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

February 2009 Lease Sale (State of Wyoming)

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 December 19, 2008. TRCP requests the following parcels be withdrawn from sale because they: 1) Contain designated big game crucial winter range or migration routes; or 2) contain vital habitat for Greater sage grouse:

WY-0902-011, WY-0902-012, WY-0902-013, WY-0902-018, WY-0902-019, WY-0902-020, WY-0902-023, WY-0902-027, WY-0902-035, WY-0902-043, WY-0902-045, WY-0902-046, WY-0902-048, WY-0902-050, WY-0902-051, WY-0902-052, WY-0902-054, WY-0902-061, WY-0902-062, WY-0902-063, WY-0902-064, WY-0902-065, WY-0902-066, WY-0902-067, WY-0902-068, WY-0902-069, WY-0902-080, WY-0902-081, WY-0902-082, WY-0902-083, WY-0902-086, WY-0902-087, WY-0902-088, WY-0902-089, WY-0902-090, WY-0902-091, WY-0902-092, WY-0902-094, WY-0902-095, WY-0902-098 WY-0902-099, WY-0902-100, WY-0902-101, WY-0902-102, WY-0902-103, WY-0902-105, WY-0902-106, WY-0902-111 WY-0902-113, WY-0902-114, WY-0902-117, WY-0902-118, WY-0902-119, WY-0902-123, WY-0902-124, WY-0902-125, WY-0902-126, WY-0902-127, WY-0902-128, WY-0902-130, WY-0902-132, WY-0902-133, WY-0902-134, WY-0902-135, WY-0902-136, WY-0902-137, WY-0902-138, WY-0902-139, WY-0902-140, WY-0902-141, WY-0902-142, WY-0902-143,

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. TRCP is working hard to ensure that energy development on public lands 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.*

The economic value of recreational hunting in the western United States is profound. As recently identified by the Western Governors' Association:

> Wildlife-associated recreation brings important economic benefits to communities throughout the West. Small communities in particular benefit from the revenue that comes with tourism, hunting and fishing, and other forms of outdoor recreation. Retail tax revenue for many small towns is provided to a large degree during the key hunting and fishing seasons. In the contiguous Western states, more than 43.6 million people participated in hunting, fishing or wildlife watching in 2006, spending almost $33.6 billion. This revenue is dependent on significant, reliable wildlife populations, which in turn depend on quality habitat and corridor movement.

Western Governors' Association, Wildlife Corridors Initiative, Oil and Gas Working Group Report (Dec. 2007).

TRCP is especially concerned with the fate of big game and Greater sage grouse and the recreational opportunities they provide tens of thousands of sportsmen each fall in Wyoming. Without comprehensive habitat management planning, closely coordinated with the Wyoming Game and Fish Department ("WFGD"), leasing and development of energy resources within crucial mule deer winter range and migration routes, or within sage grouse habitat, can have a devastating impact on those wildlife resources and the hunting opportunities they afford.

THE SPECIES AND THE IMPORTANCE OF PROTECTING KEY HABITATS

Crucial winter range and migration routes are identified by WGFD policy as "vital" to the survival and sustainability of big game. WGFD *Recommendations for Development of Oil and Gas Resources Within Crucial and Important Wildlife Habitats (December 6, 2004)* ("WGFD Recommendations") at 9. This means that these habitats and features are essential to big game population survival. *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. WGFD recommends no loss in habitat function, meaning these habitats should retain their capability to sustain populations, species or diversity over time. WGFD Recommendations at 9.

The WGFD has elaborated on the critically important role functional migration corridors play in the life of mule deer populations:

> Long-term displacement of wildlife from preferred habitats and disruption of migration routes could, in the extreme case, eliminate "migration memory" that required several thousand years to evolve. Each successive cohort of young

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> ungulates learns the locations of suitable winter habitats and migration routes from older, experienced females that lead them (e.g., Baker 1978, Mackie et al. 1998:44). Extended disruptions of migration or habitat use can result in loss of learned behavior from entire cohorts of young animals, breaking the tradition of migration to the most suitable winter habitats.

