Citizens for a Healthy Community
High Country Citizens' Alliance
NFRIA-WSERC Conservation Center
Western Colorado Congress
Wilderness Workshop

April 19, 2012

William H. Stallings, Chief
Transportation, Energy and Agriculture Section, Antitrust Division
Department of Justice
450 Fifth Street NW., Suite 8000
Washington, DC 20530

Re: *United States of America* v. *SG Interests I, Ltd. et al.*,
Civil Action No. 12–CV–00395–RPM–MEH

Dear Mr. Stallings:

The following comments are submitted in response to the proposed settlement in *United States of America* v. *SG Interests I, Ltd. et al.*, Civil Action No. 12–CV–00395–RPM–MEH.

The signatories to this letter represent a coalition of groups from across western Colorado working to protect our environment and public health. We write to express our concern and disappointment with the proposed settlement. These comments are submitted by the undersigned community groups representing thousands of members who have long worked for environmentally responsible energy development in the State. We submit these comments because a fair, transparent, and honest leasing process for public lands and public minerals is of great interest to us, and to all Coloradoans. Also because we understand the potential precedent that this case may set.

According to the complaint filed by the Department of Justice (DOJ), SG Interests (SGI) and Gunnison Energy Corporation (GEC) signed a memorandum of understanding to jointly bid on four Bureau of Land Management (BLM) gas leases (COC068350, COC068351, COC068352, and COC068490) in the Ragged Mountain area during 2004 and 2005. The complaint alleges that GEC and SGI violated federal antitrust law by agreeing to jointly bid on leases and that the U.S. was injured financially as a result of the agreement. The Sherman Anti-Trust Act allows DOJ to bring civil or criminal charges. Here, DOJ chose to bring civil charges, and proposes to settle with the two companies for $550,000 ($275,000 per company), *while allowing both companies to retain the tainted leases.*

The alleged antitrust violation casts substantial doubt on the ability of GEC and SGI to act as good stewards of the public trust. The companies went as far as allegedly having their attorneys draft and sign a memorandum of understanding in order to rig the competitive bidding process – decreasing their own costs and increasing their own profitability – all at the expense of the United States Treasury and the American people.

The proposed settlement does not satisfy the public interest[1] because: (1) the Proposed Final Judgment does not adequately address the alleged collusion that defrauded taxpayers because SGI and GEC maintain their current leases and are not debarred from future BLM leases; (2) the Proposed Final Judgment does not address the eighteen additional leases that SGI and GEC allegedly acquired by illegal means;[2] (3) paying the government what would have been paid for the leases at competitive auction does not deter collusion in the future and, in fact, may encourage collusion; and (4) the Proposed Final Judgment markedly departs from sanctions sought in a recent highly publicized trial involving an alleged bidder engaged in an act of civil disobedience at a federal oil and gas lease sale, resulting in disruption to a lease sale but arguably no actual harm to BLM or taxpayers.

First, the Proposed Final Judgment does not adequately address the alleged collusion that defrauded taxpayers because GEC and SGI maintain their current leases and are not debarred from future BLM leases. A final judgment should "deprive the antitrust defendants of the benefits of their conspiracy."[3] The proposed settlement is inconsistent with leading Supreme Court cases and other authority indicating that antitrust defendants should not see the benefit of their conspiracy. In this case, the proposed settlement should not be approved because it would allow the companies to retain the tainted leases, and failed to so much as seriously consider whether voiding the leases may be appropriate in light of the allegations and supporting documentation.

Moreover, the DOJ fails to mention why the companies should be permitted to retain leases that the agency continues to claim were obtained in violation of the law. This is a direct affront to traditional notions of justice and equity. Here, public mineral resources should revert to public ownership due to the manner in which leases were obtained.

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[1] Before entering a consent judgment, the court must determine if the entry of such a judgment is in the "public interest." To determine if the entry of judgment is in the public interest, the court must consider "the competitive impact of such judgment" and "the impact of entry of such judgment upon competition in the relevant market or markets." 15 U.S.C.16(e)(1)(A) and (B).

