The Wilderness Society

Phone: (303) 650-5935
Fax: (303) 395-0383

FAX

To: 17758616711 **From:** Barbara Young
Re: **Date:** 07/21/2017

Attached please find a protest from The Wilderness Society to the Nevada BLM's September 2017 lease sale. Thank you for considering our concerns.

Nada Culver
Senior Counsel and Director, BLM Action Center
The Wilderness Society
1660 Wynkoop Street #850
Denver, CO 80202
Direct: 303-225-4635
Nada_Culver@tws.org

THE WILDERNESS SOCIETY

July 21, 2017

Via fax at 775-861-6711 and U.S. Mail

Bureau of Land Management
Nevada State Office
1340 Financial Boulevard
Reno, Nevada 89502-7147

Re: Protest of September 2017 lease sale

To Whom It May Concern:

The Wilderness Society hereby protests the sale of lease parcels NV-17-09-001, -002, and -003 scheduled for sale at the September 2017 Nevada Bureau of Land Management (BLM) state office oil and gas lease sale in the Battle Mountain District. The mission of the Wilderness Society is to protect wilderness and inspire Americans to care for our wild places.

This protest is filed pursuant to the provisions at 43 C.F.R. § 3120.1-3. We protest the sale of these three parcels because BLM proposes to offer these parcels for sale on the basis of a mere Determination of NEPA adequacy (DNA), rather than providing a full analysis as required under the National Environmental Policy Act (NEPA).

The use of a DNA is inappropriate here because it is not based on, and does not allow for, a full understanding of the environmental issues and concerns that surround the sale of these parcels. Using a DNA is also not in compliance with several legal directives.

Interests of The Wilderness Society

The Wilderness Society ("TWS") has a long-standing interest in the management of Bureau of Land Management lands in Nevada and engages frequently in the decision-making processes for land use planning and project proposals that could potentially affect wilderness-quality lands and other important natural resources managed by the BLM in Nevada, including in the ongoing revision of the Battle Mountain Resource Management Plan and other oil and gas lease sales. TWS members and staff enjoy a myriad of recreation opportunities on BLM-managed public lands, including hiking, biking, nature-viewing, photography, and the quiet contemplation in the solitude offered by wild places. Founded in 1935, our mission is to protect wilderness and inspire Americans to care for our wild places.

Authorization to File This Protest

As Senior Counsel and Director of The Wilderness Society's BLM Action Center, I am authorized to file this protect on behalf of The Wilderness Society and its members and supporters.

Protest Issues

I. Legal Directives Governing Determinations of NEPA Adequacy Require Adequate Underlying NEPA.

The use of DNAs is governed by provisions in the Department of the Interior Departmental Manual, the BLM's NEPA Handbook, and BLM Instruction Memorandum (IM) 2010-117 (Oil and Gas Leasing Reform—Land Use Planning and Lease Parcel Reviews). Under the Departmental Manual, a DNA can only be used when (1) the proposed action is adequately covered by existing NEPA analysis and (2) there are no new circumstances, information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis. Departmental Manual Part 516 Section 11.6. A DNA "does not itself provide NEPA analysis." *Id.*

Under the BLM NEPA Handbook, before a DNA can be used, there must be a determination made that the action is adequately analyzed in existing NEPA documents and the action is in conformance with the land use plan. BLM NEPA Handbook H-1790-1 at 22. Before a DNA can be used, BLM must confirm (based on a checklist of issues that need to be considered) that the existing NEPA analysis is sufficient. *Id.* at 23, 161 (Appendix 8).

Under the BLM oil and gas IM, "[i]t is expected that the DNA process will only be appropriate in cases where the existing NEPA documentation has adequately incorporated the most current program-specific guidance." IM 2010-117 at 12.

As will be discussed next, it is clear the BLM has not met these requirements both relative to the Resource Management Plan (RMP) that is applicable to this area, and with respect to the environmental assessment (EA) from the June 2017 lease sale that the BLM relies on to support the DNA.

