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**OIL AND GAS LEASE SALE PROTEST**  
 (Filed Pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3)

**December 19, 2008 Lease Sale State of Utah**

The Theodore Roosevelt Conservation Partnership ("TRCP") hereby protests the inclusion of certain parcels in the above referenced lease sale as advertised by the Bureau of Land Management ("BLM") on Nov. 4, 2008. TRCP requests the following parcels be withdrawn from sale because they: 1) Contain designated elk and mule deer crucial winter range, fawning and calving habitat, and migration routes, or 2) contain designated crucial pronghorn habitat, or 3) contain Bonneville Cutthroat Trout habitat, or 4) are located on sage grouse winter concentration areas and leks.

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UTU87004; UTU87005; UTU87006; UTU87009; UTU87010; UTU87011; UTU87012; UTU87013;  
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UTU87023; UTU87024; UTU87025

**BACKGROUND ON TRCP'S INTEREST**

TRCP is a national non-profit (26 U.S.C. § 501(c)(3)) conservation organization dedicated to guaranteeing every American a place to hunt and fish, particularly on public lands. TRCP accomplishes its goal three ways: 1) Ensuring access to public lands, 2) ensuring adequate funding for natural resource agencies, and 3) helping to conserve fish and wildlife habitats. TRCP has formed, with various partners, a Fish, Wildlife, and Energy Working Group, comprised of some of the country's oldest and most respected hunting, fishing, and conservation organizations. With over 113,000 individual partners in the U.S. and over 1000 individual

partners 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, but is concerned that the rapid pace of development is precluding BLM from managing these resources as required by the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*

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TRCP is especially concerned with the fate of elk, pronghorn, mule deer, sage grouse, and Bonneville cutthroat trout and the recreational opportunities they provide tens of thousands of sportsmen each fall in Utah. Without comprehensive habitat management planning, closely coordinated with the Utah Division of Wildlife Resources ("UTDWR"), leasing and development of energy resources within crucial big game winter range, fawning habitat, migration routes, sage grouse wintering areas and leks, and along native trout streams can have a devastating impact on those wildlife resources and the hunting and fishing opportunities they afford.

### THE IMPORTANCE OF KEY HABITATS

UTDWR has stated in its *Statewide Management Plan for Mule Deer*: "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. UTDWR has also stated in its *Statewide Management Plan for Elk*: "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." Unfortunately, mule deer harvest numbers have plummeted over the past few decades (*e.g.*, from 101,761 in 1970 to just 34,720 in 2000). See State of Utah Mule Deer Status Report (<http://www.muledeernet.org/utahstatus.htm>). And 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.

Crucial habitats and features are essential to mule deer, elk, and pronghorn survival. See, *e.g.*, White *et al.*, *Effect of Density Reduction on Overwinter Survival of Free-ranging Mule Deer Fawns*, *Journal of Wildlife Management* 62:214-225 (1997); and Sweeney, *et al.*, *Snow Depths Influencing Winter Movements of Elk*, *Journal of Mammalogy*, Vol. 65, No. 3 (Aug. 1984), pp. 524-526. 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).

Recognizing a pressing need to better protect these habitats, the Western Governors Association ("WGA") recently approved a wildlife corridors initiative report offering a series of recommendations, including identification of important corridors and the critical habitats they connect, collaborative planning to keep the corridors intact and a standardized mapping and data-collection system to be used across the region. As noted in the report: "Large, open spaces have

long been emblematic of the West, but our burgeoning network of highways, canals, urbanization, energy development, and other land uses now threaten to fragment our grand landscapes, cutting off pathways linking crucial habitats and reducing the ecological value of the remaining crucial habitats." The process to assess the impacts to wildlife and their habitats began in February 2007, when the governors approved the *Protecting Wildlife Migration Corridors and Crucial Wildlife Habitat in the West* (Resolution No. 07-01). Overall, the initiative is based on the recognition that large intact and functioning ecosystems, healthy fish and wildlife populations, and abundant public access to natural landscapes that define the West and that, in their own right, draw people to the region.

