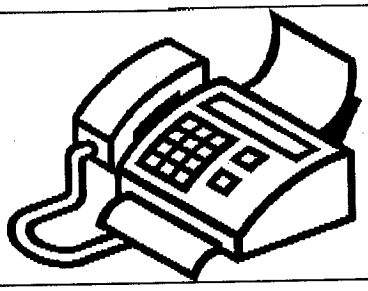

A facsimile from

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Date: 11/13/2007

Regarding: Protest of November 27, 2007 Lease Sale

Comments: Accompanying this cover sheet is a 19-page Protest of certain parcels offered in the November 27, 2007 Lease Sale by BLM in Montana

BY FACSIMILE

Gene Terland, State Director
Bureau of Land Management
Montana State Office
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RE: PROTEST OF MONTANA BLM NOVEMBER 27, 2007, LEASE SALE OF 118 PARCELS TOTALING 123,057.30 ACRES PLUS RECOMMENDATION FOR ADDITIONAL STIPULATIONS ON 5 PARCELS TOTALING 5,354.76 ACRES IN BEAVERHEAD, BROADWATER, CARBON, DAWSON, FERGUS, GARFIELD, GOLDEN VALLEY, MEAGHER, MUSSELSHELL, PETROLEUM, RICHLAND, ROOSEVELT, ROSEBUD, STILLWATER COUNTIES.

INTRODUCTION

On behalf of the Theodore Roosevelt Conservation Partnership (TRCP or Protester), I respectfully protest the inclusion of the 118 proposed lease sale parcels listed below administered by the Bureau of Land Management (BLM) or the USDA Forest Service (FS) within the state of Montana and request that these parcels be withdrawn from the November 27, 2007, lease sale. This protest is filed pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3.

All Protested Lease Sale Parcels

MT-11-07-01; MT-11-07-02; MT-11-07-03; MT-11-07-04; MT-11-07-05; MT-11-07-06; MT-11-07-07; MT-11-07-08; MT-11-07-09; MT-10-07-10; MT-11-07-11; MT-11-07-12; MT-11-07-13; MT-11-07-14; MT-11-07-15; MT-11-07-16; MT-11-07-17; MT-11-07-18; MT-11-07-19; MT-11-07-21; MT-11-07-22; MT-11-07-23; MT-11-07-24; MT-11-07-25; MT-11-07-26; MT-11-07-27; MT-11-07-28; MT-11-07-31; MT-11-07-32; MT-11-07-33; MT-11-07-34; MT-11-07-38; MT-11-07-39; MT-11-07-40; MT-10-07-41; MT-11-07-42; MT-11-07-43; MT-11-07-44; MT-10-07-45; MT-10-07-46; MT-10-07-47; MT-11-07-48; MT-11-07-49; MT-11-07-50; MT-11-07-51; MT-11-07-52; MT-11-07-53; MT-11-07-54; MT-11-07-55; MT-11-07-56; MT-11-07-57; MT-11-07-58; MT-11-07-59; MT-11-07-60; MT-11-07-61; MT-11-07-62; MT-11-07-63; MT-11-07-64; MT-11-07-66; MT-11-07-67; MT-10-07-68; MT-11-07-69; MT-11-07-70; MT-11-07-71; MT-11-07-72; MT-11-07-73; MT-11-07-74; MT-11-07-75; MT-11-07-76; MT-11-07-77; MT-11-07-78; MT-11-07-79; MT-11-07-80; MT-11-07-81; MT-11-07-82; MT-11-07-83; MT-11-07-84; MT-11-07-85; MT-11-07-86; MT-11-07-88; MT-11-07-89; MT-11-07-94; MT-11-07-98; MT-11-07-101; MT-11-07-107; MT-11-07-110; MT-11-07-112; MT-11-07-114; MT-11-07-115; MT-11-07-116; MT-11-07-119; MT-11-07-121; MT-11-07-124; MT-11-07-125; MT-11-07-126; MT-11-07-127; MT-11-07-128; MT-11-07-131; MT-11-07-153; MT-11-07-154; MT-11-07-156; MT-11-07-179; MT-11-07-182; MT-11-07-183; MT-11-07-185; MT-11-07-187; MT-11-07-188; MT-11-07-189; MT-11-07-191; MT-11-07-207; MT-11-07-208; MT-11-07-209; MT-11-07-210; MT-11-07-211; MT-11-07-212; MT-11-07-213; MT-11-07-214; MT-11-07-215.

In addition to the request to protest (withdraw) the 188 parcels listed above, I respectfully recommend additional protective stipulations be applied to 5 parcels separately listed below. The explanation for the stipulations for these parcels is given in the section, Mule Deer Winter Range and Hunting, in Richland and Roosevelt counties on page 5.