WGFD Recommendations at 8. If this migration memory is lost, animals can become disoriented and perish as they attempt to migrate to crucial winter ranges.

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). Notably, Governor Freudenthal headed this effort. 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

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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.

Greater sage grouse is listed in all western states as a special (or comparable) status species. For example, the State of Wyoming lists sage grouse as a "Status 2 Species of Special Concern", which means "[p]opulations are declining" and experiencing "[o]n-going significant loss of habitat." http://gf.state.wy.us/wildlife/nongame/SpeciesofSpecialConcern/index.asp. 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 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.

Recognizing this status and the need to conserve the species more effectively, Governor Freudenthal adopted Executive Order 2008-2. That Order explains the significance of the greater sage grouse in Wyoming, as well as the legal, social and economic ramifications of a decision to list the greater sage grouse as threatened or endangered under the ESA. The Order calls for State agencies to focus on the enhancement and maintenance of grouse populations within identified Core Population Areas ("CPA"), which overlay many of the proposed lease parcels. The Order further calls on agencies to limit new development to that which will not conflict with grouse conservation. Finally, the Order requires State agencies to "work collaboratively with [FWS], [BLM], U.S. Forest Service, and other federal agencies to ensure, to the greatest extent possible, a uniform and consistent application of this Executive Order to maintain and enhance Greater Sage-Grouse habitats and populations."

Notably, FWS appears to have endorsed the concept of protecting CPAs as one legitimate means of conserving sage grouse. *See* attached Exhibit D. In commending the State for its effort, however, FWS admonished:

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> [A]s you know and as the [Sage Grouse] Implementation Team discussed, for the strategy to be effective, the state, *federal* and private landowners in the state must implement this strategy. ... As you know federal properties in Wyoming contain a good share of the key habitat in the State and the *inclusion of those properties in the proposed strategy will be a key to its success.*

(Emphasis supplied).

LEGAL REQUIREMENTS

I. THE NATIONAL ENVIRONMENTAL POLICY ACT.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq.*, 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 has been prepared. 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 environmental impact statement ("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).

The Council on Environmental Quality's ("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). This caution was reiterated by earlier BLM Instruction Memoranda ("IM") Nos. 2000-034 (expired September 30, 2001) and 2001-062 (expired September 30, 2002).

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A. Existing Analyses Are Not Sufficient in Light of Significant New Information Concerning the Needs of Big Game and Sage Grouse.

TRCP understands the resource management plans ("RMP") on which BLM relies to support the proposed leasing action are the Casper RMP (2007), Rawlins RMP (2008), Cody RMP (1990), Grass Creek RMP (1998), Buffalo RMP (2001), Kemmerer RMP (1986), Green River RMP (1997), and Lander RMP (1987). As a preliminary matter, TRCP notes the majority of these RMPs are several years (and in some cases decades) old, clearly triggering the need for heightened scrutiny under CEQ guidance and BLM's earlier IM Nos. 2000-034 and 2001-062. Because no additional information has been provided, TRCP assumes BLM has determined that these RMPs and the NEPA analyses conducted to support their adoption decades ago have been deemed adequate for purposes of supporting the proposed lease sale.

