



*Submitted via fax: (775) 861-6745.*

September 16, 2019

Nevada State Office  
1340 Financial Boulevard  
Reno, Nevada 89502-7147

**RE: Protest of lease parcel NV-19-10-131 in Nevada BLM Oct 2019 Competitive Oil & Gas Lease Sale**

Dear Director Jon Raby:

Please accept the following protest on behalf of Trout Unlimited (TU) pursuant to Bureau of Land Management's (BLM) regulation 43 CFR 3120.1-3 and the Notice of Competitive Oil and Gas Lease Sale Internet Lease Sale posted on August 16, 2019. Specifically, we protest the inclusion of lease parcel NV-19-10-131. The parcel is scheduled to be offered at the October 1, 2019 lease sale, which includes 142 parcels containing 271,404.25 acres in the State of Nevada for internet-based competitive oil and gas leasing.

**General Background and Statement of Interest**

TU is the leading coldwater conservation organization with a mission to protect, conserve and restore our nation's trout and salmon fisheries and their watersheds. With more than 300,000 members and supporters nationwide, TU has a strong base of anglers, hunters, and recreationists in Nevada who depend upon Nevada's vast and unique natural resources for their multiple-use activities, both now and in the future.

TU believes in upholding our approach to coldwater conservation, with an emphasis on protecting intact habitat, reconnecting fragmented fish habitat, restoring degraded habitat and at-risk native trout and salmon populations and building a powerful constituency for trout and trout habitat. To maintain and enhance our goals of coldwater conservation, we encourage a balanced approach and upfront planning and management of energy development.

---

*Trout Unlimited: America's Leading Coldwater Fisheries Conservation Organization*  
Elko, NV

(307) 256-3446 • [www.tu.org](http://www.tu.org)

This lease parcel is located on the west and east side of Dixie Creek with the lease encroaching upon the riparian area and the stream itself (Figure 1). Dixie Creek is a stream that contains a genetically pure conservation population of native Lahontan cutthroat trout (LCT). Conservation populations of native coldwater fish in the arid west can be isolated and considered extremely rare. Conservation populations are also the highest ranking for native fish species and loss of any of these populations can affect the survivability of this threatened species.

We note that the LCT is on the BLM's Sensitive Species List for Nevada, is listed as Threatened under the Endangered Species Act and is a Species of Conservation Priority for the State of Nevada. Additionally, the BLM is a partner in LCT recovery efforts and the agency has implemented projects in the Dixie Creek watershed to benefit LCT, such as working with livestock producers to restore sections of the stream. When considering significance pursuant to the National Environmental Policy Act, LCT clearly exceed threshold for context.

We are concerned that this conservation population of LCT and their habitat could be compromised by oil and gas development on the contested lease parcel and that the BLM has failed to take a 'hard look' at the environmental consequences of the proposed action. Please note that while we are concerned with the completeness of the 2017 EA, our protest is also based on shortcomings of the 2019 Determination of NEPA Adequacy and the need for a new Finding of No Significant Impact, if warranted. Thus, TU's standing to protest this lease sale -- as well as any future actions -- is not contingent upon having commented on the EA originally prepared for the March 2017 oil and gas lease sale.

