



# United States Department of the Interior



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In Reply To:  
3101 (922.JB)

CERTIFIED-RETURN RECEIPT REQUESTED

April 21, 2008

## DECISION

Mr. Ben Lamb  
Conservation Director for State and National Issues  
Montana Wildlife Federation  
P.O. Box 1175  
Helena, Montana 59624-1175

### Protest Dismissed

On November 13, 2007, we received your protest (Enclosure 1) affecting the following parcels on our November 27, 2007, Competitive Oil and Gas Lease Sale (November sale):

MT-11-07-01 through 19, MT-11-07-21 through 28, MT-11-07-31 through 34, MT-11-07-38 through 64, MT-11-07-66 through 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 through 116, MT-11-07-119, MT-11-07-121, MT-11-07-124 through 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 through 189, MT-11-07-191, MT-11-07-207 through 215.

Parcels MT-11-07-01 through 14, MT-11-07-17 through 19, MT-11-07-22, and MT-11-07-23 are located on the Helena National Forest and leasing decisions are found in EISs completed in the 1990's. Parcels MT-11-07-15, MT-11-07-16, MT-11-07-21, and MT-11-07-24 through 26 are located within the Lewistown Field Office (FO) and leasing decisions are found in the Headwaters RMP. Parcels MT-11-07-27, MT-11-07-28, MT-11-07-31 through 34, MT-11-07-38 through 40, MT-11-07-50 through 52, MT-11-07-61, MT-11-07-62, MT-11-07-73 through 77, MT-11-07-82 through 85, MT-11-07-107, and MT-11-07-212 through 215 are within the Billings FO and leasing decisions are found in the Miles City District Oil and Gas RMP/EIS Amendment. Parcels MT-11-07-41 through 49, MT-11-07-53 through 60, MT-11-07-63, MT-11-07-64, and MT-11-07-66 through 70 are located within the Lewistown FO and leasing decisions are found in the Fergus Management Framework Plan (MFP) and Lewistown District Oil and Gas EA. Parcels MT-11-07-71, MT-11-07-72, MT-11-07-78 through 82, MT-11-07-86, MT-11-07-89, MT-11-07-94, and MT-11-07-98 are also located within the Lewistown FO, however leasing decisions are found within the Petroleum MFP and Lewistown District Oil and Gas EIS. Parcels MT-11-07-107, MT-11-07-110, MT-11-07-112, MT-11-07-114 through 116, MT-11-07-114 through 116, MT-11-07-119, MT-11-07-121, MT-11-07-124 through 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 through 189, and MT-11-07-191 are located within the Miles City FO and leasing decisions are found in the Big Dry RMP. Parcels MT-11-07-

207 through 211 are located within the Dillon FO and leasing decisions are found in the Dillon RMP.

### **General Issues**

#### **Protest:**

"MWF states that the primary basis for this protest is the need to provide greater protection of habitat required to sustain current populations of elk, mule deer, pronghorn, sharptail and Greater sage-grouse, as well as maintaining public hunting opportunities. Many of the leases within this protest have stipulations that will require lease holders to operate only during hunting seasons. This is not acceptable to MWF, and it is contrary to the wishes of the President as evidenced by Executive Order (EO) 13443, issued on August 16, 2007.

According to Bureau of Land Management BLM Instruction Memorandum No. 2008-006, Implementation of Executive Order 13443, Facilitation of Hunting Heritage and Wildlife Conservation, the Bureau of Land Management directed State Directors to take action to implement the EO."

The protest further notes that:

"...To MWF's knowledge, these actions, as outlined by the director of the BLM and by President George W. Bush, have not been implemented in a formal manner, and therefore, it is premature and contrary to the direction that the President and the director of the BLM have instituted to issue new leases in areas that hunters and anglers value for recreation, and as important wildlife habitat. Until these actions are taken, however, MWF believes that issuing leases in areas that are currently listed as Roadless, areas that are designated by Montana Department of Fish, Wildlife and Parks as Crucial Winter Range for Elk, mule deer, within 1 mile of Sage-Grouse or Sharptail Grouse leks, or Split Estate parcels that contain areas with conservation easements (a private property right that will be negated, resulting in a takings), the BLM should remove the parcels that MWF is protesting within."

Your protest also states that the MWF with other organizations is:

"...Trying to convince the Federal Government, and more specifically, the BLM to slow down the pace of oil and gas leasing until advanced conservation planning for fish and wildlife protection has been completed in cooperation with Montana Department of Fish, Wildlife & Parks (MDFWP). The coalition remains deeply concerned that the current pace of leasing, coupled with inadequate protective measures, timing and stipulations that will lead to severe losses in public hunting and fishing opportunities during periods of development. The lack of these measures could result in public lands unsuitable for sustaining populations of elk, mule deer, pronghorn, greater

sage-grouse and regionally important sport fisheries that are beneficial to all Americans and future generations.”

**Response:** The Bureau of Land Management (BLM) is in compliance with the intent of the Executive Order. We do consider all forms of recreation, including hunting, fishing, and also fish and wildlife resources in our planning. During our day-to-day operations, we operate under a multiple use mandate that is centered on the Federal Land Policy and Management Act (FLPMA). Multiple use means the management of the public lands for a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values. In addition to FLPMA, we are also bound by other laws including, but not limited to, the National Environmental Policy Act (NEPA), Mineral Leasing Act, Endangered Species Act, and National Historic Preservation Act.