In summary, TRCP submits that BLM has not evaluated fully the impact of habitat fragmentation, loss, and other factors (both indirect and cumulative) associated with development of the offered parcels on big game and sage grouse. Both the 2007 Casper RMP and the pending revision to the Kemmerer RMP acknowledge as much. *See* Record of Decision and Approved Casper RMP (citing, for example, *Wyoming Greater Sage-Grouse Conservation Plan* (Wyoming Sage Grouse Working Group 2003) and *Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats* (Connelly et al. 2004)). Indeed, in certain areas, the Casper RMP extended BLM's standard 0.25 mile Controlled Surface Use buffer around occupied leks to 0.75 miles, and timing limitations have been extended to 4 miles around occupied leks, from 2 miles under prior BLM practice. Casper RMP at 2-27. Similarly, BLM currently is considering extending grouse protections under the Kemmerer RMP because existing practices (i.e., those on which BLM relies to support the proposed sale) are insufficient to protect sage grouse. The preferred alternative for the Kemmerer RMP would, in fact, prohibit all surface disturbance or surface occupancy within 0.6 miles of an occupied lek, and would prohibit surface disturbing activities and/or disruptive activities in suitable sage-grouse nesting and early brood rearing habitat within 3 miles of an occupied sage-grouse lek or in identified nesting or brood rearing habitat outside the 3-mile buffer from March 15 – July 15. Kemmerer Proposed RMP and Final EIS at ES7 – 8.

As BLM already has acknowledged, the significant new information discussed merits additional analysis and a change in management direction. 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.

1. New Information on Big Game Needs.

Since the majority of the RMPs were originally developed, BLM has acquired significant new information about oil and gas development, and important wildlife habitats like crucial winter range and migration routes. This has led BLM to adjust, and in some instances

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significantly change, winter range boundaries for mule deer and other big game species, as well as boundaries for sage grouse breeding areas. BLM has also learned much more about the impacts of oil and gas development on mule deer. BLM has funded and advised on specific research to evaluate impacts on mule deer from development in winter range. 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). 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).

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). "Prior to 2000 [when nearly all the RMPs at issue here were adopted], conserving migration routes had not been a top management concern for agencies" in areas where development was relatively minor. Hall Sawyer and Matthew Kauffman, *Identifying Mule Deer Migration Routes in the Atlantic Rim Project Area* (April 1, 2008) at 1 ("sustaining current mule deer populations will require functional migration routes remain in tact.").

TRCP notes BLM Wyoming's sister offices are rethinking the continued viability of existing NEPA analysis. Montana BLM recently pulled 73,000 acres from a proposed sale based on concerns over impacts to mule deer and sage grouse. Albright G., *BLM Defers Acres from July Oil and Gas Lease Sale*, Montana/Dakota BLM Newroom (19 July 2007). Similarly, Utah BLM has acknowledged that more analysis is needed concerning the effects of oil and gas development on wildlife before leasing certain lands in that state. Catlin, T., *November Competitive Oil and Gas Lease Sale Cancelled*, Utah BLM Newsroom (28 September 2007). These actions were consistent with Wyoming BLM's decision to pull two parcels from its December 2006 Oil and Gas Lease Sale based on concerns expressed by WGFD. Lewis, P., *Information Notice-Protest Filed Parcels WY-0612-160 and WY-0612-161 Withdrawn*, Wyoming BLM Newsroom (28 November 2006). They are also consistent with Wyoming BLM's decision to pull 13 parcels from the November 2007 lease sale at the request of Governor Freudenthal and the Wyoming Game and Fish Commission. Wertz, C., *BLM Defers Offering 13 Parcels in Upcoming Oil and Gas Sale* (30 November 2007). Lastly they are consistent with the decision by the Wyoming BLM's decision to pull six parcels from its August 2008 Oil and Gas Lease Sale because, "Parcels WY-0808-071, WY-0808-072, WY-0808-078, WY-0808-080, WY-0808-154 and WY-0808-165 are deferred from the August 5, 2008, lease sale until the State of Wyoming completes its mapping exercise on core sage grouse population areas." (August 2008).

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

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The Wyoming Sage Grouse Implementation Team's recommendation is to protect core population areas. *See* Exhibit C attached. This approach has been backed by FWS. *See* Exhibit D attached. According to the Team: "Development within Core Population Areas should occur only when it can be demonstrated that the activity will have no negative effects on Sage-grouse, using a case-by-case localized approach and appropriate ground-truthing." The majority of the parcels TRCP is protesting fall within these identified "Core Population Areas".

