



June 28, 2021

Submitted via electronic mail to: appeals-northern-regional-office@usda.gov

Jamie Tripp
Dillon District Ranger
Beaverhead-Deerlodge National Forest
USDA Forest Service
Northern Region
26 Fort Missoula Road
Missoula, MT 59804

Re: Objection to USFS FONSI - May 2021 Oil and Gas Lease for the Tendoy Project

Dear Responsible Official:

Upper Missouri Waterkeeper submits this Objection to the USFS concerning its Environmental Assessment and Finding of No Significant Impact for the Tendoy Project, Application for Permit to Drill on White Pine Federal #18-1 surface well, Federal Lease MTM-96679 (NWSE Sec. 18, T. 14 S., R. 9 W.)

Objecting Party Contact Information and Statement of Interests

This Objection is filed on behalf of the objecting party by its authorized representative:

Guy Alsentzer, Esq.
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Upper Missouri Waterkeeper is a Montana clean water advocacy non-profit organization dedicated to protecting fishable, swimmable, drinkable water and healthy river systems throughout the 25,000 sq. miles of Southwest and West-central Montana's Upper Missouri River Basin. We have over 500 members and supporters throughout Montana and the United States, including many supporters who live in Southwest Montana and who utilize public lands for recreation and other uses.

Our primary geographic focus begins at the headwaters of the Big Hole, Beaverhead, Ruby, Madison, and Gallatin Rivers and reaches downstream to the Missouri's inception at Three Forks, and along the Upper Missouri to Fort Benton, including its tributaries. The proposed Tendoy Project is located in the Red Rock watershed, a tributary of the Beaverhead and ultimately the Missouri and therefore we have discrete interests in this Project and its propensity to affect water and aquatic resources.

Statement of Reasons Why the Service's Actions Are Unlawful

1. USFS violated the National Policy Act (NEPA) by arbitrarily ignoring site-specific impacts and failing to provide a convincing statement of reasons as to why the project's impacts are insignificant.
2. USFS violated the National Environmental Policy Act (NEPA) by failing to adequately disclose or analyze the project's impacts on groundwater and surface water resources.

Upper Missouri Waterkeeper submitted February 19, 2016 scoping comments on the original Tendoy Proposal. Those comments including concerns about how federal mineral leasing and exploration or development activities in the headwaters of the Missouri River Basin, and specifically how mineral lease development of the Tendoy Project could negatively affect water resources of the Big Sheep Creek watershed, which is part of the Red Rock watershed and ultimately contributes flows – and pollution – to the Missouri River.

After the scoping period a new alternative drilling location was proposed – the White Pine alternative. While the location of the White Pine drill pad differs from the originally proposed well pad for the Tendoy Project the type of land and water resource impacts at both locations can foreseeably create are one and the same. Ultimately USFS selected the alternative White Pine location for the Tendoy Project. Because Upper Missouri Waterkeeper specifically commented upon land use, visual, and water resource impacts of the Project, and in particular the problematic nature of potentially-authorized fracking activities, Waterkeeper has the right to submit an Objection to the Tendoy Project's EA and FONSI here.

I. USFS violated the National Environmental Policy Act (NEPA) by arbitrarily ignoring site-specific impacts; failing to provide a convincing statement of reasons as to why the project's impacts are insignificant.

NEPA requires agencies to undertake thorough, site-specific environmental analysis at the earliest possible time and prior to any “irretrievable commitment of resources” so that the action can be shaped to account for environmental values. *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147, 1160 (10th Cir. 2004). Oil and gas leasing is an irretrievable commitment of resources. *S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006). Thus, NEPA establishes “action-forcing” procedures that require agencies to take a “hard look,” at “all foreseeable impacts of leasing” before leasing can proceed. *Center for Biological Diversity v. United States DOI*, 623 F.3d 633, 642 (9th Cir. 2010); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 717 (10th Cir. 2009). Chief among these procedures is the preparation of an environmental impact statement (“EIS”). *Id.* USFS, however, did not prepare an EIS.

In evaluating the significance of the impact of the proposed action, the agency must consider both the context of the action as well as the intensity. The several contexts in which the significance of an action must be analyzed includes “society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27. For site-specific actions, significance usually depends on the impact of the action on the locale, *id.*, but it also depends on the impact on the world as a whole. Thus, to determine the significance of the action, USFS needed to look at not only the environmental impacts on the area to be leased, but also the analysis of the cumulative effects of oil and gas leasing in the region.

USFS' EA did not outline any convincing statement of reasons as to why the act of authorizing the first exploratory mineral operation in an otherwise undisturbed, non-

industrialized, remote headwaters region - including extractive activities such as fracking - will not have any significant impact, and furthermore failed to provide any clear or “convincing statement of reasons” for a finding of no significant impact. The EA in fact admits that the Project area is already suffering from water quality pollution related to sedimentation, may affect aquatic species of concern, and admits the Project will create more impervious surfaces from which it is reasonably foreseeable that new sedimentation to waterways will occur, exacerbating existing water resources impairments.