All Lease Sale Parcels Recommended For Additional Stipulations

MT-11-07-186; MT-11-07-192; MT-11-07-193; MT-11-07-194; MT-11-07-200

Generally, however, this Protest as a whole is generated by the likely declines in habitat, species presence and population abundance for brown trout, mule deer, white-tailed deer, elk, pronghorn, black bear, sage grouse, sharptail grouse and other upland birds throughout the lease sale area as a result of oil and gas development. The decline in species and populations will quickly lead to declines in hunting and fishing opportunities on public lands. The specific reasons for asking for a withdrawal of the 118 parcels and the addition of stipulations to the other 5 parcels are given below in sections on River Trout Habitat and Fishing (p. 2); Mule Deer Winter Range and Hunting (p. 3); Elk Crucial Winter Range And Hunting (p. 5); Sage Grouse Leks And Hunting (p. 7); High Value Hunting Areas Designated By Montana Sportsmen (p. 8); and Mule Deer Winter Range, Elk Crucial Winter Ranges and Migration Routes (p. 11).

EXPLANATORY NOTES AND ABBREVIATIONS

For reader clarity, the stipulations defined by BLM and used in this Protest are listed below with their explanatory text:

- FWP Montana Department of Fish, Wildlife & Parks
- CSU 12-1 Controlled Surface Use; Prior to surface disturbance on slopes over 30 percent, an engineering/reclamation plan must be approved by the authorized officer. Such plan must demonstrate how the following will be accomplished: site productivity will be restored, surface runoff will be adequately controlled, off-site areas will be protected from accelerated erosion, such as rilling, gullying, piping and mass wasting. Water quality and quantity will be in conformance with state and federal laws. Surface disturbing activities will not be conducted during extended wet periods, and construction will not be allowed when soils are frozen.
- NSO 11-2 No Surface Occupancy; Surface occupancy is prohibited within riparian areas, 100-year flood plains of major rivers, and on water bodies and streams.
- NSO 13-2 No Surface Occupancy; Surface use prohibited from April 1 to June 15 within established spring calving range for elk.
- Timing 13-1 Timing; Surface use is prohibited from December 1 through March 31 within crucial winter range for wildlife, except that the stipulation does not apply to operation and maintenance of production facilities.
- Timing 13-3 Timing; Surface use is prohibited from March 1 to June 15 in grouse nesting habitat within 2 miles of a lek, except that the stipulation does not apply to operation and maintenance of production facilities.
- Timing 13-7 Timing; Surface use is prohibited from December 1 through May 15 within big game winter/spring range, except that the stipulation does not apply to operation and maintenance of production facilities.
- Timing 15-1 Timing; Surface use is prohibited from December 1 through May 15 within big game winter range, except that the stipulation does not apply to operation and maintenance of production facilities.

This Protest incorporates up-to-date information on fish and wildlife habitat and GIS maps on sportsmen user-values from FWP staff in Dillon, Helena, Miles City and Glasgow, Montana offices.

RIVER TROUT HABITAT AND FISHING

Drainages and Tributaries to the Beaverhead River: TRCP protests the leasing of the following 5 parcels on unstable drainages and tributaries to the Beaverhead River below Clark Canyon Reservoir in Beaverhead County: MT-11-07-207; MT-11-07-208; MT-11-07-209; MT-11-07-210; MT-11-07-211 based on likely adverse impacts to stream trout habitat. TRCP's concern for these parcels extends to the downstream trout fishery in the Beaverhead River.

Unstable drainages that feed the Beaverhead River on the proposed lease parcels are Gallagher Gulch Creek, Long Gulch and Bill Hill Creek. Development on these leases holds the potential to generate soil erosion and sedimentation directly into these streams and the Beaverhead River. The Beaverhead River below Clark Canyon Reservoir is a Class I (Blue Ribbon) trout fishery – the highest classification afforded Montana lakes and streams by FWP based on recreational and fish habitat values. Each year thousands of anglers visit from other nations, across the United States and within Montana to experience a world-class blue ribbon trout fishery. The Beaverhead River produces some of the largest trout, particularly brown trout, in Montana.

While CSU 12-1 is designed to protect slopes over 30%, there are no stipulations protecting soils with high erosive potential on slopes less than 30% found in these drainages in parcels MT-11-07-208; MT-11-07-209; MT-11-07-210; and MT-11-07-211. Also, CSU 12-1 would require a plan that demonstrates how site productivity will be restored; surface runoff will be adequately controlled; off-site areas will be protected from accelerated erosion; water quality and quantity will be maintained in conformance with state and federal water quality laws; surface-disturbing activities will not be conducted during extended wet periods; and construction will not be allowed when soils are frozen. However, the standards that would need to be met are not quantified in any way. Because defined measurable thresholds of disturbance that must be adhered to are not given, this stipulation offer no assurance that development on slopes either less or greater than 30% would not have deleterious impacts to water quality. TRCP therefore protests the inclusion of these lease parcels in the lease sale until meaningful and measurable protections are applied to the leases to adequately control erosion and sedimentation of streams.

