



MONTANA TROUT UNLIMITED

178 IBLA 159

Decided September 23, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

MONTANA TROUT UNLIMITED

IBLA 2009-150

Decided September 23, 2009

Appeal from a decision of the State Director, Montana State Office, Bureau of Land Management, dismissing a protest against the offering of certain parcels in a competitive oil and gas lease sale.

Affirmed in part; set aside and remanded in part.

1. Environmental Policy Act--Environmental Quality:
Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases

In considering the potential impacts of oil and gas exploration and development when BLM proposes to lease public lands for oil and gas purposes, BLM may properly use a "Documentation of Land Use Plan Conformance and NEPA Adequacy" worksheet to assess the adequacy of previous environmental review documents. Under Departmental rules implementing NEPA, 43 C.F.R. Part 46, BLM must determine, with appropriate supporting documentation, that the existing environmental analyses assess the environmental effects of the proposed action and reasonable alternatives, and the supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects than previously analyzed. If BLM fails to do so, its decision will be set aside and remanded for compliance with 43 C.F.R. § 46.120.

APPEARANCES: Sarah McMillan, Esq., Missoula, Montana, for appellant; Karen L. Dunnigan, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Montana Trout Unlimited (Montana TU) has appealed from a February 12, 2009, decision made by the State Director, Montana State Office, Bureau of Land Management (BLM), dismissing its protest of the January 27, 2009, competitive oil and gas lease sale. Ten of the parcels are administered by the Billings Field Office (FO) and three by the Dillon FO. Montana TU challenges the sale under both the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2) (2006), and section 302(a) of the Federal Land and Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006), contending that BLM failed to conduct site-specific environmental analysis prior to the sale, refused to supplement obsolete NEPA documents with new information, neglected to defer leases, and declined to add certain protective stipulations to leases, thereby negatively affecting the Yellowstone cutthroat trout (YCT). For the reasons discussed below, we affirm BLM's denial of Montana TU's protest in part and set aside and remand BLM's decision in part for further action consistent with this decision.

I. BACKGROUND

In preparation for the January 2009 oil and gas lease sale, BLM's Billings FO prepared an Interim Documentation of Land Use Conformance and NEPA Adequacy worksheet (DNA) for the parcels within its jurisdiction, assessing whether inclusion of the nominated parcels in the oil and gas lease sale conformed to existing, adequate NEPA analyses and land use plans. Appellant challenges the adequacy of that DNA, described below.

A. Land Use Plans, Environmental Impact Statements, and Records Of Decisions

The DNA states that the Billings FO considered the following documents: the 1984 Final Billings Resource Management Plan (RMP) (Final Billings RMP); the 1994 Record of Decision (ROD) for the 1992 Final Oil and Gas RMP/Environmental Impact Statement (EIS) (1992 RMP/EIS); and the 2003 ROD for the Final Statewide Oil and Gas EIS and Proposed Amendment to the Powder River and Billings RMPs (2003 RMP/EIS).¹ DNA at 1. While the DNA does not explicitly identify the YCT or information concerning that species, a review of the referenced NEPA documents informs the reader that fisheries within the RMP area, which include rivers, lakes, stock ponds, and streams, support populations of cutthroat trout. 1992 RMP/EIS at 41. The 2003 RMP/EIS identifies the YCT as a BLM species of concern and sensitive

¹ The 2003 RMP/EIS is not included in the record on appeal. They can be found at http://www.blm.gov/mt/st/en/fo/miles_city_field_office/og_eis.html. BLM developed the 2003 RMP/EIS to analyze the effects of Coalbed Methane exploration and production in the Billings RMP area.

species.² See 2003 RMP/EIS, Wildlife Appx. at Table WIL-1. The RMP Amendment explicitly states that oil and gas exploration and production may cause direct removal of fish habitat, degrade habitat with sedimentation, alter spawning and seasonal migration because of stream obstructions, cause direct loss of fish from accidental spills or pipeline ruptures releasing harmful substances, and reduce spring flows because of water removal for drilling activities. See 2003 Oil & Gas RMP/EIS Amendment at 4-183.

