



# United States Department of the Interior



BUREAU OF LAND MANAGEMENT  
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Billings, Montana 59101-4669  
<http://www.blm.gov/mt>

In Reply To:  
3100 (922.JB)

CERTIFIED-RETURN RECEIPT REQUESTED

April 21, 2008

## DECISION

Michael Gibson  
Conservation Director  
Montana Trout Unlimited  
P.O. Box 7186  
Missoula, Montana 59807-7186

### Protest Dismissed

On November 13, 2007, we received your protest filed on behalf of Montana Trout Unlimited (TU) (Enclosure 1). You protested the November 27, 2007, competitive oil and gas lease sale of the following parcels:

MT-11-07-01 through 14, MT-11-07-17 through 20, MT-11-07-22, MT-11-07-23, MT-11-07-207 through 211, MT-11-07-214, and MT-11-07-215

Parcels MT-11-07-01 through 14, MT-11-07-17 through 20, MT-11-07-22, and MT-11-07-23 are located in the Helena National Forest. Leasing decisions for these parcels are found in EISs completed in the late 1990's. Parcels MT-11-07-207 through 211 are located in Beaverhead County and are on lands administered by the Bureau of Land Management's (BLM) Dillon Field Office. The leasing decisions for these parcels are found in the ROD and approved Dillon RMP. Parcels MT-11-07-214 and MT-11-07-215 are in Carbon County on land administered by the Billings Field Office of the BLM. Leasing decisions for these parcels are found in the ROD and Oil and Gas RMP/EIS Amendment for the Miles City District (Miles City Amendment).

### General Protest Concerns

In the **Introduction** portion of the protest it is stated, "Given the pace and scope of harmful oil and gas development we have witnessed in Wyoming, we are concerned similar impacts could occur to Montana's world renowned coldwater fisheries."

The BLM and the Forest Service (FS) still believe that the governing reasonably foreseeable development (RFD) scenarios for the three protested areas are correct in that we have no new geological or geophysical information pointing to the need for changes.

The RFD scenario for the Dillon Resource Management Plan (RMP) forecasts a total of 10 wells in all of Beaverhead and Madison Counties on all ownerships over the life of the plan. There have been no wells drilled in either county since 1996 which was 10 years before completion of the RMP.

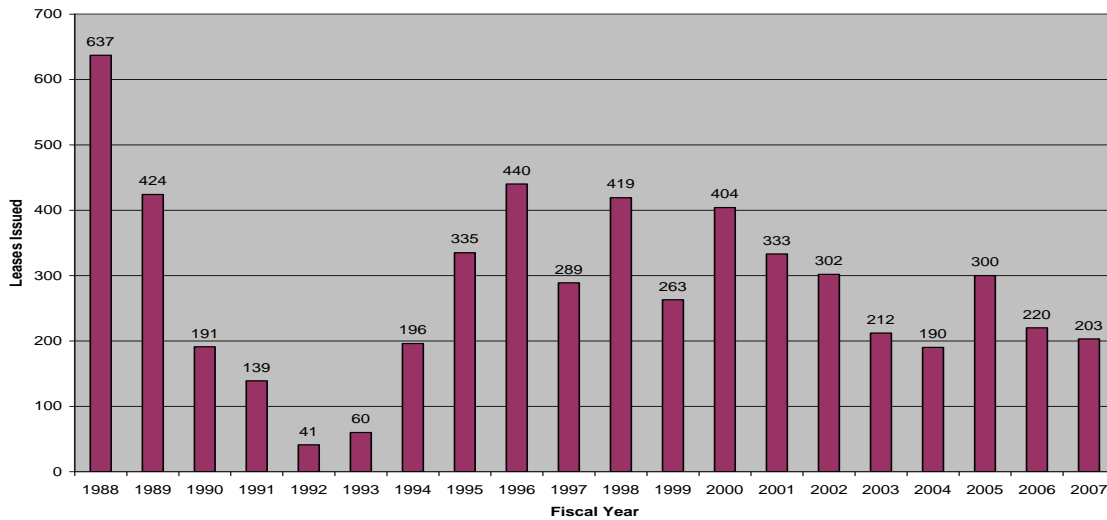
The RFD scenario for the Billings Field Office forecasts one well will be drilled per township on all ownerships in the area of the protested parcels over a 15-year span from completion of the Amendment in 1994. To date, there have been no wells drilled in the township where the nominations are located since the completion of the Amendment.

The RFD scenario for the Helena National Forest forecasts seven exploratory wells forest-wide over the projected 15-year life span of the document. Since adoption of the record of decision (ROD) for the leasing Environmental Impact Statement (EIS), there have been no wells drilled in the Helena National Forest. However, there was one well recently drilled within the boundaries of the forest on private lands.