Additionally, NSO 11-2 must be included in MT-11-07-210 because Long Gulch flows through the southwest portion of the parcel.

For these 5 disputed parcels, no-surface-occupancy (NSO) or other stipulations are unlikely to be successful in the protection of essential trout habitat characteristics, instream flows or water quality in the Beaverhead River. If river trout habitat conditions cannot be sustained at the current high quality, the recreational values of the fishery will be lost and anglers will permanently lose the world-class trophy trout fishing opportunities. BLM did not analyze its ability to protect the habitat function of reservoir and river trout through "no-lease" stipulations.

Without defining adequate measurable thresholds of disturbance that must be adhered to under stipulation CSU 12-1 as applied to parcels MT-11-07-208; MT-11-07-209; MT-11-07-210; and MT-11-07-211, and without adding stipulation NSO 11-2 to parcel MT-11-07-210, leasing of these 5 parcels would irretrievably and unlawfully commit these drainages and tributaries to the Beaverhead River to gas development with a high likelihood that Blue Ribbon fishery values in the Beaverhead River would be degraded or even lost.

MULE DEER WINTER RANGE AND HUNTING

The proliferation of well service roads and industry vehicle traffic alone in known ranges of mule deer will predictably lead to population declines according to 30 years of field research conducted by western state fish and wildlife agencies, the USDA Forest Service and several major universities. Recent mule deer counts conducted over a three-year period showed a 46 percent decline in mule deer abundance in the Pinedale Anticline Project Area in Wyoming despite timing stipulations to minimize impacts on wintering deer (Sawyer *et al.* 2006). Deer in drilling areas that had high deer use (high value habitat) in winter were displaced to low-value habitat with a lower herd carrying capacity, resulting in the documented herd decline over time. The biological principles and conclusions reached in these studies are applicable to the parcels cited in this Protest, based on my 35 years of experience as a professional biologist with undergraduate and graduate degrees in biology and ecology.

Sawyer *et al.* (2006) contains the following conclusions vital to a proper analysis of the impact of leasing the affected parcels and to formulation of a proper mitigation plan:

- Mule deer rely on several important seasonal ranges, including winter and transition ranges, which generally provide mule deer with better foraging opportunities.
- Managers should not overlook the importance of all seasonal ranges for maintaining healthy and productive mule deer populations. Summer, transition, and winter ranges are equally important; loss or degradation of one will not be compensated for by the others.
- Relatively small amounts of direct habitat loss can affect winter distribution patterns of mule deer and the effects of direct habitat loss may be long term for species like mule deer that rely on native shrubs (*i.e.*, sagebrush).
- Migrations between summer and winter ranges generally follow traditional routes that are learned and passed on from mother to young. Without migratory routes, many seasonal ranges would be inaccessible to mule deer, and it is unlikely current populations could be maintained.
- Identifying and conserving migration routes to and from seasonal ranges is a key component to successful mule deer management.

Until recently, conserving migration routes has not been a top management concern for wildlife agencies because there have been no large-scale habitat alterations in the study area and the landscape has remained relatively unchanged. However, recent BLM approvals for oil and gas leasing will result in large-scale habitat changes that could potentially impact the effectiveness of migration routes.

Sawyer (2007) found impacts to mule deer from gas development include direct and indirect habitat losses that can potentially result in reduced population performance. Direct habitat loss occurs when native vegetation is converted to access roads, well pads, pipelines, and other project features. Indirect habitat losses occur when wildlife are displaced or avoid areas near infrastructure because of increased levels of human disturbances (*e.g.*., traffic, noise, pollution, human presence).

The threats to mule deer are widespread, and the most significant adverse impacts do not occur on the land at drilling sites because these lands can be reclaimed. Trucks, personnel, equipment, roads and facilities associated with ongoing operations displace wintering mule deer from favored habitat.

Deer in Colorado avoid roads, particularly areas within 200 meters of a road (Rost and Bailey, 1979). Roads reduce big game use of adjacent habitat from the road edge to over 0.5 mile away (Berry and Overly, 1976). Roads are a major contributor to habitat fragmentation by dividing large landscapes into smaller patches and converting interior habitat into edge habitat. With increased habitat fragmentation across large areas, the populations of some species become isolated, increasing the risk of local extirpations or extinctions (Noss and Cooperrider, 1994). In the protested parcels, there is no evidence that BLM considered the adverse effects of road building, high road densities and frequent heavy vehicle traffic incident to natural gas development on mule deer herds, or even acknowledged long-standing scientific studies documents the effects of roads and traffic on big game.