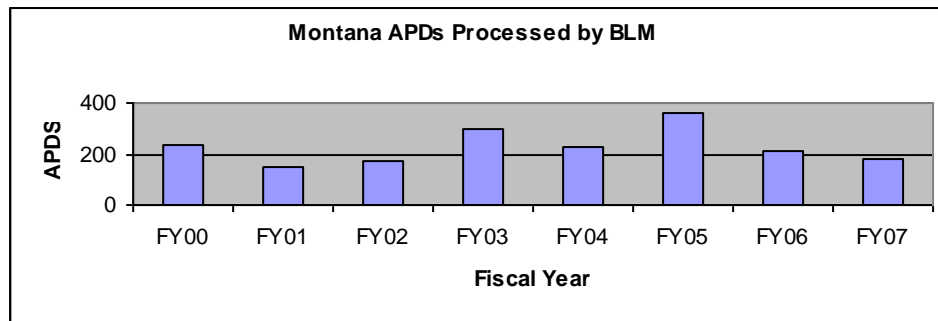
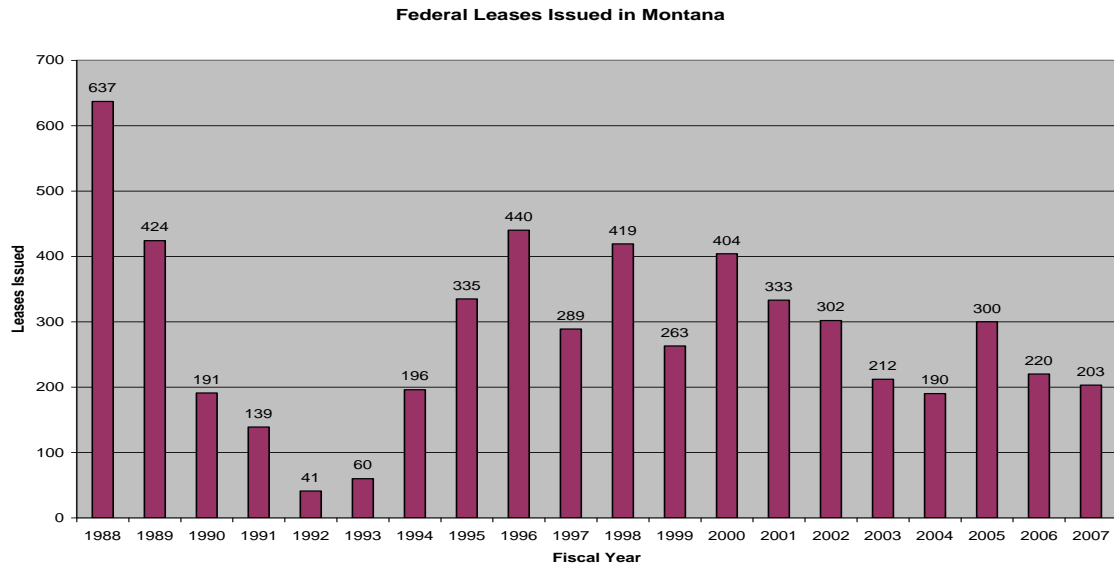
We consult with multiple State, Federal, Local, and Tribal agencies and private entities including the Montana Department of Fish, Wildlife and Parks (MDFWP) and the Fish and Wildlife Service (FWS), on land management issues on an ongoing basis.

Your protest has not provided evidence that continuing leasing in the interim is harming your organization or in violation of the intention of the Executive Order (EO) or IM No. 2008-06. Neither the EO nor the IM require that the BLM cease activities, including oil and gas leasing, immediately on Federal lands.

The BLM reviewed all of the parcels on lands administered by the BLM prior to offering them for lease. A Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) was completed for each of the parcels on the November sale. The DNAs serve to document the "hard look" that the BLM took to determine whether new circumstances, new information, or environmental impacts not previously anticipated or analyzed in the governing land use plans/NEPA documents warranted new analysis or supplementation of existing NEPA documents, and whether the impact analysis supports the proposed action (oil and gas leasing). Based on the completed analysis, the BLM made a decision that the existing land use plans and NEPA analyses supports oil and gas leasing without the need for supplemental NEPA or planning analysis.

The Helena National Forest prepared FSH 1909.15 Sec. 18.1 NEPA Sufficiency review of the "1998 Oil and Gas Leasing Final Environmental Impact Statement/Supplemental Environmental Impact Statement (FEIS/SEIS) and Record of Decision (ROD) for the Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest" in response to requests for lease in the southern Big Belt Mountains, Broadwater and Meagher Counties. In that review, they determined that the stipulations, and the areas to which they apply, identified in the FEIS/SEIS and Leasing ROD remained applicable. The MWF requested that any nominations in areas currently listed as Roadless should be removed from the lease sale list. However, those lands within roadless are protected with a variety of No Surface Occupancy (NSO) stipulations.

In regard to your concern on the pace of leasing and development, we would like to offer the following graphs on both leasing and applications for permit to drill. The first graph documents the number of Federal leases issued recently in Montana. The second graph documents the number of Federal applications for permit to drill (APDs) approved in Montana in recent years.



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

The BLM applies stipulations to leases that are developed through the BLM land use planning process or in Forest Service (FS) documents that we are formally involved in under NEPA that have ample opportunities for involvement by the public and local government. We believe these stipulations are adequate and appropriate. The protest does not provide evidence that they are not. Nor does the protest provide evidence that there will be "severe" losses in public hunting and fishing opportunities during periods of development.

In your protest letter, you identified some additional points of concern on page 4. These points are general in nature and appear to be overall resource management concerns that are covered by our land use plans and planning process. Since these concerns do not specifically identify issues with the parcels being protested, they will not be specifically addressed in this decision.

## Legal Concerns

### I. National Environment Policy Act (NEPA):

#### A. Protest: The BLM violated NEPA by failing to take the required "hard look" at significant new information that questions the validity of its current RMPs. The protest alleges that:

"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 protest notes that:

"...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-11-07-10; 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-11-07-41; MT-11-07-45; MT-11-07-46; MT-11-07-47; MT-11-07-48; MT-11-07-49; **MT-11-07-50;** MT-11-07-52 through 60; MT-11-07-63; MT-11-07-64; MT-11-07-66 through 72; MT-11-07-78 through 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 through 194; MT-11-07-200; and MT-11-07-207 through 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."

