

REC'D - BLM - NSO

APR 15 2016

Yomba Shoshone Tribe

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Re: Protest of BLM's Proposed June 16, 2016 Oil and Gas Competitive Lease Sale and Environmental Assessment Environmental Assessment**Reference: 3120 (NV922.r)****To Whom It May Concern:**

The Yomba Shoshone Tribe (the "Tribe") files this Protest of the Bureau of Land Management ("BLM")'s planned June 2016 Competitive Oil and Gas Lease Sale and Environmental Assessment DOI-BLM-NV-B000-2016-0002-EA. The Tribe formally protests the inclusion of each of the 42 parcels, covering 74,701.61 acres outlined in the Notice of Competitive Oil and Gas Lease Sale, dated March 16, 2016. However, the Tribe lists concerns with specific areas in Part VI. Further, as noted in Part III, it is the BLM's failure to engage in proper scoping that prevents the Tribe from more specifically identifying parcels.

SUMMARY

BLM proposes to lease 74,701.61 acres of land in the Battle Mountain District in Nevada. On February 5, 2016, the Tribe submitted comments to BLM raising numerous problems with the proposed sale. These concerns remain unaddressed. Our February 5, 2016 comment letter is appended to this Protest and is hereby incorporated by reference.

Over the past decade, hydraulic fracturing ("fracking") has opened up areas of shale oil deposits to exploration that were, previously, uneconomical to develop. The rise of fracking has resulted in grave results for the environment, endangered species, and cultural resources for indigenous peoples. Contrary to the BLM's suggestion in their EA, the availability in fracking opens up areas of Nevada to exploration that would not have been developed in past years.

Fracking's rise throughout the country, and the experience of States where fracking has been heavily used, provide important lessons for Nevada. Oil and gas exploration, generally, has been linked to increased seismic activity, polluted waters and air, harmful effects to human health and dangers to threatened and endangered species. In areas where fracking is employed, these risks are exponentially increased. Fracking introduces a combination of chemicals, known to contain carcinogens and pollutants, into the environment. Further, fracking poses a unique risk to states like Nevada that are suffering from extreme drought. Fracking uses a large amount of water that is then rendered useless.

Disturbingly, the BLM has closed its eyes to the potential effects of fracking. The Environmental Assessment relies on outdated data, and ignores the mandates of the National Environment Protection Act ("NEPA"). Specifically, the BLM appears to have intentionally ignored the potential effects of the proposed leases so as to not prepare an Environmental Impact

Statement. Instead, the agency prepared a much less rigorous Environmental Assessment, which completely ignored the fact that the availability of fracking greatly increases the risk that oil and gas development may occur on lands that have previously gone undeveloped.

The BLM has previously failed to live up to the requirements imposed by the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA). The Environmental Assessment issued pursuant to the July 17, 2014 Oil and Gas Competitive Lease Sale contains many of the same mistakes. Then, as now, the BLM ignored the increased interest in fracking, jettisoned the no-action alternative, failed in its scoping requirement and avoided preparing an EIS.

Unless the BLM changes course, it will make many of the same mistakes again. This Protest examines the various mistakes made by the BLM. Specifically, the Protest:

1. Examines the growth of fracking across the country and how it has made oil and gas drilling available in areas that could not have previously been drilled and explains the environmental and human effects of the drilling technique.
2. Alleges that the BLM has violated NEPA by failing to take a "hard look" before concluding that significant oil and gas drilling is unlikely. The BLM made this decision without fully considering how fracking has changed the oil and gas industry and make the proposed parcels a much more economically-viable option. Also, that the BLM further violated NEPA by failing to prepare an Environmental Impact Statement instead of a less-rigorous Environmental Assessment
3. Argues that the BLM violated the NHPA's scoping requirements by not involving the Tribe prior to nominating parcels;
4. Argues that the BLM violated the MLA by not including stipulations to prevent the waste of natural resources;
5. Shows that the BLM did not adequately prevent unnecessary or undue degradation of public lands in violation of the FLPMA;
6. Lists concerns about specific parcels.

RELIEF REQUESTED

For these reasons, more fully discussed below, we respectfully request that the BLM cancel this lease sale until the agency prepares an EIS that considers both the increased likelihood of oil and gas development as a result of fracking, the potential effects of the leases themselves, and the available alternatives to reduce the negative effects of oil and gas development. We are also requesting that the BLM inform prospective lessees that the sale is under protest, and could be subject to litigation. Further, if the BLM continues with the sale, we request that BLM stay issuance of the leases pending litigation.