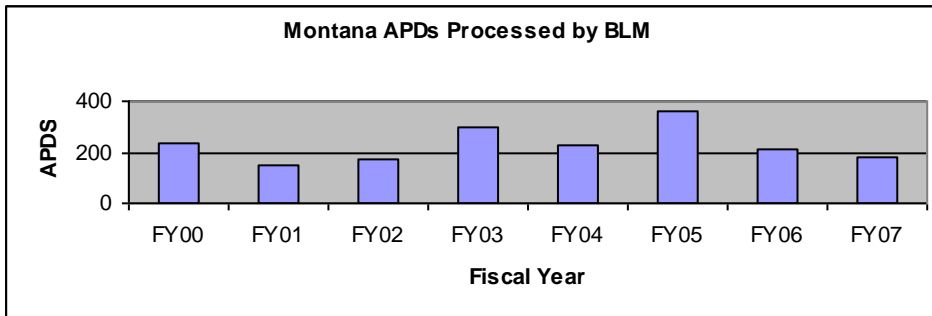
The Montana Trout Unlimited is concerned about impacts to coldwater fisheries from increased oil and gas development. The above information indicates there is not an increase in development in areas of your concern in recent years.

The following information reflects the historical trend for Federal leasing activity and approval of applications for permit to drill in Montana.

**Federal Leases Issued in Montana**



**Montana APDs Processed by BLM**



As can be seen from the above statistics, both leasing and permitting activities have not seen major increases. Actually, there is a decrease of both permitting and leasing activity since 2005.

Montana Trout Unlimited raises the following general concerns in their protest:

### **1.) Changed Circumstances and a Lack of Public Comment Opportunity**

#### **Protest:**

"The underlying Resource Management Plans covering the management areas where these leases are located provide a general analysis and leasing decision, however, the identification of site-specific lease parcels represents changed circumstances that need to be analyzed in a supplement to that leasing decision. Because specific lease parcels have never been analyzed in a NEPA document, this needs to occur before they can be offered for sale.

Up until the sale notice, the public was unaware of the location of specific lease parcels to be sold. 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 the 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."

**Response:** This part of the protest addresses both BLM and FS lands. The first part of our response addresses BLM lands.

BLM Managed Lands: The Miles City Amendment was approved on February 2, 1994. This plan amendment contains the leasing decisions for parcels MT-11-07-214 and 11-07-215. The ROD and the Dillon RMP were approved on February 7, 2006. This document contains the leasing decisions for parcels MT-11-07-207 through MT-11-07-211. As part of our planning process used to prepare the RMP and RMP amendments, specific areas within the two planning areas were identified that would either be opened or closed to leasing subject to the following levels of constraints:

- Areas opened to leasing, subject to existing laws, regulations, and formal orders; and the terms and conditions of the standard lease form.

- Areas opened to leasing, subject to leasing, subject to moderate constraints such as seasonal and controlled surface use restrictions.
- Areas open to leasing subject to major constraints such as no-surface-occupancy (NSO) stipulations on areas more than 40 acres in size or more than 0.25 mile in width.
- Areas closed to leasing.

These areas are mapped and displayed in the documents.

The Proposed Final Dillon RMP also identified the fact that there were existing leases within the planning area and suspended nominations that would be available when the plan was completed. The Miles City Amendment listed existing oil and gas fields in the planning area which included the Billings Field Office.

Because of our open and public process for preparation of documents, the public was made aware of lands that were available for lease and what terms would apply if any lands were offered for lease. Opportunity for public involvement and comment on the leasing decisions was offered by the BLM during preparation of the documents. These opportunities are documented in Chapters 5 of the Proposed Dillon RMP and the Final Miles City Amendment. In addition, Chapter 5 of the Proposed Dillon RMP also lists Montana Trout Unlimited as an organization that commented on the Draft RMP. The organization also received a printed copy of the Proposed RMP.

The Dillon Field Office reviewed the Dillon RMP to determine leasing availability and appropriate stipulations for each parcel in the Field Office. The Billings Field Office completed a similar review for parcels in their Field Office. Both offices, following their review of the leasing decisions in the RMP as well as any new circumstances, completed Documentations of Land Use Plan Conformance and National Environmental Policy Act (NEPA) Adequacy (DNAs). The DNAs are completed by Field Offices to confirm their review of leasing requests and constitute a final check to ensure that the planning and NEPA analysis from that RMP was still adequate for leasing. They are not to be considered NEPA documents. However, they represent a determination by the BLM that there are no changed circumstances which would warrant further NEPA analysis.