As explained in the WGA's Oil and Gas Working Group Report (Dec. 2007):

Care in early stages of planning oil and gas development is important to avoid damage that can take decades to overcome. The Governors' policy resolution specifically identifies the importance of crucial habitats and corridors to healthy wildlife populations and recognizes the need to mitigate the impacts of energy development on these important resources. The reason behind the Governors' focus is clear -- both energy development and wildlife are crucial to a healthy economy and high quality of life in the West. Therefore, accommodating oil and gas development, while minimizing impacts to wildlife habitat, is essential.

"Sage-grouse historically inhabited much of the sagebrush-dominated ecosystems of North America. Today, sage-grouse population abundance and extent have declined throughout most of their historical range." BLM National Sage-Grouse Habitat Conservation Strategy (Nov. 2004) at 6. "Large-scale modification of sagebrush habitats associated with energy development may have important impacts on habitat use or vital rates of sagebrush-dependent wildlife species." Naugle et al., *Sage-grouse Population Response to Coal-bed Natural Gas Development in the Powder River Basin: Interim Progress Report on Region-wide Lek-count Analyses* (May 26, 2006). Additional information has shown the importance of winter habitat use by sage grouse. Naugle et al., *Sage-Grouse Winter Habitat Selection And Energy Development In The Powder River Basin: Completion Report* (June 24, 2006). "Knowledge that sage-grouse avoid energy development in breeding (Naugle et al. 2006) and wintering seasons (this report) shows that conservation strategies to date to protect the species have been largely ineffective." *Id.* at 1.

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." Greater sage grouse is listed in all western states as a special (or comparable) status species. For example, the state of Utah lists sage grouse as "sensitive" species, meaning there is "credible scientific evidence to substantiate a threat to continued population viability" (<http://dwrcdc.nr.utah.gov/ucdc/ViewReports/SSL121407.pdf>).

Section 6840.06.D of the BLM Manual (Special Status Species Management) provides "BLM shall carry out management for the conservation of State listed plants and animals." (Emphasis supplied). In this context, the term "conservation" means "the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted." BLM Manual § 6840.01. The Manual further directs "[a]ctions authorized by BLM shall further the

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conservation of ... special status species and shall not contribute to the need to list any special status species under provisions of the ESA, ... ." BLM Manual § 6840.12 (emphasis supplied). See also BLM Manual § 6840.22.C.

On December 4, 2007, the Federal District Court for the District of Idaho reversed and remanded the U.S. Fish and Wildlife Service's ("FWS") decision not to list the sage grouse as "threatened" or "endangered" under the ESA. *Western Watersheds Project v. U.S. Forest Service*, 535 F. Supp. 2d 1173 (D. Idaho 2007). The court explained the perilous condition of the sage grouse and the impact suffered by its habitats to date. *Id.* at 1173. Further elaborating on the current state of grouse habitat, 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 1186. The court specifically focused on the impact of oil and gas development on grouse habitat as identified by an independent expert team. *Id.* at 1179. The court noted "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 1188.

LEGAL REQUIREMENTS

I. THE NATIONAL ENVIRONMENTAL POLICY ACT.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq.*, was enacted in recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment, [and] ... the critical importance of restoring and maintaining environmental quality to the overall welfare ... of man ... ." 42 U.S.C. § 4331. NEPA "prescribes the necessary process by which federal agencies must take a 'hard look' at the environmental consequences of [their] proposed courses of action." *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (internal quotations omitted); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA is intended to focus the attention of the government and the public on the likely environmental consequences of a proposed agency action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

Within the Price, Vernal, and Richfield offices, TRCP understands that the proposed sale of the following 78 parcels contested within this protest are based on the Price RMP (2008), Vernal RMP (2008), and Richfield RMP (2008) UTU86787; UTU86788; UTU86789; UTU86836; UTU86837; UTU86839; UTU86840; UTU86841; UTU86842; UTU86843; UTU86844; UTU86845; UTU86846; UTU86847; UTU86849; UTU86850; UTU86852; UTU86853; UTU86854; UTU86855; UTU86856; UTU86860; UTU86862; UTU86863; UTU86878; UTU86880; UTU86881; UTU86882; UTU86883; UTU86884; UTU86885; UTU86886; UTU86896; UTU86898; UTU86944; UTU86946; UTU86947; UTU86948; UTU86949; UTU86950; UTU86951; UTU86952; UTU86953; UTU86970; UTU86972; UTU86975; UTU86979; UTU86980; UTU86981; UTU86982; UTU86983; UTU86988; UTU86995; UTU86996; UTU86997; UTU87000; UTU86701; UTU8702; UTU87003; UTU87004; UTU87005; UTU87006; UTU87009; UTU87010; UTU87011; UTU87012; UTU87013; UTU87014; UTU87015; UTU87016; UTU87017; UTU87018; UTU87019; UTU87020; UTU87022; UTU87023; UTU87024; UTU87025. Despite the recent revision of these RMPs, the BLM has 1) failed to analyze new information concerning the impact of oil and gas development on mule deer, elk