"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."

The protest also notes:

"...the majority of current RMPs do not address the impacts of mineral leasing and development on mule deer winter ranges and migration routes." "For this reason, the agency's decision to lease parcels that could significantly impact 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."

**Response:** The BLM and the FS took a "hard look" at new information and new circumstances before deciding to offer any of the parcels on the November competitive oil and gas sale for lease. The BLM completed DNAs for all parcels and the Forest Service prepared a Forest Service Handbook 1909.15 Sec. 18.1 NEPA Sufficiency review of the 1998 Oil and Gas Leasing FEIS/SEIS and Record of Decision for the Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest in addition to their verification process in response to requests for lease in the southern Big Belt Mountains, Broadwater and Meagher Counties. During this review process, the BLM made decisions regarding areas to defer from leasing and also considered comments provided by the Montana Fish, Wildlife and Parks. In these reviews, the BLM and the Forest Service determined that the stipulations, and the areas to which they apply, identified in the governing NEPA documents and land use plans remain applicable for lands determined to be available for leasing. Both agencies considered all new available information when completing the applicable reviews. We specifically considered crucial mule deer and elk winter ranges, wild trout habitat, and sage-grouse habitat.

The protest also lists a number of parcels as being identified by the MDFWP as being critical habitat for mule deer and vital for survival and sustainability of mule deer populations. The protest states that only 16 parcels were stipulated for mule deer winter range. In that, the protest is in error. Fifty-four parcels listed in the protest at this point have the applicable winter range stipulation applied to all or portions of the parcels.

Parcels MT-11-07-28, MT-11-07-31 through 34, MT-11-07-40, MT-11-07-50, MT-11-07-186, MT-11-07-192 through 194, and MT-11-07-200 have stipulation MT 13-1 applied those portions identified as having crucial winter range for wildlife. This stipulation reads as follows:

Surface use is prohibited from December 1 to March 31 within crucial winter range for wildlife. This stipulation does not apply to the operation and maintenance of production facilities.

To protect crucial white-tailed deer, mule deer, elk, antelope, moose, bighorn sheep, and sage-grouse winter range from disturbance during the winter use season, and to facilitate long-term maintenance of wildlife populations.

Parcels MT-11-07-01, MT-11-07-05, and MT-11-07-07 through 12 have Forest Service stipulation R1-FS-2820-15 Timing-1. This stipulation reads as follows:

No surface use is allowed during the following time period(s). This stipulation does not apply to operation and maintenance of production facilities.

December 1 to May 15

For the purpose of:

To preclude surface disturbing activities within big game winter range which could cause increased stress and/or displacement of animals during the critical time period. (Helena National Forest and Elkhorn Mountains portion of the Deerlodge National Forest Oil and Gas EIS, Appendix C-5 and Record of Decision, p. 10).

Parcels MT-11-07-15, MT-11-07-21, MT-11-07-25, MT-11-07-26, MT-11-07-41 are located in Meagher County on BLM-administered lands. Parcels MT-11-07-45 through 49, MT-11-07-53 through 56, MT-11-07-58 through 60, MT-11-07-63, MT-11-07-64, MT-11-07-66 through 72, MT-11-07-78 through 81, MT-11-07-86, MT-11-07-89, MT-11-07-94, and MT-11-07-98 are located in either Fergus or Petroleum Counties on BLM lands. While no lands requiring special wildlife stipulations were identified on these parcels, as required by the governing land use plans and NEPA documents, the following standard stipulation (Enclosure 2) was applied to all of the listed parcels:

The lessee/operator is given notice that the lands within this lease may include special areas and that such areas may contain special values, may be needed for special purposes, or may require special attention to prevent damage to surface and/or other resources. Possible special areas are identified below. Any surface use or occupancy within such special areas will be strictly controlled, or **if absolutely necessary**, excluded. Use or occupancy will be restricted only when the BLM and/or the SMA demonstrates the restriction necessary for the protection of such special areas and existing or planned uses. Appropriate modifications to imposed restrictions will be made for the maintenance and operations of producing oil and gas wells.

After the SMA has been advised of specific proposed surface use or occupancy on the leased lands, and on request of the lessee/operator, the Agency will furnish further data on any special areas which may include:

One fourth mile from identified essential habitat of state and federal sensitive species. Crucial wildlife winter ranges during the period from December 1 to May 15, and in elk calving areas during the period from May 1 to June 30.

Seasonal road closures, roads for special uses, specified roads during heavy traffic periods and on areas having restrictive off-road vehicle designations.

The protest makes the statement that:

"...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."

The protest does not provide evidence that the DNAs are inadequate.

Finally, the protest suggests that the majority of the existing land use plans and NEPA documents do not address the impacts of mineral leasing and development on mule deer winter ranges and migration routes. The protest does not provide specific information to demonstrate that this is the case. As noted above, the BLM and the Forest Service did apply winter range stipulations where applicable.

**B. Protest: 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 protest states that:

"...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."

The protest also notes that:

"...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."

You also state that:

"...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."

**Response:** A plan-level decision to open the lands to leasing represents the BLM's or Forest Service's determination, based on the information available, that it is appropriate to allow development of the specific parcels consistent with the terms of the lease, specific stipulations, laws, regulations, and orders, and subject to reasonable conditions of approval. The governing land use plans/NEPA documents for the protested plans are the Big Dry RMP, Dillon RMP, Headwaters RMP, Miles City District Oil and Gas RMP/EIS Amendment, Fergus Management Framework Plan (MFP), Petroleum MFP, Lewistown District Oil and Gas Environmental Assessment of BLM Leasing Program, and Helena National Forest Oil and Gas Leasing EIS.