FS Managed Lands: The Helena National Forest oil and gas leasing analyses were completed in the late 1990s by the FS with involvement by the BLM. These documents are cited below:

Oil and Gas Leasing Final Environmental Impact Statement, Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest, April 1995

Oil and Gas Leasing Final Supplemental Environmental Impact Statement, Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest, April 1998

Record of Decision Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest Oil and Gas Leasing Final Environmental Impact Statement, May 1998

As noted above, the ROD for the Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest Oil and Gas Leasing EIS was adopted by the FS on May 25, 1998, and by the BLM on June 19, 1998. In the ROD, the Forest Service made both the availability decisions according to 36 CFR 228.102(d) and leasing decisions for specific lands according to 36 CFR 228.102(e). The BLM was a joint lead agency under terms of NEPA with the FS. The BLM made several decisions in the ROD. In the first decision, the BLM made the decision that we would only offer and issue leases on lands included in the Forest Supervisor's decision to authorize specific lands for leases. No parcels would be offered on the decision area without the approval of the FS. The second part of the first decision noted that the BLM would offer lands for lease and issue leases for lands within the Helena National Forest subject to stipulations required by the Forest Supervisor. Finally, the BLM made leasing decisions for the split estate lands within the boundaries of the forest. As a joint lead agency, the BLM participated in the analysis and documentation leading to the FS decisions and recommendations. The agency shared responsibility with the FS for compliance with NEPA. We provided the RFD scenario for oil and gas for the document. The document complies with BLM requirements for oil and gas leasing. Finally, both the original and supplemental EISs reflect consideration of public input obtained during the analysis and decisionmaking process.

Because of the open and public process for preparation of the EIS and supplemental EIS, the public was made aware of lands that were available for lease and what terms would apply if any lands were offered for lease. Opportunity for public involvement and comment on the leasing decisions was offered by the FS and the BLM during preparation of the documents. Opportunity for public involvement is documented in the original EIS in Chapters 5, 8, and 9. Additional opportunity for public input is documented in the supplemental EIS in Chapters 8 and 9.

Upon receipt of lease nominations from the BLM, the Helena National Forest reviewed the leasing EIS to determine leasing availability and appropriate stipulations for each parcel in the forest. The FS, following their review of the leasing decisions in the EIS as well as any new circumstances, completed the review required by 36 CFR 228(e) and provided copies of their checklists to the BLM. These checklists are completed by the FS to confirm their review of leasing requests and constitute a final check to ensure that the planning and NEPA analysis from the leasing EIS is still adequate for leasing. These reviews document the FS's verification that there are no changed circumstances which would warrant further NEPA or planning analysis.

The protest contends that up until the sale notice, the public was unaware of the location of specific lease parcels to be sold. The protest further contended that 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. As made clear above, the process used in developing the governing leasing documents for the protested parcels offered ample public involvement and did identify areas that would be subject to lease with associated stipulations and other mitigation measures.

We also point out that, at this stage, we are required to complete an EIS for leasing but are not required to complete a parcel-by-parcel review under NEPA. The Ninth Circuit Court recently upheld this approach in *Northern Alaska Environment Center v. Kempthorne*, 457 F.3d 969, (9<sup>th</sup> Cir. 2006). In their decision, they explained that oil and gas projects generally entail separate stages of leasing, exploration, and development. They noted that, at the leasing stage, there is no way of knowing what plans for development, if any, may eventually come to pass. The decision held that, at the leasing stage, the government was not required to do a parcel-by-parcel examination of potential environmental effects. Such effects are unidentifiable at that stage because parcels likely to be affected by development are unknown. Site-specific analysis must be done later at the permitting stages when development plans are known.

## 2.) Failure to Properly Map Lease Parcels

### Protest:

"Given the documents provided in the Competitive Lease Sale Notice, it is difficult at best 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. In the maps made available in the sale notice, the relation to existing lease parcels is 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)."

**Response:** This portion of your protest was previously addressed in the response to your protest of our May competitive oil and gas lease sale. The same answer is provided below.

The notice for the November sale included both a narrative description of all parcels with the legal descriptions for each parcel and a map. All parcels are listed by state, county, and township and range. The township and range legal description is recognized by law as to the definite location of a tract of land. In addition, each parcel has cross references to all the stipulations that apply to the parcel.

The map, posted with the sale notice for the November sale as a separate document, consisted of a map of Montana and the Dakotas showing parcels included in the sale with imbedded hot-links to detailed plats of individual parcels. This map is accessible at the following website:

[http://www.blm.gov/mt/st/en/prog/energy/oil\\_and\\_gas/leasing/current\\_sale\\_list.html](http://www.blm.gov/mt/st/en/prog/energy/oil_and_gas/leasing/current_sale_list.html)W

By clicking on the number on this map, the parcel will be displayed on a more detailed map.

For existing oil and gas leases, the public can access this information at the following BLM website:

<http://www.geocommunicator.gov/GeoComm/landmin/home/index.html>

If requested, we also assist the public with information on where parcels on a sale notice are located by providing maps and access to ownership plats at our offices. These maps include surface and mineral management status maps, title plats, and oil and gas field maps. The internet sites listed on our sale notice are sites that can be used to identify surface owners. These actions meet the requirements of the Federal Onshore Oil and Gas Leasing Reform Act of 1987.