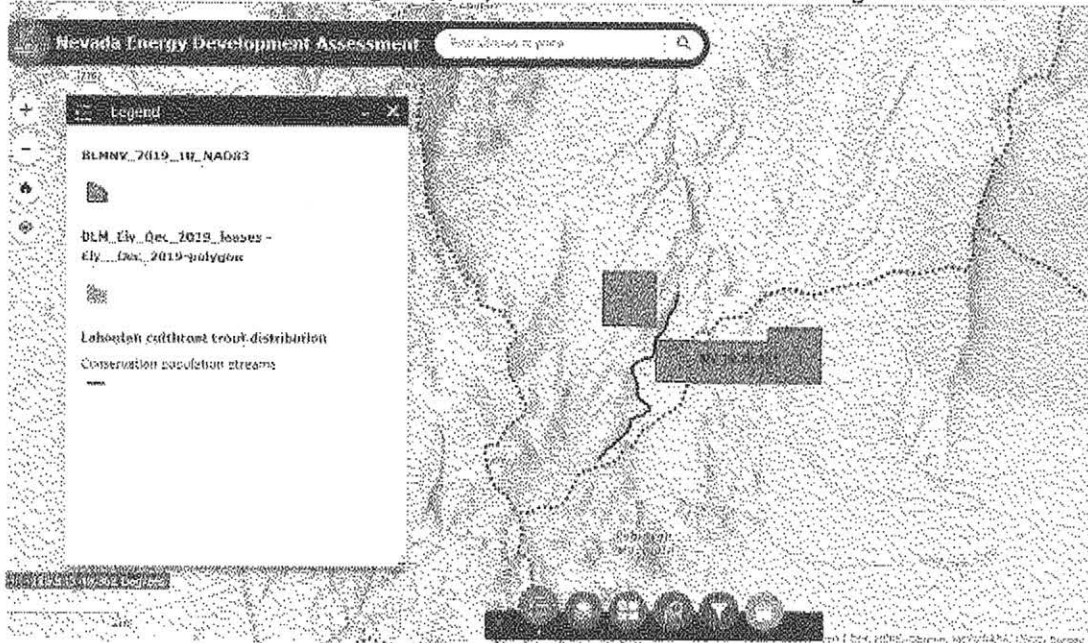


Figure 1. Conservation population of Lahontan cutthroat trout in Dixie Creek overlapped by lease parcel 131.

#### Statement of Reasons

Trout Unlimited specifically protests **NV-19-10-131** (protested parcel) for the following reasons:

- 1) There has not been a Finding of No Significant Impact applicable to lease parcel NV-19-10-131. The

Determination of NEPA Adequacy for the March 2019 oil and gas lease sale references Environmental Assessment DOI-BLM-NV-E000-2016-0004-EA<sup>1</sup> (2017 EA) as the document providing NEPA adequacy for the protested parcel. However, the decision in 2017 was to defer the lease due to Native American concerns. The Decision Record issued March 13, 2017 states: "Under the selected alternative, 25 parcels and portions of parcels would be withheld from the March Lease Sale due to areas with Native American Concern requiring additional consultation"; NV-19-10-131<sup>2</sup> is one of the parcels listed. Accordingly, lease parcel NV-19-10-131 was not included in the lease sale notice for the March 2017 oil and gas lease sale notice, posted December 07, 2016.

The 2017 Finding of No Significant Impact (2017 FONSI) and Decision Record were premised on the deferred leases not being included in the sale and the 2017 FONSI is only applicable to the parcels that went forward at that time. Therefore the 2017 EA, 2017 FONSI and the 2017 Decision Record cannot be relied upon to conclude the existing environmental analysis is sufficient. Indeed, the BLM's NEPA Handbook states the following:

*However, you must prepare a new FONSI before reaching a decision if the new proposed action is:*

- 1. essentially similar to, but not specifically a feature of, the selected alternative*
- 2. a feature of, or essentially similar to, an alternative that was analyzed in the EA or EIS, but was not selected.*<sup>3</sup>

Offering lease parcel NV-19-10-131 was a feature of an alternative that was analyzed in the EA for the March 2017 oil and gas lease sale, however that alternative was not selected. Therefore, a new FONSI must be prepared.

We note, however, that given the significance of LCT, their status as Threatened, and the lack of stipulations to protect aquatic habitat in Dixie Creek, the proposed action may very well result in significant impacts and a FONSI may not be warranted. Accordingly, the parcel should be deferred pending more rigorous environmental review.

Nevertheless, should the BLM determine that leasing the protested parcel would not be likely to result in significant impacts, we request that a FONSI be made available for a 30-day comment period. This is consistent with BLM's NEPA Handbook, which states that "public review is necessary if or when...there is either scientific or public controversy over the effects of the proposal."<sup>4</sup> Clearly, the interest in oil and gas leasing, lease sale protests, and media coverage shows that there is public controversy over this lease sale and the parcels being offered.

- 2) Lack of analysis and adequate stipulations on parcels located in rare and threatened native Lahontan cutthroat trout watersheds, as well as a lack of stipulations to ensure the protection of water quality and/or water quantity.