INTEREST OF THE PROTESTING PARTY

The Tribe is a federally recognized tribe of Western Shoshone Indians. The Western Shoshone people have lived in the area now known as the Reese River Valley for thousands of

years.¹ The Yomba Reservation was formally organized in 1938. The Reservation is comprised of a series of ranches, spanning about 15 miles along the Reese River.² Tribal members live on, visit and enjoy the public lands in the Battle Mountain District. Members use the land for their livelihoods, as well as recreational and other pursuits and intend to continue doing so in the future. In addition to environmental concerns, the Tribe is concerned about protecting cultural resources located in the area.

STATEMENT OF REASONS

I. Nevada Drilling and the History of Fracking

The proposed lease sale reflects growing industry interest in drilling areas that were previously uneconomical to develop. The EA notes that fracking is a common practice and that the use of fracking for the proposed leases is "reasonably foreseeable."³ Despite the recognition that fracking is likely to be used on the proposed leases, the Reasonably Foreseeable Development Schedule details only limited projected development. Specifically, the EA estimates that 20 wells, covering 50-75 acres could be expected. This accounts for about 0.05% of the lease sale area.⁴ This estimate is based, mostly, on past development within the lease area. According to the EA, a total of 15 wells were approved within the Tonopah Field Office (TFO) between 1997 and 2014. None ultimately became production wells.⁵ This was far below projections made in 1997. Although fracking is not the only available development method, it poses the greatest potential for increases in drilling, and the greatest threats to the environment. A brief overview of the history of drilling in Nevada and the rise of fracking will help color the rest of the discussion about the BLM's proposed lease sale.

Nevada has not traditionally been home to large amounts of oil and gas drilling. Although some drilling occurred between 1900 and 1950, the first commercial drilling began in 1954 in Railroad Valley.⁶ Since then, Nevada has been the site of relatively little oil and gas drilling. Since 1990, oil and gas production has steadily declined.⁷ However, fracking greatly increases the likelihood that Nevada could become the site of increased drilling within the next 10 years.

As with all natural resources, fossil fuels exist at different concentrations across the earth. These differences in concentrations are primarily responsible for what areas can and cannot be economically developed. Traditionally, most oil and gas production has come from conventional deposits, where natural gas, oil and water sit in a reservoir in geological formations.⁸ However, a large percentage of the world's oil and natural gas deposits are in unconventional deposits.⁹

¹ Elmer R. Rusco, "The Indian Reorganization Act in Nevada: Creation of the Yomba Reservation," *J. of Calif. and Great Basin Anthr.* Vol. 13, No. 1, pp. 77-94, 79 (1991).

² *Supra*, note 1 at

³ EA, page 18.

⁴ EA, page 16

⁵ *Id.*

⁶ "Oil and Gas Historical Summary," available at <http://www.nbmgu.unr.edu/Oil&Gas/HistoricalSummary.html>.

⁷ EA, page 16

⁸ Behrens, Carle E. et al., *U.S. Fossil Fuel Resources: Terminology, Reporting, and Summary*, Congressional Research Service at 6 (Dec. 28, 2011) ("Behrens")

⁹ *Id.*

Although these deposits contain large amounts of natural gas and oil, they exist at low concentrations over a large area, making the deposits far less economically viable.¹⁰

As conventional deposits dry up, the demand to find economic ways to extract oil and natural gas from unconventional deposits grows. Fracking has emerged as the most promising, and most hotly contested, option for accessing those deposits. Although fracking was first used in the 1940s, its use greatly increased after 1970 due to Congressional focus on drilling in previously uneconomical areas.¹¹ Fracking involves pumping water, proppant and chemical additives at high pressures down a wellbore in order to create fractures in rock. These fractures are held open with sand to allow oil and gas to flow.¹² In addition to fracking, two other separate, but related technological developments have added to the increased availability of unconventional deposits: horizontal drilling and “multi-stage” fracking.¹³ All of these methods pose grave risks to water availability and pollution, may lead to human health effects and may lead to increased seismic activity. Disturbingly, the EA addresses many of these concerns, and includes a supplementary white paper on issues related to fracking, but somehow does not conclude that an Environmental Impact Statement is necessary. As will be discussed in part II, this is because the BLM has ignored recent developments in the oil and gas industry and misunderstands its own requirements under NEPA.