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pronghorn, and sage grouse 2) and relies on an arbitrary "reasonable foreseeable development" or "RFD" scenarios.

Within the Fillmore Field Office, TRCP understands the proposed sale of the following 45 parcels contested within this protest are based on the Warm Springs Resource Area Resource Management Plan and Record of Decision (WSRA RMP ROD, 1988), the House Range Resource Area Resource Management Plan and Record of Decision (HRRR RMP/ROD1987) UTU86791; UTU86792; UTU86793; UTU86794; UTU86795; UTU86796; UTU86797; UTU86798; UTU86799; UTU86800; UTU86801; UTU86802; UTU86803; UTU86804; UTU86805; UTU86806; UTU86807; UTU86808; UTU86809; UTU86810; UTU86811; UTU86812; UTU86813; UTU86814; UTU86815; UTU86816; UTU86817; UTU86818; UTU86819; UTU86820; UTU86821; UTU86822; UTU86823; UTU86824; UTU86825; UTU86826; UTU86827; UTU86828; UTU86829; UTU86830; UTU86831; UTU86832; UTU86833; UTU86834; UTU86835.

In 2007 the BLM acknowledged that the Fillmore RMP's do not adequately evaluate impacts to wildlife in order to lease them and subsequently deferred 41 parcels in crucial elk and mule deer habitat from the August 2007 lease sale. In an effort to lease these parcels within the Fillmore Field Office (FFO), the BLM has developed the Fillmore Oil and Gas Leasing Environmental Assessment (UT-010-08-050, 2008). Conducting an environmental assessment to lease these parcels is wholly in inadequate and further NEPA review is necessary prior to the leasing stage.

In summary, the EA: 1) Fails to analyze new information concerning the impact of oil and gas development on mule deer, elk, pronghorn, sage grouse, and Bonneville cutthroat trout; 2) relies on an arbitrary "reasonable foreseeable development" or "RFD" scenario; 3) does not allow for due consideration of public comment; 4) and contains no analysis of the impact of proposed leasing on hunting in the affected area.

#### A. An Environmental Impact Statement is Warranted for Fillmore FO Leasing.

As a preliminary matter, TRCP submits the EA supporting the proposed leasing action on the protested 45 parcels represents a wholly inadequate level of analysis for leasing over 78,000 acres of minerals in elk and mule deer crucial winter range, fawning and calving habitat, and migration routes, designated crucial pronghorn habitat, Bonneville Cutthroat Trout habitat, and sage grouse wintering areas. The Fillmore lease parcels located in and around the Deep Creek Mountains are encompassed within "an isolated "island" ecosystem and the fourth highest range in the Great Basin, the "Deeps" dominate the Great Salt Lake Desert in altitude, sheer mass, and biotic richness" (available at: [http://www.blm.gov/ut/st/en/fo/salt\\_lake/blm\\_special\\_areas/wilderness\\_study\\_areas/deep\\_creek\\_mountains.html](http://www.blm.gov/ut/st/en/fo/salt_lake/blm_special_areas/wilderness_study_areas/deep_creek_mountains.html)). Developing these crucial habitats could have a permanent impact on wildlife within the leasing area and the West Desert/Deep Creek limited bull elk hunting unit.

Further, lease parcels located near Birch, Granite, and Trout Creeks in the Deep Creek Mountains hold genetically pure Bonneville Cutthroat Trout and are located in the Utah Southern Great Salt Lake Desert Management Unit. Birch Creek is the very stream where Bonneville Cutthroat trout were rediscovered in 1974 after they were thought extirpated for over a decade (<http://wildlife.utah.gov/pdf/cacs7.pdf>). This demonstrates the importance of this watershed for the future of Bonneville Cutthroat trout viability. Leasing this area could have significant

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impact on the productivity of this watershed. The potential impacts of the proposed sale are likely to be "significant" for NEPA purposes, and thus an environmental impact statement ("EIS") is warranted.