At the leasing stage, we are required to complete the appropriate NEPA document 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.

Further, the BLM would note that the standard BLM "Offer to Lease for Oil and Lease for Oil and Gas" notes immediately above the signature line that rights granted by the lease are subject to "applicable laws." One such law is the Federal Onshore Oil and Leasing Reform Act of 1987 ("FOOGLRA"), 30 U.S.C § 226; et seq. It states that "No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities within the lease area." This means that a lessee's exclusive right to drill can only be exercised with the approval of the Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture.

**C. Protest: The BLM violated NEPA by failing to consider NSO and No-Leasing Alternatives.** You note in the protest that 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. You state that CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is the heart of the NEPA process.

You also note that:

"...When lands with special characteristics, such as wilderness, are proposed for leasing, the IBLA has held that, "(to) 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." You believe crucial winter ranges and migration routes are as special as wilderness and therefore require NEPA analysis before leasing.

As the protest notes, MWF believes that the BLM has not analyzed alternatives to the full approval of the leasing nominations for the parcels that contain or are within 1/4 mile of mule deer winter range and migration routes, such as NSO and no leasing alternatives. You stated that 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. You also stated that for all alternatives which were eliminated from detailed study the agencies must briefly discuss the reasons for their having been eliminated.

The protest notes that:

"...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."

**Response:** All the governing land use plans and NEPA documents for the protested parcels considered a range of alternatives ranging from no leasing to a continuation of existing management. The BLM either was the sole author or was a joint lead in the case of the Helena National Forest Leasing EIS. As noted above, the governing land use plans and NEPA documents for BLM lands are the 1994 Miles City District Oil and Gas RMP/EIS Amendment, the Big Dry RMP, the Headwaters RMP, the Fergus MFP, the Petroleum MFP, and the 1981 Lewistown District Oil and Gas Environmental Assessment of BLM Leasing Program. All of these documents considered multiple uses.

We note that the protest cites an IBLA decision referred to as Sierra Club, 79 IBLA at 246. This case was later reconsidered and the decision set aside by the IBLA. We should also point out that it dealt with geothermal and not oil and gas leasing.

Finally, you stated in your protest that 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.

The BLM believes we have completed adequate analyses. All the governing land use planning and NEPA documents did consider a mix of alternatives going from very restrictive (no leasing) to less restrictive. NEPA was followed in the preparation of all subject NEPA documents. As part of the analyses a range of stipulations was also considered. Stipulations developed in those documents were applied as warranted.

## II. Federal Lands Policy and Management Act ("FLPMA")

**Protest: The leasing decision violated FLPMA's requirement to prevent undue or unnecessary degradation (UUD) 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. Your protest states:**

"...The BLM's duty to prevent UUD under FLPMA is mandatory, and BLM must, at a minimum, demonstrate compliance with the UUD standard...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."

You note that:

"...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).

Finally, the protest notes that:

"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."

**Response:** The BLM believes we complied with FLPMA by completing the governing land use plans for the protest parcels. These are the 1994 Miles City District Oil and Gas RMP Amendment, the 1996 Big Dry Amendment, the 1984 Headwaters RMP, the 1977 Petroleum MFP, and the 1978 Fergus MFP. The NEPA documentation for oil and gas leasing in Fergus and Petroleum Counties is the 1981 Lewistown District Oil and Gas Environmental Assessment of BLM Leasing Program. All of these documents gave serious consideration to oil and gas leasing and development on Federal lands. These plans and NEPA documents document the environmental analyses used to develop mitigation measures for impacts from oil and gas to other resources and resource uses in the planning areas. In addition, we worked as a joint lead agency on the oil and gas leasing EIS for the Helena National Forest. These documents also reflect consideration of public, other agency, and interdisciplinary team input. In addition to mitigation built into the planning and NEPA documents, the BLM has the regulatory authority to adopt reasonable measures at the application for permit to drill stage. We believe that by completing the planning and NEPA documents and using our regulatory authority during oil and gas exploration and development, the BLM will have complied with our mandate to ensure actions do not lead to undue and unnecessary degradation of resources such as crucial mule deer and elk winter ranges, mule deer and elk migration routes, and sage-grouse leks and associated habitat wild trout habitat characteristics in the Beaverhead River.

As you note, Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), extends protection to the administration of the public lands: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." The Department has issued no regulation defining what might constitute "unnecessary or undue degradation" in the context of onshore oil and gas development, an activity where some level of environmental degradation is to be expected.

As the IBLA recently noted in "Biodiversity Conservation, ET AL." (174 IBLA 1):

"[n]either FLPMA nor implementing regulations defines the term 'undue or unnecessary degradation.'" Colorado Environmental Coalition, 165 IBLA 221, 229 (2005); see 43 U.S.C. § 1702 (2000). In other contexts, BLM has promulgated regulations defining the term. See, e.g., . . . 43 C.F.R. § 3809.5 (surface management). No similar definition appears in the onshore oil and gas regulations. Compare 43 C.F.R. § 3100.0-5 (definitions for Onshore Oil and Gas Leasing: General) and 3160.0-5 (definitions for Onshore Oil and Gas Operations). However, those [latter] regulations provide that

the right of a lessee to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold [is] subject to: Stipulations 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.

Wyoming Outdoor Council, 171 IBLA 108, 121 (2007), quoting 43 C.F.R. § 3101.1-2.

Nonetheless, FLPMA coexists with mineral leasing statutes and recognizes the need for multiple use management, which includes taking into account the nation's need for nonrenewable resources such as minerals, 43 U.S.C. § 1702(c) (2000), and "domestic sources of minerals . . . from the public lands," 43 U.S.C. § 1701(a)(12) (2000). Congress thus recognized that the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA, and that something more than the usual effects anticipated from such development subject to appropriate mitigation, must occur for degradation to be "unnecessary or undue."