All methods of fracking employ large amounts of water. The EA suggests that 50,000-300,000 gallons may be needed to fracture shallow vertical wells and between 800,000 to 10 million gallons may be used for more difficult-to-access wells.¹⁴ The EA goes on to note that the water used for fracking will likely be obtained from local sources. Fracking also poses a great risk of contamination to usable water zones.¹⁵ Stanford researchers have linked fracking to drinking water contamination in Pavillion, Wyoming. Disturbingly, the researchers noted that the oil and gas companies did not do anything illegal – the contamination was part and parcel of their operations.¹⁶

Just within the last year, the human effects of pollution resulting from fracking have started to emerge. Studies conducted in states with a history of oil and gas development as well as an experience with fracking, have linked development and disturbing effects to human health. The University of Pittsburgh, for example, found that mothers in Southeastern Pennsylvania living near fracking sites gave birth to children who were unusually small.¹⁷ A similar study

¹⁰ *Id.*

¹¹ EA, page 151.

¹² *Id.*

¹³ See CITI, *Resurging North American Oil Production and the Death of the Peak Oil Hypothesis* at 9 (Feb. 15, 2012); New York State Department of Environmental Conservation, *Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program, Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs* at 4 (Sep. 7, 2011).

¹⁴ EA, page 152.

¹⁵ EA, page 156.

¹⁶ Shogren, Elizabeth, “Fracking linked to groundwater contamination in Pavillion, Wyoming” *High Country News*, March 30, 2016, available at <http://www.hcn.org/articles/new-research-links-fracking-contamination-groundwater-pavillion-wyoming>

¹⁷ “PA. Studies Link Fracking With Health Problems,” available at http://www.philly.com/philly/health/20150116_Pa_studies_link_fracking_with_health_problems.html.

from the University of Pennsylvania found that the opening of fracking sites were linked with higher hospital admissions for cardiovascular diseases.¹⁸

In addition to these water and pollution issues, fracking has been linked to increased seismic activity. High-pressure injections cause micro-seismic events that are typically too small to be felt on the surface. However, the possibility of a larger earthquake resulting from fracking cannot be ruled out.¹⁹ In fact, larger earthquakes, including a magnitude 5.7 earthquake in Oklahoma in 2011, have been linked to wastewater injection.²⁰

II. BLM Violated the National Environmental Policy Act

The BLM violated the National Environmental Policy Act (NEPA) through arbitrary decision-making, and failing to complete an Environmental Impact Statement (EIS). Specifically, the BLM arbitrarily determined that very little activity would result from the proposed lease sale. Although little development occurred as a result of the previous lease sale, the standard requires the BLM to consider all reasonably foreseeable development. Considering the state of the law around fracking and the state of the oil industry, it is still reasonably foreseeable that development could occur.

1. Preparation of an EIS

An Irreversible and Irretrievable Commitment of Resources

The BLM has ignored the fact that its proposed sale constitutes an irreversible and irretrievable commitment of resources that requires the preparation of an EIS. NEPA requires federal agencies to prepare an EIS at the earliest possible time, a requirement that BLM has wholly ignored.

NEPA requires federal agencies to prepare an Environmental Impact Statement prior to any "major Federal actions significantly affecting the quality 'of the environment.'"²¹ In some circumstances, agencies may prepare a less-rigorous examination, called an Environmental Assessment (EA) in order to determine whether an EIS is necessary.²² If the agency determines that an EIS is not required, it must then issue a Finding of No Significant Impact (FONSI), explaining its conclusions.²³ Agencies must comply with NEPA "at the earliest possible time" to protect the environment and avoid delays later on.²⁴ To that end, NEPA requires agencies to conduct an EIS at the "go/no go stage," when an agency still has the maximum number of options for addressing environmental concerns.²⁵ Additionally, NEPA requires federal agencies

¹⁸ *Id.*

¹⁹ Turcotte, Donald J., Moors, Eldridge, M. & Rundle, John B. "Super Fracking" *Physics Today* August 2014, 37.

²⁰ *Id.* at 36.