Significance is evaluated in terms of both context and intensity. 40 C.F.R. § 1508.27. "Intensity" should be judged, among other ways, by considering: "3) Unique characteristics of the geographic area such as proximity to ... ecologically critical areas; (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks ... [and] (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts."

The proposed lease parcels will be within and in close proximity to crucial winter range, fawning areas and migration routes. The impact of eventual development on those areas is "highly controversial" in that there appears to be significant disagreement between BLM and the scientific community concerning the impact of oil and gas development on crucial winter range and what is required to protect big game from those impacts. BLM's EA concedes that it is difficult to tell what the overall impact of leasing will be on these resources. Finally, there is little question that the cumulative impact of oil and gas leasing presents a serious threat to big game viability. All these factors militate in favor of a finding of significance, and, therefore, the production of an EIS.

**B. BLM Must Recognize the Latest Information on Mule Deer and Sage Grouse.**

Agencies must supplement existing environmental analyses if 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). Moreover, 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 action, even after a proposal has received initial approval.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989).

NEPA's implementing regulations further underscore this obligation. 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). Even where an EIS has been previously prepared, "[i]f there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989).

Case in point, the Utah BLM recognized the importance of new information when it decided to pull 42 parcels in the August 2007, lease sale, cancel the entire November 2007 lease sale and then defer 5 parcels in the February, 2008 lease sale. Catlin, T., *Federal Oil and Gas Sale Scheduled for August 21*, Utah BLM Newsroom (15 August 2007); Catlin, T., *November*

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*Competitive Oil and Gas Lease Sale Cancelled*, Utah BLM Newsroom (28 September 2007); Catlin, T., *Federal Oil and Gas Sale Scheduled for February 19*, Utah BLM Newsroom (15 February 2008). The proposed lease parcels should not be leased until BLM has evaluated the best available information on mule deer and sage grouse.

**1. Vernal, Richfield and Price RMPs Inadequately Evaluate Significant New Information**

Despite the recent completion of new RMPs for the Vernal, Richfield, and Price field offices, the BLM has failed to analyze new information about oil and gas development, and impacts to important wildlife habitats like crucial winter range, fawning areas, and migration routes. The most recent findings, including published literature, report significant impacts to mule deer use of winter range, with 27% being attributed to energy development. Sawyer, H. et al., 2006 ANNUAL REPORT. SUBLETTE MULE DEER STUDY (PHASE II): LONG-TERM MONITORING PLAN TO ASSESS POTENTIAL IMPACTS OF ENERGY DEVELOPMENT ON MULE DEER IN THE PINEDALE ANTICLINE PROJECT, Cheyenne, Wyoming, USA (2006) and Sawyer, H. et al., 2006. WINTER HABITAT SELECTION OF MULE DEER BEFORE AND DURING DEVELOPMENT OF A NATURAL GAS FIELD, *Journal of Wildlife Management* 70:396-403 (2006). This is despite BLM's use of lease stipulations like those to be utilized under the proposed action described in the RMPs and EA. The mule deer research from Sublette County, Wyoming 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). Yet, the RMPs and the EA do not even reference these studies in the literature cited.

In addition, recent studies have concluded that protection of migration corridors is critical to sustaining migratory mule deer populations in key areas. *See generally* Western Ecosystems Technology, Final Report for the Atlantic Rim Mule Deer Study (April 2007) and Hall Sawyer and Matthew Kauffman, *Identifying Mule Deer Migration Routes in the Atlantic Rim Project Area* (April 1, 2008) at 1. Again, there is no mention of this research in the RMPs and EA.

Information contained in an EIS "must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). "Agencies shall insure the professional integrity, including scientific integrity, or the discussions and analyses in environmental impact statements." 40 C.F.R. §1502.24. By failing to incorporate and respond to clear scientific conclusions, BLM has violated this fundamental principle concerning the integrity of its NEPA analysis. To the extent BLM believes it lacks information sufficient to draw conclusions based on the foregoing science, it must make that fact clear in its EIS or EA. 40 C.F.R. § 1502.22. Ultimately, BLM "has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable ... . The agency cannot ignore the[] uncertain but probable effects of its decisions." CEQ Forty Most Asked Questions (No. 18).

