



March 9, 2007

By Fax

Gene Terland
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Re: Notice of Competitive Oil and Gas Lease Sale – March 27, 2007

Dear Director Terland :

Introduction:

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, Montana Trout Unlimited (TU) protests the inclusion of leases in the March 27, 2007 Montana BLM lease sale that encompass the Beaverhead River watershed. The specific BLM lease parcels that TU protests are: BLM parcels MT 03-07-**07** through MT 03-07-**19**; BLM parcels MT 03-07-**26** through MT 03-07-**47**; We are deeply concerned that proposed leases within the Beaverhead River watershed and corridor and its tributaries will damage habitat and impair the fishery in what is widely regarded as one of Montana's premier Blue Ribbon trout streams.

Additionally, we protest the inclusion of parcels located on lands managed by the United States Forest Service in lease parcels MT 03-07-**20** through MT 03-07-**25**; and 03-07-**48**. These parcels contain known Westslope cutthroat drainages and important big game habitats. We feel that it is inappropriate to lease these areas based on an Environmental Impact Statement that is more than one decade old without analyzing new and updated significant information, providing for public comment, and considering a range of alternatives.

Given the immense value that the Beaverhead River and native Westslope cutthroat trout represent to Montana's anglers, sustainable recreation based economy, and

coldwater fisheries, Montana Trout Unlimited believes that the sale of leases is inappropriate. The issuance of these leases would result in unbalanced management of the public's resources.

General Protest Concerns Affecting Protested Leases

1.) Failure to accurately depict the location of leases:

Given the documents provided in the Competitive Lease Sale Notice, it is difficult at best to for the public to understand where the leases are located. As a result, it is extremely difficult for the public to offer meaningful public comment and analysis. The maps made available that the sale notice directs the public to use in identifying lease parcels are from the Montana Information Technology Services Division with the State of Montana. This mapping has resulted in confusion due to the fact that none of the lease parcels are delineated and the relation to existing parcels is also not shown. We believe that this constitutes a violation of the Federal Onshore Oil and Gas Leasing reform Act (FOOGLRA) that requires: "Such notice shall include the terms or modified lease terms and maps or a narrative description of the affected lands. Where the inclusion of maps in such notice is not practicable, maps of the affected lands shall be made available to the public for review. *Such maps shall show the location of all tracts to be leased, and of all leases already issued in the general area.*" 30 U.S.C. § 226(f) (emphasis added.).

2.) Changed Circumstances and a Lack of Public Comment Opportunity

While the underlying 2007 Dillon RMP provides a general analysis and leasing decision, the identification of site-specific lease parcels represents changed circumstances that need to be analyzed in a supplement to that RMP. Because specific lease parcels have never been analyzed in a NEPA document, this needs to occur before they can be offered for sale. Furthermore, determinations of NEPA adequacy (DNA), do not fulfill NEPA's supplemental analysis requirement 40 C.F.R. § 1502.9(c); as explained in relevant case law: "DNAs, unlike EAs and FONSI, are not mentioned in NEPA or in the regulations implementing NEPA. . . . Thus, DNAs are not themselves documents that may be tiered to NEPA documents, *but are used to determine the sufficiency of previously issued NEPA documents.*" *Southern Utah Wilderness Alliance*, 164 IBLA at 123 (quoting *Pennaco*, 377 F.3d at 1162).

Up until the sale notice, the public was unaware of the location of specific lease parcels to be sold, and as explained at item #1, the identification given in the sale notice is flawed. Because the public has been unaware as to where specific lease parcels would be sold, identification of specific lease parcels represent changed circumstances upon which the public has not been able to comment or review site-specific NEPA analysis. The Federal Lands Policy Management Act (FLPMA) requires that BLM "shall allow an opportunity for public involvement and . . . shall establish procedures . . . to give . . . the public adequate notice and an opportunity to comment on and participate in the formulation of . . . programs relating to the management of the public lands." 43 U.S.C. §

1712(f). While the public had the opportunity to comment on the underlying land use plan, that right has not been made available regarding the specific leases parcels. The BLM has provided no opportunity for public comment on the protested lease parcels prior to this protest, which is essentially an after-the-fact opportunity for involvement, which fails to meet the requirements of FLPMA. Until this oversight is corrected, the protested lease parcels should not be offered for sale.

3.) Inadequate NEPA Analysis on Forest Service Lands

The Forest Service lease parcels being offered (03-07-**20** through 03-07-**25**; and 03-07-**48**) have a leasing decision based upon the 1995 Final EIS for Oil & Gas Leasing on the Beaverhead National Forest (1995 EIS). The information and data contained in the EIS and the opportunity for public comment is over 12 years old. Many changes have occurred since the development of that EIS. This is expressed in the Draft EIS for the Beaverhead-Deerlodge Revised Forest Plan, which discussed the increased potential for oil and gas development in the Beaverhead-Deerlodge based on high energy prices: “With the current all time high in oil & gas prices, we may see a renewed interest in leasing on the Forest. Certainly, any discovery in southwest Montana, whether on public or private land, would result in more leases and likely Applications for Permits to Drill (APDs).” (DEIS Chapter 3, 391) The 1995 EIS analysis and the stipulations derived from it, are based upon the economic reality and reasonable foreseeable development scenario from 1995, when energy prices were substantially lower than they are today.