[2] Note: the *Qui Tam* suit that precipitated this settlement alleges that SGI and GEC engaged in similarly illegal leasing behavior up until November of 2006. *See United States v. SG Interest I, LTD., SG Interests VII, LTD., and Gunnison Energy Corporation*, Civil Action No. 12-cv-00395-RPM-MEH (Feb. 14, 2012).

[3] *Int'l Boxing Club v. U.S,* 358 U.S. 242, 253, (1959) (quotations omitted); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966) ("[A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct...."); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 368 (1961) ("Those who violate the Act may not reap the benefits of their violations ...." (quotations omitted)).

Second, the Proposed Final Judgment would absolve SGI and GEC of any guilt associated with acquisition of at least eighteen additional leases allegedly acquired by unlawful means without imposing any fine at all. A court's role in protecting the public interest, as required by the Tunney Act when approving an antitrust agreement, is one of ensuring that the government has not breached its duty to the public in consenting to the decree.[4] The settlement addresses only four of the alleged violations by SGI and GEC. The settlement does not mention a conclusive or an ongoing investigation related to all 22 of the allegedly tainted leases.

Furthermore, the complaint alleges that SGI and GEC antitrust violations were not an isolated occurrence, but rather a systematic and recurring practice. Collusion between SGI and GEC extended beyond one incident and, indeed, beyond the two lease sales at issue in the proposed settlement. The whistleblower in the *Qui Tam* suit that precipitated this settlement, Anthony Gale, alleges that SGI defrauded the U.S. in connection with public auctions of federal gas leases conducted by the BLM in Lakewood, CO, from February 10, 2005 through November 9, 2006. Our own research shows that SGI and GEC acquired at least 22 leases at six different lease sales during that period. This settlement would result in fines for four leases issued at two lease sales and simultaneously release the Defendants from various liability on not only the four bids mentioned in the Antitrust Complaint, but for all activities surrounding the 22 federal oil and gas bids that they won between February 10, 2005 and November 9, 2006. Simply put, this fails to protect the public interest.

Moreover, many of the leases acquired by SGI and GEC during the period of these alleged antitrust violations were issued over formal protest. Issuance and development of these leases, therefore, is arguably in direct contravention of the public interest. If development proceeds, it should not be undertaken by operators known to disregard the public trust – the values at stake are simply too great. Of the 22 leases issued to SGI and GEC during the period when the antitrust violations occurred, local citizens, local governments, and conservation groups protested at least one-third. These leases were issued over objections related to wildlife impacts (including impacts to threatened and endangered species), for overlapping Inventoried Roadless Areas, as well as for concerns related to water use and contamination. Many of the leases overlap with an area known as the Thompson Divide—where local citizens are currently trying to permanently withdraw the area from availability for future oil and gas leasing, and which includes a provision for the reimbursement of leaseholders that would eliminate the threat of development on existing leases. Additionally, all of these leases are upstream from Paonia Reservoir, which is a primary source of irrigation water for North Fork Valley farmers and a resource that the community is determined to protect from any sort of contamination.

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[4] *United States v. Microsoft*, 231 F. Supp. 2d 144, 152 (D.D.C. 2002) *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). Importantly, "[t]he legislators [behind the Tunney Act] found that consent decrees often failed to provide appropriate relief, either because of miscalculations by the Justice Department or because of the 'great influence and economic power' wielded by antitrust violators." United States v. AT&T, 552 F. Supp. 131, 148 (D. D.C. 1982). Courts have "refused to accept or approve those provisions [that they do] not find to meet the public interest standard." United States v. GTE Corp., 603 F. Supp. 730, 740 n.42 (D. D.C. 1984) (citing AT&T, 552 F. Supp. at 147–53).