In order to protect reservoirs, as well as the recreational and environmental values of fisheries, BLM adopted a no surface occupancy stipulation (NSO) prohibiting surface occupancy and use within 1/4 mile of “designated reservoirs with fisheries” (designated fisheries stipulation).³ 1992 RMP/EIS at 145, 153, 161; 1994 ROD at 14.⁴ BLM also prohibits surface occupancy and use within riparian areas, 100-year flood plains of major rivers, water bodies, and streams to protect the unique biological and hydrological features associated with those waters, and to maintain riparian/wetland function and water quality (riparian NSO stipulation).⁵ 1994 ROD at 9. In a Controlled Surface Use (CSU) stipulation, BLM further proscribes surface occupancy and use on slopes greater than 30 percent to prevent erosion on steep slopes (erosion NSO stipulation).⁶ *Id.* at 9-10. No specific stipulation was created for the YCT. However, “these stipulations can be revised, withdrawn, or added to a specific lot, tract, aliquot part, or parcel of land if new data or changing

² The 2003 RMP/EIS’s glossary defines “species of concern” as “[a]nimals not yet listed as endangered or threatened but are undergoing status review by a federal or state agency.” On August 18, 1998, the U.S. Fish and Wildlife Service (FWS) received a formal petition to list the YCT as threatened. 66 Fed. Reg. 11244 (Feb. 23, 2001). The FWS found that listing the YCT as either threatened or endangered was not warranted. 71 Fed. Reg. 8818 (Feb. 21, 2006). A “sensitive species” requires special management consideration to avoid potential future listing under the Endangered Species Act. BLM Manual 6840 – Special Status Species Management, Glossary 5 (Dec. 12, 2008). The YCT, no longer a species of concern, remains a BLM sensitive species.

³ BLM designated this stipulation as NSO 11-5.

⁴ It is unclear from the record which reservoirs within the Billings FO’s boundaries are “designated” and what procedures BLM follows to denominate “reservoirs with fisheries.”

⁵ This stipulation is labeled NSO 11-2.

⁶ BLM identifies this stipulation as CSU 12-1.

environmental conditions warrant.” 1992 RMP/EIS at i. BLM found no reason to add stipulations in the 2003 Oil & Gas RMP/EIS Amendment.⁷

B. DNA Determination and Supporting Record

The Billings FO commented in the DNA that it had “consulted with Montana Fish, Wildlife, and Parks, Region 5 [FWP], and the Helena office, on these specific proposed lease parcels . . .” DNA at 3. The record on appeal does not contain any record of or reference to such consultation. BLM’s Answer on appeal attaches a declaration of Jayson R. Parks, a Wildlife Biologist with the Billings FO. *See Answer*, Ex. 2. Parks explains that FWP requested, out of specific concern for YCT habitat, that BLM defer or apply the riparian NSO stipulation to MTM 98730, that BLM “deferred leasing the portions of the parcel in Section 24 because it was upland adjacent to the river and could not be protected by an NSO stipulation,” and that the riparian “NSO stipulation was applied to the remainder of the parcel in Sections 25 and 35.” *Answer*, Ex. 2 at 2. BLM also informs the Board on appeal that the State agency “requested that BLM apply [the riparian NSO] stipulation for all lots in [MTM 98730] for YCT habitat protection along Little Timber Creek,” and that “BLM applied [the riparian NSO] stipulation to the lots intersecting Little Timber Creek.” *Id.* With respect to MTM 98738, we are told that the “FWP requested that BLM defer portions of [that] lease, or alternatively apply [the riparian NSO] stipulation to protect, among other things, YCT habitat,” and that “BLM deferred leasing in Section 17 because it was upland adjacent to the river and could not be protected by [the riparian NSO] stipulation.” *Id.* Finally, BLM states that the riparian NSO stipulation “was applied to the remainder of the parcel in sections 21 and 22.” *Id.*

The DNA poses the following questions: “Is the existing analysis adequate and are the conclusions adequate in light of any new information or circumstances (including, for example, . . . most recent BLM lists of sensitive species)? Can you reasonably conclude that all new information and all new circumstances are insignificant with regard to analysis of the proposed action?” In reply, the Billings

⁷ BLM included in the record the Final Supplement to the Montana Statewide Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans, dated Dec. 2008. *See Administrative Record (AR)*, attachment 9. Because the Billings FO’s DNA does not identify the 2008 State RMP and there is no record evidence that the decisionmaker considered that RMP in deciding to include the parcels in the Jan. 2009 Lease Sale, we will not consider that NEPA document on appeal. *Center for Native Ecosystems*, 174 IBLA 361, 369 (2008) (“Where the record fails to demonstrate that additional NEPA documents were reviewed and considered by the decisionmaker, we will not consider those documents on appeal in determining whether the procedural requirements of NEPA have been satisfied.”).