In light of (1) WAFWA's conclusions earlier this year, (2) the court's decision in Western Watersheds, and (3) the State's efforts – supported by FWS – to protect CPAs, it is simply not prudent to lease lands containing documented sage grouse habitat pending further study of the grouse's status. This is particularly true of parcels within CPAs identified by the Wyoming Sage Grouse Implementation Team. 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 FWS' obligations, the court's findings certainly warrant additional NEPA review by BLM prior to leasing.

B. 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.[1]

[1] 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

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Accordingly, the appropriate time to evaluate the impact of leasing on crucial winter range or grouse habitat is *before* an oil and gas lease is granted. *Sierra Club v. Peterson,* 717 F.2d 1409, 1414-1415 (D.C. Cir. 1983) *citing Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)). The court in *Sierra Club* specifically rejected the contention that leasing was a mere paper transaction not requiring NEPA compliance. Rather, it concluded where the agency could no longer completely preclude surface disturbance 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. Thus, 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 this case, BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbance. None of the environmental documents previously prepared by BLM examines the site-specific or cumulative impacts of mineral leasing and development on crucial big game winter range and migration routes. BLM has not analyzed the new information cited herein, 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 big game winter ranges and migration routes lands in efforts to maintain the vital habitat function these lands provide.

BLM, at a minimum, must analyze 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 beyond what was done at the RMP level. TRCP contends the proposed parcels cannot lawfully be sold unless NSO stipulations are considered in a site specific analysis for each parcel and are added for all parcels within these sensitive areas, where appropriate, to maintain the function of these habitats. However, whether BLM agrees with TRCP as to the appropriate outcome of the analysis is not the point. 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. Duty to Maintain Current Inventories.

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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").

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FLPMA requires BLM to prepare and maintain a current inventory of all public lands and their resources. 43 U.S.C. § 1711(a). This systematic inventory forms the basis of the land use planning process. 43 U.S.C. § 1701(a)(2). "Th[e] inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." 43 U.S.C. § 1711(a).

Through the use of radio and satellite telemetry, scientists from WGFD and other big game researchers have been able to identify migration routes used by big game in their seasonal movements. These materials constitute inventories and evaluations of the areas using vastly improved 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 information was not available at the time the relevant RMPs were developed and cannot be said to have been considered for NEPA purposes.

As noted above, BLM is relying on outdated RMPs and corresponding inventories for this lease sale. A decision by BLM to hold the lease sale as scheduled without taking into account the new information cited above would be arbitrary and capricious. *Compare Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1167-68 (N.D. Cal. 2006) ("The Court concludes it was arbitrary and capricious to approve the RAMP with such obviously outdated and inadequate inventories.").

B. Duty to Avoid Unnecessary and Undue Degradation.

"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). 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.").

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 UUD of big game crucial winter ranges and migration routes and grouse habitat. *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

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disapprove of an otherwise permissible ... operation because the operation though necessary ... would unduly harm or degrade the public land.").[2]

In this instance, BLM has a statutory obligation to demonstrate that leasing in or adjacent to crucial big game winter ranges and migration routes and within grouse habitat will not result in UUD. Specifically, BLM must demonstrate that leasing will not lead to future development that causes UUD by irreparably damaging the habitat function of crucial big game winter ranges and migration routes and sage grouse habitat that could lead to population decline. Existing analysis has not satisfied BLM's obligation to comply with the UUD standard and prevent permanent impairment of the function of crucial winter ranges and migration routes and sage grouse habitat of these public lands. Proceeding with leasing would be arbitrary, capricious, and an abuse of discretion.

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.

Current RMPs, on which the proposed leasing action is based, do not account for the duties imposed on BLM by virtue of 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

[2] 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); *Mineral Policy Center v. Norton*, 292 F. Supp. 2d at 49.

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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).

CONCLUSION

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

TRCP respectfully requests that the Wyoming State Director withdraw these disputed parcels from the December 2, 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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