Third, paying the government what would have been paid for the leases at competitive auction does not deter collusion in the future and, in fact, may encourage collusion. A Proposed Final Judgment requires divestiture of assets in markets in which companies collectively service, provide clear and logical relationship between allegations in complaint and proposed remedies, and provide a timeline and enforcement mechanism.[5] Here, the Proposed Final Judgment fails to achieve the "just and proper" relief prayed for in the complaint, and it is inadequate to "prevent the recurrence" and "dissipate the anticompetitive effects of the violation."[6] The $550,000 fine ostensibly reflects what SGI and GEC would have paid for the leases at sale if they had been acting independently. The companies originally paid an average of $25 per acre for the four illegally bid upon leases. The $550,000 penalty would increase the per acre average to $175. However, the $175 per acre average is well below the $300 per acre maximum bid the companies agreed upon in the case of the fourth lease—a number that companies were clearly comfortable paying, even with slanted scales. It is not clear what the agreed upon maximum bids were on the other leases.

Not only is the proposed settlement less than GEC and SGI agreed that they would pay for one of these leases at auction, it is also less than they would have to pay defending their actions in court, and it presumably forecloses a more thorough DOJ investigation that may involve additional risks and liabilities for the companies. GEC President Brad Robinson stated that "[w]e believe that our agreement and bids met the appropriate legal requirements. However, the DOJ believes differently and GEC decided to settle the allegations to avoid the legal costs associated with a protracted DOJ investigation."[7] The fine is nominal to these corporations, it does not reflect the seriousness of the alleged offense, and it is insufficient to deter companies from illegally colluding to bid on federal mineral estate in the future. To the contrary, the proposed settlement would send a clear message to these companies, and the industry in general, that collusion at a lease sale will, at worst, result in a fine tantamount to what they would have paid for the lease absent collusion.

Fourth, the proposed settlement is demonstrably out of line with charges DOJ has pursued against other parties who have disrupted lease sales – rendering this settlement patently prejudicial on its face. For example, Tim DeChristopher, a young man from Utah who registered and bid at a BLM oil and gas lease sale in December 2008, was prosecuted by DOJ and charged with two felony counts: scheming to disrupt the auction and making false statements. When convicted last year, and while awaiting sentencing, Mr. DeChristopher faced up to 10 years in prison. He is currently serving two years in federal prison in California while his lawyers appeal. It is grossly unjust that DOJ pursued criminal charges against Mr. DeChristopher, while pursuing only civil charges and a fine of $550,000 against GEC and SGI, after these parties allegedly

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[5] *United States v. AT&T Inc.*, 541 F. Supp. 2d 2, 7 (D.D.C. 2008).

[6] The Complaint prays for this relief: "Plaintiff shall have such other relief, including equitable monetary relief, as the nature of this case may require and is just and proper to prevent the recurrence of the alleged violation and to dissipate the anticompetitive effects of the violation. *See* United States v. SG Interests I LTD., et al.; Proposed Final Judgment and Competitive Impact Statement, 77 Fed. Reg. 10,775, 10,776 (Feb. 23, 2012) (emphasis added).

[7] Seth Mensing, Crested Butte News, "*It Raises Questions...*" (Feb. 24, 2012).

defrauded the American people by systematically scheming, and on multiple occasions, by making false statements on lease bid forms.

Allegations span a much broader timeframe than the settlement would address, there is no indication of an ongoing or completed investigation dealing with allegations left unaddressed in this settlement, and there is much public concern about the area proposed for development and the leases implicated by allegations. Therefore, we believe this proposed settlement is unjustifiable according to the public interest.

If this case is dismissed under the proposed settlement, we fear it will set a troubling precedent that undermines the protection and responsible use of our public lands. As noted above, the proposed settlement is woefully insufficient and is demonstrably not in the public interest. Therefore, we are concerned that the proposed settlement may actually entice further collusion and attempts to defraud the public, instead of acting to deter such surreptitious behavior.