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## 2. New Information on Sage Grouse Needs.

Biologists from the Western Association of Fish and Wildlife Agencies ("WAFWA") recently presented to WGFD a memorandum entitled: *Using the Best Available Science to Coordinate Conservation Actions that Benefit Sage-Grouse Across States Affected by Oil and Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)* (29 January 2008) (Copy attached as Exhibit A). The memorandum states:

Full field energy development appears to have negative impacts on sage-grouse populations under current lease stipulations (Lyon and Anderson 2003, Holloran 2005, Kaiser 2006, Holloran et al. 2007, Aldridge and Buyce 2007, Walker et al. 2007, Doherty et al. 2008). Much of greater sage-grouse habitat in MZ 1 and 2 has already been leased for oil and gas development. These leases carry stipulations that have been *shown to be inadequate* for protecting breeding and wintering sage-grouse populations during full field development. (Holloran 2005, Walker et al. 2007, Doherty et al. 2008). New leases continue to be issued using the same stipulations. To ensure the long term persistence of populations and meet goals set by the states for sage-grouse, *identifying and implementing greater protection within core areas from impacts of oil and gas development is a high priority.*

.....

Research indicates that oil and gas development exceeding approximately 1 well pad per square mile with associated infrastructure, results in calculable impacts on breeding populations, as measured by the number of male sage-grouse attending leks (Holloran 2005, Naugle et al. 2006). Because breeding, summer, and winter habitats are essential to populations, development within these areas should be avoided.

(Emphasis supplied).

WAFWA's critique was directed at current stipulations BLM places on oil and gas leases (and also applies as a condition of approval on Applications for Permits to Drill and Right of Ways). Those stipulations are not based on science, but instead on a traditional consensual agreement from the "late 1960's" as stated in the attached Affidavit by BLM Biologist David A. Roberts (July 20, 1998) in Laramie County, Wyoming. (See Exhibit B). As WAFWA correctly notes, those stipulations have been determined to be ineffective in accomplishing their purpose. The FWS agrees. In commenting on the use of these stipulations in the Atlantic Rim of WY, FWS stated that it "does not support a 0.25 mile protective buffer around sage-grouse leks as a mitigation measure, nor does [FWS] support a 2-mile [seasonal] buffer to protect nesting habitat." Rather, FWS "strongly recommend[] minimum protection measures as described by Connelly et al. (2000)." See Letter from FWS to BLM dated January 26, 2006. Those measures include precluding surface disturbance within two miles of an active lek. Connelly et al.,

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*Guidelines to Manage Sage Grouse Population and Their Habitats*, Wildlife Society Bulletin 2000, 28(4): 967-985.

Despite this evidence, the Utah RMP's and the Fillmore EA in question all continue to use outdated stipulations that are shown to result in sage grouse population declines. The Vernal RMP states that development around leks will merely "avoid developing roads, fences, poles, and utility lines within 1,300 feet of a lek," and that development will "use the best available technology such as installation of multi-cylinder pumps, hospital sound reducing mufflers, and placement of exhaust systems to reduce noise" within 1/2 mile of known active leks. The Price RMP establishes a standard for No Surface Occupancy "within 1/4 mile of identified Sage Grouse Leks." Finally, the Fillmore EA requires that "No surface disturbing or otherwise disruptive activity would be allowed from November 15 through March 1 in identified greater sage-grouse winter concentration areas," and does not take the necessary steps to ensure that development is done right when activities are allowed to move forward.

No parcels should be leased near sage grouse leks or wintering areas until the BLM more thoroughly evaluates the latest scientific information on the impacts of development on sage grouse.

**D. The RFD Scenarios are Unreasonable.**

Without the slightest acknowledgement of these factors, BLM employs the same fundamental RFD scenario it has relied on for two decades. In light of improving technologies and economic pressures making otherwise marginal oil and gas production more cost-effective, it is totally unreasonable to assume that, once leased, production would be limited to historical standards and expectations.