### **3.) Lack of Cumulative Impacts Analysis**

#### **Protest:**

"Rivers throughout Montana, including those in the watersheds for which Montana TU is protesting the sale of lease parcels, have experienced deleterious impacts to the aquatic environment in recent drought years due to low stream flows and increased water temperatures. The condition of several fisheries this past summer prompted Montana Fish Wildlife and Parks to impose fishing closures to protect trout from additional stresses. The BLM needs to conduct an assessment of vulnerable aquatic and wildlife species, and natural systems that will be adversely impacted by global climate change. The BLM should manage vulnerable systems and their 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 that leasing, and in turn development, authorizes. Additionally the impacts of closures to angling, and relationships between land use decisions such as oil and gas leasing by the BLM and the impaired nature of coldwater fisheries leading to closures in the planning area needs to be analyzed. This analysis should culminate in appropriate stipulations, lease terms, and/or decisions not to lease in these vulnerable habitats."

**Response:** This comment raises generalized concerns about climate change and the potential cumulative impacts of oil and gas development on vulnerable aquatic species. The comment requests that the BLM thoroughly analyze cumulative impacts the RMP may authorize including the leasing and development of oil and gas resources. It stresses that the relationship between land use decisions such as oil and gas leasing and the impaired nature of coldwater fisheries in the planning area need to be examined.

While the conditions the comment observes are likely related to the long-term drought conditions experienced by the intermountain west, the analysis of direct, indirect, and cumulative impacts to climate change from oil and gas leasing and development in the area in question would likely be low based on the level of activity forecast in the RFD scenarios for the different planning areas noted on the first page of this Decision. Leasing documents for the protested BLM parcels are the Dillon RMP and the 1994 Miles City District Oil and Gas RMP/EIS Amendment (1994 Amendment). Leasing decisions

for the Helena National Forest are found in the Helena National Forest EISs (USDA, 1995 and USDA, 1998). The Dillon RMP forecast a total of 10 wells in the entire planning area (Beaverhead and Madison Counties) over the life of the plan. The 1994 Amendment forecast a total of one to three wells per township in the portion of Carbon County where the protest parcels are located. The RFD scenario developed for the 1995 Helena National Forest Oil and Gas Leasing Environmental Impact Statement (EIS) and 1998 Supplemental EIS forecast that a total of seven wells would be drilled on the Forest during the life of the document. To date these RFDs have not been exceeded.

The governing leasing documents for the protested parcels adequately analyzed the direct, indirect, and cumulative effect of oil and gas leasing and development in Beaverhead, Broadwater, Carbon, and Meagher Counties. The leasing documents included stipulations and other mitigation measures. In addition, they also made decisions as to lands that would not be made available for lease.

BLM Managed Lands: While the BLM did not directly analyze global climate change in the Dillon RMP and the 1994 Amendment, it did analyze a wide array of alternatives in the documents and the impacts, including cumulative impacts, of the proposed alternatives on resources and resource uses in the planning areas. Resources and resource uses analyzed include but are not limited to climate and air quality, hydrology, soils, vegetation, and fish and wildlife. These analyses addressed the cumulative impacts to the Clarks Fork of the Yellowstone and the Beaverhead River. In our decisions for the 1994 Amendment and the Dillon RMP, the BLM balanced uses that we can impact or manage. The analysis established the appropriate lease terms and conditions and identified areas not available for lease. Montana Trout Unlimited has not provided information to identify flaws in the BLM's analysis in their protest filed on the November lease sale.

FS Managed Lands: Whether the FS should "manage vulnerable systems and their tributaries to prevent them from experiencing regime shifts brought on by the impacts of climate change and remove other stressors from those systems" is a subject of much debate and outside the scope of the oil and gas leasing decisions.

The BLM and the FS did look at direct, indirect, and cumulative effects in relation to other management actions and the leasing decision for the Helena National Forest (USDA, 1995 and USDA, 1998). Those two analyses, in particular, the Supplemental Environmental Impact Statement (SEIS) which focused on cumulative effects, contributed to the decisions to put protections for stream corridors in place through use of various stipulations and other mitigation measures. The decision was made on Forest Service lands to protect all streams not just impaired streams. In addition, they also made decisions as to lands that would not be made available for lease.

### Parcel Specific Concerns

In addition to their general concerns, Montana Trout Unlimited also addressed several site-specific concerns.

#### **1. Clarks Fork of the Yellowstone parcels MT-11-07-214 and MT-11-07-215:**



**Protest:** The protest notes that parcel MT-11-07-214 needs NSO 11-2 to apply to the portions of the lease in Sections 3 and 4 that are within the 100-year flood plain of the Clarks Fork of the Yellowstone River. It also notes that this stipulation to be included for areas including Hollenbeck Draw and Williams Draw.

Likewise, while NSO 11-2 is applied to portions of parcel MT-11-07-215, this stipulation needs to apply to all water bodies on lease, including Sand Coulee.