We urge the DOJ and the Court to: (1) pursue civil and criminal prosecution of GEC and SGI; (2) consider alternative remedies that address the numerous other leases at issue in the *Qui Tam* action; (3) commit to pursuing a thorough, transparent investigation of the other lease sales and leases tainted by the alleged antitrust violations to restore public trust in the integrity of the leasing process and determine the legality of the bidding process for all leases held by the companies; (4) consider requiring GEC and SGI to forfeit the subject leases; and (5) consider imposing a $1,650,000 penalty ($825,000 per company) – triple the amount proposed by DOJ – in exchange for settling the suit to adequately deter similar behavior in the future. We believe these penalties and further actions are needed to satisfy the public interest and to send a clear signal that the United States government will not tolerate collusion, or other illegal, anti-competitive processes in bidding on valuable federal mineral resources.

Thank you for taking our comments into consideration. Should you have any questions please do not hesitate to contact me.

Sincerely,

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April 20, 2012

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Re: *United States of America v. SG Interests I, Ltd., et al.*, Civil Action No. 12-CV-00395-RPM-MEH

Dear Mr. Stallings,

High Country Citizens' Alliance, Wilderness Workshop and NFRIA-WSERC Conservation Center submit the following comments concerning Civil Action No. 12-CV-00395-RPM-MEH. The comments herein supplement a letter by the undersigned organizations submitted under different cover earlier in the week. The three groups represent thousands of members in western Colorado who are concerned about management of public lands and public resources.

"Men must turn square corners when they deal with the government," said former Supreme Court Justice Oliver Wendell Holmes, Jr. When they do not, the consequences must be sufficient to deter other men from cutting corners in the future. According to the complaint filed by the Department of Justice (DOJ), SG Interests (SGI) and Gunnison Energy Corporation (GEC) signed a memorandum of understanding to jointly bid on four gas leases (COC068350, COC068351, COC068352, and COC068490) in Gunnison and Delta Counties during 2004 and 2005. The Sherman Anti-Trust Act allows DOJ to bring civil or criminal charges. In this case, DOJ brought civil charges, and it proposes to settle with the two companies for $550,000, while allowing both companies to retain the tainted leases. The proposed settlement fails miserably in terms of 1) penalizing the defendants given the serious allegations in the complaint, 2) deterring future collusion that defrauds the federal government and taxpayers in these tight fiscal times, and 3) being fair enough to engender respect for the rule of law in light of the radically harsher penalty of significant jail time recently sought and imposed in a case involving not deliberate collusion, but making a political statement at federal oil and gas sales.[1]

The Clayton Act, as amended by the Antitrust Procedures and Penalties Act (APPA), requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest."[2] In making that determination, the court is directed to consider:

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[1] We refer to the case of Tim DeChristopher, who in December, 2008 registered and bid at a BLM oil and gas lease sale in Utah. DeChristopher was prosecuted by DOJ and charged with two felony counts. Convicted last year, he is currently serving a two-year prison sentence.

[2] 15 U.S.C. § 16(e)(1).

(a) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(b) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[3]

Given the factors outlined in this letter and other concerns, DOJ's proposed settlement cannot be said "to be within the reaches of the public interest."[4] This letter highlights one particularly egregious concern that does not appear to have been considered by DOJ: the proposed settlement may not capture the true value to the purchaser of at least one of the parcels, given that parcel's federal minerals underlie private property now owned by GEC's principal, Mr. Bill Koch. The question as to whether principals at GEC may have personally earned financial benefits from the tainted leasing process goes to the heart of whether the proposed settlement allowing the companies to retain all tainted leases subject to muted sanctions meets the public interest review standard for the proposed settlement.

GEC is owned by William I. "Bill" Koch.[5] One of the parcels at issue in the settlement, and thus which GEC acquired a 50% interest without competitive bidding, is numbered COC068351 (comprising 1280 acres).[6] Mr. Koch thus controls whether and how lease COC068351 ("the Parcel") will be developed. The Parcel overlaps the northwest portion of a large piece of private property now owned by Mr. Koch known as the Lower Bear Ranch. Compare the map (Attachment 1) of the four parcels at issue in the proposed settlement (Parcel COC068361 is to the parcel furthest to the east, near Paonia Reservoir) with a map prepared by Mr. Koch's Bear Ranch.[7] These maps also show that the Parcel overlaps with the entirety of a block of Bureau of Land Management (BLM) land that divides Lower Bear Ranch and Upper Bear Ranch, a parcel that Mr. Koch has proposed to acquire in trade as part of a land exchange.[8]

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[3] Id. (emphasis added).