²¹ *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002)

²² 40 C.F.R. 1501.4(b)

²³ 40 C.F.R. 1501.4(e)(1)

²⁴ 40 C.F.R. § 1501.2

²⁵ 40 C.F.R. § 1502.5

to consider all alternatives to proposed actions.²⁶ This ensures that agencies fully consider all alternatives, including completely abandoning the project.²⁷

In *Connor v. Bufford*, 848 F.2d 1441 (9th Cir. 1988), the 9th Circuit Court of Appeals set a standard for when an agency had reached a point of commitment where an EIS was necessary. In *Bufford*, the BLM had authorized a lease sale that included both Non Surface Occupancy (NSO) leases and non-Non Surface Occupancy (non-NSO leases). Under a non-NSO lease, the BLM could place some restrictions on how a leaseholder could drill, but could not bar drilling altogether. The Court held that the sale of NSO leases did not constitute the “irreversible and irretrievable” commitment of resources that would require preparation of an EIS. *Bufford*, 848 F.2d at 1447-48. However, the non-NSO leases were a different story. Because the government did not reserve the ability to bar all “surface-disturbing activity,” the agency was required to complete an EIS. *Id.* at 1448-51.

This is a situation that is nearly identical to the one that existed in *Bufford*. The BLM admits that once a lease is sold, the leaseholder will retain the “right to use as much of the lease lands as is necessary to explore for, drill for, mine, extract, remove and dispose of the leased resource in the leasehold.”²⁸ The EA goes on to note that site-specific stipulations will be able to prevent environmental harm. Clearly, the BLM has completely ignored its requirements under NEPA, as interpreted by the 9th Circuit. As will be discussed more fully below, whether the BLM thinks that it is likely or unlikely that drilling will actually occur is irrelevant here. The fact is that, by offering for sale leases that give leaseholders an irreversible right, the BLM is irreversibly and irretrievably committing resources without the preparation of an EIS, as demanded by NEPA.

Significant Impacts

In addition to its failure to prepare an EIS at the earliest possible stage, BLM has illegally concluded that the proposed leases would have no significant environmental impact. The BLM relies on the fact that Nevada has not historically been the site of oil and gas exploration for its decision. BLM’s determination is astonishing considering the likelihood that fracking has increased interest in Nevada as a site for exploration.

When preparing a FONSI, an agency must present reasons for the finding to convince courts that the agency took a “hard look” at potential environmental impacts.²⁹ A hard look requires an agency to consider all impacts that may be individually minor, but that could have cumulative impacts in the future.³⁰ The requirement ensures that courts can properly evaluate agency decision making. The context and intensity of the action are essential considerations for determining an action’s significance.³¹ Contextual analysis requires a consideration of the affected environments, regions and interests.³² Although the contextual analysis for most actions will be limited to a specific locality (i.e., a specific county or state), the BLM should recognize

²⁶ 42 U.S.C. 4332(2)(E)

²⁷ *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988)

²⁸ EA, at 26.

²⁹ *Blue Mountains Biodiversity Project*, 161 F.3d at 1212 (internal quotation marks and citation omitted).

³⁰ 40 C.F.R. §1508.7

³¹ 40 C.F.R. § 1508.27.

³² 40 C.F.R. § 1508.27

that the proposed action could have much larger consequences, due to current world-wide debates about fracking.

Intensity, on the other hand, depends on 10 factors, listed in 40 C.F.R. § 1508.27:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect and endanger or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

The proposed action implicates a number of the 10 intensity factors above. As noted above, the threat of fracking brings with it the possibility that Nevada will experience pollution, water shortages and increased seismicity. The EA almost entirely ignores the controversial nature of fracking. Fracking is one of the most highly contentious issues in the media.³³ As the proposed area is exceptionally close to both the Yomba and Duck Water Reservations, there is a high likelihood that the area includes a number of cultural and historical resources that could be affected by any drilling that may occur. Strangely enough, the EA also ignores the possible favorable benefits of having increased drilling, which may involve many more job opportunities and an increase in persons coming to the state, spending money. Even if these individual factors are, by themselves, considered insignificant, it is difficult to deny that, taken together, the possible effects of the action are significant.