**Response:** The BLM has reviewed these two parcels to determine if the additional stipulations need to be added. After reviewing the parcels and applicable inventory data, the determination has been made that stipulation NSO 11-2 which is designed to protect riparian areas, 100-year flood plains of major rivers, and water bodies and streams was properly applied to the two parcels. There is no evidence that any portion of parcel MT-11-07-214 needs NSO 11-2. As such, it was not applied to the parcel. It was applied to a portion of parcel MT-11-07-215 where it was needed. The protest provides no information justifying the stipulation's inclusion on parcel MT-11-07-214 or on other parts of parcel MT-11-07-215.

## **2. Beaverhead parcels MT-11-07-207 through 211:**

**Protest:** Your protest notes that unstable drainages that feed the Beaverhead River on the protested 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 that are tributaries to the Beaverhead River, a Blue Ribbon Fishery.

You state that while CSU 12-1 is designed to protect slopes over 30 percent, there are no stipulations protecting soils with high erosive potential on slopes less than 30 percent. Also, CSU-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, such as rilling, gullyng, piping, and mass wasting; water quality and quantity will be 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. For these reasons, TU protests the inclusion of these lease parcels in any BLM lease sale until meaningful and measurable protections are applied to the leases to adequately control erosion and sedimentation of streams.

Finally, you state that stipulation NSO 11-2 has been left off of parcel MT-11-07-210 even though Long Gulch flows through the southwest portion of the lease.

**Response:** The BLM has reviewed the parcels identified at this point in the protest to determine if the additional stipulations need to be added. The protest questions the adequacy of stipulation MT-12-1 to protect steep slopes over 30 percent. You believe that without having defined measurable standards in the stipulation there is no guarantee that development on slopes over 30 percent would not cause adverse effects to water quality. The protest alleges that the stipulation does not adequately control erosion and sedimentation of streams. We believe that it does adequately protect slopes over 30 percent.

As you note, no stipulation is designed to mitigate impacts to erosive soils on slopes less than 30 percent. Such stipulation is not needed because the BLM will mitigate any impacts by following the regulations and standards described below.

Any proposed mitigation plan would be processed and approved through either an APD or through a sundry notice proposing surface disturbing activity on the lease. The following requirements for surface protection are noted at page 10335 in Onshore Oil and Gas Order Number 1, March 7, 2007, which has the force of regulation:

*c. Surface Protection.* Except as otherwise provided in an approved Surface Use Plan of Operations, the operator must not conduct operations in areas subject to mass soil movement, riparian areas, flood plains, lakeshores, and/or wetlands. The operator also must take measures to minimize or prevent erosion and sediment production. Such measures may include, but are not limited to:

- Avoiding steep slopes and excessive land clearing when siting structures, facilities, and other improvements; and
- Temporarily suspending operations when frozen ground, thawing, or other weather-related conditions would cause otherwise avoidable or excessive impacts.

Other guidance specific to the Dillon Field Office that would be followed by the BLM is found in the Dillon Resource Management Plan Record of Decision/Approved Plan in Appendix M - Procedures in Oil and Gas Recovery. Bureauwide guidance is found in the publication Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development (2007), otherwise referred to as the "Gold Book." We refer TU to Chapter 4 - Construction and Maintenance. These standards are used by the BLM and operators in developing plans for construction of well pads and/or access roads.

Finally, while not mentioned in the protest, the BLM has applied a stipulation for protection of areas susceptible to mass movement (land slides). The NSO stipulation MT-11-25 was written for areas of active mass movement and applied to portions of Parcels MT-11-07-207 through 210. This stipulation provides further protection to steep and erosive slopes.

The protest provides no evidence that steep slopes and areas of active mass movement are not adequately protected by existing stipulations and the application of Onshore Oil and Gas Order Number 1 and guidelines for well pad construction and other associated surface disturbing activities.

Finally, the protest questions why NSO stipulation MT-11-2, which is designed to protect riparian areas, 100-year flood plains of major rivers, and water bodies and streams, was not applied to parcel MT-11-07-210. Our Dillon Field Office reviewed their inventory data, including data collected this past summer, and determined that the stipulation did not apply to this parcel as no portion is within a riparian area, 100-year flood plain, or on a water body or stream. The protest provides no data showing otherwise.

**3. Helena National Forest parcels: MT-11-07-01 through 14; MT-11-07-17 through 20; MT-11-07-22; and MT-11-07-23**

**Protest:**

"These leases are being offered under the direction of the 1997 Helena National Forest and Elkhorn Portion of the Deerlodge National Forest Oil and Gas Leasing Analysis (1997 EIS). Yet it appears that information regarding Westslope Cutthroat Trout has not been updated to reflect current populations or the *Memorandum of Understanding and Conservation Agreement for Westslope Cutthroat Trout and Yellowstone Cutthroat trout in Montana (April, 2007)*, (Cutthroat Trout Westslope MOU) to which the Forest Service is a party."