Field Manager simply states without any specifically referenced support, that “all nominated parcels are considered against current resource data,” to conclude that “the existing analysis in the RMP/EIS remains valid.” DNA at 2-3. In response to the query whether existing NEPA documents analyzed site-specific impacts related to the current proposed action, the Field Manager replies generally that the 1984 ROD identifies “specific stipulations [that] protect the then known resources in these areas” and that “a large amount of resource information has been gathered and utilized [since 1994] to determine which stipulations to apply to mitigate the impacts to these resources.”⁸ *Id.* Without further discussion, the DNA summarily asserts and concludes that the “stipulations are appropriate and have been applied to the proposed action where appropriate.” *Id.*

The Billings FO determined the proposed action was substantially the same as proposed actions previously analyzed and that these prior environmental analyses adequately assessed the environmental consequences of the proposal to include the identified parcels in the January 2009 lease sale.

On December 12, 2008, the State Director issued a Notice of Competitive Oil and Gas Lease Sale, authorizing BLM to offer approximately 21,736.02 acres on 26 parcels in Montana, including 16 parcels administered by the Billings FO and 10 parcels administered by the Dillon FO.⁹ As to the Billings FO parcels, 9 contained the erosion stipulation (nos. 2 through 5, 12, and 13); 12 contained the riparian NSO stipulation (nos. 3 through 5, 7, 11, 14, and 16); and 1 contained the designated fisheries NSO stipulation (no. 14). AR, attachment 2, Jan. 27, 2009, Competitive Oil and Gas Lease Sale Notice at 13, 27-28, 29.

Montana TU protested the sale of 13 of those parcels on January 12, 2009.¹⁰ According to appellant, BLM designated the YCT as a sensitive species in 1996. *See* Protest at unpaginated 3 n.2. BLM subsequently became a signatory to interagency guidance known as the 2007 Memorandum of Understanding and Conservation Agreement for Westslope Cutthroat Trout and Yellowstone Cutthroat Trout in

⁸ The 1992 RMP/EIS, at page 41, considered wildlife habitat, including fisheries, among the resources.

⁹ Lands in North Dakota were also opened for lease.

¹⁰ Montana TU protested the Billings FO’s inclusion of leases MTM 98728 through 98734 (parcel nos. 1 through 7) and MTM 98736 through 98738 (parcel nos. 9 through 11). Of those 10 parcels, 5 have the erosion NSO stipulation (parcel nos. 2 through 5) and 5 have the riparian NSO stipulation (parcel nos. 3, 4, 5, 7, and 11). Montana TU also protested the Dillon FO’s inclusion of leases MTM 98744 (parcel no. 17), 98745 (parcel no. 18), and 98748 (parcel no. 21).

Montana (MOU). *Id.* at unpaginated 4.¹¹ Montana TU noted that the Billings FO was scheduled to revise its RMP, and that the neighboring Butte and Dillon FOs had already revised their respective RMPs. *Id.* at unpaginated 3, 7. The implementing RODs for the revised RMPs require a “1/2 mile NSO for streams with cutthroat trout of 99% or higher genetic purity and a 1/2 mile CSU for streams with 90-99% genetic purity . . . [and] a 1/2 mile NSO for Blue Ribbon Trout Streams.”¹² *Id.* at unpaginated 7.