In deep-gas fields having 4-16 well pads per section, the number of producing well pads and associated human activity may negate the potential effectiveness of timing restrictions on drilling activities as a means of reducing disturbance to wintering deer. Mitigation measures designed to minimize disturbance to wintering mule deer in natural gas fields should consider all human activity across the entire project area and not be restricted to the development of wells or to known winter ranges.

Reducing disturbance to wintering mule deer may require restrictions or approaches that limit the level of human activity during both production and development phases of the wells. Directional-drilling technology offers promising new methods for reducing surface disturbance and human activity.

Comprehensive public access planning and developing road management strategies also may be a necessary part of mitigation plans.

BLM contends that seasonal timing restrictions in big game winter range alone (a prohibition on drilling from December 1 through May 15) will be sufficient to protect mule deer and elk from the adverse effects of oil and gas development in the lease sale parcels. However, Sawyer (2006) undercuts BLM's premise that such seasonal protections in a single portion of mule deer habitat are sufficient. Reliance on such measures is unjustified in light of the best available data which NEPA requires BLM to employ.

Beaverhead County: FWP has identified parcels MT-11-07-207; MT-11-07-208; MT-11-07-209; MT-11-07-210; MT-11-07-211 as mule deer winter range. BLM has applied to all 5 parcels the Timing 13-7 stipulation. TRCP requests that the BLM withdraw parcels MT-11-07-207; MT-11-07-208; MT-11-07-209; MT-11-07-210; and MT-11-07-211 from the lease sale.

Broadwater and Meagher Counties: FWP has identified parcels **MT-11-07-01**; **MT-11-07-04**; **MT-11-07-05**; MT-11-07-06; **MT-11-07-07**; **MT-11-07-08**; **MT-11-07-09**; **MT-10-07-10**; **MT-11-07-11**; **MT-11-07-12**; MT-11-07-13; MT-11-07-15; MT-11-07-21; MT-11-07-22; MT-11-07-25; and MT-11-07-26 as mule deer winter range. BLM has applied the Timing 15-1 stipulation to only 9 (**in bold type**) of the 16 parcels documented as mule deer winter range. The full areas of all 16 protested parcels identified as having mule deer winter range must be withdrawn from the lease sale to avoid the known adverse impacts incident to pad construction and operation and maintenance of production facilities.

Fergus, Golden Valley, Musselshell and Petroleum Counties: FWP has identified parcels **MT-11-07-28**; **MT-11-07-31**; **MT-11-07-32**; **MT-11-07-33**; **MT-11-07-34**; MT-11-07-39; **MT-11-07-40**; MT-10-07-41; MT-10-07-45; MT-10-07-46; MT-10-07-47; MT-10-07-48; MT-10-07-49; **MT-11-07-50**; MT-11-07-52; MT-11-07-53; MT-11-07-54; MT-11-07-55; MT-11-07-56; MT-11-07-57; MT-11-07-58; MT-11-07-59; MT-11-07-60; MT-11-07-63; MT-11-07-64; MT-11-07-66; MT-11-07-67; MT-10-07-68; MT-11-07-69; MT-11-07-70; MT-11-07-71; MT-11-07-72; MT-11-07-78; MT-11-07-79; MT-11-07-80; MT-11-07-81; MT-11-07-86; MT-11-07-89; MT-11-07-94; and MT-11-07-98 as mule deer winter range. BLM has applied the Timing 13-1 stipulation to only 7 (**in bold type**) of the 40 parcels documented as mule deer winter range. The full areas of all 40 protested parcels identified as having mule deer winter range must be withdrawn from the lease sale to avoid the known adverse impacts incident to pad construction and operation and maintenance of production facilities.

Richland and Roosevelt Counties: FWP has identified parcels MT-11-07-186; MT-11-07-192; MT-11-07-193; MT-11-07-194; and MT-11-07-200 as being critical wintering areas for mule deer. It is requested that no surface disturbance be allowed in cottonwood stands in parcels MT-11-07-186 and MT-11-07-194 by setting a year-round NSO stipulation. It is further requested that a Timing 13-7 stipulation be placed on parcels MT-11-07-192 and MT-11-07-193. Parcel MT-11-07-200 should be protected with a Timing 13-1 stipulation.

ELK CRUCIAL WINTER RANGE AND HUNTING

The impacts of road construction and motor vehicle activity on elk habitat, elk population distribution, and hunter success are well known from more than 30 years of field studies conducted in western states by state fish and wildlife agencies, the USDA Forest Service, and universities. The following bulleted statements reference studies listed in Sources of Information at the end of this Protest. Additional studies found that elk avoidance of roads is not limited to logging areas, but applies generally across elk range in the protested parcels.

