances of important big game and sage grouse habitat.

C. The BLM violated NEPA by failing to consider NSO and No-Leasing Alternatives

The requirement that agencies consider alternatives to a proposed action further reinforces the conclusion that an agency must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. §4332(C). CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. Environmental analysis must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after agency officials have bound

themselves to a particular outcome (such as surface occupation within these sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e. no leasing or NSO stipulations).

When lands with special characteristics, such as wilderness, are proposed for leasing, the IBLA has held that, "[t]o comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed." Sierra Club, 79 IBLA at 246. Therefore, formal NEPA analysis is required unless the BLM imposes non-waivable NSO stipulations. We believe that crucial winter ranges, migration routes, and habitat for a species under ESA review are as special as wilderness and therefore require NEPA analysis before leasing.

Here, the BLM has not analyzed alternatives to the full approval of the leasing nominations for the parcels that contain crucial big game winter range or migration routes, trout fisheries, and sage grouse habitat, such as NSO and no-leasing alternatives. 42 U.S.C. § 4332(2)(C)(iii). Federal agencies must, to the fullest extent possible, use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. 40 C.F.R. § 1500.2(e). "For all alternatives which were eliminated from detailed study," the agencies must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Wyoming Outdoor Council held that the challenged oil and gas leases were void because BLM did not consider reasonable alternatives prior to leasing, including whether specific parcels should be leased, appropriate lease stipulations, and NSO stipulations. The Board ruled that the leasing "document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite preleasing NEPA document for these parcels." 156 IBLA at 359 *rev'd on other grounds by Pennaco*, 266 F.Supp.2d 1323 (D.Wyo., 2003)(holding that when combined NEPA documents analyze the specific impacts of a project and provide alternatives, they satisfy NEPA). The reasonable alternatives requirement applies to the preparation of an EA even if an EIS is ultimately unnecessary. See Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 US 1066 (1989). Therefore, the BLM must analyze reasonable alternatives under NEPA prior to leasing.

Here, lease stipulations must be designed to protect the important big game habitats and migration routes as well as sage grouse habitat in Wyoming. The agency, at a minimum, must perform an alternatives analysis to determine whether or not leasing is appropriate for these parcels given the significant resources to be affected and/or analyze whether or not NSO restrictions are appropriate. Thus, the BLM's failure to perform an alternatives analysis to determine the appropriateness of such restrictions in advance of leasing is arbitrary, capricious, and an abuse of discretion.

II. Federal Lands Policy and Management Act ("FLPMA")

- A. **The leasing decision violated FLPMA's requirement to prevent undue or unnecessary degradation of mule deer crucial winter ranges, elk winter ranges, mule deer and elk migration routes, wild trout habitat characteristics in both the Bear River and Sevier River watersheds, and active sage grouse leks and associated habitat**

"In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. §1732(b). In the context of FLPMA, by using the imperative language "shall", "Congress [leaves] the Secretary no discretion" in how to administer the Act. NRDC v. Jamison, 815 F.Supp. 454, 468 (D.D.C. 1992).

The BLM's duty to prevent unnecessary or undue degradation ("UUD") under FLPMA is mandatory, and BLM must, at a minimum, demonstrate compliance with the UUD standard. See, Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (the UUD standards provides the "law to apply" and "imposes a definite standard on the BLM."). In this case involving proposed leasing of the protested parcels, the agency is required to demonstrate compliance with the UUD standard by showing that future impacts from development will be mitigated and thus avoid undue or unnecessary degradation of mule deer, elk, and pronghorn crucial winter ranges and migration routes as well as sage grouse habitat and lek buffers. See e.g., Kendall's Concerned Area Residents, 129 TBLA 130, 138 ("If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.").

BLM's obligation prevents UUD of the big game winter ranges and migration routes, and sage grouse habitats are not "discretionary." "[T]he court finds that in enacting FLPMA, Congress's intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary... is undue or excessive." Mineral Policy Center v. Norton, 292 F.Supp. 2d 30, 43 (D.D.C., 2003) (emphasis supplied). "FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible... operation because the operation though necessary... would unduly harm or degrade the public land." *Id.* at 40 (emphasis supplied). In the case at hand, BLM has a statutory obligation to demonstrate that leasing in or adjacent to crucial big game winter ranges and migration routes as well as sage grouse habitat and lek buffers will not result in UUD.

Specifically, BLM must demonstrate that leasing (and subsequent development including operations and maintenance) will not result in future mineral development that causes UUD by irreparably damaging the habitat function of crucial big game winter ranges and migration routes and sage grouse habitat and lek buffers that could lead to population decline. Further, the agency is required to manage the public's resources "without permanent impairment of the productivity of the land and the quality of the environment..." 43 U.S.C. § 1702(c). See also, Mineral Policy Center v. Norton, 292 F.Supp. 2d at 49.

Existing analysis has not satisfied the BLM's obligation to comply with the UUD standard and prevent permanent impairment of the function of crucial winter ranges, migration routes, sage grouse habitat and leks of these public lands. Proceeding with leasing would be arbitrary, capricious, and an abuse of discretion.