Against that backdrop, Montana TU claimed that the Billings FO failed to identify “in any planning document authorizing oil and gas leasing – the current distribution of conservation populations of YCT in the [lease sale] area or the condition of their habitat” and how oil and gas activities would impact the sensitive species. *Id.* at unpaginated 3. The information BLM did rely on was inadequate to support the lease sale, stated Montana TU, because the existing NEPA documents were outdated and incomplete. By declining to conduct supplemental NEPA analysis before the sale, especially in the wake of neighboring RMP revisions and the MOU, BLM allegedly failed to take a “hard look” at existing and new information regarding adverse impacts to YCT caused by oil and gas activities in violation of NEPA, 42 U.S.C. § 4332(2) (2006). Protest at unpaginated 5. Montana TU considered BLM’s decision to issue leases without the more restrictive stipulations required by other BLM field offices to be irreversible, and requested deferral of the protested parcels until a revised Billings RMP, containing similarly restrictive stipulations, was finalized. *Id.* at unpaginated 7.

Montana TU also contended the Dillon FO unjustifiably failed to apply its CSU stipulation, for protecting lands within 1/2 mile of streams containing Westslope cutthroat trout, to parcel numbers 17, 18, and 21, claiming those parcels are within 1/2 mile of Cabin Creek, and that this creek supports Westslope cutthroat trout. Protest at unpaginated 2-3.

In denying Montana TU’s protest, BLM responded that the Billings FO included in every lease the appropriate stipulation approved by the existing land use plan

¹¹ The signatories to the MOU commit to “maintain, secure, and/or enhance cutthroat populations,” “continue to survey waters to locate additional cutthroat populations,” and “restore and/or expand populations of each cutthroat subspecies into selected suitable habitats with respective historical ranges.” Statement of Reasons (SOR), Ex. 4, MOU at 3. They further agree to “significantly reduce threats to existing populations,” “increase their spatial distribution and abundance,” and “protect genetic integrity.” *Id.*, MOU at 4.

¹² “Blue Ribbon” is a designation applied by FWP to identify recreational fisheries of extremely high quality. SOR at 2.

decision (the 1994 ROD), and that Montana TU failed to provide “any significant new circumstances or information bearing on the environmental consequences of leasing which were not within the broad scope analyzed previously in the governing RMPs” Decision at 3-4. BLM further found that the Dillon FO had imposed appropriate protective stipulations because the Westslope cutthroat trout fishery in Cabin Creek is “over 6 miles upstream from these lease parcels.” *Id.* at 2. Montana TU appealed.

II. ANALYSIS

Montana TU claims that the application of more stringent NSO and CSU stipulations to the subject oil and gas leases is essential to the conservation of the middle Yellowstone River area’s native YCT. SOR at 5. Appellant argues that the stipulations BLM attached to the protested leases are inadequate to protect the sensitive species, and asserts that BLM violated NEPA by (1) failing to perform a site-specific, pre-leasing NEPA analysis of the potential impacts of oil and gas exploration and development on YCT; (2) failing to supplement existing NEPA documents; and (3) failing to defer leasing until a new Billings RMP is finalized. Regarding the Dillon FO, Montana TU charges BLM with violating its own RMP, in violation of FLPMA, claiming that BLM erred by declining to apply the CSU stipulation to whole streams containing genetically pure populations of Westslope cutthroat trout.¹³

BLM’s response relies primarily on a Board order adjudicating an earlier appeal by appellant, *Montana Trout Unlimited*, IBLA 2007-231, Order dated April 30, 2008. In that appeal, Montana TU argued that BLM should have prepared site-specific, pre-leasing NEPA analyses before leasing parcels that were issued without NSO stipulations, and also contended that the environmental documents relied upon by BLM failed to take into account more recent scientific information and concerns regarding Westslope cutthroat trout, pointing specifically to the MOU. The Board held that BLM was not required to conduct site-specific analysis at the lease sale stage and that, even though the MOU provided new information about the status of the fish and the goals and objectives of the parties to the MOU, Montana TU had

¹³ Montana TU also avers that the Dillon FO violated NEPA by failing to reference a NEPA document that discusses “the extent to which Westslope uses the lower reaches of Cabin Creek during the portions of the year when it has not been dewatered, nor what impacts oil and gas development might have on a stream that is dewatered seasonally.” SOR at 28. Because the organization failed to raise the argument in its protest to the State Director, it is precluded from raising the issue for the first time on appeal. See 43 C.F.R. § 4.410(c)(1) (party to a case limited on appeal to those issues “raised by the party in its prior participation”); *Forest Guardians*, 170 IBLA 253, 259 (2006).

failed to demonstrate that the oil and gas leases at issue would significantly affect Westslope cutthroat trout in a manner not already addressed in the environmental documentation relied upon by BLM. We have held that when arguments raised by an appellant have been addressed in other Board decisions to which it was a party, and the appellant fails to show that those arguments remain viable, the Board may dispose of such arguments in summary fashion. *Wyoming Outdoor Council*, 172 IBLA 289, 294 (2007). Here, however, we think the circumstances on appeal sufficiently distinguishable from those found in IBLA 2007-231 to warrant specific review of appellant's present challenge.