As noted above, by completing the planning and NEPA documents to determine appropriate stipulations, using our regulatory authority to impose reasonable measures during oil and gas exploration and development, we believe undue and unnecessary degradation of resources will not occur.

**III. The Mineral Leasing Act (MLA) gives the BLM discretion over whether to lease the disputed parcels.**

**Protest:** The protest notes that leasing on Federal lands under the Mineral Leasing Act is discretionary. It also notes that when a lease application is received and before the lease sale, no right has vested for the applicant and potential bidders and the BLM retains the authority not to lease.

You believe that:

"...Withdrawing the protested parcels from the lease sale until proper pie-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."

**Response:** The BLM understands our discretion under the MLA. As noted above, the BLM reviewed all of the parcels on lands administered by the BLM prior to offering them for lease. A DNA was completed for each of the parcels on the November sale. The DNAs serve to document the "hard look" that the BLM took to determine whether new circumstances, new information, or environmental impacts not previously anticipated or analyzed in the governing land use plans/NEPA documents warranted new analysis or supplementation of existing NEPA documents, and whether the impact analysis supports the proposed action (oil and gas leasing). Based on the completed analysis, the BLM made a decision that the existing land use plans and NEPA analyses supports oil and gas leasing without the need for supplemental NEPA or planning analysis.

Before transmitting parcels to the BLM for lease, the Helena NF prepared FSH 1909.15 Sec. 18.1 NEPA Sufficiency review of the "1998 Oil and Gas Leasing FEIS/SEIS and Record of Decision for the Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest" in response to requests for lease in the southern Big Belt Mountains, Broadwater and Meagher Counties. In that review, they determined that the stipulations, and the areas to which they apply, identified in the FEIS/SEIS and Leasing ROD remained applicable.

As we previously emphasized, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 gives authority to the Secretary to deny an APD. A lessee's exclusive right to drill can only be exercised with the approval of the Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture.

### **Resource Specific Concerns**

#### **I. River Trout Habitat and Fishing:**

**Protest:** You state:

"MWF protests the leasing of the following five 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. MWF's concern for these parcels extends to the downstream trout fishery in the Beaverhead River.

The protest further states:

"While CSU 12-I 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. MWF 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, the protest notes:

"NSO 11-2...must be included in MT-11-07-2 10 because Long Gulch flows through the southwest portion of the parcel.

For these five (5) disputed parcels, NSO or other stipulations are not likely 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."

Finally, the protest states:

"...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 five 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."

**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.

The protest also notes that there are no stipulations protecting soils with erosive potential on slopes less than 30 percent. However, the requirements for surface protection described below would be enforced in this case.

Any proposed mitigation plan for surface disturbing activities on slopes over 30 percent or erosive soils 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 (RMP) Record of Decision (ROD)/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 MWF 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). No surface occupancy 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/or 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.

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. The protest indicates that the Long Gulch flows through the southwest portion of the parcel. 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.

## **II. Mule Deer Winter Range and Hunting**

### **A. Protest:** Your protest states:

"...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 3-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 protest goes on to say that:

"...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."

The protest also notes that:



"...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."

The protest adds that:

"...in the protested parcels, there is no evidence that the 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."

**Response:** Your protest indicates that the MWF believes that there will be large scale dense development of natural gas fields in the areas where you protested parcels similar to that occurring at present in Wyoming. You believe that recent BLM approvals for oil and gas leasing will result in large-scale habitat changes that could potentially impact the effectiveness of migration routes.

The BLM does not believe that this suggested level of disturbance is reasonably foreseeable. The parcels you protested are located in Beaverhead, Broadwater, Fergus, Golden Valley, Meagher, Musselshell, and Petroleum Counties.

The following is a review of existing reasonably foreseeable development (RFD) scenarios and historic well drilling activities on all ownerships below to explain why we do not believe your argument is valid. Federal activity is described above.

The protested parcels in Beaverhead County are located within BLM's Dillon Field Office. The Dillon RMP was finished in 2006. The RFD scenario developed for that RMP forecast a total of 10 wells would be drilled somewhere in either Beaverhead and/or Madison Counties on all ownerships during the life of the plan. There are no producing wells in either county at this time.

Parcels MT-11-07-01 through 14, MT-11-07-17 through 19, MT-11-07-22 and MT-11-07-23 located in Broadwater and Meagher Counties are within the boundaries of the Helena National Forest. 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. Only one well has been drilled within the boundaries of the Forest but not on Forest Service (FS) land since completion of the EIS.

Parcels within Golden Valley and Musselshell Counties are within the BLM's Billings Field Office. The governing land use plan for leasing on BLM lands in that Field Office is the 1994 Miles City District Oil and Gas RMP/EIS Amendment. The RFD scenario for that document projected that a total of 995 wells would be drilled on all ownerships in the Field Office during the life of the RFD scenario (15 years). Since the plan was completed in 1994, a total of 240 wells have been drilled in the entire Billings Field Office. Four wells were drilled in Golden Valley with one completed as an oil well and the rest plugged and abandoned. Fifty-four wells were drilled in Musselshell County with 12 completed as oil wells.