---

<sup>1</sup> DOI-BLM-NV-E000-2016-0004-EA was posted October 18, 2016 on the ePlanning website for the March 2017 lease sale.

<sup>2</sup> The EA for the March 2017 oil and gas lease sale lists the protested parcel as NV-17-03-046; this parcel is the same as lease parcel NV-19-10-131. For clarity we reference NV-19-10-131 in our protest.

<sup>3</sup> H-1790-1, 5.1.4, FONSI, Decisions, Protests, and Appeals

<sup>4</sup> H-1790-1, 8.4.2, The Finding of No Significant Impact (FONSI)

We note that stipulation NV-B-10-B-CSU was not applied to the protested parcel. This is a Controlled Surface Use (CSU) stipulation to avoid impacts to 100-year flood plains, and areas within 500 feet of perennial waters, springs, wells, and wetland/riparian areas. However, even if this stipulation were to be attached to the lease, it falls short of providing an adequate level of protection. We note that the stipulation would not allow the BLM to deny operations on the lease, only allowing for mitigation measures, which could include relocation of operations.

Lease notices NV-B,E-00-A-LN appear to be applied to the protested lease. This is a lease notice informing that the prospective lessee that the "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."

It is important to note that while the lease notice states that the BLM may disapprove a proposed activity, this is questionable. A lease notice is not the same as a lease stipulation and it is only through the application of a No Surface Occupancy (NSO) stipulation on the entire lease parcel that the BLM can deny activity altogether. Additionally, the USFWS has not promulgated a rule designating critical habitat to LCT, limiting the applicability of this lease notice.

The BLM should be aware that there is an important distinction between lease notices and stipulations in that lease notices are entirely unenforceable. See 43 C.F.R. § 3101.1-3, Stipulations and Information Notices: "An information notice [i.e., lease notice] has no legal consequences, except to give notice of existing requirements, and may be attached to a lease by the authorized officer at the time of lease issuance to convey certain operational, procedural, or administrative requirements relative to lease management within the terms and conditions of the standard lease form. Informational notices shall not be a basis for denial of lease operations." (emphasis added)

This clear distinction between lease notices and lease stipulations underscores the need for the BLM to defer the protested parcel until a resource management plan revision can develop new stipulations – such as an NSO to protect LCT habitat – that will unequivocally provide the BLM with the authority to deny lease operations that could impact LCT and their habitat.

Currently, there is no such stipulation, creating a situation in which lease rights conveyed through leasing would limit the mitigation measures that the BLM would be able to employ at the APD stage. We note that elsewhere, the BLM has implemented highly restrictive stipulations to protect conservation populations of cutthroat trout. This includes a ½ mile NSO to protect Westslope Cutthroat Trout in the Butte Field Office in Montana and the Tres Rios RMP in Colorado implementing a ¼ mile NSO to protect Greenback Cutthroat trout, a species that – like LCT – are listed as Threatened under the Endangered Species Act.

Clearly, the BLM has found that sensitive coldwater fisheries necessitate highly restrictive stipulations in order to protect these trout from the impacts of oil and gas development. Unfortunately, the stipulations from the outdated Elko RMP fail to meet this standard of protection, leaving the protested parcel without adequate stipulations to protect the LCT population in Dixie Creek from impacts of oil and gas development, including increased erosion and sedimentation and the threat of spills.

- 3) The DNA for the October 1, 2019 lease sale relies upon the 2017 EA to have provided the 'hard

look' required by NEPA. However, the 2019 EA fails to meaningfully address the importance of watersheds, riparian areas and wetland areas to the planning region and adequately include an environmental analysis of fishery and aquatic resources. The 2017 EA also fails to account for the presence of native trout habitat near the protested parcel, specifically the threatened Lahontan cutthroat trout (*Oncorhynchus clarki henshawi*), merely noting that they occur in the general area. Moreover, neither the 2017 EA or the 2019 DNA discuss *why* there are not likely to be significant impacts to LCT, nor does the agency provide supporting documentation to support the claim that the proposed action – including future impacts stemming from the proposed action – would not constitute significant impacts upon LCT, a resource that is clearly significant.