- Roads reduce big game use of adjacent habitat from the road edge to over 0.5 mile away (Berry and Overly, 1976).

- Logging and road-building activity along major migration routes change the winter distribution of elk (Leege, 1976).
- Elk in Montana avoid habitat adjacent to open forest roads, and road construction creates cumulative habitat loss that increases impacts to elk as road densities increase (Lyon, 1979).
- Roads are a major contributor to habitat fragmentation by dividing large landscapes into smaller patches and converting interior habitat into edge habitat. With increased habitat fragmentation across large areas, the populations of some species become isolated, increasing the risk of local extirpations or extinctions (Noss and Cooperrider, 1994).
- When many elk herds were located in inaccessible areas and elk harvests were below their potential in most states, construction of new roads was viewed as a positive contribution to more intensive elk management. Now, however, timber harvest is greater on previously unroaded national forests, and the network of roads is a major wildlife management problem (Lyon and Ward, 1982).
- A west central Idaho study shows elk occur in greater densities in roadless area compared to roaded areas, and hunter success is higher in roadless areas compared to roaded areas (Thiessen, 1976).
- An expanding network of logging roads made elk more vulnerable to hunters and harassment, and higher road densities caused a reduction in the length and quality of the hunting season, loss of habitat, over harvest, and population decline (Lyon and Basile, 1980).
- One result of road construction is the decreased capacity of the habitat to support elk from decreased habitat effectiveness. In highly-roaded areas in Montana, only 5% of bull elk live to maturity. Road closures extend the number of mature bulls to 16% and extend their longevity to 7.5 years (Leptich and Zager, 1991).
- Elk in Colorado avoid roads, particularly areas within 200 meters of a road (Rost and Bailey, 1979).
- Travel restrictions on roads appear to increase the capability of the area to hold elk in Montana (Basile and Lonner, 1979).
- Road closures allow elk to remain longer in preferred areas (Irwin and Peek, 1979).
- Road closures in the Tres Piedras area in New Mexico during big game season are generally accepted by the public and result in increased elk harvest (Johnson, 1977).
- Increased hunter success was found in unroaded areas (25%) and reduced open-road density areas (24%) than roaded areas (15%) (Gratson and Whitman, 2000).
- Road-related variables have been implicated as increasing elk vulnerability in virtually every study in which the influence of roads has been examined. Bull elk vulnerability is highest in areas with open roads, reduced in areas with closed roads, and lowest in roadless areas (Lyon, Weber and Burcham, 1997).

The high density of roads and road traffic associated with natural gas well operation and maintenance in a densely developed field will predictably lead to losses in elk reproduction and population size and substantial reductions in public elk hunting opportunity on both public lands and nearby private and state lands. As with mule deer, in the protested parcels with elk, there is no evidence that BLM considered the adverse effects of road building, high road densities and frequent heavy vehicle traffic incident to natural gas development on elk herds, or even acknowledged long-standing scientific studies documents the effects of roads and traffic on big game.

BLM contends that seasonal timing restrictions in big game winter range alone (a prohibition on drilling from December 1 through May 15) will be sufficient to protect mule deer and elk from the adverse effects of gas development in the lease sale parcels. However, Sawyer (2007) undercuts BLM's premise that such seasonal protections in a single portion of mule deer habitat are sufficient. Reliance on such measures is unjustified in light of the best available data, which NEPA requires BLM to employ.

Broadwater and Meagher Counties: FWP has identified parcels **MT-11-07-01**; MT-11-07-03; **MT-11-07-04**; **MT-11-07-05**; **MT-11-07-07**; **MT-11-07-09**; **MT-11-07-12**; MT-11-07-13; MT-11-07-15; MT-

11-07-16; MT-11-07-17; MT-11-07-18; MT-11-07-19; MT-11-07-21; MT-11-07-22; MT-11-07-23; MT-11-07-24; MT-11-07-25; and MT-11-07-26 as elk crucial winter range. Additionally, the Rocky Mountain Elk Foundation owns conservations for protecting elk crucial winter range on private lands adjoining parcels MT-11-07-13 and MT-11-07-26. BLM has applied the Timing 15-1 stipulation to only 6 (**in bold type**) of the 19 parcels documented as elk crucial winter range. BLM has not addressed movement or migration of elk among the parcels or to adjacent lands under conservation easement to fulfill seasonal life needs. As a result, the full areas of all 19 protested parcels identified as having elk crucial winter range must be withdrawn from the lease sale.