**Response:** Substantial fish surveys across the Helena Forest have been completed and are on-going since the Helena Forest Oil and Gas Final EIS and Supplemental EIS were completed. Fish species and upper limits of distribution information by stream throughout the southern Big Belt Mountains were last updated in 2006. Nearly all of the named streams within the proposed lease area have been evaluated for the presence of fish.

Additional surveys on fish species composition and distribution in the southern portion of the Big Belt Mountains have continued in 2007 with sampling conducted during October and November in the Carl Creek, Sulphur Bar Creek, and Greyson Creek drainages. Rainbow trout were found in the Carl Creek drainage, rainbow and brook trout in the Sulphur Bar Creek drainage and Westslope Cutthroat Trout along with brook trout were found in Greyson Creek. These continual survey efforts to refine overall fish distribution as well as Westslope Cutthroat Trout distribution do meet the intent of the 2007 Westslope Cutthroat Trout MOU.

Pertinent aspects of the 2007 Westslope Cutthroat Trout MOU include that the cooperators will strive to maintain the number of conservation populations known to be present in 2007. The Helena Forest 1998 Supplemental EIS addresses those aspects of the MOU and this is detailed in the ROD for the EIS by providing for the use of NSO 4A stipulation for the entire drainages occupied by 15 Westslope Cutthroat populations east of the continental divide. In 2002, various federal agencies and the Montana Department of Fish, Wildlife and Parks (MDFWP) cooperatively assessed the Westslope Cutthroat Trout status throughout the various 4<sup>th</sup> code hydrologic units throughout Montana and specified the Westslope Cutthroat Trout populations that were to be considered conservation populations. Although the NSO 4A stipulation does not apply to all the conservation populations of Westslope Cutthroat Trout, there are other means to ensure that viability of the slightly hybridized Westslope Cutthroat Trout now considered to be conservation populations will be maintained that are identified in the EIS. Cutthroat trout populations with up to 10 percent hybrid influence were concluded in 2002 to be conservation populations and these same populations are identified as conservation populations in the 2007 MOU. Only the genetically pure populations of Westslope Cutthroat Trout east of the continental divide were given the NSO protection in the Helena Forest Final supplemental EIS. The means to protect the hybrid populations of Westslope Cutthroat Trout now considered to be conservation populations include stipulations required as part of the 1998 ROD. This includes the 100-foot NSO 2 for all streams (Stip 6F in USDA 1995 Appendix C page 31), NSO and CSU

stipulations for various slope categories (USDA 1995 Appendix C pages 29-31) and the 500-foot watershed stipulation with details in the 1995 EIS (Stip 6G in USDA 1995 Appendix C page 32). Additional protection is provided and prescribed through the standard lease terms (USDA 1995 Appendix B) and the provision to provide for the application of various Conditions of Approval to ensure resources are protected.

**Protest:**

"The fact that only one lease 11-07-13 has an NSO 4A: *"To preclude construction of well sites and related facilities, such as tank batteries in priority bull trout drainages and other drainages having an elevated importance to the viability of Upper Missouri Westslope cutthroat trout and bull trout"* shows that the agency has not updated its environmental impact statement and the stipulation designed to protect Westslope Cutthroat Trout has not been applied using the most current distribution data."

**Response:** The selected alternative for the original Leasing EIS protected the ten genetically pure Westslope Cutthroat Trout in the Helena Forest east of the continental divide that were known at the time (USDA 1995 page Summary-17). These populations were protected by stipulation NSO 4A identified as NSO 4P in the Leasing EIS for the Helena National Forest. Five additional streams were identified during completion of the Supplemental EIS in 1998 as additional survey information became available. The NSO stipulation was applied to the five additional populations. As part of a 2007 18-1 review, the genetically pure cutthroat trout in the Ray Creek drainage were included for coverage with the NSO 4A stipulation to be consistent with the 1998 Supplemental EIS direction to provide for NSO in drainages east of the continental divide with genetically pure Westslope Cutthroat Trout.

Additional fishery surveys, by FS personnel conducted in November 2007 as part of grazing allotment evaluations, documented Westslope Cutthroat Trout as present in the headwaters of Greyson Creek. The Greyson Creek drainage is not currently covered by the NSO stipulation for cutthroat trout. The genetic status of the Greyson Creek cutthroat trout population is currently unknown. The FS uses the best available data at the time of processing parcels. The genetic status data is not available. However, there is adequate protection provided by the 100-foot NSO and 500-foot CSU stipulation as well as various Conditions of Approval available through the standard oil and gas leasing terms discussed under concern No. 1 earlier to address local population concerns for the cutthroat trout in Greyson Creek. If a site-specific proposal to explore for oil or gas in the Greyson Creek drainage were to occur, applying a variety of approaches to address viability concerns of the localized population as discussed on pages 4-63 and 4-64 of the Supplement to the 1995 EIS (USDA 1998b) and the 1995 EIS (USDA 1995 page Summary-11), should provide the means to ensure that viability of the population is maintained. In addition, the effectiveness of the various measures to be implemented in response to an APD would be documented in a site specific biological evaluation.