The following is a link to the Montana Board of Oil and Gas Conservation (MBOGC) website that contains information regarding drilling activity in the State of Montana in areas with out RFD scenarios for the governing leasing documents: <http://bogc.dnrc.state.mt.us/>

Parcels MT-11-07-21 and MT-11-07-24 through 26 are located in Meagher County within the BLM's Lewistown Field Office. Historical records of the MBOGC show that there have been a total of nine oil and gas tests drilled on all ownerships in that county to date. Eight of these tests were completed as dry holes and one as a water source well. Parcels within Fergus and Petroleum Counties are also located within the boundaries of the Lewistown Field Office. During the last 27 years, 71 oil and gas tests have been drilled in Fergus County on all ownerships. A total of six of these wells were drilled as gas wells. The status shown on the MBOGC website for three of these well is "gas" and the status of one is shown as "shut in." The others were plugged and abandoned. No producing oil wells were completed in the County. The other wells were either plugged and abandoned or converted to water wells. Average depth of the gas wells was 1883 feet. These wells would be typically spaced at statewide spacing of one well per 640 acres. During the last 27 years, a total of 74 wells have been drilled on all ownerships in Petroleum County. None of these were gas wells. Twenty wells were drilled as oil wells. Of these 20 wells, two were completed as

producing wells, nine were either shut-in or temporarily abandoned, and the rest were plugged and abandoned.

The protest contains no data casting doubt on the geologic interpretation of the BLM and Forest Service. The historical drilling data and existing RFD scenarios support that the interpretation of oil and gas potential for the BLM and FS planning documents remain valid. They do not support the level of effects described in the protest.

**B. Protest:** On page 8 of your protest, you have asked that five parcels in Beaverhead County be withdrawn from the November leases sale due to the presences of mule deer winter range.

**Response:** As you noted in the protest, the applicable stipulation for protection of winter range in the Dillon Field Office was applied to all five parcels. Your protest demonstrates no reason to withdraw the parcels.

**C. Protest:** On page 8 and 9 of your protest, you have asked that the full area of 16 parcels in Broadwater and Meagher Counties; and 40 parcels in Fergus, Golden Valley, Musselshell, and Petroleum Counties identified as having mule deer range be withdrawn from the lease sale to avoid known adverse impacts incident to pad construction and operation and maintenance of production facilities.

**Response:** Where mule deer winter range was identified, we have applied the applicable stipulation for protection of winter range required by the governing land use plans and NEPA documents. This stipulation will mitigate impacts from well pad construction to winter range. Well-related winter maintenance and other operations are mostly infrequent or of short duration and would be timed in such a way as to minimize impacts to mule deer. No evidence has been provided that these stipulations will not protect mule deer.

**D. Protest:** The protest identifies five parcels in Richland and Roosevelt Counties as being critical winter range for mule deer: MT-11-07-186; MT-11-07-192; MT-11-07-193; MT-11-07-194; and MT-11-07-200.

The protest requests that no surface disturbance is allowed in cottonwood stands in parcels MT-11-07-186 and MT-11-07-194 by setting a year-round NSO stipulation. It further requests that a Timing 13-7 stipulation be placed on parcels MT-11-07-192 and MT-11-07-193. Finally, it suggests that parcel MT-11-07-200 should be protected with a Timing 13-1 stipulation.

**Response:** As noted earlier, we have reviewed these parcels. All parcels listed above are in the Miles City Field Office and the governing RMP is the Big Dry RMP. This RMP does not include a year-round NSO stipulation for cottonwood stands such as you requested be added to parcels MT-11-07-186 and MT-11-07-194. The protest does not provide justification or a rationale for a year-round NSO stipulation for cottonwood stands. Timing stipulation 13-7 for winter-spring range applies strictly in the Dillon Field Office of BLM. The proper winter range timing stipulation, MT 13-1, was applied to parcels MT-11-07-192 and MT-11-07-193. Parcel MT-11-07-200 does have timing stipulation 13-1 applied where it was identified as needed by the BLM.

### III. Elk Crucial Winter Range and Hunting:

**A. Protest:** The protest states that "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..."

The protest further notes:

"...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."

**Response:** The protest provides no evidence that there will be a high density of roads and road traffic associated with natural gas development in the area of the protested parcels. You make reference to "the high density of roads and road traffic associated with natural gas well operation and maintenance in a densely developed field..." You also mentioned "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..." The BLM believes that it is not reasonable to foresee a high level of natural gas development or even oil development in the areas where the protested parcels are located. We have described the low level of development that the BLM believes is foreseeable in Broadwater, Fergus, Golden Valley, Meagher, Musselshell, and Petroleum Counties above when we addressed the general protest concerning Mule Deer winter range. The protested parcels are located in the same general areas discussed above.

**B. Protest:** Beginning on page 10 of your protest, you identify 19 parcels in Broadwater and Meagher Counties as elk crucial winter range based on information from the MDFWP. You identify that that the Rocky Mountain Elk Foundation owns conservation easements for protecting elk crucial winter range on private lands adjoining parcels MT 11-07-13 and MT 11-07-26. You state that timing limitation stipulation 15-1 for the protection of crucial winter range was only added to six of the 19 parcels. Finally, you state that the BLM has not addressed movement or migration of elk among the parcels or to adjacent lands under conservation easements fulfill seasonal life

needs. As a result, you state that the full areas of all 19 protested parcels identified as having elk crucial winter range must be withdrawn from the sale.

**Response:** Thirteen of the 19 parcels you identify at this point are located in the Helena National Forest. Leasing of these 13 parcels is governed by the 1998 Helena National Forest Oil and Gas Leasing EIS for which the BLM was a cooperating agency. Recently, the Helena NF prepared FSH 1909.15 Sec. 18.1 NEPA Sufficiency review of the "1998 Oil and Gas Leasing FEIS/SEIS and ROD for the Helena National Forest and Elkhorn Mountains Portion of the Deerlodge National Forest" in response to requests for lease in the southern Big Belt Mountains, Broadwater and Meagher Counties. In that review, the Forest determined that the stipulations protecting big game, including elk, and the areas to which they apply, identified in the Final EIS and additional SEIS and Leasing ROD remain applicable. The remaining six parcels are located within the boundaries of BLM's Lewistown Field Office (FO). The governing land use plan for this part of the FO is the 1984 Headwaters RMP.