[4] *KeySpan*, 763 F. Supp. 2d at 637 (quoting *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (internal quotations omitted)).

[5] See http://northforkvalleyproject.com/.

[6] Complaint ¶ 14.

[7] See http://centralrockieslandexchange.com/wp-content/uploads/2011/10/MapBLMExchangeParcels.pdf.

[8] Mr. Koch has been attempting without success to secure the Central Rockies Land Exchange since 2010. The exchange involves federal and private lands in Colorado and Utah. Proposals for legislation have been extremely controversial in Gunnison and Delta Counties. See http://www.denverpost.com/ci_15800378; http://www.gjsentinel.com/special_sections/articles/land-swap-potential-drilling-cause-for-north-fork.

Mr. Koch apparently acquired the Bear Ranch in 2007, after Gunnison Energy obtained a 50% interest in the Parcel's federal mineral rights in February 2005.[9] With the security of knowing his company (GEC) controlled the federal oil and gas rights to Lower Bear Ranch, Mr. Koch built a number of expensive improvements on the Ranch.[10] Mr. Koch's significant investment in the property overlying the Parcel's federal minerals raises the question of the value of those mineral rights to GEC and Mr. Koch. The federal lease Parcel is now likely worth much more to Mr. Koch than it was when GEC purchased it. If a fair auction were held today, GEC would likely pay a premium to protect its owner's considerable investment in the surface estate. Further, it is possible that Mr. Koch was able to purchase the Lower Bear Ranch at a discount because his company controlled the sub-surface minerals; the development of such minerals could impact the Ranch's scenic and amenity values.

We request that DOJ ensure that any settlement and/or penalty reflect the enhanced financial interest that GEC and Mr. Koch have in the Parcel, given Mr. Koch's ownership of the overlying Bear Ranch. The proposed settlement does not do so. In light of what is currently known about these leases and the companies involved in the alleged unlawful bidding practices, the decisions to neither pursue a trial, conduct a thorough investigation of all potentially tainted leases under oath, nor to insist on rescission of tainted leases – clearly do not further the public interest.

Thank you for your consideration of these comments.

Sincerely,

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[9] See http://aspenjournalism.org/2011/10/24/the-price-of-privacy/ ("Koch ... began buying his land near the Raggeds Wilderness in 2007."); Complaint at page 2 (lease to the Parcel obtained in 2005).

[10] See http://aspenjournalism.org/2011/10/24/the-price-of-privacy/ (describing the erection of "an 'authentic' Western town in a former pasture" on the Ranch, from structures he purchased for $3.1 million and moved to the Ranch).

