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January 12, 2009

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Sent by Fax

Re: January 2009 Montana BLM Statewide Oil and Gas Lease Sale

Montana Trout Unlimited (MTU) represents the 3,200 members and 13 chapters in Montana, with a mission to conserve, protect and restore coldwater fisheries and their watersheds. MTU is not against oil and gas leasing on public lands. Instead, we advocate for development that does not make oil and gas activities the dominant land use while setting aside special areas and ensuring lease stipulations, environmental mitigation, and enforcement are effective to guarantee protection of fish and wildlife and their habitats. Many of our members fish in streams located on, or that flow from, BLM lands administered by the Billings and Dillon Field Offices and have a passion for the conservation of these watersheds and the coldwater fisheries they support.

Because of concerns for coldwater fisheries, MTU protests the following lease parcels in the January, 2009 oil and gas lease sale.

Protested leases in the Dillon Field Office: 1-09-17, 1-09-18, and 1-09-21

Protested leases in the Billings Field Office that MTU requests that BLM defer: 1-09-01, 1-09-02, 1-09-03, 1-09-04, 1-09-05, 1-09-06, 1-09-07, 1-09-09, 1-09-10, 1-09-11

Protest Points

For clarity, we have will address our protest points based upon the Field Office for which the contested leases are managed due to differences in their respective land use plans.

Dillon Field Office

According to the sale notice and list, CSU stipulation 12-13, a stipulation for the protection of lands within ½ mile of the center line of streams with Westslope cutthroat

trout with genetic purity between 90-99% is only applied to leases 1-09-19 and 1-09-20. This stipulation should also be applied to leases 1-09-17, 1-09-18, and 1-09-21. These leases are all located within ½ mile of Cabin Creek, a stream that supports Westslope cutthroat trout with a genetic purity of 98% according to genetic sampling conducted on 6/20/2000.¹ If stipulation CSU 12-13 is not applied, or there are any remaining questions about the genetic purity of these populations of Westslope cutthroat trout, MTU requests that these leases be deferred.

Also, the sale list had applied stipulation NSO 11-20 to leases 1-09-17, 1-09-19, and 1-09-20. However this stipulation is for Blue Ribbon Trout Streams and MTU believes that this stipulation has been applied in error to these leases. The closest Blue Ribbon Trout Stream is the Beaverhead River, located over ten miles away. While this is not necessarily a protest point, MTU wanted to take this opportunity to notify the BLM of this discrepancy.

Billings Field Office

Upon review of the sale notice in the Billings Resource Area, it appears that the only lease stipulations that would be beneficial for coldwater fisheries are CSU 12-1 for slopes over 30%; NSO 11-2 for riparian areas and 100-year floodplains; and NSO 11-5 for designated reservoirs with fisheries which affects one lease, 1-09-14. In effect, this would allow development in many drainages that currently contain Yellowstone cutthroat trout or have the potential for restoration and reintroduction of this specie listed as "Sensitive" by the BLM. Also at risk would be the designated Blue Ribbon Trout Streams in the Field Office, specifically the Yellowstone and Boulder Rivers. When comparing the stipulations that have been applied to these contested leases to similar stipulations that other BLM Field Offices have developed for these same resources – native cutthroat trout and Blue Ribbon Trout Streams – it is clear the stipulations for the Billings Field Office fall far short of what have been deemed necessary and prudent levels of protection elsewhere.

For instance, the Butte Field Office, which is adjacent to the Billing Field Office, with the Park County/Sweetgrass County line serving as the jurisdictional boundary, has far more protective stipulations for Blue Ribbon Fisheries and native cutthroat trout. For example, the recently proposed Final Butte RMP would require a ½ mile NSO for streams with cutthroat trout of 90% or higher genetic purity and a ½ mile NSO would also be applied for streams with a high potential for restoration of cutthroat trout. Furthermore, ½ mile NSO would be applied to all Blue Ribbon Streams.

Likewise, the Dillon Field Office RMP applies a ½ mile NSO for streams with cutthroat trout of 99% or higher genetic purity and a ½ mile CSU for streams with 90-99% genetic purity. The Dillon Field Office also applies a ½ mile NSO for Blue Ribbon Trout Streams.

¹ Montana Fisheries Information System, accessed January 6, 2009

Clearly, fisheries protections for leases being offered in the Billings Resource Area fall far short of standards developed by other BLM Field Offices in Montana. The adjacent Butte Field Office has developed far more protective stipulations for the protection of trout fisheries. In this instance, a lease on the Yellowstone River to the east of the Park County/Sweetgrass County line (in the Billings FO) would receive no stipulations specifically for the protection of Blue Ribbon Trout Stream or Yellowstone cutthroat trout. However a lease west of the county line (in the Butte FO) would receive a ½ mile NSO stipulation. This kind of inconsistency in planning for oil and gas development is alarming and MTU feels that it points to the need to update the Billings RMP with respect to coldwater fisheries before oil and gas leases are sold and the irretrievable commitment of resources by BLM is made.