Furthermore, the EA gives short shrift to the significance of authorizing first-of-its-kind fracking activities specifically in an ecologically sensitive headwaters region. The EA casually dismisses proven water contamination issues arising from known well cement casing failure rates and provides oblique references to engineering practices that will allegedly minimize water resource pollution. None of these cursory statements provide a hard look at proven instances of contamination from like exploration across the American West, and likewise conflates the legal requirement to identify an impact with the duty to take a hard look at a Project’s impacts on the human environment and reconcile their contextual significance.

USFS’ failure to recognize or address the contextual significance of fracking in remote, headwaters region of SW Montana’s Red Rock watershed is underscored by the broader context of the Project as a ‘growth inducing’ activity. The very purpose of the Project is to build a record sufficient to allow industrial-scale development in the Tendoy mineral play. And as noted previously this region does not presently contain traditional or widespread mineral leasing or development, and therefore the concept of this initial project as the first of potentially many larger industrial scale mineral development projects is not only properly within the purview of the EA, but also a mandatory assessment parameter for the USFS. Tellingly, the EA is silent on recognizing this context, reasonably foreseeable cumulative impacts of related future development, and silent as regards taking a hard look at the identified water and land resource impacts and how these could become much more severe – and increasingly problematic for local water quality, aquatic life, and aquatic species of concern – should full-scale development of the Tendoy’s occur.

USFS’ failure to consider the Project as a ‘growth-inducing’ action and related cumulative impacts, arbitrary disregard of site-specific impacts, and failure to provide a convincing statement of insignificance violates NEPA.

II. USFS violated the National Environmental Policy Act (NEPA) by failing to adequately disclose or analyze the project’s impacts on groundwater and surface water resources.

Inadequate Analysis of Surface Water Pollution Impacts

USFS arbitrarily concluded there would not be any significant Project impacts to ground or surface water despite admitting otherwise in its EA:

Increased traffic from construction and operation of the project could impact fishery habitat and populations through increased sediment entering the stream. Increases in sediment delivery could result in negative impacts to habitat such as decreased pool numbers and reduced pool depths which would reduce overwinter habitat. Increased sediment levels would likely also decrease available spawning habitat in both streams by filling in spawning gravels reducing the amount of available spawning habitat. Section 3.6.4, Impacts Common to Both Alternatives, pp.74.

This admission is significant because the Project's likelihood to contribute anything more than *de minimis* discharges of sediment to Little Sheep Creek (or its upstream ephemeral tributaries) will cause or contribute to violations of water quality standards because the downstream Sheep Creek is listed as an impaired water on Montana DEQ's 303d List (2018) for sediment, but does not possess a TMDL. USFS recognizes that DEQ's note for this segment specifically identifies sedimentation as a primary cause halting the waterway from fulfilling its aquatic life designated uses. EA at 35. An impaired waterway without a TMDL may not lawfully receive any further permitted discharges of the same pollutant of concern pending completion of the TMDL. See Friends of Pinto Creek, 504 F.3d 1007 (9th Cir. 2007) *cert denied*, 129 S. Ct. 896 (2009).

USFS arbitrarily concluded that it can rely on and rationalize general BMPs and ambiguous strategies aimed at minimizing pollutant discharges of sediment when in fact the legal requirement is that the Project may not cause or contribute to violations of water quality standards, and here may not functionally allow any sediment discharges exacerbating receiving waters' existing impairment for sedimentation. See 40 C.F.R. §§ 122.44, 122.44(i). Furthermore, to the extent the USFS is relying on the purported application of a nonsignificance exemption to nondegradation policy in Montana law to sanction the Project's new discharges of pollutants USFS failed to adequately examine how the proposed activity can avail itself of those exemptions without running afoul of antidegradation requirements of the federal Clean Water Act.

Inadequate Analysis of Aquatic Life Impacts

USFS also concludes that keynote aquatic species like the Westslope Cutthroat Trout will not be negatively affected by the Project. No one contests that sediment pollution to local waterways in the Tendoy range is a leading cause of waterway impairment and poor aquatic habitat. Likewise, no party contests the reality that sedimentation disproportionately affects the viability of sensitive trout species. Despite these facts USFS deems the Project insignificant in impact on aquatic species and water resources.