A. The Billings FO Had No Legal Duty to Perform Site-Specific, Pre-Leasing NEPA Analysis on Parcels Included in the Protested Oil and Gas Lease Sale

Montana TU argues that NEPA requires BLM to evaluate the reasonably foreseeable, site-specific, parcel-by-parcel environmental impacts that oil and gas exploration and development would have on the YCT before selling lease parcels because the environmental consequences of leasing the land as it relates to YCT were not previously analyzed. SOR at 13-14. It is undisputed that BLM is required by section 102(2)(C) of NEPA to consider the reasonably foreseeable consequences of its actions. Thus, BLM must consider the likely impacts of oil and gas development that may result from approval of oil and gas lease sales. The questions then become at what point, and to what level of detail, must analyses of a particular issue occur. Montana TU bears the burden of demonstrating with objective proof that BLM failed adequately to consider reasonably foreseeable consequences when required to do so. *See Colorado Environmental Coalition*, 171 IBLA 256, 262 (2007). We find that Montana TU fails to meet that burden.

We have held that NEPA documents, like the EISs that support large-scale oil and gas leasing, do not need to be as site-specific as an EIS or an Environmental Assessment that supports a site-specific action. *See Biodiversity Conservation Alliance*, 174 IBLA 1, 16 (2008). BLM may defer site-specific environmental review until any ground-disturbing activity is proposed. *Id.* In this case, no site-specific action has been proposed, and we find BLM's discussion regarding the potential adverse impacts to the quality of YCT habitat caused by oil and gas operators in the 2003 Oil & Gas RMP/EIS Amendment sufficient. *See 2003 Oil & Gas RMP/EIS Amendment* at 4-183. If an operator seeks to engage in on-the-ground activity in the future, it must submit an application for a permit to drill (APD) and a surface plan of operations, which may only be approved following site-specific NEPA analysis. BLM may then either deny the application, require best management practices, or modify operations to protect resources such as YCT habitat at that time. 43 C.F.R. §§ 3101.1-2,¹⁴

¹⁴ Departmental regulations at 43 C.F.R. § 3101.1-2 describe BLM's specific authority
(continued...)

3162.3-1(a) and (c), 3162.5-1(a); Instruction Memorandum (IM) No. MT-2009-039 (April 23, 2009).¹⁵ If BLM approves an APD with which Montana TU disagrees, appellant may file an appeal pursuant to 43 C.F.R. Subpart 3165.

B. The MOU and the Stipulations of Other RMPS Are Not Per Se Evidence of a Potential Significant Impact to the YCT Not Already Considered by BLM

Montana TU contends that the environmental documents relied upon by BLM failed to take into account the MOU and the updated Dillon and Butte FOs' RMPs, which contain more recent information regarding YCT, and that a "supplemental NEPA analysis to account for this significant new information . . . is thus required by NEPA." SOR at 19. "Because [of] the designation of YCT as [a] sensitive species, the completion and signing of the [MOU], and the designation of Blue Ribbon Fisheries are potentially significant new pieces of information requiring additional analysis of the foreseeable impacts from oil and gas activity (beyond that contained in the 1984 RMP, the 1994 O&G RMP, or the 2003 O&G RMP/EIS) BLM[']s decision to rely upon DNA documents to justify the lease sales violated NEPA." *Id.* at 22.

Montana TU notes that leases on the Yellowstone River are "protected with a 1/2 mile NSO stipulation[] if offered by the Butte Field Office (pursuant to the recently proposed Butte RMP), while similar leases on the same Yellowstone River would not receive the same NSO protection if they are . . . in the [jurisdiction of the] Billings Field Office." SOR at 20. Appellant asserts BLM is required to supplement its environmental analysis, arguing that the most restrictive, protective stipulation must be applied to entire streams that have protected cutthroat trout, not to sections of streams, as neither fish nor water remain fixed in place within a stream. *Id.* at 20, 27.