LCT are federally listed as a threatened species by US Fish and Wildlife Service (USFWS).<sup>5</sup> Lahontan cutthroat are the only native trout to occur in these planning areas and are identified as Sensitive and Special Status Species by NDOW and by BLM. The 2017 EA fail to discuss conformance with the USFWS 1995 Recovery Plan<sup>6</sup> for LCT, the Lahontan cutthroat status review<sup>7</sup> and the 2009 Action Plan Profile.<sup>8</sup> Most importantly, the 2017 EA lacks discussion on current restoration and habitat enhancement projects ongoing in the Nevada BLM planning districts<sup>9</sup>, and if and how oil and gas may impact those efforts, including those in the Dixie Creek drainage. In 2010, a Business Plan<sup>10</sup> was created for the *Lahontan Cutthroat Trout Keystone Initiative* that outlined conservation strategies, actions and partners over a ten-year period that address ways to prevent threats to LCT populations and habitats and ensure a diverse conservation portfolio.

This lack of environmental analysis concerning LCT may be the result of the BLM's decision in 2017 to not move forward with the sale of the protested parcel. However, now that the parcel is being offered, the DNA prepared for the sale likewise fails to account for LCT, conservation efforts, the direct effects of oil and gas leasing and reasonably foreseeable development on LCT, their habitat and efforts to recover this native trout species. Additionally, both the 2017 EA and 2019 DNA fail to address cumulative impacts of oil and gas exploration and development within watersheds that support LCT, including within the Elko Field Office.

Simply put, the DNA is silent on the issue of LCT while the 2017 EA fails to take the hard look required by NEPA. Instead the BLM proposes to kick the analysis can to a point in the future, stating that "a site-specific analysis of how each species would be affected would be conducted as proposals for development of a lease are received" (2017 EA, p. 96). This rationale is flawed for two reasons:

---

<sup>5</sup> US Fish and Wildlife Service. Listing date October 13, 1970.

<https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=E00Y>

<sup>6</sup> USFWS. 1995. Recovery Plan for the Lahontan Cutthroat Trout. January 1995. Region 1, Portland, Oregon.

<sup>7</sup> U.S. Fish and Wildlife Service. 2009. Lahontan Cutthroat Trout (*Oncorhynchus clarkii henshawi*)-5-Year Review: Summary and Evaluation. USFWS Nevada Fish and Wildlife Office, Reno, NV. March 30, 2009.

<sup>8</sup> USFWS. 2009. Lahontan cutthroat trout Action Plan.

<sup>9</sup> TU, NDOW, USFS and USFWS are building an interconnected meta-population of LCT in the upper Reese River system. This physical barrier prevents access of non-native trout and allows the removal of non-native trout if necessary. Any ground-water withdrawal in the hydrogeographic region of any of the LCT occupied tributaries of the upper Reese or other places has the potential to decrease summer base flows and result in take of LCT.

<sup>10</sup> *A Business Plan for the Conservation of the Lahontan Cutthroat Trout: A Ten year Plan for Conservation Throughout Its Range*. November 2010. <https://www.nfwf.org/lct/Documents/lct-business-plan.pdf>.

- 1) It is possible that categorical exclusion would be utilized for an APD. For instance, one of the categorical exclusions from Section 390 of the Energy Policy Act of 2005 might be applicable at some point in the future, thus meaning that there would be no meaningful NEPA analysis during either the leasing or APD stage.
- 2) As previously noted, unless an NSO is applied to the entire lease, the BLM must allow development somewhere on the lease, meaning that a robust analysis of sensitive resources such as LCT must occur at the leasing stage.

Regarding the second point, TU suggests that the BLM needs to complete an environmental impact statement before it may offer the protested lease. Given the lack of meaningful analysis in the 1986 Final Elko RMP EIS and the 2017 EA, we believe that both NEPA and case law support the need for the BLM to complete an EIS in order to avoid violating NEPA.