Yellowstone cutthroat trout (YCT) are considered a Sensitive Species² by the BLM and the BLM is a signatory of the *Memorandum of Understanding and Conservation Agreement for Westslope Cutthroat Trout and Yellowstone Cutthroat Trout in Montana*, July, 2007. (<http://fwp.mt.gov/content/getItem.aspx?id=28662>). Objective number one of the Cutthroat Conservation Agreement is to: "Maintain, secure, and/or enhance all cutthroat trout populations designated as conservation populations, especially the genetically pure components." (Page 4) This objective is further defined, stating that it "entails *protecting habitat*, maintaining successful life history strategies by ensuring migratory populations have access to different seasonal and life-stage habitats, and *avoiding actions that may be detrimental to these populations*." (Page 5, emphasis added)

Montana Trout Unlimited is concerned that by leasing the contested parcels in the Billings Field Office, that this principle objective of the Cutthroat Conservation Agreement is not being met. Indeed, in May of 2007 MTU commented on a lack of analysis and protections for coldwater fisheries in the *Draft Supplemental EIS to the Montana Statewide Oil and Gas Amendment*. With regard to Yellowstone cutthroat trout (YCT) our comments were the following:

Given that the Yellowstone cutthroat trout is a State and BLM Sensitive Species, the BLM is a partner in the Cooperative Conservation Agreement for Yellowstone Cutthroat Trout within Montana (Sept. 2000), and the core of the agreement is to protect populations of YCT with unaltered genotypes, the SEIS is woefully inadequate in addressing several critical elements:

- *How the conservation agreement for YCT will guide development proposed in watersheds inhabited with conservation populations of YCT.*
- *It fails in Chapter 3 Affected Environment to identify the current distribution of all conservation populations of YCT in the planning area.*
- *It fails to identify the potential impacts oil and gas development will have on restoration efforts in watersheds with potential for the restoration of YCT.*

² The status of species on Bureau of Land Management Lands as defined by the BLM 6840 Manual; designated by the Montana State Office of the BLM in 1996.

- *It does not disclose in Chapter 4 Environmental Consequences, the potential deleterious impacts from conventional and CBNG development to imperiled populations of YCT.*
- *It recommends inadequate stipulations for protecting remaining populations of native trout in the planning area.*

The BLM's response in the FEIS was the following:

"The FEIS has been modified within the Wildlife, Aquatic Resources section of Chapter 3 to include additional information on the occurrence of YCT within the Planning Area. The potential for adverse impacts to individual populations of YCT or restoration efforts will be evaluated during the review process of an operator's POD. Should a proposed development activity have the potential for an adverse effect on the specie or individual population, the BLM would implement appropriate measures to provide protection."

(FSEIS, Chapter 5, 5-20)

With regard to the occurrence of YCT, the "additional information" in the FEIS at Chapter 3 is profoundly generalized, stating: *"today, pure, unhybridized populations are limited to some headwaters streams and Yellowstone National Park."* (FEIS, Chapter 3, 3-147) MTU reiterates our point that the Billings BLM Field Office has failed to identify – in any planning document authorizing oil and gas leasing – the current distribution of conservation populations of YCT in the planning area or the condition of their habitat.

Likewise, the impacts to those yet-to-be-identified populations by oil and gas activities authorized by leasing has not been analyzed and disclosed. If the BLM has not identified populations, habitat conditions, and current and future cumulative impacts in the planning area, then any determination about the impacts brought on by the irrevocable commitment of leasing – and subsequent drilling that leasing extends the right to conduct – is arbitrary and capricious.

NEPA requires that a federal agency decision, such as a decision by the BLM to offer parcels for mineral lease, be based on all relevant factors and be supported by the facts in the record. *See Penaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). An agency decision is arbitrary and capricious if:

The agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

MTU believe the BLM has failed to consider important aspects of protecting the river/stream segments crucial for YCT and has offered an explanation that runs contrary to the evidence before the agency. Indeed, BLM has failed to identify populations of YCT and has no way of knowing how oil and gas drilling authorized by leasing will affect these unidentified populations or the potential for restoration of this Sensitive Specie for which the BLM is obligated to help conserve through the Cutthroat Conservation Agreement. No stipulations have been developed to protect this Sensitive Specie as has occurred in other Field Offices, and no thorough analysis of impacts has been disclosed in any document authorizing leasing. Furthermore, BLM has clearly come to the conclusion that across the Sweetgrass/Park County line in the Butte Field Office, YCT and Blue Ribbon Fisheries require significant stipulations to prevent harm from oil and gas activities. Yet by crossing an administrative boundary, these same resources are granted no stipulations. This conclusion is so implausible that it can not be ascribed to a difference in view or the product of agency expertise, but rather a complete lack of planning that can only be remedied through a supplemental NEPA analysis or revision of the Billings RMP.