¹⁴ (...continued)

to impose post-lease, site-specific surface use controls. BLM's authority to prescribe more stringent protection measures is not affected by the regulation. *See Yates Petroleum Corporation*, 176 IBLA 144, 156 (2008). However, BLM may rely on statutory categorical exclusions created by section 390 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, permitting it to forego further NEPA analysis before approving certain APDs submitted within 5 years of a final RMP with respect to the subject lands. 42 U.S.C. § 15942 (2006).

¹⁵ This IM instructs BLM that when a project is proposed, the agency should look at the special status species list, Natural Heritage database information, and other information, as appropriate, to determine if sites or habitats of special status species are known to occur or could occur in the project area. If a proposed alternative or project has the potential to positively or negatively affect special status species or their habitat, the impacts should be described and addressed in the NEPA analysis.

The parties agree that under NEPA, a Federal agency is required to take a hard look at new information or circumstances concerning the environmental effects of the proposed action if the new circumstances “raise significant new information relevant to environmental concerns.” *Coalition of Concerned National Park Service Retirees*, 169 IBLA 366, 375 (2006) (internal quotation and citation omitted); 40 C.F.R. § 1502.9(c)(ii). Appellant, however, must demonstrate on appeal that “facts relevant to environmental concerns and bearing on the proposed action or its impacts have emerged since the EIS was prepared or last amended,” necessitating supplementation of NEPA analyses. *Center for Native Ecosystems*, 171 IBLA 256, 267 (2007).

Montana TU offers no analysis showing how the MOU and the revised Dillon and Butte RMPs evidence the existence of any potential significant impact to the YCT not already considered by BLM before the lease sale at issue. The MOU outlines goals and objectives, rather than express requirements, to conserve and restore YCT. More importantly, it does not discuss how any particular lease sale affects specific environmental concerns. Our own review of the Dillon February 2006 RMP shows that the 1/2 mile NSO stipulation only applies to known populations of *Westslope* cutthroat trout, not YCT. Neither that RMP nor its implementing ROD includes any discussion specific to YCT. The Butte RMP extensively discusses YCT occurrence and management within the Butte FO planning area, but Montana TU does not point to any discussion in the RMP or its implementing ROD that provides any new information regarding the YCT that the Billings FO did not consider in its land use and environmental documents. Simply noting the existence of RMPs with different mitigation measures for sensitive species does not prove a NEPA violation.

In *Coalition of Concerned National Park Service Retirees*, appellants protested an oil and gas lease sale because, among other reasons, BLM had failed to consider significant new information regarding special status wildlife. The applicable RMP/EIS in that case allowed for a 1/4 mile NSO stipulation around sage grouse leks. Appellants claimed that the biological status of the sage grouse, and consensus on what is required to protect that species, had changed dramatically since the applicable RMP/EIS was published. They argued that the NSO stipulation was insufficient because the State’s Game and Fish Department had subsequently adopted a 2-mile buffer around the leks. The State’s protective measures, according to appellants, qualified as significant new information and BLM violated NEPA’s hard look requirement by failing to adopt a similar stipulation for the protested leases before the sale. 169 IBLA at 376. The Board disagreed. We found the appellants failed to show, with objective proof, that the State stipulations contained or constituted evidence that BLM had failed to consider a substantial environmental question of material significance to leasing. *Id.* at 386-87.

The reasoning in *Coalition of Concerned National Park Service Retirees* applies here. The existence of the MOU and NSO stipulations in other RMPs is not *per se*

evidence of a potential significant impact to the YCT not already considered by BLM. Nevertheless, Montana TU's claim that the Billings FO failed to take a hard look at whether all significant environmental impacts were previously considered and whether new information regarding YCT is or is not significant raises a question as to the adequacy of the DNA. SOR at 22.