Fergus, Golden Valley, Musselshell, and Petroleum Counties: FWP has identified parcels **MT-11-07-27**; **MT-11-07-31**; **MT-11-07-32**; **MT-11-07-33**; **MT-11-07-34**; MT-11-07-39; **MT-11-07-40**; MT-10-07-41; MT-11-07-42; MT-11-07-43; MT-11-07-44; MT-11-07-48; MT-11-07-49; **MT-11-07-50**; MT-11-07-52; MT-11-07-56; MT-11-07-63; MT-11-07-64; MT-11-07-66; MT-11-07-67; MT-10-07-68; MT-11-07-98; **MT-11-07-110**; **MT-11-07-112**; **MT-11-07-114**; and **MT-11-07-119** as elk crucial winter range. BLM has applied the Timing 13-1 stipulation to only 11 (**in bold type**) of the 26 parcels documented as elk crucial winter range. The full areas of all 26 protested parcels identified as having elk crucial winter range must be withdrawn from the lease sale to avoid the known adverse impacts incident to pad construction and operation and maintenance of production facilities.

Stillwater County: FWP has identified parcel MT-11-07-212 as elk crucial winter range. BLM has applied the NSO 13-2 and Timing 13-1 stipulations to the parcel. The full area of parcel MT-11-07-212 must either be withdrawn from the lease sale to avoid the known adverse impacts incident to pad construction and operation and maintenance of production facilities.

SAGE GROUSE LEKS AND HUNTING

In 2005, the State Director of the BLM signed the Management Plan and Conservation Strategies for Sage Grouse in Montana. The overall goal of this document is for cooperators to implement strategies that "Provide for the long-term conservation and enhancement of the sagebrush steppe/mixed-grass prairie complex within Montana in a manner that supports sage grouse and a healthy diversity and abundance of wildlife species and human uses". Specifically, the document cites Policy Act BLM 6840, "[BLM] State directors, usually in cooperation with state wildlife agencies, may designate sensitive species. BLM shall carry out management, consistent with the principles of multiple use, for the conservation of sensitive species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species as T&E".

Currently, there are regional concerns about the overall status of sage grouse, and recent research indicates that, at a minimum, any energy development within 1 mile of an active sage grouse lek has adverse impacts on sage grouse populations, even when ¼ mile no-surface-occupancy (NSO) and 2-mile seasonal timing stipulations are applied. There is still considerable research that needs to occur in order to better define how development should occur in order to avoid impacts to sage grouse. TRCP believes that, considering the status of sage grouse, the results of recent research, the additional research that is needed to avoid addition impacts related to energy development, and agreement between FWP and BLM to cooperate through the Montana Management Plan for Sage Grouse, a conservative approach to leasing and development near Sage Grouse leks is warranted. We currently believe that leasing minerals within a 1-mile radius of active sage grouse lek at this time is not appropriate, and that leases should at minimum require a no surface occupancy for a 1-mile radius around active leks and a 4-mile radius, March 1 to June 30 seasonal timing stipulation.

Significant new information from Walker *et al.* (2007a and b) has brought new information that should be considered by BLM in its leasing decisions. The studies show that energy development, particularly natural gas development, is having negative effects on sage-grouse populations over and above those of

Musselshell County: Members of the Billings Rod & Gun Club have collectively identified parcels MT-11-07-50 and MT-11-07-51 as critical areas for sage grouse hunting that they want withdrawn from oil and gas leasing and development.

Garfield, Musselshell and Petroleum Counties: Members of the Billings Rod & Gun Club have collectively identified parcels MT-11-07-61; MT-11-07-62; MT-11-07-73; MT-11-07-74; MT-11-07-75; MT-11-07-76; MT-11-07-77; MT-11-07-78; MT-11-07-82; MT-11-07-83; MT-11-07-84; MT-11-07-85; MT-11-07-88; MT-11-07-114; MT-11-07-121; MT-11-07-124; MT-11-07-125; MT-11-07-126; MT-11-07-127; MT-11-07-128; and MT-11-07-131 as critical areas for pronghorn hunting that they want withdrawn from oil and gas leasing and development.

Garfield County: Members of the Laurel Rod & Gun Club have collectively identified parcels MT-11-07-114 as a critical area for white-tailed deer hunting that they want withdrawn from oil and gas leasing and development.

Dawson and Richland Counties: Members of the Dawson County Rod & Gun Club have collectively identified parcels MT-11-07-61; MT-11-07-62; MT-11-07-73; MT-11-07-74; MT-11-07-75; MT-11-07-76; MT-11-07-77; MT-11-07-78; MT-11-07-82; MT-11-07-83; MT-11-07-84; MT-11-07-85; MT-11-07-88; MT-11-07-114; MT-11-07-121; MT-11-07-124; MT-11-07-125; MT-11-07-126; MT-11-07-127; MT-11-07-128; MT-11-07-131; MT-11-07-182; MT-11-07-183; MT-11-07-185; MT-11-07-187; MT-11-07-188; MT-11-07-189; MT-11-07-191 as critical areas for mule deer, white-tailed deer, elk, pronghorn, black bear and upland bird hunting that they want withdrawn from oil and gas leasing and development.