Of course, the EA continuously repeats the assertion that Nevada has not been a traditional site of oil and gas development. It is likely that any response will also note that oil prices have dropped during 2016. Both of these points ignore the reality of Nevada and global oil trading. First, there is a good reason why fracking has not been used in Nevada up until the present: until 2014, it was not legal. The Nevada Commission on Mineral Resources did not develop rules that addressed fracking until September, 2014.³⁴ It should be noted that the rulemaking was highly contested by fracking opponents, further underscoring the controversial nature of the current action. At the time the rules were passed, energy companies made clear that they hoped to begin fracking operations in Northern Nevada. As noted by the Reno-Gazette Journal: "Noble Energy looks to employ fracking across a broad swath of northeastern Nevada..."³⁵

In addition, the mere fact that oil prices have dropped does not mean that oil and gas development will not occur. These leases cover 10 years, a large period of time during which the oil industry can change significantly. The recent drop in oil prices is largely due to two factors: 1. the recent shale oil boom in the United States and 2. a downturn in China's economy. Specifically, until fairly recently, most analysts assumed that the majority of the world's oil supply would come from conventional deposits. However, the boom in shale oil and gas development in America has severely altered the landscape.³⁶ The boom in unconventional drilling means that the U.S. has increased its production to 4 million more barrels a day than it did just 8 years ago.³⁷ Therefore, the current price of oil represents the success of those companies who are drilling in unconventional wells and continued American energy independence. In addition to the success of unconventional drilling, the Chinese economy has

³³ See, DeLong, Jeff "State regulators allow fracking to start in Nevada." *Reno Gazette-Journal*, available at <http://www.rgj.com/story/news/2014/08/28/state-regulators-allow-fracking-start-nevada/14763041/>; Shogren, Elizabeth, "Fracking linked to groundwater contamination in Pavillion, Wyoming" *High Country News.*, March 30, 2016, available at <http://www.hcn.org/articles/new-research-links-fracking-contamination-groundwater-pavillion-wyoming>; Turcotte, Donald J., Moores, Eldridge, M. & Rundle, John B. "Super Fracking" *Physics Today* August 2014, 37.

³⁴ DeLong, Jeff "State regulators allow fracking to start in Nevada." *Reno Gazette-Journal*, available at <http://www.rgj.com/story/news/2014/08/28/state-regulators-allow-fracking-start-nevada/14763041/>.

³⁵ *Id.*

³⁶ Hartmann, Bernhard & Sam, Saji, "What Low Oil Prices Really Mean" *Harvard Business Review*, March 26, 2016, available at: <https://hbr.org/2016/03/what-low-oil-prices-really-mean>.

³⁷ *Id.*

taken a nose-dive. As China is one of the world's largest oil producers, and the world's second-largest economy, the oil and gas industry has certainly felt those effects.³⁸

In many ways, however, focusing on whether fracking will occur are somewhat beside the point, as it masks the actual standard that must be followed. Specifically, the BLM misunderstands the requirement that they must consider all "reasonably foreseeable" results of the proposed action. A 9th Circuit District Court has held that NEPA's requirement that agencies consider all "reasonably foreseeable" environmental effects of their proposed actions is similar to the doctrine of proximate cause. That is, the agencies must consider all environmental effects having a "reasonably close causal relationship" with the proposed action.³⁹ Considering the recent developments in fracking technology, and the fact that fracking has only been legal in Nevada for the past few years, it is certainly foreseeable that fracking could be used on the proposed lease sites.

The BLM's continuous assurances that any negative effects could be managed through site-specific mitigation measures also rings hollow. This flies in the face of the demands of NEPA that courts have reiterated time and time again. An EIS must be prepared so long as there are still "substantial questions" as to whether future agency actions can fully stop harmful environmental effects.⁴⁰ As noted above, once these leases are sold, the BLM loses the ability to completely prevent exploration on the leased land. The EA completely fails to explain how, or what kind of, mitigation could completely protect the environment from the negative effects of exploration and drilling.

2. The No-Action Alternative

Separate from, but related to the EIS requirement, is NEPA's demand that agencies fully consider all alternative actions, including completely abandoning the proposed action. 42 U.S.C. § 4332(2)(E). Even in a case like this one, where the agency has determined that an EIS is unnecessary, consideration of a no-action alternative is "critical to the goals of NEPA."⁴¹

As noted above, agencies must prepare an EIS before an irretrievable commitment of resources. However, concerns about environmental impacts of a proposed action will likely exist before the point of irretrievable commitment, necessitating the consideration of alternatives. NEPA's requirement for a full and fair consideration of the no-action alternative is "both independent of, and broader than, the EIS requirement."⁴² NEPA requires consideration of the alternative where actions "open[] the door to potentially harmful post-leasing activity." Here, they are deferring a hard look until after the leases are sold. In so doing, they are not giving full consideration to the no-action alternative because no action is not feasible at that point.