As noted above, the FS uses the best available data to determine what stipulations are needed for lease nominations before authorizing the BLM to

issue a lease. In this case, only parcel MT-11-07-13 was determined to need stipulation NSO 4A. No data was provided in the protest that suggested otherwise.

**Protest:** The protest notes that conservation populations of Westslope Cutthroat Trout are found in at least one drainage, Bear Gulch, and there are no NSO stipulations for parcels in the drainage (MT-11-07-09).

**Response:** Parcel MT-11-07-09 is the only parcel in Bear Gulch. Currently there is no known fishery in Bear Gulch based in Helena Forest fishery files. Coordination with MDFWP biologists also provided information that supports no fish have been found in Bear Gulch. The protest provided no information showing otherwise.

**Protest:** The protest notes:

"CSU 18 is a lease notice applied to all USFS leases (MT-11-07-1 through 14; MT-11-07-17 through 20; MT-11-07-22; and MT-11-07-23) and states that a biological evaluation of the leased lands may be required prior to surface disturbance to determine if endangered, threatened, proposed, candidate or sensitive plant or animal species or their habitat are present and to identify needed mitigation measures prior to under taking any surface-disturbing activities on the lands covered by this lease. It is assumed that it applies to Westslope Cutthroat Trout, a US Forest Service sensitive species.

However, this lease notice fails to recognize that leasing is an irretrievable commitment of resources and it is the Forest Service's duty under NEPA to update the leasing EIS to current conditions, so as to ensure that the public is aware of potential impacts leasing would have on Westslope Cutthroat Trout and disclose where those populations are located. CSU 18 does not replace the agencies NEPA obligations."

**Response:** The agencies have complied with the NEPA requirements for leasing these parcels. As discussed earlier, the FS and the BLM completed a Final EIS and a Supplemental EIS, and the FS completed a new information review prior to authorizing these parcels for lease sale. The new information review ensures that parcels are administratively available for lease and consistent with the Forest Plan. Parcels are reviewed for new information and required stipulations are included. Finally, parcels are reviewed to determine whether or not occupancy can occur on the individual parcels.

The 1998 ROD determined that sufficient protections are provided, commensurate to the status of the populations. Offering these parcels is consistent with the pertinent aspects of the 2007 Westslope Cutthroat Trout MOU as discussed above. In addition, at the time of ground disturbing activities (APD), the FS is required to conduct NEPA on the site-specific activity and subsequent Biological Evaluations (BE)/Assessments (BA) will be developed as appropriate (FEIS, Appendix E, p. E-30 and C.F.R. 36 § 228.107 (a)).

**Protest:** The protest notes that the Forest Service needs to conduct surveys, before leasing, in conjunction with the MDFWP of drainages that leasing might affect and determine what streams are suitable for restoration for cutthroat trout. Stipulation NSO 14A (the BLM notes that this should apparently be NSO 4A) should then be applied before leasing. The North Fork of Deep Creek is given as an example of a stream having no information. Parcels located in part or whole in the drainage of the North Fork of Deep Creek include MT-11-07-06 through 8, MT-11-07-13, and MT-11-07-14.

**Response:** Extensive surveys of streams throughout the area proposed for leasing in the Big Belt Mountains within the Helena Forest have been completed by both FS and MDFWP fishery biologists since the Helena Forest Oil and Gas EIS was completed. The North Fork of Deep Creek has been extensively surveyed by FS fishery personnel and only brook trout have been found in the drainage. The overall need for needed stipulations to protect sensitive fish species was assessed by both 1995 EIS and the 1998 Helena Forest Supplemental EIS. The effects to Westslope Cutthroat Trout were evaluated and the Biological Evaluation conducted as part of the EIS process came to a conclusion for Westslope Cutthroat Trout of "May Impact Individuals, but would not Result in a Trend toward Listing." There was also an assessment that there was risk for negative effects to other fish species (USDA 1995 page 4-99), but effects would not be significant due to the ability to apply the Conditions of Approval detailed in Appendix D of the 1995 EIS (USDA 1995 Appendix D).

Based on surveys noted above, no conservation populations of trout requiring the application of stipulation NSO 4A have been found in the North Fork of Deep Creek.

**Protest:** The protest states that Deep Creek is recognized as an important spawning tributary for rainbow and brown trout in the Missouri River above Canyon Ferry Reservoir, there are no stipulations designed to protect the investment made through Future Fishery restoration projects. These projects - designed to stabilize banks, reduce sedimentation and improve spawning success of trout - were started in 1996 and 2004, with the 1996 project influencing a 20-mile stretch of stream. Also, the impacts to the effectiveness of these projects that leasing and resulting development that leasing authorizes have not been analyzed nor has the public had the opportunity to comment on this issue once the leases to be sold were identified.

