



# United States Department of the Interior



## BUREAU OF LAND MANAGEMENT

Montana State Office  
5001 Southgate Drive

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

February 12, 2009

In Reply Refer To:

3100 (MT922.JB)

MTM 98742

January 27, 2009 Competitive Oil & Gas Lease Sale

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

### Decision

Jennifer L. Farve

Attorney for N-Bar Ranch, LLC and Rossmore Plaza, LLC

Moore, O'Connell & Reffling

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Bozeman, Montana 59771-1288

### Protest Dismissed

On January 12, 2009, we received your protest filed on behalf of your clients (Enclosure 1). You protested the January 27, 2009, competitive oil and gas lease sale as it relates to parcel MT 01-09-15. This parcel is located within the boundaries of the Bureau of Land Management's (BLM) Lewistown Field Office (FO). As noted in the protest, oil and gas leasing decisions for this parcel are found in the Fergus Management Framework Plan (MFP) with National Environmental Policy Act (NEPA) documentation found in the Lewistown District Oil and Gas Environmental Assessment (Lewistown EA).

In addition to a number of general concerns, the protest generally focuses on four allegations:

1. The Lewistown EA is inadequate to fulfill the BLM'S obligations under NEPA;
2. Before offering parcel MT 01-09-15 for sale, the BLM should prepare a current Resource Management plan (RMP) and perform a proper Environmental Assessment;
3. Development of these oil and gas interests is likely to adversely affect wildlife and fishing on the N-Bar Ranch; and
4. The BLM must also ensure its actions are not likely to jeopardize the continued existence of any endangered or threatened species.

The BLM will address these specific points below.

1. **The Lewistown EA is inadequate to fulfill the BLM'S obligations under NEPA.**

**Protest:** The protest notes:

*Handwritten notes:*  
JB  
2/6/09  
C. O. J.  
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2-10

“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...

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.... 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 or any comments from the public with responses by the agency... 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" in the West HiLine planning area."

The protest further states that

"...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."

Finally, the protest alleges that:

"...rather 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."

**Response:**

The BLM notes that the protest references *Montana Wilderness Association*. This case considers the adequacy of the West HiLine RMP to serve as an oil and gas leasing document. It also considered the adequacy of the 1981 EA to form the basis of the NEPA analysis of oil and gas leasing and development in the RMP. It did not address leasing in Fergus County under the Fergus MFP and Lewistown EA. The BLM believes that these two documents continue to adequately address leasing in Fergus County.

A Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) was completed for the protested parcel. The DNA serves 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 plan/NEPA document 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.

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

**Protest:** The protest notes that:

"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 ... 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. § 15002d ("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."

**Response:** While acknowledging the age of the MFP and EA, the BLM believes that they are both adequate documents to form the basis for decision to offer the protested parcel for lease. The BLM reviewed the protested parcel prior to offering it for lease. As we explained earlier in this decision, the BLM completed a DNA for the protested parcel. The DNA serves 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 warrant new analysis or supplementation of existing NEPA documents, and whether the impact analysis supports the proposed action (oil and gas leasing).

While the protest is correct in saying that the BLM cannot document public involvement in the development of the EA, the agency can document such involvement in the development of the governing MFP and oil and gas leasing decisions. As documented in the preface to the combined summary of the Belt Mountains and Fergus MFPs dated November 1978, there was abundant opportunity for public comment. The preface to the document notes that each rancher with an allotment on public lands within the planning unit was contacted during the allotment management plan inventory. It also documents that there were public meetings in the Fergus Planning Unit in Roy, Winifred, Fort Benton, and Lewistown during preparation of the MFP. In addition, several agencies, including Montana Fish Wildlife and Parks (MFWP), Natural Resource

Conservation Service (NRCS), Fish and Wildlife Service (FWS), and Fergus and Chouteau Counties provided data and assistance during the preparation of the MFP.

The protest does not provide information disclosing a lack of public involvement in making leasing decisions for the planning area.

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

**Protest:** The protest states:

“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.”