In *Conner v Bufford*, a leading case on the issue of NEPA analysis for oil and gas leasing, the issue in question is similar to the one concerning the protested parcel: a federal agency – in the case of *Conner v Bufford*, the Forest Service – issued a FONSI based on an EA for oil and gas leasing and claimed that they did not need to perform an EIS. An appeal of this decision was filed by James Conner, the Montana Wildlife, and the Madison-Gallatin Alliance and protests of subsequent lease sales were also filed. This appeal and lease sale protest was denied and the appellees filed suit in district court, claiming that the sale of leases without an EIS violated NEPA. Federal district court, citing *Sierra Club v. Peterson*, ruled that if a lease is not completely covered by an NSO stipulation, then an EA was not sufficient and that an EIS was required:

“Even though the standard and special mitigation stipulations provided a modicum of protection for the environment, the court held that the sale of non-NSO leases entailed an irrevocable commitment of land to significant surface-disturbing activities, including drilling and roadbuilding, and that such a commitment could not be made under NEPA without an EIS. 717 F.2d at 1414-15

Additionally, the court noted that mitigation measures do not render oil and gas activities insignificant and that if an activity cannot be absolutely precluded, then an EIS is required:

We are unpersuaded by appellants' argument that the mitigation measures reduce the effects of even oil and gas exploration, development, and production activities to environmental insignificance. We understand that the mitigation stipulations enable the government to regulate many of the adverse environmental impacts of oil and gas activities. We seriously question, however, whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance. NEPA does not require that mitigation measures completely compensate for the adverse environmental effects of post-leasing oil and gas activities, see *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 987 (9th Cir.1985), but an EIS must be prepared as long as "substantial questions" remain as to whether the measures will completely preclude significant environmental effects. *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir.1986); *Foundation for North Am. Wild Sheep v. United States*, 681 F.2d 1172, 1180-81 (9th Cir.1982). Thus, even if there is a chance that regulation of surface-disturbing activities will render insignificant the impacts of those activities, that possibility does not dispel substantial questions regarding the government's ability to adequately regulate activities which it cannot absolutely preclude. In sum, we agree

with the district court that the government violated NEPA by selling non-NSO leases without preparing an EIS (emphasis added) Conner v. Bufford 848 F.2d 1441, 1451 (9<sup>th</sup> Cir. 1988)).

The key finding here is that waiting until the APD stage to fulfil NEPA's requirements to 'look before you leap' is not sufficient unless the BLM can show that mitigation measures (such as lease notices and stipulations) will completely preclude significant impacts. The paucity of meaningful analysis and documentation provided up to this point, including in the 1986 EIS, 2017 EA and 2019 DNA, show that the BLM has failed to take a hard look at the impacts of the proposed action and activities related to leases issued.

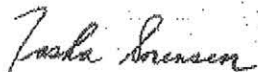
Lastly, we note that while the BLM may require conditions of approval (COA) at the APD stage, COAs are not the same as stipulations and cannot be relied upon to deny surface occupancy; COAs do not dictate if drilling will occur, but how. In numerous instances the BLM has interpreted 43 CFR § 3101.1 to only allow for the relocation of proposed operations by up to 200 meters

- 4) Without updated environmental analysis and a revised RMP, expanding interests in oil and gas leasing and development in the region will contribute to habitat alterations for coldwater fisheries and the BLM making irretrievable commitments of resources that are likely to harm collaborative restoration and native trout reintroduction efforts for LCT. The Elko RMP is from 1987 and oil and gas leasing decisions are being made based 32-year-old plan. Accordingly, we ask that the BLM not only defer the protested parcel, but all future leases nominated within identified LCT drainages until the agency revises the Elko RMP.

#### Conclusion

Trout Unlimited believes this parcel is being offered in error. The existing NEPA documents upon which the BLM has relied to offer lease parcels for oil and gas development are outdated and no longer valid with respect to LCT and commitments that the BLM has made to protect occupied habitat and suitable reintroduction habitat. TU strongly feels that the agency's assessments and findings fail to account for new information and changed circumstances relative to native trout conservation and leasing should be deferred pending a revised RMP that includes adequate stipulations for the protection of LCT in the field office.

Sincerely,



Tasha Sorensen  
Western Energy Lead  
Trout Unlimited  
1808 S. 5<sup>th</sup> Ave.  
Cheyenne, WY 82007  
307.256.3446