According to a recent NY Times article, "The wellhead price of natural gas is about five times higher than it was in the 1990s" and "The Bush administration, in its effort to expand energy production, has issued more than three times the number of well-drilling permits on Western lands as in the Clinton administration's last six years," (Barringer, Falcity. *A Push to Wrest More Oil From Land, but Most New Wells Are for Natural Gas*. New York Times. August 3, 2008.). With new market situations causing increasing prices and political interests pushing for increased natural gas production, it is unreasonable to expect that future natural gas development levels will mirror those of the 1980's when the situation is clearly different.

By relying on an illegitimate RFD scenario, BLM has artificially downplayed the likely environmental impacts of development in the leased area. Such impacts can be seen in places such as the Powder River Basin and Pinedale Anticline, where new technologies have made previously unavailable gas sources accessible and highly marketable. The environmental degradation associated with those developments has been profound, yet BLM's EA and RMPs appears to dismiss these potential impacts altogether.

Further, the recently prepared Fillmore EA doesn't even reevaluate the Reasonable Foreseeable Development scenario within the Fillmore field office. Rather, the Fillmore EA depends on two outdated supplemental EAs for Oil and Gas Leasing, both prepared in 1980. These are the RFD in the supplemental EA House Range Resource Area and the RFD in the

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supplemental EA for Oil and Gas Leasing, Warm Springs Resource Area. As disclosed by the UT BLM, energy discoveries have recently been made in close proximity to the Fillmore FO Dec. 19 proposed lease parcels. According to recent statements from Terry Catlin, energy team lead from the Utah BLM state office "What's driving industry interest in the area is the Wolverine oil strike in south-central Utah near Richfield" ([http://www.sltrib.com/news/ci\\_11132127](http://www.sltrib.com/news/ci_11132127)). This Wolverine strike is not even discussed or considered in the RFD because the mineral discovery occurred after the RFD was developed.

These RFDs fail to recognize not only the earlier stated impacts, but also substantial changes in BLM policy over the intervening years that are specifically designed to increase development nationwide. For example, in 2003, BLM issued Instruction Memoranda Nos. 2003-233, INTEGRATION OF THE ENERGY POLICY AND CONSERVATION ACT (EPCA) INVENTORY RESULTS INTO THE LAND USE PLANNING PROCESS (EXPIRED), and 2003-234, INTEGRATION OF THE ENERGY POLICY AND CONSERVATION ACT (EPCA) INVENTORY RESULTS INTO OIL AND GAS EXPLORATION AND DEVELOPMENT USE AUTHORIZATIONS (EXPIRED), for the stated purposes of reaffirming BLM's "commitment to not unduly restrict access to the public lands for energy exploration and development" and of implementing the Administration's goal for federal agencies to "expedite their review of permits or take other actions necessary to accelerate the completion of [energy-related projects]" including through reassessment and modification of so-called "constraints" to federal oil and gas leasing. Instruction Memorandum 2003-234 required a review of all existing lease stipulations to determine if they were still "necessary and effective" and to direct that, if "lease stipulations are no longer necessary or effective, the BLM must consider granting waivers, exceptions, or modifications." BLM issued Instruction Memorandum 2004-110, FLUID MINERAL LEASING AND RELATED PLANNING AND NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PROCESSES (EXPIRED), to direct land managers to proceed with leasing even while applicable land use plans were being revised, even if those plans were considering protecting the natural values of the same lands, and to require that any deferrals of leasing be supported by detailed explanations and documentation, submitted to the state and national directors of the BLM. Instruction Memorandum 2005-247, NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) COMPLIANCE FOR OIL, GAS, AND GEOTHERMAL DEVELOPMENT (EXPIRED), was issued in the wake of the Energy Policy Act of 2005 ("EPA Act"), Pub. L. No. 109-58, 119 Stat. 594 (2005),<sup>1</sup> to address "NEPA compliance" in light of the new leasing priorities. It recommends BLM develop a NEPA alternative of higher well density and development beyond that actually proposed by an operator and provides direction as to how to make the maximum number of projects fit into categorical exclusions to avoid NEPA altogether.