Carbon County: Members of the Billings Rod & Gun Club have collectively identified parcels MT-11-07-213; MT-11-07-214 and MT-11-07-215 as critical areas for mule deer and pronghorn hunting that they want withdrawn from oil and gas leasing and development.

PROTESTER

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 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. TRCP has formed, with various partners, a Fish, Wildlife, and Energy Working Group, which is comprised of some of the country's oldest and most respected hunting, fishing, and conservation organizations.

TRCP is working hard to ensure that the development of oil and gas resources on public lands in the Rocky Mountains 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, elk, sage grouse, and trout and other desirable fish species and the recreational opportunities they provide tens of thousands of sportsmen each fall in Montana. Without comprehensive habitat management planning that is coordinated with the FWP, leasing and development of crucial big game winter ranges and migration routes and valuable fish habitat in lakes, reservoirs and streams will have a devastating effect on the fishing and hunting opportunities in Montana and jeopardize more than $1 billion in sustainable economic benefits that come from fishing- and hunting-based recreation.

TRCP currently has 1,727 Partners (individual members) and 106 Affiliates (businesses and hunter/angler organizations) throughout Montana. The 106 Affiliates have a collective membership of about 124,580 hunters and anglers. TRCP's Partners and Affiliates hunt and fish throughout the state, including in the

parcels protested. In fact, the collective long-term hunting experience of hunters and anglers in several TRCP Affiliates that have so far contributed to the sportsmen user-value maps cited in this Protest in specific parcels (p. 8-9) have hunted and continue to hunt in the parcels in the November 27 lease sale identified as high user value.

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 has 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).

This requirement 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).

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. More specifically, FWP has updated and new information on crucial mule deer and known elk winter ranges and mule deer and elk migration routes in all of the parcels proposed offered for leasing in the November 27 lease sale, on wild trout habitat characteristics in the Beaverhead River, and on active sage grouse leks and associated habitat in the lease sale area. Recent updates to the seasonal boundaries and migration routes for mule deer were completed in 2006, 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 and known elk winter ranges and migration routes, on wild trout habitat characteristics in the Beaverhead River, and on active sage grouse leks and associated habitat throughout central and eastern Montana. For this reason, BLM's approval of the disputed lease parcels is arbitrary, capricious, contrary to law, and an abuse of discretion.

1. Mule Deer Winter Range, Elk Crucial Winter Ranges and Migration Routes

All or parts of parcels **MT-11-07-01**; **MT-11-07-04**; **MT-11-07-05**; MT-11-07-06; **MT-11-07-07**; **MT-11-07-08**; **MT-11-07-09**; **MT-10-07-10**; **MT-11-07-11**; **MT-11-07-12**; MT-11-07-13; MT-11-07-15; MT-11-07-21; MT-11-07-22; MT-11-07-25; MT-11-07-26; **MT-11-07-28**; **MT-11-07-31**; **MT-11-07-32**; **MT-11-07-33**; **MT-11-07-34**; MT-11-07-39; **MT-11-07-40**; MT-10-07-41; MT-10-07-45; MT-10-07-46; MT-10-07-47; MT-10-07-48; MT-10-07-49; **MT-11-07-50**; MT-11-07-52; MT-11-07-53; MT-11-07-54; MT-11-07-55; MT-11-07-56; MT-11-07-57; MT-11-07-58; MT-11-07-59; MT-11-07-60; MT-11-07-63; MT-11-07-64; MT-11-07-66; MT-11-07-67; MT-10-07-68; MT-11-07-69; MT-11-07-70; MT-11-07-71; MT-11-07-72; MT-11-07-78; MT-11-07-79; MT-11-07-80; MT-11-07-81; MT-11-07-86; MT-11-07-89; MT-11-07-94; MT-11-07-98; MT-11-07-186; MT-11-07-192; MT-11-07-193; MT-11-07-194; and MT-11-07-200; MT-11-07-207; MT-11-07-208; MT-11-07-209; MT-11-07-210; MT-11-07-211 provide critical habitat for mule deer, and are considered vital by the FWP for the survival and sustainability of mule deer populations. BLM found 16 of these parcels (in bold type) to be important enough habitat to identify them in the applicable RMPs and provided the use of timing stipulation to prevent unwanted impacts.

In a neighboring state, BLM, through its Memorandum of Understanding with the Wyoming Department of Game & Fish (WGF), agreed to consider the information provided by WGF on a regular basis to update the boundaries and other special features and habitats for big game, including mule deer. 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.

Note, BLM has funded and served as advisors on specific research in Wyoming (Sublette Mule Deer Study) to evaluate impacts on mule deer from development in winter range. The most recent findings, including published literature (Sawyer, 2007; Sawyer *et al.*, 2006; Walker *et al.*, 2007a and 2007b), 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.