C. The Billings FO Inadequately Documented in its DNA Whether New Circumstances or Information Would Result in Significantly Different Environmental Effects

NEPA requires an agency that is assessing whether it can rely on existing NEPA documents for a proposed action first to examine existing analyses to determine whether they adequately analyzed the effects of the proposed action on matters of environmental significance, and then to determine whether there exists new information relevant to environmental concerns that is significant and was not previously analyzed. We have stated that the

record must show that [BLM] examined existing NEPA statements to identify the portions of those statements that analyzed the effects of oil and gas development on [relevant environmental concerns]. After identifying existing NEPA analysis, it was then incumbent upon BLM reviewers to determine whether there were “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” See 40 CFR 1502.9(c).

Center for Native Ecosystems, 170 IBLA 331, 346 (2006); see *Southern Utah Wilderness Alliance v. Norton*, 457 F.Supp. 2d 1253, 1264 (D.Utah 2006) (“agencies must be alert to new information that may alter the results of its original environmental analysis, and continue to take a hard look at the environmental effects of its planned action” (internal punctuation and quotations omitted), *aff'd sub nom. Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008). BLM's NEPA analysis must be supported by the administrative record. See *Center for Native Ecosystems*, 170 IBLA at 346. That record must reflect that BLM has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information. See, e.g., *Randy A. Green*, 177 IBLA 264, 281 (2009) (setting a BLM decision aside and remanding so that BLM could more clearly indicate that it has taken a “hard look” at the potential environmental impacts to the current biological resources before a Federal land sale).

Departmental regulations at 43 C.F.R. Part 46, effective November 14, 2008, (73 Fed. Reg. 61292 (Oct. 15, 2008)), also address BLM's responsibility to support its decisions in the record, providing that

[a]n existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the [decision maker] determines, *with appropriate supporting documentation*, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. *The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.*

43 C.F.R. § 46.120(c) (emphasis added). While not cited by either party, this rule existed when BLM published its notice of competitive oil and gas lease sale, and is applicable here.¹⁶

In the DNA, BLM states that the parcels were “considered against current resource data.” DNA at 2. The record fails to show that BLM “reasonably conclude[d] that all new information and all new circumstances are insignificant with regard to analysis of the proposed action.” DNA at 3. BLM clearly recognizes the YCT as a resource of environmental significance; the agency designated it a sensitive species and signed an MOU to help conserve YCT. Moreover, the Billings FO acknowledges that new information that may impact the proposed action existed at the time it prepared the DNA. BLM consulted Montana FWP about the YCT located within the oil and gas lease sale area. *See* BLM answer at Ex. 2. The agency also purported to evaluate “current resource data” and a “large amount of resource information,” but nowhere in the DNA does BLM state whether the new information discussed matters of environmental significance and, if so, why it does not result in significantly different environmental effects from those previously analyzed in existing NEPA documents. Moreover, the record on appeal is devoid of “current resource data,” a “large [or any] amount of resource information,” or any summary of, or specific reference to such.

[1] In considering the potential impacts of oil and gas exploration and development when proposing to lease public lands for oil and gas purposes, BLM may

¹⁶ The regulations codified Departmental policy in place since Dec. 29, 2000, which had instructed BLM “to establish an administrative record that documents clearly that [the decision maker] took a ‘hard look’ at whether new circumstances, new information, or unanticipated environmental impacts warrant new analysis or supplementation of existing NEPA documents and whether the impact analysis is valid for the proposed action,” even where the decision maker determines he or she can properly rely on existing NEPA documents, and that the “documentation can be concise but must adequately address the criteria.” IM 2001-062 (Dec. 29, 2000), *replacing* IM 99-147 (July 1, 1999).

properly use a DNA to assess the adequacy of previous environmental review documents. Under NEPA and the Department's implementing regulations at 43 C.F.R. Part 46, BLM must determine, with appropriate supporting documentation, that the existing environmental analyses assess the environmental effects of the proposed action and reasonable alternatives, and the supporting record must include an evaluation of whether new circumstances, new information, or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects. If BLM fails to do so, the decision that relied upon the inadequate documentation will be set aside and remanded for compliance with 43 C.F.R. § 46.120. Given the paucity of supporting documentation in this record, we are unable to determine whether BLM has taken the requisite hard look at new information and, accordingly, set aside BLM's decision and remand this case for action consistent with this holding.