**Response:** The NSO 2 (Stip 6F in USDA 1995 Appendix C page 31), stipulation that prevents surface occupancy within 100-feet of water and the 500-foot CSU stipulation 4 (Stip 6G in USDA 1995 Appendix C page 32) that are applied Forest-wide along with the ability to impose Conditions of Approval (USDA 1995 Appendix D) via standard lease terms (USDA 1995 Appendix B) should provide ample means to ensure that adverse effects to water quality and fisheries do not occur. However, applicable stipulations and the effects development to restoration projects would be assessed and conditions of approval would be addressed as part of a site-specific application to drill.

**Protest:** The protest notes:

"...although Deep Creek is recognized as an important spawning tributary for rainbow and brown trout in the Missouri River

above Canyon Ferry Reservoir, there are no stipulations designed to protect the investment made through future fishery restoration projects. These projects - designed to stabilize banks, reduce sedimentation and improve spawning success of trout-were started in 1996 and 2004, with the 1996 project influencing a 20 mile stretch of stream.... Also, the impacts to

the effectiveness of these projects that leasing and resulting development that leasing authorizes have not been analyzed nor has the public had the opportunity to comment on this issue once the leases to be sold were identified."

The protest notes that stipulations that do apply to the North Fork of Deep Creek are NSO 2 that

"...precludes surface disturbing activities on areas within 100 feet of courses, water bodies, flood plains, and riparian areas to protect water quality" and stipulation CSU 4 that allows "activities within 500 feet of water courses, water bodies, flood plains, areas may be located and/or designed to avoid or minimize the potential for adverse effects to surface water."

It further notes that given the importance of Deep Creek and the restoration work that has been invested in this watershed, NSO within 500 feet of Deep Creek and its tributaries would help ensure that oil and gas activities do not compromise the time, money, and effort spent to restore this coldwater fishery that is an important component of the Missouri River, a recognized Blue Ribbon Fishery.

**Response:** There was acknowledgement in the fisheries effects portion of the 1998 Supplemental EIS (USDA 1998b pages 4-131 and 4-132) that there could be some minor negative effects to fisheries as a result of drilling a well depending on the location of the site, what activities were conducted, the magnitude of the activities, and the condition of the habitat. However, it was also disclosed in the 1995 EIS (USDA 1995 page 1-11) that negative effects could be minimized to the degree that effects would not be significant through a variety of measures including various stipulations and conditions of approval. The analysis of the RFD allows the FS and the BLM to predict and reasonably analyze effects (USDA 1995 Appendix E).

The Oil and Gas 1995 EIS and 1998 Supplemental EIS document states that some negative effects are possible. However, the 1995 EIS (USDA 1995 page 1-11) points out that mitigation measures specified as part of the preferred alternative including the 500-foot CSU stipulation mentioned in the protest and Conditions of Approval (USDA 1995 Appendix D) are adequate to ensure that undue and unnecessary degradation to resources is prevented on the protested parcels on the Helena National Forest in the Deep Creek Drainage that are listed above.

**Decision:** For the reasons stated above, your protest is dismissed. This decision to deny this protest may be appealed to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and the enclosed Form 1842-1 (Enclosure 2). If an appeal is taken, Notice of Appeal must be filed in the Montana State Office at the above

address within 30 days from receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from is in error.

This Decision will become effective at the expiration of the time for filing a notice of appeal unless a petition for a stay of Decision is timely filed together with a notice of appeal, see 43 CFR 4.21(a) (Enclosure 3). The provisions of 43 CFR 4.21(b) defines the standards and procedures for filing a petition to obtain a stay pending appeal.

We are issuing a lease for the lands included in parcels MT 11-07-02 through MT 11-07-13, MT 11-07-17 through MT 11-07-20, MT 11-07-22, MT 11-07-207 through MT 11-07-211, MT 11-07-214, and MT 11-07-215 to the successful bidder.

In case of an appeal, the adverse parties to be served are:

Gulf Western Geophysical LLC, 7373 Broadway, Suite 300, San Antonio, TX 78209  
Springfield Oil CO., 27619 Brook Drive, Hot Springs, SD 57747  
Thomas Boyd, 1501 Stampede Ave, Unit 9016, Cody, WY 82414

/s/ Howard A. Lemm

Howard A. Lemm  
Acting State Director

3 Enclosures

- 1-Protest Received November 13, 2007 (6 p)
- 2-Form 1842-1 (2 p)
- 3-43 CFR 4.21(a) (2 p)

cc: (w/enclosures)

BLM Dillon Field Office, Dillon, MT  
BLM Billings Field Office, Billings, MT  
Regional Forester, Forest Service, Northern Region, Federal Building. P.O.  
Box 7669, Missoula, MT 59807  
Forest Supervisor, Helena National Forest, 2880 Skyway Drive, Helena, MT  
59602  
Gulf Western Geophysical LLC, 7373 Broadway, Suite 300, San Antonio, TX 78209  
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