III. The Mineral Leasing Act gives the BLM discretion over whether to lease the disputed parcels

BLM has broad discretion in leasing federal lands. The Mineral Leasing Act ("MLA") provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a). In 1931 the Supreme Court found that the MLA "goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare." U.S. ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A later Supreme Court decision stated that the MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325. Thus, the BLM has discretionary authority to approve or disapprove mineral leasing of public lands.

When a leasing application is submitted and before the actual lease sale, no right has vested for the applicant or potential bidders—and BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966). See also Bob

Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) ("[R]efusing to issue [certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior"); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [MLA] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory"); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975) ("[T]he Secretary has discretion to refuse to issue any lease at all on a given tract"); Pease v. Udall, 332 F.2d 62 (C.A. Alaska) (Secretary of Interior has discretion to refuse to make any oil and gas leases of land); Geosearch, Inc. v. Andrus, 508 F. Supp. 839 (D.C. Wyo. 1981) (leasing of land under MLA is left to discretion of the Secretary of Interior). Similarly, IBLA decisions consistently recognize that BLM has "plenary authority over oil and gas leasing" and broad discretion with respect to decisions to lease. See Penroc Oil Corp., et al., 84 IBLA 36, 39, GFS (O&G) # (1985), and cases cited therein.

Withdrawing the protested parcels from the lease sale until proper pre-leasing analysis has been performed is a proper exercise of BLM's discretion under the MLA. BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law.

CONCLUSION

For the reasons stated above, the disputed mule deer, elk, and pronghorn crucial winter range and migration routes, and sage grouse habitat and leks parcels, and important trout fisheries watersheds are inappropriate for mineral leasing and development. Existing pre-leasing analysis does not comply with NEPA, FLPMA or other applicable law. Protesters respectfully request that the State Director withdraw these disputed parcels from the February 19, 2008 competitive lease sale. In the event that the BLM proceeds to offer these parcels, all prospective bidders should be informed of the pending protest.

While the presentation in this current protest document appears crucial of BLM, TRCP's intent is solely to work towards conservation of important fish and wildlife values and associated public hunting and fishing recreation while minerals are being extracted for the public good. In our view, there needs to be a new strategy to conserve fish and wildlife habitat and associated hunting and fishing recreation while minerals are being extracted from public lands and National Forest System lands. The current strategy employed by BLM in Wyoming, Colorado and Utah has and is resulting in enormous losses in fish and wildlife resource values that hunters and anglers believe are often avoidable with a new approach to public lands management. TRCP stands ready to assist BLM in devising a new public lands conservation strategy that fits with a sound mineral extraction program, but we see the current fast pace of leasing as preventing a more reasoned and less destructive management approach.

Respectfully submitted,



Feb. 4, 2008

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Appendix A

Fourteen Questions for BLM Prior to Oil & Gas Lease Sales

1. Given that individual leases are not identified to the public until the lease sale notice and given that the only mechanism for addressing concerns is with an administrative protest, what is the Bureau of Land Management (BLM) doing to ensure that the public can be engaged outside of protests once lease parcels have been identified?
2. How will BLM ensure that the public lands proposed for leasing be managed for a balance of traditional multiple uses, including fish and wildlife habitat and hunting and fishing activities, as oil and/or gas exploration and potential full field development occurs?
3. How and when will BLM develop a specific conservation strategy in concert with Montana Fish, Wildlife & Parks (FWP) that will provide specific recommendations and actions to minimize impacts and proactively address fish and wildlife management and needs for the parcels offered for leasing?
4. How and where has BLM incorporated recommendations from FWP on how to maintain current big game and upland game bird population objectives in the parcels offered for leasing?
5. How will BLM establish plans for mitigation, detailed monitoring and the use of adaptive management to prevent, minimize or mitigate impacts of oil and/or gas exploration and development for the parcels offered for leasing?
6. How will this project impact the uses our members make of our public lands during of oil and/or gas exploration and development on these same lands?
7. What will BLM do to ensure that areas that are developed get restored so that they can be hunted again during our lifetime?
8. Because development might keep our members from being able to hunt for the rest of our life on public lands that our families and ourselves have traditionally used, what will BLM do to provide our members with alternative locations where they can continue hunting?
9. Will BLM pay for additional FWP Block Management areas, purchase or lease other areas, or provide additional access to huntable public lands in our area?
10. How will BLM mitigate the loss of fish and wildlife and fishing and hunting opportunity in the lease parcels where our members hunt and fish and where the losses have occurred, and how will you measure when replacement of that loss has occurred?
11. How long will this development take to be implemented, recovered, and mitigated before our members will be able to hunt here again? Seventy five years is well beyond our lifetimes and our children's lifetimes
12. How does BLM plan on helping FWP address the increased poaching and law enforcement needs that have been proved to be associated with development?

13. How does the amount of money suggested for mitigation relate to the revenues that will come from the developed area, and how does it relate to the habitat base and to the biological needs of wildlife populations being affected?
14. How does BLM plan on compensating hunters for the loss of numbers of big game and upland game birds that might occur as a result of development?