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). CEQ NEPA guidance states, “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 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 [decision document] contains a ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences’ of the proposed action. Southwest Center for Biological Diversity, 154 IBLA 231, 236 (2001) (quoting California v. Block, 690 F.2d 753, 761 (9th Cir. 1982)) (emphasis supplied). *See also*, Friends of the Bow v. Thompson, 124 F.3d 1210, 1213 (10th Cir. 1997) (to comply with NEPA’s “hard look” requirement an agency must adequately identify and evaluate, environmental concerns) (emphasis supplied).

The economic reality surrounding oil and gas development throughout the western United States in general, and on the Beaverhead Deerlodge in particular has changed significantly since the EIS was completed. Therefore the 1995 analysis needs to be supplemented to reflect this changed circumstance, required by NEPA’s supplemental analysis requirement.

Resource Specific Concerns

1.) Westslope Cutthroat Trout Conservation

The Beaverhead-Deerlodge National Forest, currently in the final stages of its Forest management plan revision, has determined in their preferred plan alternative that entire watersheds containing westslope cutthroat streams should be under NSO stipulations for oil and gas leasing. This is marked increase in protection over the stipulations specified in the 1995 EIS (under which these leases are being offered). Given that the Beaverhead-Deerlodge National Forest is in the final stages of its revision process and that as part of that analysis the Forest is looking at the 1995 stipulations to determine if they are still sufficient for resource protection, it makes sense to hold off on leasing on the Forest until the completion of the revision process and the subsequent ROD.

If leases are issued before the forest plan revision is complete, a supplemental analysis to the 1995 EIS specifically addressing the management direction for watersheds and Westslope cutthroat trout must be undertaken as required by NEPA's supplemental analysis requirement 40 C.F.R. § 1502.9(c).

For BLM parcels affecting Westslope cutthroat trout watersheds, TU is concerned that surface occupancy will be allowed on slopes over 30%. Any road building or pad construction on these lands will likely necessitate cut and fill slopes, destabilizing the slopes and resulting in reclamation difficulty and landslides hazards. Because of the potential for water quality degradation that this presents, TU recommends that these leases only be offered with an NSO stipulation for slope over 30%.

2.) Inadequate Hydrological Analysis

In neither the Dillon RMP nor 1995 Beaverhead Oil and Gas Leasing EIS was the problem of the interception of upper water table aquifer flow into Clark Canyon Reservoir, Little Sheep Creek, Grasshopper Creek, or any tributaries adequately analyzed. Nor do the underlying leasing decision or the outdated EIS address the potential for the transport of contaminants through a base flow from the aquifer to the surface water (should a well blow out or become over pressured). Impacts to the freshwater aquifer and hydrology should be fully analyzed and understood before these areas are offered for lease and committed to some level of oil and gas extraction.

3.) Inadequate Stipulations Protecting Steep Slopes

As addressed specific to Westslope cutthroat trout, only applying a CSU stipulation to mitigate impacts to slopes over 30% is insufficient to ensure successful rehabilitation. At that steepness, development would involve large cut and fill slopes would be difficult to reclaim. Also, a CSU stipulation would not preclude development

and therefore would not minimize sediment output or maintain slope stability as an NSO stipulation would. Poor land management decision quite literally flow down hill, and in this case down hill are native trout streams and world renowned fisheries. NSO stipulations for slopes over 30% must be included in all of these lease parcels if they are to be offered responsibly.

4.) Maintaining Quality of Experience

The Beaverhead River is a destination fishery of national significance. Many guides, outfitters, fly shops, motels, restaurants and associated businesses in local communities depend upon a high quality of experience to draw angler to the area and keep them coming back on return trips. Before leases can be offered for sale in the region – particularly along famous stretches of a world-renowned river – it is imperative that sufficient analysis is conducted on the impacts to the quality of experience and what the potential loss of a destination fishery will mean to the local businesses that depend upon a healthy watershed and visual integrity that make for high quality angling experiences.

5.) Climate Change in Cumulative Effects Analysis

Like many rivers in southwest Montana, the Beaverhead River has experienced deleterious impacts to the aquatic environment in recent drought years due to low stream flows, increased water temperatures, and inadequate over-wintering habitat. Surveys have found reduced populations of wild trout, smaller populations of large trout, and diminished physical condition in remaining trout. In recent years, the condition of the fishery has prompted fishing closures to protect remaining trout from additional stresses. Before leasing, the cumulative effects of climate change and drought need to be analyzed by the BLM and agencies should conduct an assessment of vulnerable species including aquatic, game species, and natural systems that will be adversely impacted by global climate change. The BLM should manage vulnerable systems like the Beaverhead River and its tributaries to prevent them from experiencing regime shifts brought on by the impacts of climate change and remove other stressors from those systems by thoroughly analyzing cumulative impacts in the underlying land use plan and EIS that have authorized leasing and providing appropriate stipulations, lease terms, and/or decisions not to lease in these vulnerable habitats.

Conclusion:

While Trout Unlimited does not oppose oil and gas drilling in principle, we strongly urge the BLM to reconsider selling leases on parcels that abut or that may affect native trout streams and watersheds and the irreplaceable Beaverhead River trout fishery. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law. We further urge the BLM and the Forest Service to consult with conservation groups like Trout Unlimited and offer public input before offering leases in important trout habitats. Doing so will go

a long ways toward reducing conflict over the management of public lands, and will save time, effort, and expense on all sides.

Thank you for your consideration, and please let us know if you would like to discuss these concerns in greater detail.

Sincerely,

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