It was determined by the Lewistown Field Office that the parcels in question could be leased as there were no wildlife values on them requiring special stipulations. However, the parcels in question have a comprehensive package of stipulations and notices (Enclosure 2) attached to them that includes the following stipulation for winter range:

"The lessee/operator is given notice that the lands within this lease may include special areas and that such areas may contain special values, may be needed for special purposes, or may require special attention to prevent damage to surface and/or other resources. Possible special areas are identified below. Any surface use or occupancy within such special areas will be strictly controlled, or **if absolutely necessary**, excluded. Use or occupancy will be restricted only when the BLM and/or the SMA demonstrates the restriction necessary for the protection of such special areas and existing or planned uses. Appropriate modifications to imposed restrictions will be made for the maintenance and operations of producing oil and gas wells.

After the SMA has been advised of specific proposed surface use or occupancy on the leased lands, and on request of the lessee/operator, the Agency will furnish further data on any special areas which may include:

One fourth mile from identified essential habitat of state and federal sensitive species. Crucial wildlife winter ranges during the period from December 1 to May 15, and in elk calving areas during the period from May 1 to June 30.

Seasonal road closures, roads for special uses, specified roads during heavy traffic periods and on areas having restrictive off-road vehicle designations."

The applicable stipulations have been applied to the 19 protested parcels.

The protest provides no argument to justify the statement that the parcels should be withdrawn and there is no evidence in the protest that the stipulations do not adequately protect elk crucial winter range.

**C. Protest:** On page 11 of your protest, you identify 26 parcels in Fergus, Golden Valley, Musselshell, and Petroleum Counties as elk crucial winter range. You state that the BLM has applied the timing stipulation 13-1 to only 11 of the 26 parcels. You request that 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.

**Response:** Fergus and Petroleum Counties are located within the Lewistown Field Office. The Field Office informed us that while there is winter range in the area, there is no identified crucial elk winter range in these counties. This was based on a review of their data and consultation with the MDFWP. Parcels MT-11-07-27, MT-11-07-31 through 34, MT-11-07-39, MT-11-07-40, MT-11-07-50, and MT-11-07-52 are located in Golden Valley and Musselshell Counties. Timing stipulation 13-1 was applied to parcels MT-11-07-27, MT-11-07-31 through 34, MT-11-07-40, and MT-11-07-50 by the Billings Field Office to offer protection for winter range. Their review did not indicate the need for the stipulation on the other parcels in the Billings Field Office. Parcels MT-11-07-110, MT-11-07-112, MT-11-07-114, and MT-11-07-119 are located in Garfield County in the Miles City Field Office. All of these parcels had stipulation 13-1 applied.

Where crucial elk winter range was identified, we have applied the applicable stipulation for protection of elk winter range required by the governing land use plans and NEPA documents. This stipulation will mitigate impacts from pad construction to elk winter range or calving areas. Winter maintenance and other operations are mostly infrequent or of short duration and would be timed in such a way as to minimize impacts to mule deer. Other activities may be of an emergency nature. No evidence has been provided that these stipulations will not protect elk.

**D. Protest:** According to the protest, MDFWP has identified parcel MT-11-07-212 as elk crucial winter range. You state that the 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.

**Response:** The BLM assumes that the protest meant "Timing 13-2" and not NSO 13-2. Stipulation NSO 11-2 is the stipulation that protects riparian areas. Timing stipulation 13-2 protects elk calving areas.

We have applied applicable stipulations for protection of elk required by the governing land use plan, the 1994 Miles City Oil and Gas RMP/EIS Amendment to parcel MT-11-07-212. These stipulations will mitigate impacts from well pad construction to Elk winter range or calving areas. Well related winter maintenance and other operations are mostly infrequent or of short duration and would be timed in such a way as to minimize impacts to mule deer. No evidence has been provided that these stipulations will not protect elk.

#### IV. Sage-Grouse Leaks and Hunting:

**Protest:** Your protest notes that:

"...Based on new information on sage-grouse, the BLM made the decision to temporarily defer all or portions of 94 parcels on the July 31, 2007, sale list, pending additional review of new information regarding crucial sage-grouse habitat and potential impacts of oil and gas development on the habitat as described in this decision. Therefore, all 13 of the parcels listed below must be deferred from leasing by BLM.

MDFWP has identified parcels MT-11-07-38; MT-11-07-82; MT-11-07-86; MT-11-07-98; MT-11-07-101; MT-11-07-107; MT-11-07-115; MT-11-07-116; MT-11-07-125; MT-11-07-153; MT-11-07-154; MT-11-07-156; and MT-11-07-179 as having active sage-grouse leks within 1 mile. BLM has applied the Timing 13-3 stipulation to only 2 of the 13 parcels documented as being within 1 mile of sage-grouse leks. The full areas of all 13 protested parcels identified as being within 1 mile of sage-grouse leks must be withdrawn from the lease sale to avoid the known adverse impacts incident to pad-construction and operation and maintenance of production facilities.

These referenced leases all occur within a 1-mile radius of active sage-grouse leks. MWF asserts that the leasing of all of these parcels should be deferred until range wide populations of sage-grouse have increased to the degree that the species is no longer considered sensitive and until additional research is conducted to help define how development should occur near active sage-grouse leks. Also, any future nominations to lease minerals within a 1-mile radius of active sage-grouse lek should be deferred, and if there should be a minimum requirement for no surface occupancy for a 1-mile radius around active leks and a 4-mile, March 1 to June 30 seasonal timing stipulation. These nominations should be deferred until range wide populations of sage-grouse have increased to the degree that the species is no longer considered sensitive and additional research is conducted to help define how development should occur near active sage-grouse leks."