*D. BLM Had No Duty to Defer Offering the Challenged Parcels
for Lease Until the New Billings FO RMP Is Finalized*

Montana TU argues BLM should have deferred the lease sale until the new Billings FO RMP is finalized. In the protest decision, the State Director acknowledged that BLM is working on a revised RMP for the Billings FO and has established a tentative completion date in 2011. Citing IM No. 2004-110 and BLM Handbook, H-1601-1, he explains BLM's general policy of following current land use allocations and existing land use plan decisions for oil and gas and related energy actions during preparation of land use plan amendments or revisions. Decision at 3. He also indicates that "a decision to temporarily defer an action could be made where a different land use or allocation is currently being considered in the preferred alternative of a draft or proposed RMP revision or amendment," but that "[t]hese decisions would be specific to individual projects or activities and must not lead to an area-wide moratorium on certain activities during the planning process." *Id.* Noting that IM No. 2004-110, Change 1 provides additional guidance when BLM has developed alternatives and has released a draft RMP/EIS for public review, the decision explains that the Billings RMP revision is in a very early stage, and that a draft RMP with a preferred alternative has not yet been developed. Nevertheless, the State Director reports, BLM decided to defer leasing two areas. *Id.* at 4.

Nothing in NEPA or the implementing regulations require BLM to postpone or deny a proposed action covered by an existing EIS for the current land use plan in order to preserve alternatives during the course of preparing a new land use plan and EIS. See 40 C.F.R. § 1506.1(c)(2); *Colorado Environmental Coalition*, 169 IBLA 137, 144 (2006). While the Billings FO has discretion to temporarily defer leasing during land use planning revision, it need not do so merely because its RMP is "in the process of being revised." BLM's policy guidance only advises a state director to consider deferring leasing of lands designated as subject to restraints on leasing in a

preferred alternative of a draft or final RMP revision or amendment, but which had not been so designated in the existing RMP. *Biodiversity Conservation Alliance*, 174 IBLA 174, 178 (2008). These are not the facts before us. Montana TU has not shown that BLM violated NEPA by declining to defer leasing and relying on its existing land use plans.

E. BLM did not Violate FLPMA

Montana TU argues that the Billings FO should have created a more restrictive stipulation to protect YCT habitat, but has not stated with specificity or objective proof, how the existing designated fisheries, erosion, and riparian NSO stipulations are inadequate. Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), directs the Secretary, “by regulation or otherwise, [to] take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” In order to show BLM failed to comply with section 302(b) of FLPMA, an appellant must, at a minimum, show that issuing leases to the parcels at issue without more protective stipulations would result in adverse impacts to resource values. *See Continental Land Resources*, 162 IBLA 1, 7 (2004). Although it objects to BLM’s choice of stipulations, Montana TU has not substantiated its argument that the project, with these stipulations, will actually cause unnecessary or undue degradation of the public lands.

Finally, Montana TU alleges that the Dillon FO violated FLPMA by failing to adopt a CSU stipulation, which was approved in the RMP, for parcels 17, 18, and 21. FLPMA mandates that “the Secretary shall manage the public lands . . . in accordance with the land use plans . . .” 43 U.S.C. § 1732(a). Departmental regulations provide that once BLM has approved an RMP, “all future resource management authorizations and actions . . . shall conform to the approved plan.” 43 C.F.R. § 1610.5-3(a). The Dillon FO RMP contains a CSU stipulation, designated as CSU 12-13, to protect lands within 1/2 mile of streams containing Westslope cutthroat trout. Montana TU argues that the entire span of Cabin Creek supports Westslope cutthroat trout and runs within 1/2 mile of the parcels of concern. BLM’s assessment of Cabin Creek shows that cutthroat trout distribution begins at stream mile 11 and ends at stream mile 13.7, but those stream miles are not in the vicinity of the parcels at issue. BLM also explained that those parcels are where the stream is diverted downstream for agricultural purposes and cannot there sustain the protected fish. Thus, no need exists to place the CSU stipulation on that area of Cabin Creek. Montana TU makes no argument to the contrary.

FLPMA contains no *per se* rule requiring BLM to apply universally stipulations identified in an RMP. Rather, BLM correctly applies such stipulations if and as appropriate. An appellant must show BLM abused its discretion in determining which stipulations to apply to each parcel; Montana TU has not done so here.