The requirement that the BLM consider the no-action alternative is clearly triggered here. As noted above, oil and gas exploration and drilling certainly poses threats to the leased lands, and Nevada in general. However, the BLM decided to only pay lip service to the no-action

³⁸ Natham, Doug. "Crude Oil Prices in 2016: Made in China?" Forbes Investing, Jan. 20, 2016, available at <http://www.forbes.com/sites/dougnathman/2016/01/20/crude-oil-prices-in-2016-made-in-china/2/#407fbf5b4805>

³⁹ *Center for Biological Diversity v. Salazar* 937 F.Supp.2d 1140,

⁴⁰ *Conner v. Burford*, 848 F.2d 1441, 1450 (1988)

⁴¹ *Bob Marshall Alliance v. Hodel* 852 F.2d 1223, 1228-1229 (1988).

⁴² *Id.* at 1229 (internal citations omitted)

alternative, devoting less than a page to its consideration. This falls far below the requirement of “full and meaningful consideration” required by NEPA.⁴³ This is likely because the BLM’s logic is internally inconsistent, and leads to untenable conclusions. If the prospect of fracking or other types of development on the proposed leases is really so remote and speculative as to not require an EIS, then a no-action alternative should be an attractive option for the BLM. The BLM is certainly not *required* to issue leases. A true analysis of the no-action alternative would examine the time and money that would have to be expended by the BLM in order to issue the leases, respond to protests and litigation like this one, and the realistic amount of money these leases would bring in for the federal government. In such a case, the BLM may actually benefit from not moving forward with the proposed sale. Of course, this assumes that the sales are actually unlikely, which is belied by the facts. Regardless, no such analysis occurred, which is the point. The BLM clearly did not give full consideration to a no-action alternative, thus violating NEPA.

3. Threats to Endangered Species

Preparation of an EIS is necessary where a proposed action “may adversely affect an endangered or threatened species or its habitat.”⁴⁴ The mere fact that an action may have negative impacts is not in itself enough to warrant the preparation of an EIS. Instead, the agency must fully and closely evaluate any potential impacts to endangered species to determine whether the threat is serious enough to warrant an EIS.⁴⁵ Threats to endangered species are an important factor in determining whether an EIS is necessary.⁴⁶

As with much of the EA, there is little to no evaluation of what effects the proposed action could have on threatened and endangered species. As noted, the BLM erroneously concludes that there will be no significant impacts as a result of the proposed action. As such, there is no discussion on the effects that future development may have on threatened or endangered species in the area. In particular, the Tribe is concerned with the effects that development may have on the greater sage grouse. Because of the serious nature of the proposed activities, a stronger evaluation of threats to threatened and endangered species is warranted.

III. BLM Violated the National Historic Preservation Act

The National Historic Preservation Act requires federal agencies “to take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”⁴⁷ Much like NEPA, NHPA requires agencies to consider the long-lasting effects of any proposed action before moving forward. Although NHPA gives more leeway to agencies than NEPA does, it still requires agencies to “make a reasonable and good faith effort to identify historic properties.”⁴⁸ The agency must attempt to mitigate any negative effects of the proposed action on the new undertaking. In addition to conferring with the State Historic Preservation Officer (SHPO) and the Advisory Council on

⁴³ *Id.*

⁴⁴ 40 C.F.R. § 1508.27(b)(9).

⁴⁵ *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1081 (E.D. Cal. 2004)

⁴⁶ *Id.*

⁴⁷ 16 U.S.C. § 470(f)

⁴⁸ *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)

Historic Preservation, NHPA requires federal agencies to confer with Native American tribes.⁴⁹ Although the process for evaluating sites for historic or cultural resources will change with different circumstances, the agency must make a “reasonable and good faith effort” to identify relevant properties.⁵⁰ Such efforts “may include background research, consultation, oral history interviews, sample field investigation, and field survey.”⁵¹

Section 106 of the NHPA establishes the Advisory Council on Historic Preservation (ACHP), which makes regulations that implement section 106 of the NHPA.⁵² These regulations require agencies to: 1. identify historic properties and any consulting parties; 2. give notice to consulting parties; 3. assess whether the proposed action will have adverse effects; 4. notice to consulting parties that no adverse effects were found, and time for the parties to respond; and 5. if adverse effects are found, the agency must continue to work with consulting parties to develop alternative to the action or mitigation. The agency must maintain documentation that is sufficiently detailed to give consulting parties the opportunity to respond to any agency findings.⁵³