**Response:** The sage-grouse lek data that the BLM uses to determine stipulations to attach to a parcel is a compilation of information collected by a number of agencies and individuals. The BLM uses our own inventory data supplemented by data from the FWP, private landowner, consultants, and other sources.

Because of new information and the various studies regarding the impacts of oil and gas development on sage-grouse, the Montana BLM is not issuing new leases within 1 mile of active lek in areas that we foresee the possibility of developing new stipulations or land use allocations in our ongoing land use plans. We will ensure during our review that we preserve our decision space and that we do not limit our choice of reasonable alternatives within

the land use plans if it is determined that the current stipulations need to be revised.

Parcels MT 11-07-38 and MT 11-07-82 are located within the Billings Field Office. They were offered for lease after consultation with MDFWP. The MDFWP confirmed that the adjoining leks were inactive.

We are deferring from leasing the following lands in parcel MT 11-07-101 due to an adjoining active lek:

T. 11 N., R. 30 E., PMM, MT  
 Sec. 2 Lots 1, 2  
 Sec. 2 S2NE, SE

For parcel MT 11-07-101, we are adding the sage-grouse protective timing 13-3 stipulation for the following lands:

T. 11 N., R. 30 E., PMM, MT  
 Sec. 4 S2  
 Sec. 10 E2, NW  
 Sec. 12 LOTS 1, 2  
 Sec. 12 W2NE, NW

The other parcels are located within either the Lewistown or Miles City Field Offices. There were no active leks within 1 mile of the parcels located within the Lewistown Field Office. One parcel (MT 11-07-125) located within the Miles City Field Office was within 1 mile of an active lek. We are deferring from leasing the following lands in parcel MT 11-07-125 due to an adjoining active lek:

T. 12 N., R. 34 E., PMM, MT  
 Sec. 10 N2

**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 3). 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 4). 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 leases for the lands included in parcels MT-11-07-02 through 13, MT-11-07-17 through 19, MT-11-07-22, MT-11-07-27, MT-11-07-28, MT-11-07-31 through 34, MT-11-07-38 through 64, MT-11-07-66 through 79, MT-11-07-82



through 85, 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 through 116, MT-11-07-119, MT-11-07-121, MT-11-07-124 through 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-11-07-186 through 189, MT-11-07-191 through 194, MT-11-07-200, MT-11-07-207 through 215.

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

Anderson Oil Ltd., 5005 Woodway Drive, Suite 300, Houston, TX 77056-1784  
 Brigham Oil & Gas LP, 6300 Bridgepoint Pkwy, Bldg 2, Suite 500,  
 Austin, TX 78730  
 Cody Oil & Gas Corporation, P.O. Box 597, Bismarck, ND 58502  
 Green Diamond Oil LLC, P.O. Drawer 2360, Casper, WY 82602  
 Gulf Western Geophysical LLC, 7373 Broadway, Suite 300, San Antonio, TX 78209  
 Missouri Basin Well Service Inc., P.O. Box 458, Belfield, ND 58801  
 Nisku Royalty LP, P.O. Box 2293, Billings, MT 59103-2293  
 Pearl Montana Exploration & Production Ltd., 111 5th Ave SW, Suite 2500,  
 Calgary, Alberta, CN T2P 3Y6  
 Petro-Hunt LLC, 1601 Elm St., Suite 3400, Dallas, TX 75201  
 Petro-Sentinel LLC, P.O. Box 477, Williston, ND 58802-0477  
 Retamco Operating Inc., P.O. Box 790, Red Lodge, MT 59068-0790  
 Springfield Oil Co., 27619 Brook Drive, Hot Springs, SD 57747  
 Swanson Production Co LLC, 518 17th Street, Suite 1680, Denver CO 80202  
 Thomas Boyd, 1501 Stampede Ave, Unit 9016, Cody, WY 82414  
 Tim J. Keating, P.O. Box 50715, Billings, MT 59105

/s/ Howard A. Lemm

Howard A. Lemm  
 Acting State Director

4 Enclosures

- 1-Montana Wildlife Federation Protest (November 13, 2007) (23 pp)
- 2-Standard Stipulations (2 pp)
- 3-Form 1842-1 (1 p)
- 4-43 CFR 4.21(a) (2 pp)

cc: (w/enclosures)

Anderson Oil Ltd., 5005 Woodway Drive, Suit 300, Houston, TX 77056-1784  
 Brigham Oil & Gas LP, 6300 Bridgepoint Pkwy, Bldg 2, Suite 500,  
 Austin, TX 78730  
 Cody Oil & Gas Corporation, P.O. Box 597, Bismarck, ND 58502  
 Forest Supervisor, Helena National Forest, 2880 Skyway Drive, Helena, MT  
 59601  
 Green Diamond Oil LLC, P.O. Drawer 2360, Casper, WY 82602  
 Gulf Western Geophysical LLC, 7373 Broadway, Suite 300, San Antonio, TX 78209  
 Missouri Basin Well Service Inc., P.O. Box 458, Belfield, ND 58801  
 Nisku Royalty LP, P.O. Box 2293, Billings, MT 59103-2293

Pearl Montana Exploration & Production Ltd., 111 5th Ave SW, Suite 2500,  
Calgary, Alberta, CN T2P 3Y6  
Petro-Hunt LLC, 1601 Elm St., Suite 3400, Dallas, TX 75201  
Petro-Sentinel LLC, P.O. Box 477, Williston, ND 58802-0477  
Regional Forester, National Forest Service, Northern Region, P.O. Box 7669,  
Missoula, MT 59807  
Retamco Operating Inc., P.O. Box 790, Red Lodge, MT 59068-0790  
Springfield Oil Co., 27619 Brook Drive, Hot Springs, SD 57747  
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