Furthermore, the BLM's response that "*The potential for adverse impacts to individual populations of YCT or restoration efforts will be evaluated during the review process of an operator's POD.*" and that if there is the potential for adverse effects that, "*the BLM would implement appropriate measures to provide protection*" amounts to closing the barn door after the horses have bolted. The irretrievable commitment of resources respective to oil and gas development on public lands occurs at the leasing stage, *not* at the POD stage. Therefore it is critical that stipulations protecting sensitive resources such as Blue Ribbon Trout Streams and native cutthroat trout be developed and analyzed *prior* to leasing.

Likewise, the "fundamental objective" of NEPA is to ensure that a federal agency "will not act on incomplete information only to regret its decision after it is too late to correct." *Southern Utah Wilderness Alliance v. Norton*, 457 F. Supp.2d 1253, 1261 (D. Utah 2006) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989)) (citation omitted). By leasing in the Billings FO where oil and gas activities could have deleterious effects to populations of Yellowstone cutthroat trout, and justifying this action by stating that "*The potential for adverse impacts to individual populations of YCT or restoration efforts will be evaluated during the review process of an operator's POD*", the BLM is knowingly acting on incomplete information, while abdicating its responsibility to a point in time that is *after* an irretrievable commitment of resources is made. In addition, BLM is in effect granting a right to development that the agency may not be able to mitigate the impacts of at the POD stage. This constitutes a clear NEPA violation that again, can only be remedied through a supplemental NEPA analysis of the revision of the Billings RMP.

Under the BLM's regulations governing fluid mineral leases, a lessee has the "right" to use the leased lands subject only to stipulations contained in the lease, restrictions deriving from nondiscretionary statutes, and "such reasonable measures as may be

required by the authorized officer.” 43 C.F.R. § 3101.1-2. The regulations go on to state, however, that the additional reasonable measures can only be imposed if “consistent with lease rights granted.” *Id.* A phrase often heard from agency personnel when considering the addition of new stipulations to an existing lease is that the agency’s “hands are tied” because the new stipulations are viewed as impermissibly encroaching the vested right of the lessee to develop. In other words, the BLM irretrievably and irreversibly commits resources at the point of leasing, making it extremely difficult or impossible to impose additional stipulations at a future date. See *Penaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004). This is supported by the BLM’s Handbook for Planning for Fluid Mineral Resources, which states, “In the fluid minerals program, [the point of irreversible] commitment occurs at the point of lease issuance.” U.S. Dep’t of Interior, Bureau of Land Management, Handbook H-1624-1, Planning for Fluid Mineral Resources.

Because of the practice of vesting development rights at the time of lease issuance, MTU is concerned that should a site-by-site analysis at the POD stage reveal that a particular parcel is not appropriate for surface occupancy, or other types of impacts, that the BLM’s hands would be tied, and the agency would be unable to effectively protect the resource, in this case Blue Ribbon Trout Streams and Yellowstone cutthroat trout, a Sensitive Specie. MTU believes that this underscores the importance of ensuring that the BLM has taken an adequate, hard look at existing and new information – through the Billings RMP revision or a supplemental NEPA analysis – prior to offering parcels of public land for mineral leasing.

Because the BLM has not applied any protections specific to Yellowstone cutthroat trout of Blue Ribbon Fisheries, MTU requests that at a minimum, the sale of these leases be deferred until the release of the new Billings RMP, for which draft alternatives are currently being developed. Additionally, we request that the Billings RMP adequately identify YCT populations, habitat conditions, restoration potential in drainages within the planning area, cumulative impacts and develop effective stipulations, as has already occurred in the Dillon and Butte Field Offices.

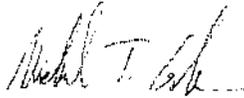
Conclusion

For contested leases in the Dillon Field, MTU requests that BLM apply stipulation CSU 12-13 in order to protect Westslope cutthroat trout with genetic purity of 90% to 99%, thereby making the leases conform to the Dillon Resource Management Plan.

For the contested leases in the Billings Field Office, MTU request that these leases be deferred so that a through analysis can be conducted as part of the Billings RMP revision and that effective stipulations can be developed consistent with other BLM Field Offices in Montana.

Thank you for the consideration of our protest.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael Gibson".

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