Although federal agencies have leeway when implementing the requirements of NHPA, section 106 requires agencies to comply “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.”⁵⁴ Here, the BLM has clearly violated the requirements of the NHPA, and admit to as much in the EA.⁵⁵

1. *The BLM Failed to Comply with the NHPA*

The first, and most glaring violation of the NHPA is spelled out in the EA. As noted above, federal agencies are required to comply with the NHPA early in the process. The reasons for this are obvious: it gives agencies, and consulting parties, the ability to protect historic properties and cultural resources before it is too late. Although agencies have some discretion in how and when to comply with NHPA, section 106 clearly requires compliance before spending Federal money or issuing licenses. Despite this fairly direct requirement, the BLM admits that:

*The majority of parcels nominated for the 2016 Oil & Gas Lease sale have not been inventoried for cultural resources; therefore, the types of resources that may be present in any particular area within parcels is unknown.*⁵⁶

The EA goes on to admit that resources important to Native American Tribes have not been identified. Instead, “[o]nly the potential impacts to tribal *resources* were analyzed in this EA...” The EA then promises that the BLM will, in the future, consult with Tribes to “limit, reduce, or *possibly* eliminate any negative impacts...”⁵⁷ It is not clear from the EA what efforts, if any, were made to comply with the NHPA.

⁴⁹ 16 U.S.C. §470(a)(d)(6)(A)

⁵⁰ 36 C.F.R. § 800.4(b)(2)

⁵¹ *Id.*

⁵² § 470i

⁵³ *See, generally*, 36 C.F.R. § 800.2

⁵⁴ NHPA, section 106

⁵⁵ EA, pgs. 86, 88.

⁵⁶ EA, pg. 86, emphasis added.

⁵⁷ EA, pg. 88, emphasis added.

A reasonable and good faith effort to identify historic and culturally significant properties in the proposed area would almost certainly include field surveys and extensive communication with local tribes and landowners. However, the BLM has shirked this responsibility. As noted above, the proposed action threatens to harm air and water resources, may result in increased seismicity and will be highly controversial. The proposed action also covers a wide swath of land, and is an ancestral home to many local Native American tribes. If any proposed action justified extensive research to identify historical and cultural resources, it is this one.

The EA justifies this clear violation of the NHPA by arguing that identification of historic or cultural significant sites is not required because the current action only authorizes the sale of leases and does not authorize surface disturbing activities. But this logic is little more than semantic gymnastics. As noted in the discussion of the BLM's violations of the NEPA, although the proposed action does not authorize surface-disturbing activities, it gives a leaseholder an irrevocable right to conduct such activities. The proposed action does not authorize surface-disturbing activities in much the same way that driving off a cliff does not cause injury. Both the NEPA and the NHPA require Federal agencies to step on the brakes before they reach the edge, not immediately before they hit the ground.

2. The BLM Should Have Consulted With the Tribe Earlier In the Process

The EA notes that Native American consultation letters were sent to a number of tribes, including the Yomba Shoshone Tribe on November 17, 2015. This occurred after the BLM engaged in internal scoping meetings during which specific parcels were identified for sale or deferral.⁵⁸ In addition to the NHPA and its implementing regulations, the BLM has entered into a State Protocol Agreement that governs undertakings that may affect historic and cultural resources and actually supplants the regulations. Unlike the NHPA, this agreement is explicit when it states that identification and evaluation of historic properties must occur at the "earliest feasible planning stage."⁵⁹ The Agreement also requires that the BLM consult with SHPOs and Tribes prior to authorizing an undertaking. Further, the BLM must define Areas of Potential Effects, and comply with Class III field inventory research, none of which has occurred. There is simply no reason why the Tribe should not have been involved in the discussion of which parcels should be nominated or deferred from the very beginning of the process. By not contacting the tribe until after parcels were identified, the BLM essentially shifted the burden of identification over to the Tribe. Notably, the Tribe has few resources to devote to identifying cultural properties with specificity. Early consultation with the Tribe would have allowed the Tribe and BLM to pool their resources to ensure cultural and historic sites were not affected by the proposed action.

IV. The BLM Violated the Mineral Leasing Act

The Mineral Leasing Act (MLA) specifically requires that oil and gas leases must include the explicit condition that a lessee will "use all reasonable precautions to prevent waste of oil or gas developed in the land."⁶⁰ Proper compliance with the MLA is especially important in the

⁵⁸ EA, pg. 9.

