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BARRY G. O'CONNELL (1947-2006)

January 12, 2009

Gene Terland  
Montana State Director  
Bureau of Land Management  
5001 Southgate Drive  
Billings, MT 59101-4669

Via Fax (406) 896-5292 and U.S. Mail

RE: Notice of Competitive Oil and Gas Lease Sale - January 27, 2009  
Our file no: 86069/011

Dear Director Terland:

**I. Introduction**

N-Bar Ranch, LLC and Rossmore Plaza, LLC, surface owners of real property located in the NW~~1~~<sup>4</sup> of Section 15 and SW~~1~~<sup>4</sup> of Section 24, all in Township 12 North, Range 23 East, hereby protest the U.S. Bureau of Land Management's ("BLM") inclusion of Lease 01-09-15 in the January 2009 Montana BLM oil and gas lease sale. This protest is filed pursuant to 43 C.F.R. § 4.450-2 and 3120.1-3.

This protest is predicated on the BLM's failure to adequately consider the environmental impacts of its decision to offer the subject parcel for lease under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C.A. §§ 4321 et seq. and the Endangered Species Act of 1973 ("ESA"), 16 U.S.C.A. §§ 1531 et seq.

**II. General Protest Concerns**

Through the passage of NEPA, Congress clearly articulated a national policy to promote enhancement of the natural environment by ensuring consideration of environmental impacts prior to federal action.

Pursuant to NEPA, any federal agency contemplating a major federal action that would have a significant impact on the human environment must first

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prepare an Environmental Impact Statement ("EIS"). See 42 USCA § 4332. NEPA requires that an EIS include descriptions of:

- the environmental impacts of the proposed action;
- any unavoidable adverse environmental impacts;
- alternatives, including no action;
- the relationship between short term uses of the environment and maintenance of long-term ecological productivity irreversible and irretrievable commitments of resources; and
- secondary/cumulative effects of implementing the proposed action.

See 42 USCA § 4332(C).

Thus, before implementing any "major" or "significant" or "federal" action, the agency must consider the environmental impacts of that action, identify unavoidable environmental impacts and make this information available to the public in an EIS. All these conditions must be satisfied before implementing the proposed action.

The underlying land use plan covering the management areas within Fergus County is the 1978 Fergus Management Framework Plan ("MFP"). Unlike Resource Management Plans ("RMP") prepared today, the MFP lacks a NEPA component. Consequently, no EIS or other environmental assessment was prepared in conjunction with the plan.

In 1981, the Lewistown District of the Montana State Bureau of Land Management ("BLM") prepared an Oil and Gas Leasing Environmental Assessment ("EA") for the purpose of assessing the impact from Federal oil and gas leasing by the BLM. Although the EA begins by assessing oil and gas leasing in a three state area - Montana and the Dakotas - it goes on to describe the resources in the Lewistown District. While the EA evaluates the environmental impacts of oil and gas leasing in the district, its analysis is extremely general.

The Lewistown Field Office reviewed this EA and MFP in completing its Documentation of Land Use Plan Conformance and NEPA Adequacy ("DNA") and in recommending the lease parcels be offered for sale. Despite the fact that the EA is more than twenty years old, and the MFP is more than thirty years old, the BLM field office determined its obligations under NEPA regarding the lease sales were met though the existing MFP and EA. Accordingly, no current EA was performed.

Neither the MFP or the 1981 EA were designed to govern planning in the area for the length of time they have been in effect. It simply is not reasonable to expect the MFP to accurately forecast and plan for reasonably foreseeable development of oil and gas resources thirty years

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into the future. Leasing is an irretrievable commitment of resources and it is the BLM's duty under NEPA to update the leasing EIS to current conditions, so as to ensure that the public is aware of public impacts leasing would have on the natural environment. See *Montana Wilderness Association v. Fry*, 310 F.Supp.2d 1127, 1143 (D. Mont. 2004).

**III. The 1981 EA is Inadequate to Fulfill the BLM's Obligations Under NEPA.**

The adequacy of an EIS is judged by whether it constituted a "detailed statement" that took a "hard look" at all of the potentially significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. *Montana Wilderness Association*, 310 F.Supp.2d at 1143. The "hard look" mandated by Congress must be timely, and must be taken objectively and in good faith - "not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Id.* quoting *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9<sup>th</sup> Cir. 2000).

In *Montana Wilderness Association*, the Court examined the 1981 Oil and Gas EA for the Lewistown District - the same EA that the BLM relies upon here - as well as the West HiLine RMP/EIS, and determined they were insufficient to support the BLM's sale of oil and gas leases and pipeline right of way. *Montana Wilderness Association*, 310 F. Supp. 2d at 1146. Having first found the West HiLine RMP/EIS failed to perform the requisite "hard look" analysis, the Court went on to examine whether the 1981 EA was sufficient to fulfill BLM's obligations under NEPA. The Court noted it was unclear whether the 1981 EA was subject to public comment or discussion. The document contains no mention of public meetings, nor any comments from the public with responses by the agency, as would be required of an EIS. The Court further noted the BLM never issued a Finding of No Significant Impact (FONSI) for the 1981 Oil and Gas EA. As a result, the BLM did not fulfill its duties under 40 C.F.R. § 1508.9. The Court therefore concluded neither the West HiLine RMP/EIS nor the 1981 EA could support the BLM's sale of oil and gas leases. Summary judgment was granted to the plaintiff as to this issue. *Montana Wilderness Association*, 310 F.Supp.2d at 1146.