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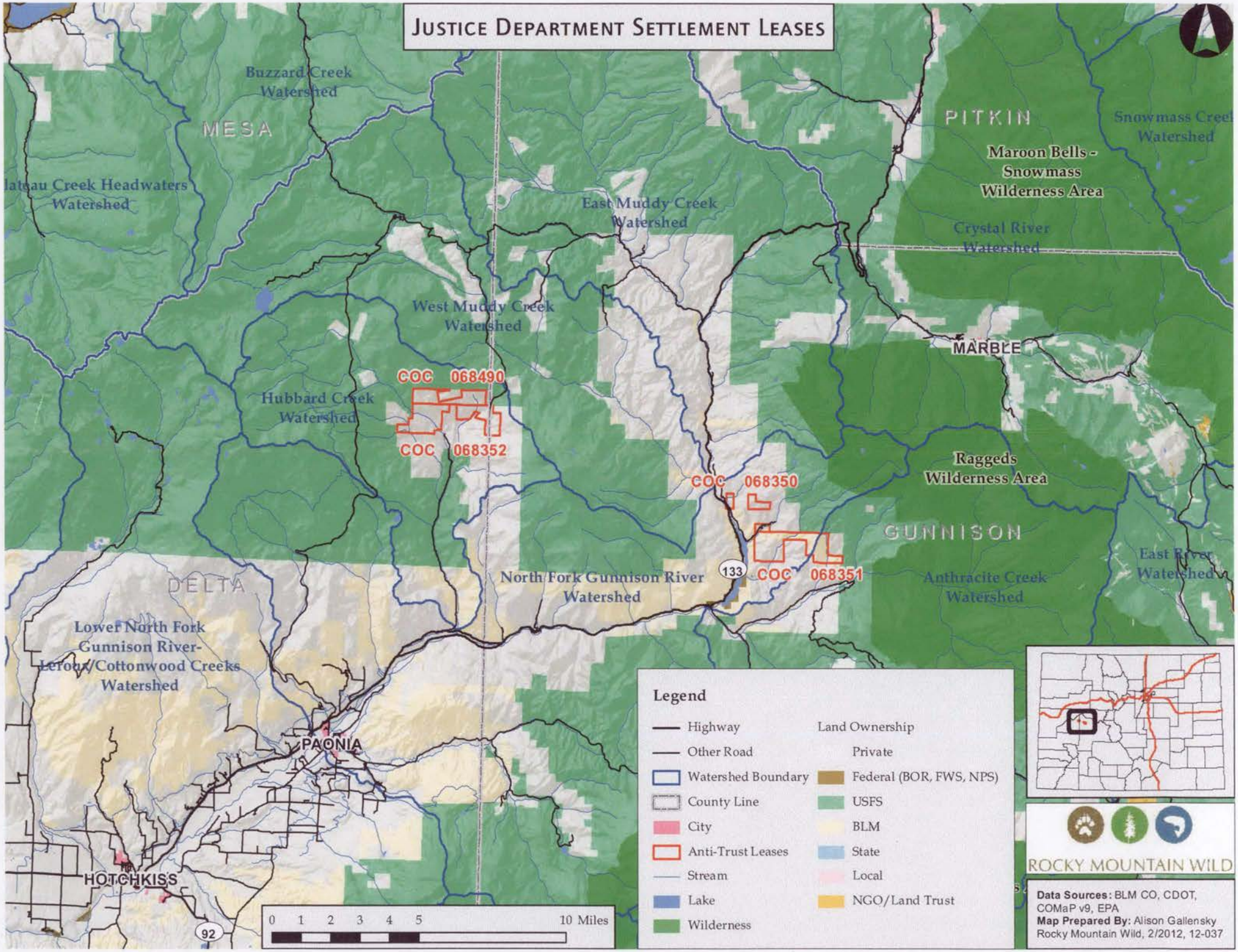
JUSTICE DEPARTMENT SETTLEMENT LEASES
Buzzard Creek Watershed
MESA
Plateau Creek Headwaters Watershed
East Muddy Creek Watershed
PITKIN
Snowmass Creek Watershed
Maroon Bells - Snowmass Wilderness Area
Crystal River Watershed
West Muddy Creek Watershed
MARBLE
COC 068490
Hubbard Creek Watershed
COC 068352
COC 068350
Raggeds Wilderness Area
GUNNISON
DELTA
North Fork Gunnison River Watershed
133
COC 068351
Anthracite Creek Watershed
East River Watershed
Lower North Fork Gunnison River-Leroux/Cottonwood Creeks Watershed
PAONIA
HOTCHKISS
92
0 1 2 3 4 5 10 Miles
Legend
Highway
Other Road
Watershed Boundary
County Line
City
Anti-Trust Leases
Stream
Lake
Wilderness
Land Ownership
Private
Federal (BOR, FWS, NPS)
USFS
BLM
State
Local
NGO/Land Trust
ROCKY MOUNTAIN WILD
Data Sources: BLM CO, CDOT, COMaP v9, EPA
Map Prepared By: Alison Gallensky
Rocky Mountain Wild, 2/2012, 12-037