⁵⁹ State Protocol Agreement between The Bureau of Land Management, Nevada and The Nevada State Historic Preservation Office for Implementing the National Historic Preservation Act. Part 1. Section 106 Activities: I. Defining an Undertaking: B. SHPO Notification of Proposed Undertakings.

⁶⁰ 30 U.S.C. § 225.

current proposed action. Oil and gas development always runs the risk of releasing harmful waste, and fracking amplifies that risk. In particular, fracking results in the release of methane into the air, which has been linked to serious negative health effects, and is an ozone precursor.

Throughout the Sale Notice, the BLM notes that there are a number of restrictions that may exist for future leases. However, nowhere does the BLM note that lessees will be required to prevent the waste of oil or gas developed. At the most, the Notice of Sale notes that “[s]ome parcels are subject to surface use restrictions.” This falls far below the requirement that all lessees will be required to do everything in their power to prevent the waste of oil and gas that is developed.⁶¹

A very similar issue was recently examined in California. The Center for Biological Diversity claimed that the BLM violated the MLA for essentially the same reason. There, the district court determined that the BLM was in compliance with the MLA. There, the BLM had explicitly stated in the leases that the lessee was required to “prevent unnecessary damage to, loss of, or waste of leased resources.”⁶² The Court held that such a stipulation was enough to satisfy the MLA. Notably, the Yomba Tribe does not have access to the exact lease terms. However, nowhere in any of the documents available to the Tribe (the Sale Notice and Amendments, Parcels or Stipulations) is there any stipulation requiring the lessees to avoid waste. Considering the information now before the Tribe, this is a clear violation of the MIA.

V. The BLM Violated the Federal Land Policy and Management Act

The Federal Land Policy and Management Act (“FLPMA”) requires agencies to take “any action necessary to prevent unnecessary or undue degradation of [public] lands.”⁶³ As noted above, oil and gas activities necessarily involve wasting valuable resources and can be prevented by not engaging in development activities. Therefore, the action is both undue and unnecessary. At the very least, the BLM should be required to consider not taking any action at all so as to avoid wasting natural resources.

VI. Specific Parcel Concerns

Through informal scoping, the Tribe is concerned that there are campsites, burial grounds, ceremonial grounds (possibly used for fandangos, Sun Dances and Ghost Dances). This area is located in and around the interface between the valley floor and the forested areas in the mountains. Clearly, this land was and is home to an area of great concern for the Tribe. In Sections 3, 4, 9, 16, 21, 28 and 33 in Township 15 N, Range 45E, closer to the mountains, the Tribe engages in berry picking and other plant gathering. The Tribe is also concerned that those areas may contain further wagon roads and ceremonial sites. Had the BLM engaged in the scoping required by the NHPA, the Tribe could more exactly note its concerns about development in this area.

From discussions with private landowners on the proposed lease site, the Tribe has learned that there are artesian wells located on or near the parcels located at Section 24, 25, 35 and 36 in Township 15N, Range 43E. Any oil and gas drilling poses a threat to naturally-

⁶¹ Notice of Sale, pg. 5.

⁶² *Ctr. for Biological Diversity & Sierra Club v. BLM*, 937 F. Supp. 2d 1140, 1650 (N.D. Cal. 2013)

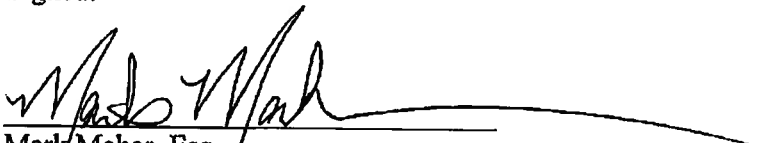
⁶³ 43 U.S.C. § 1732(b).

occurring water sources, and fracking, as discussed above, increases the threat posed. The Tribe also has similar concerns for: Sections 19, 20, 30, 31 and 32 in Township 15N, Range 44E. There are a number of springs located in this area, specifically noted on maps provided by the BLM. The proposed action clearly threatens these water sources.


CONCLUSION

The BLM has clearly violated its duties under the NEPA, NHPA, MLA and FLPMA by failing to prepare an EIS, engage in proper scoping and by not preventing waste on leased lands. For these reasons, the Tribe formally protests the proposed action.

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On Behalf of the Yomba Shoshone Tribe