<sup>1</sup> In Section 366 of the EPA Act Congress imposed a 30-day timeframe for the approval of APDs based on arguments by industry representatives that BLM was too slow approving APDs. Congress also provided a series of mandatory "categorical exclusions" from NEPA compliance for certain activities in Section 390 of the EPA Act. These exclusions allow BLM to completely avoid analyzing and disclosing the environmental impacts of certain activities related to oil and gas development (e.g., drilling new wells in an already "developed field").

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More importantly, the Government Accountability Office ("GAO") issued a report in June 2005 entitled OIL AND GAS DEVELOPMENT - INCREASED PERMITTING ACTIVITY HAS LESSEned BLM'S ABILITY TO MEET ITS ENVIRONMENTAL PROTECTION RESPONSIBILITIES (GAO-05-418). The GAO found that the increased volume of Applications for Permit to Drill ("APD"), and mandates to promptly process them, resulted in more BLM staff resources being devoted to issuing permits and less to monitoring and enforcing compliance with environmental standards. According to the GAO, the total number of oil and gas drilling permits approved by BLM more than tripled, from 1,803 to 6,399, during fiscal years 1999 - 2004. GAO 17. The GAO explains succinctly that this "dramatic increase in oil and gas development on federal lands over the past 6 years has lessened BLM's ability to meet its environmental protection responsibilities." GAO 5. For example, the field offices visited by GAO investigators reported meeting annual environmental monitoring requirements "only about half of the time" during the 6 year period. GAO 22.

The RFD scenario for the Fillmore FO, being two decades old is significantly outdated and no leasing should occur until these RFDs are revised. Numerous technologies have been created over the last 20 years for developing natural gas resources that have greatly expanded industry's ability to extract gas that was previously unavailable or economically infeasible. This increased efficiency should be considered, along with the rising cost of natural gas that is spurring increased development interest in areas where it was previously unseen.

**E. The Fillmore EA Does Not Analyze the Impact of the Proposed Lease Sale on Hunting.**

NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of the proposed action" and "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted). In this case, BLM has not evaluated adequately the impact of proposed leasing on hunting in the affected area within the Fillmore FO. Although the EA recognizes the "Deep Creek Mountains in the northwest corner of the project area is known for mule deer hunting and camping," (Fillmore EA 2008) the BLM makes no attempt to determine how the impacts of leasing and the subsequent development of oil and gas on crucial winter range and fawning areas will impact hunting. The EA instead generally discusses how energy development "could affect wildlife resources in a variety of direct and indirect ways."

Moreover, in evaluating the cumulative impact of the proposed lease sale, BLM states that its "Cumulative Impact Analysis Area" is limited to the action area. However, big game do not respect BLM's administrative boundaries. A proper cumulative impact analysis must account for the overall impact of the proposed lease sale on the herd units to which animals in the action area belong. BLM has not even attempted such analysis. As a result, the American sportsmen has no idea how BLM's proposal will affect him.

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**F. BLM Must Conduct the Required NEPA Analysis Before Leasing or Impose "No-Surface Occupancy" Stipulations.**

CEQ regulations make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. NEPA analyses must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after BLM has bound itself to a particular outcome (such as surface occupation within sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e., no leasing or No Surface Occupancy (NSO) stipulations).

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, BLM argues lease development must be permitted subject only to limited discretionary measures imposed by the surface-managing agency.<sup>2</sup>

Accordingly, the appropriate time to evaluate the impact of leasing on crucial winter range, fawning habitat, is *before* an oil and gas lease is granted. *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-1415 (D.C. Cir. 1983) *citng Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)). Unless BLM is prepared to withdraw the protested parcels or incorporate NSO stipulations into leases on the protested parcels, BLM must analyze the impacts of subsequent development prior to leasing. 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.

In an effort to prevent further loss of crucial big game habitats and migration corridors, the Western Governor's Association in 2007 issued a resolution calling for better identification and cooperation to protect these important habitats for the future. *See Resolution 07-01, Protecting Wildlife Migration Corridors and Crucial Wildlife Habitat in the West*. In the associated follow-up report from the Oil and Gas Working Group (December 2007), problems

<sup>2</sup> That said, BLM has broad discretion in leasing federal lands in the first instance. The Mineral Leasing Act ("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. "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").

with the current leasing process and recommendations for better management and coordination were made. Recommendation #1-D states: "Western Governors should request the Secretaries of the Interior and Agriculture to assess, and implement where appropriate, a policy of site-specific NEPA analysis before offering new federal lease parcels in the areas that the states deem to be wildlife corridors and crucial habitats." (Emphasis supplied).