USFS hangs its hat on proposed roadway improvements and BMPs that will allegedly reduce sediment delivery to aquatic habitat by 50%. USFS specifically alleges that the combination of roadway improvements, road discharges only to ephemeral waterways some distance to surface waters, and vegetative and topographical buffering will make such sedimentation negligible in Little Sheep Creek. The EA also relies on stipulations for BMPs in all land use practices for the Project, and the statement that new roads will not be constructed in riparian or wetland areas, as proof of minimizing sedimentation and discharges to sensitive streams like Little Sheep Creek and therefore allegedly rendering such discharges insignificant..

The EA's stipulations and tiered references to state-level BMPs and appendices represent check-list recitations of bland best practices lacking specificity or guarantees that they will be capable or efficient in adequately protecting local water resources from degradation, particularly given the ecological and topographical context at-hand. It was capricious for USFS to conclude a vague assortment of generalized best practices are adequate to control – and prevent – unlawful further degradation of local water resources and aquatic habitat given known water quality impairments, a sensitive ecological context, and abundant record evidence showing the significant direct, indirect, and cumulative impacts that fracking operations incite on local environments.

USFS also failed to consider the ecological context of local surface and ground water resources or Westslope Cutthroat Trout. The Tendoy region is one of the few areas within the Upper Missouri River Basin providing high-quality habitat and range for this trout species, and likewise this region contains one of the few known populations of genetically pure Westslope cutthroat. USFS' cursory analysis of this trout population presumes hybridization contra to MT FWP data, and ignores the fact that this species has been reduced to less than 5% of their historic range and therefore requires, at a minimum, distinct assurances based upon targeted pollution control strategies proven to protect aquatic species from harm. The EA is devoid of such detailed analyses or specific mitigation strategies.

Inadequate Analysis of Ground Water Pollution Impacts

The Project is situated in a vast and complex hydrographic region. Fractured bedrock with unproven groundwater connectivity but consistent surface interface give rise to surface water expressions in the form of emergent wetlands. These small wetlands and groundwater sources are vital resources in the otherwise arid environment of the Tendoy. The EA says that the White Pine alternative will have no impacts to groundwater from drilling operations, yet provides no hard look at the fracking technologies necessarily involved. As mentioned earlier the extent of the EA's analysis of groundwater impacts is cursory mention of checklist procedures and standardized drilling operations that will allegedly minimize harm. Scientific studies have reported many instances across the country of groundwater contamination due to surface spills or oil and gas wastewater, including fracking flowback. Fracking and other unconventional production techniques pose inherent risks to groundwater due to releases below the surface, and these risks must be properly evaluated. Once groundwater is contaminated, it is very difficult – if not impossible – to restore the original quality of the water.

Groundwater contamination can occur in a number of ways, and the contamination may persist for many years. Poorly constructed or abandoned wells are recognized as one of the most likely ways by which contaminants may reach groundwater. Faulty well construction, cementing, or casing, as well as the injection of fracking waste underground, can all lead to leaks. Older wells that may not have been designed to withstand the stresses of hydraulic fracturing but which are reused for this purpose are especially vulnerable. Neither current federal or state rules ensure well integrity. The well casing can potentially fail over time and create pathways for contaminants to reach groundwater. Well casing failure can occur due to improper or negligent construction. The EA should have studied the rates of well casing failures over time and evaluate the likelihood that well casing failures can lead to groundwater contamination.

Similarly, fluids and hydrocarbons may contaminate groundwater by migrating through newly created or natural fractures. Many unconventional techniques intentionally fracture the formation to increase the flow of gas or oil. New cracks and fissures can allow the additives or naturally occurring elements such as natural gas to migrate to groundwater. Fluids can also migrate through pre-existing and natural faults and fractures that may become pathways once the fracking or other method has been used. USFS failed to consider long-term studies on the potential for fluid migration through newly created subsurface pathways. Fluid migration is of particular concern when oil and gas operations are close to waters that support special-status species such as the Westslope Cutthroat Trout.

Here USFS has elected to implement water resources stipulations which do little to ensure adequate protection of water resources and the wildlife that depend on them. Contamination of an aquifer due to fracking would affect the entire aquifer, causing impacts to water sources as far as miles away. On the whole USFS' analysis of groundwater impacts was

abbreviated and a checklist item at best, failing to reflect a considered analysis taking a hard look at the diverse and potentially significant pollution impacts that fracking or like unconventional production techniques could foreseeably create in the Tendency.

III. Conclusion

The EA and FONSI consider and authorize a Project and series of activities which USFS has unlawfully neglected to analyze, in violation of NEPA. Impacts to sensitive surface and groundwater resources, aquatic habitat and the Westslope Cutthroat Trout are, contrary to the EA's unsubstantiated conclusions, significant and in many cases unmitigable.

Respectfully submitted-

A handwritten signature in black ink, appearing to read "Guy Alsentzer", with a long horizontal flourish extending to the right.

Guy Alsentzer, Esq.