It is also consistent with other actions taken by BLM field offices in other states. For example, the Glenwood Springs Field Office in Colorado on January 10, 2002, stated that BLM will "hold in abeyance any leasing decisions until we are able to do a complete and through 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 on mule deer winter ranges and migration routes. The information provided by mule deer research in 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) (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 mule deer winter range and migration routes 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.

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. 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.

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, and 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 mule deer 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 mule deer winter ranges and migration routes. 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 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 mule deer 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. TRCP believes crucial winter ranges and migration routes 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 or are within ¼ mile of mule deer winter range and migration routes, 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).

Further, BLM has not analyzed alternatives to the full approval of the leasing nominations for the parcels that contain or are within ¼ mile of known elk crucial winter range and migration routes in the parcels known to hold crucial winter range for elk, such as NSO and no-leasing alternatives.

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 pre-leasing 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 mule deer and elk habitats and migration routes in Montana. 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. In this case, Protestor believes that the proposed lease sale parcels cannot lawfully proceed unless NSO stipulations are added for all parcels within these sensitive areas. Thus, 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, known elk winter ranges, mule deer and elk migration routes, wild trout habitat characteristics in both Clark Canyon Reservoir and the Beaverhead River, 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 winter ranges, known elk crucial winter range, mule deer and elk migration routes, wild trout habitat characteristics in the Beaverhead River, and active sage grouse leks and associated 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.").

BLM's obligation prevents UUD of the mule deer and elk winter ranges and migration routes 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 mule deer and known elk crucial winter ranges, mule deer and elk migration routes, wild trout habitat characteristics in the Beaverhead River, and active sage grouse leks and associated habitat will not result in UUD.

Specifically, BLM must demonstrate that leasing will not result in future mineral development that causes UUD by irreparably damaging the habitat function of mule deer winter ranges and migration routes 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 and migration routes 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." Ducsing 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); Geoscarch, 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) 8 (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 118 protested parcels in Beaverhead, Broadwater, Carbon, Dawson, Fergus, Garfield, Golden Valley, Meagher, Musselshell, Petroleum, Richland, Roosevelt, Rosebud, Stillwater counties are inappropriate for mineral leasing and development. Existing pre-leasing analysis does not comply with NEPA, FLPMA or other applicable law. Substantial new information on mule deer winter range and crucial elk winter ranges and migration routes in parcels impacted by oil and gas development in neighboring states and the parcels included in the November 27 lease sale, on trophy trout habitat characteristics, angler use and angling economic value in the Beaverhead River and its tributaries, and on the location, condition and use of active sage grouse leks and associated habitat in parcels included in the lease sale has not been incorporated into BLM's evaluation of the proposed lease sale parcels. As a result, BLM's current RMPs reflect inadequate management of fish and wildlife habitat and associated public hunting and fishing use of those parcels. The new information cited in this Protest applies to the parcels cited. The lack of use of new information and the inadequacy of present land and water management seriously jeopardizes the annual contribution exceeding $1 billion hunting and fishing make to Montana's economy.

The leasing of parcels containing or near active sage grouse leks in all lease sale parcels should be deferred until the federal status of the sage grouse is determined, until range-wide populations of sage grouse have increased to the degree that the species is no longer considered sensitive, and the potential for federal listing is not in question. In addition, at any time in the future when leasing might occur, all areas within a 1-mile radius of an active sage grouse lek should carry a no-surface-occupancy (NSO) stipulation without seasonal considerations, and a 4-mile radius of an active sage grouse lek should carry a NSO stipulation with seasonal considerations, until additional research better defines potential impacts. Montana citizens have raised substantial concerns about surface impacts to fish and wildlife resources and hunting and fishing opportunities, and the need for exclusions of parcels from leasing and NSO restrictions for parcels that can accommodate drilling but not surface occupancy of structures, equipment, vehicles or workers. The Protester respectfully requests that the State Director withdraw these disputed parcels from the November 27, 2007, competitive lease sale. In the event that the BLM proceeds to offer these parcels, all prospective bidders should be informed of the pending protest.

New information on the areas considered to be critical to the future of hunting fishing in Montana is being assembled in a special user-value mapping project conducted jointly by TRCP and FWP. Hunters and anglers in organized rod and gun clubs and conservation organizations throughout Montana are identifying, in a new layer of GIS maps, hunting and fishing areas of such high importance in their local areas that they want them withdrawn from oil and gas leasing entirely or protected by very strong and enforced stipulations aimed at preserving the user values. While the mapping effort is not yet completed, the first maps generated are available for central and eastern Montana, and several mapped areas intersect with parcels offered in the November 27 lease sale.

While the presentation in this current protest document appears critical of BLM, TRCP's intent is solely to works 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,

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