## II. FEDERAL LANDS POLICY AND MANAGEMENT ACT ("FLPMA")

FLPMA directs the Secretary and BLM to manage public lands "under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a); see also 43 U.S.C. § 1701(a)(8) (listing purposes and values that should be considered in the management of public lands). FLPMA further requires that "[i]n managing the public lands the Secretary 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). 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. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (the UUD standard provides the "law to apply" and "imposes a definite standard on the BLM."). Finally, 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); *Mineral Policy Center v. Norton*, 292 F. Supp. 2d at 49.

In this case, BLM 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 big game crucial winter ranges, fawning areas, and migration routes. See e.g., *Kendall's Concerned Area Residents*, 129 IBLA 130, 138 ("If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan."). See also *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 40 (D.D.C. 2003) ("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."). In this instance, BLM has a statutory obligation to demonstrate that leasing in or adjacent to crucial big game winter ranges, fawning areas, and migration routes will not result in UUD.

By failing to incorporate the best available scientific data concerning the needs of big game, fish and sage grouse, BLM has failed to adhere to its obligations under FLPMA. BLM's proposed action would rely on timing stipulations already shown to be ineffective in maintaining mule deer and grouse populations. This will result in UUD and permanent impairment by irreparably damaging the habitat function key habitats that will likely lead to population decline. This UUD and permanent impairment will, in turn, drive both wildlife populations and the hunting and related recreational opportunities they support out of the affected area. BLM cannot commit over 188,000 acres of key wildlife habitats to a single use and ignore its corresponding obligation to maintain the other uses of public lands as required by FLPMA. Proceeding with leasing would be arbitrary, capricious, and an abuse of discretion.

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### III. EXECUTIVE ORDER 13443: FACILITATION OF HUNTING HERITAGE AND WILDLIFE CONSERVATION

On August 16, 2007, President Bush signed Executive Order ("EO") 13443, the purpose of which is "to direct Federal agencies that have programs and activities that have a measurable effect on public land management, outdoor recreation, and wildlife management, including the Department of the Interior ..., to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat." See EO 13443 reprinted at 72 Fed. Reg. 46,537 (Aug. 20, 2007). Among other things, EO 13443 requires BLM to:

- Evaluate the effect of agency actions on trends in hunting participation and, where appropriate to address declining trends, implement actions that expand and enhance hunting opportunities for the public;
- 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; and
- Establish short and long term goals, in cooperation with State and tribal governments, and consistent with agency missions, to foster healthy and productive populations of game species and appropriate opportunities for the public to hunt those species.

The RMPs and EA, on which the proposed leasing action is based, does not account for the duties imposed on BLM by virtue of EO 13443. The documents do not even acknowledge EO 13443. Leasing of the protested parcels will directly adversely impact the very resources and recreational and hunting interests EO 13443 is intended to protect. Yet, BLM has provided no explanation of whether or how the proposed lease sale will comply with EO 13443. While TRCP understands EO 13443 purports not to create an independent right of judicial review, proceeding to lease the protested parcels without consideration of the goals and objectives of EO 13443 would be arbitrary and capricious and without observance of procedures required by EO 13443. See 5 U.S.C. § 706(2)(a) and (d).

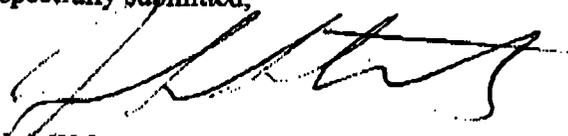
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**CONCLUSION**

For the reasons stated above, parcels containing disputed big game crucial winter range, fawning areas, and migration routes are inappropriate for mineral leasing and development at this time. Existing pre-leasing analysis does not comply with NEPA, FLPMA or other applicable law. Utah citizens have raised substantial concerns about impacts to big game resources and the need for additional actions to protect these resources.

TRCP respectfully requests that the Utah State Director withdraw these disputed parcels from the December 19, 2008 competitive lease sale. In the event BLM proceeds to offer these parcels, all prospective bidders should be informed of the pending protest.

Respectfully submitted,



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