Just as in *Montana Wilderness*, here the 1981 Oil and Gas EA for the Lewistown District fails to satisfy the BLM's obligations under NEPA. The document is general in nature and its information is outdated. There has been no opportunity for public comment, as required under NEPA procedures. See 40 C.F.R. § 1500.1(b) ("NEPA procedures must ensure that environmental information is available to the public officials and citizens before decisions are made and before actions are taken," and further, "public scrutiny [is] essential to implementing NEPA.") Rather

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than serving as the framework for assessing the impact of the proposed action, reference to the 1981 EA is merely a way for the BLM to justify a decision already made. See 40 C.F.R. § 1502.2(G) (NEPA analysis is intended to "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"). This is contrary to statute and the principles which NEPA embodies.

**IV. Before offering lease 01-09-15 for sale, BLM should prepare a current Resource Management Plan and perform a proper Environmental Assessment.**

The BLM has no obligation to offer these specific lease parcels for sale. Rather than engaging in an irretrievable commitment of resources based on an outdated land use plan and an environmental assessment already recognized for its inadequacy by a Montana Federal District Court, the BLM should prepare a current RMP for Fergus County and EA to assess the environmental impact of leasing these interests. In so doing, the BLM must carry out its obligations under NEPA in a manner which encourages and facilitates public involvement. See 40 C.F.R. § 1500.2(d) ("Federal agencies shall to the fullest extent possible ... encourage and facilitate public involvement in decisions which affect the quality of the human environment"). Only in this fashion can the BLM satisfy its obligations under NEPA.

**V. Development of these oil and gas interests is likely to adversely affect wildlife and fishing on the N-Bar Ranch.**

Distribution patterns of big game wildlife reveals that these lease parcels lie in what is likely wintering habitat, and possibly calving territory, for elk on the N-Bar Ranch. Mule Deer and White Tail Deer also frequent this area. These migration patterns are confirmed by the individuals who work and reside at the N-Bar Ranch. Additionally, Flatwillow Creek, a cold-water fishery, lies in close proximity to the lease parcel located in Section 24. According to Anne Tews, Fish Biologist of Montana Fish, Wildlife and Parks, any mining activity in this area must take special precaution against its impacts on Flatwillow Creek, which is known to be an excellent Brown Trout fishery.

**VI. The BLM must also ensure its actions are not likely to jeopardize the continued existence of any endangered or threatened species.**

The Endangered Species Act contains substantive and procedural provisions requiring federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species. See 16 U.S.C. § 1536(a)(2). The ESA prescribes a

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three-step process to facilitate compliance with its substantive provisions. First, an agency proposing an action must inquire of the U.S. Fish and Wildlife Service whether any threatened or endangered species "may be present" in the area of the proposed project. See 16 U.S.C. § 1536(a)(3). If the answer is affirmative, the agency must prepare a "biological assessment" ("BA") to determine whether such species is "likely to be affected by the action." The BA may be part of the EA for the project. If it is determined that the project is likely to affect listed species, formal consultation with the U.S. Fish and Wildlife Service is required.

In Fergus County, the Pallid Sturgeon and Black-footed Ferret are both listed by the U.S. Fish Wildlife Service as threatened or endangered. The Montana Natural Heritage Program reports several species of concern in the township and range of the subject leases, including the Greater Sage-Grouse, Mountain Plover and Black-tailed Prairie Dog. Despite the likely existence of a threatened, endangered or sensitive species in the area, it does not appear any effort was made to consult with the U.S. Fish Wildlife Service or perform a biological assessment.

Prior to selling oil and gas leases, the ESA requires the agency to assess the potential effects of the action on threatened or endangered species. See 50 C.F.R. § 402.12(a). According to the Ninth Circuit, when the action is the sale of oil and gas leases, the scope of the action includes activities from leasing through post-production and abandonment. *Montana Wilderness Association*, 310 F.Supp.2d at 1150 (citing *Conner v. Burford*, 848 F.2d 1441,1453 (9 th Cir. 1988)).

In *Montana Wilderness Association*, the Court found the West HiLine RMP/EIS BA failed to perform an analysis of the effects of oil and gas production on any species and therefore concluded the BLM failed to fulfill its pre-leasing obligations under the ESA. *Montana Wilderness Association*, 310 F.Supp.2d at 1150. In the absence of any assessment of impacts from oil and gas development on threatened or endangered species, it appears the BLM has likewise failed to satisfy its obligations under the ESA here.

## VII. Conclusion

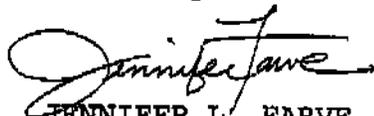
The inability of the 1978 MFP and 1981 EA to satisfy the BLM's pre-leasing obligations under NEPA and the ESA is obvious. Proceeding with these sales on the basis of these documents constitutes a blatant disregard for the process and lack of respect for the public's right to participate in these proceedings. Offering these leases for sale in the absence of the proper assessments is likely to result in an unforeseen impact to the natural environment. Accordingly, on behalf of the N-Bar Ranch, I request the BLM withdraw Lease 01-09-15 until the proper

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agencies have complied with applicable law and the objectives of NEPA.

Thank you for your consideration. Please feel free to contact me if you wish to discuss these concerns in further detail.

Sincerely,



JENNIFER L. FARVE  
Attorney for N-Bar Ranch, LLC  
and Rossmore Plaza, LLC

cc: client  
JLF4150.WPD