**Response:** The protested parcel has several stipulations attached to it that address these concerns. The stipulation identified as Standard 16-3 in the sale notice allows the BLM to strictly control, or when necessary, exclude activity within special areas. Some of the areas include areas within 500 feet, or when necessary, within the 25-year flood plain from reservoirs, lakes, and ponds and intermittent, ephemeral or small perennial streams; within 1,000 feet, or when necessary, within the 100-year flood plain from larger perennial streams, rivers, and domestic water supplies. These restrictions would protect Flatwillow Creek. Other restrictions include protection of 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. This restriction protects winter range and calving areas. During review of this parcel for potential leasing, the BLM contacted MFWP. The protest provides no information to identify that these stipulations would not provide adequate protection for these resources.

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

**Protest:** The protest alleges that the BLM is in violation of the Endangered Species Act (ESA) by offering the protested parcel for lease. It alleges that the BLM should have consulted with the FWS before offering the protested parcel.

**Response:** The BLM has ensured compliance with the ESA through the stipulations and lease notices added to the lease parcel. In addition, during preparation of the Judith, Valley, Phillips RMP/EIS consultation with the Fish and Wildlife Service under Section 7(c) of the Endangered Species Act was completed. The Final RMP/EIS included a biological assessment that addressed oil and gas leasing and

development with concurrence from the Fish and Wildlife Service that formal consultation was not needed.

In addition to notices and stipulations added to the standard terms, the standard terms of the lease themselves require compliance with the ESA. Please see the following language of the language of the standard lease terms extracted from Section 6:

“If in the conduct of operations, threatened or endangered species, objects of historic or scientific interest, or substantial unanticipated environmental effects are observed, lessee must immediately contact lessor. Lessee must cease any operations that would result in the destruction of such species or objects.”

In addition to the standard terms, stipulation “Standard 16-3” contains a lease notice stating the following:

**“ENDANGERED OR THREATENED SPECIES--**The SMA is responsible for assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be in violation of the Endangered Species Act of 1973 by detrimentally affecting endangered or threatened species or their habitats.

The lessee/operator may, unless notified by the authorized officer of the SMA that the examination is not necessary, conduct the examination on the leased lands at his discretion and cost. This examination must be done by or under the supervision of a qualified resources specialist approved by the SMA. An acceptable report must be provided to the SMA identifying the anticipated effects of a proposed action on endangered or threatened species or their habitats.”

In this case, the SMA (surface management agency) is the BLM.

The lease parcel also includes the following stipulation that affects all portions of the parcel:

**“Endangered Species Act Section 7 Consultation Stipulation**

“The lease area may now or hereafter contain plants, animals, or their habitats determined to be threatened, endangered, or other special status species. BLM may recommend modifications to exploration and development proposals to further its conservation and management objective to avoid BLM approved activity that will contribute to a need to list such a species or their habitat. BLM may require modifications to or disapprove proposed activity that is likely to result in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of a designated or proposed critical habitat. BLM will not approve any ground-

disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the Endangered Species Act as amended, 16 U.S.C. § 1531 et seq., including completion of any required procedure for conference or consultation.”

The BLM believes that these mitigation requirements ensure that the ESA will be enforced during exploration or development of the lease if any threatened or endangered species are encountered. However, none have been identified in the area of the lease parcel

**Decision:** For the reasons stated above, your protest is dismissed. This Decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 (Enclosure 2) and the enclosed Form 1842-1 (Enclosure 3). If an appeal is taken, the Notice of Appeal must be filed in the Montana State Office at the above address within 30 days from receipt of this Decision. The appellant has the burden of showing that the decision appealed from is in error. If you wish to file a petition for a stay pursuant to 43 CFR Part 4, Subpart B § 4.21, during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

#### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;
3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

Copies of the Notice of Appeal, Petition for Stay, and any statement of reasons, written arguments or briefs must also be submitted to the Office of the Solicitor at the address shown on Form 1842-1 at the same time the original documents are filed in this office.

We are issuing a lease for the lands included in the protested parcel as it received an offer to lease at the sale. In case of appeal, the adverse party to be served is:

Coburn LLC, 2055 Highway 287, Wolf Creek, MT 59648

/s/ Gene R. Terland

Gene R. Terland  
State Director

3 Enclosures

- 1-Letter of January 12, 2009 (6 pp)
- 2-Form 1842-1 (1 p)
- 3-43 CFR 4.21(a) (2 pp)

cc: Coburn LLC, 2055 Highway 287, Wolf Creek, MT 59648  
Lewistown Field Office

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