II. The Tonopah Resource Management Plan Does Not Provide an Adequate Environmental Analysis in Support of the Determination of NEPA Adequacy

To start with, the underlying RMP for the area where these lease parcels are located is drastically out of date and in need of revision, and thus this twenty-year old RMP (the 1997 Tonopah RMP) cannot be used to support a DNA in this instance, which the BLM attempts to do.

BLM is obligated to "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. Establishment of baseline conditions is an important requirement of NEPA. In *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988), the Ninth Circuit states that "without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on

the environment, and consequently, no way to comply with NEPA." The court further held that "[t]he concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process."

In this lease sale, as in others throughout the state (and as highlighted in our protest of the June 2017 lease sale), the BLM has not updated its description and analysis of the affected environment. Thus, no valid baseline of environmental conditions is presented, which violates the requirements of NEPA. The need to present an accurate and current description of baseline conditions can only be accomplished if the underlying RMPs are revised before oil and gas leasing is authorized.

Without an updated baseline, BLM also cannot fully analyze the direct, indirect and cumulative effects of leasing and development on the affected environment. Further, the radical changes in the types of drilling technologies that are now in use also undermine the existing analysis of likely impacts from leasing and development, requiring updated analysis. *See, e.g., Center for Biological Diversity (CBD) v. BLM*, 937 F. Supp. 2d 1140 (N.D. Cal. 2013) (finding that the new technique of hydraulic fracturing must be considered in an oil and gas leasing NEPA analysis). In the *CBD* case, the court found that the failure to update evaluation in an underlying land use plan to address modern hydraulic fracturing practices violated NEPA. BLM is now preparing a programmatic EIS to evaluate the impacts of hydraulic fracturing in California. The draft version of that EIS, issued in January 2017, now sets out a preferred alternative in which "[o]nly areas with high oil and gas potential or within the boundaries of existing oil and gas fields would be open to leasing."[1]

An updated baseline and environmental analysis at the RMP level for oil and gas leasing in the Battle Mountain District, and really throughout the state, is needed to support ongoing leasing. The Tonopah RMP does not allow the BLM to effectively analyze the direct, indirect, and cumulative effects of leasing and development on the affected environment based on current conditions. In addition, the Tonopah RMP did not address the likely effects of development using the updated techniques of horizontal drilling and hydraulic fracturing. Until these problems are corrected in an updated environmental impact statement (EIS) and/or RMP, the current RMP cannot be used to support the DNA for the September 2017 lease sale.

In the DNA, BLM claims repeatedly that leasing the three parcels would be in conformance with the provisions in the Tonopah RMP. But after 20 years it is impossible for the BLM to credibly claim that these same lands would be available for leasing under the same conditions if a new, updated RMP was developed. In fact, in BLM Nevada's EA for the June 2017 lease sale, BLM not only determined that more than half of the proposed lease parcels conflict with important public lands resources and those conflicts cannot be avoided with stipulations in the existing RMPs, but BLM also went through the exercise of developing new stipulations that could and should be adopted in the revised Battle Mountain RMP to address those conflicts. See DOI-BLM-NV-B020-2017-0002-EA, p. 17-18 and Appendix C. Clearly, BLM would not actually

[1] *See* https://www.federalregister.gov/documents/2017/01/06/2016-31975/notice-of-availability-of-the-draft-central-coast-resource-management-plan-amendment-and-draft, https://www.blm.gov/press-release/blm-announces-public-meetings-draft-plan-oil-and-gas-leasing-central-california.

make these lands available for leasing under the same conditions if and when a new RMP is developed.

Both NEPA and the Federal Land Policy and Management Act (FLPMA) contemplate and require working from up to date information in land use plans and the associated environmental analyses. *See e.g.*, 43 U.S.C. §§ 1711(a) and 1712(a) (inventories required on a "continuing" basis and must be kept "current" and land use plans must be revised "when appropriate") and 40 C.F.R. § 1502.9(c)(ii) (supplemental environmental impact statements required if there are "significant new circumstances or information"). The unanalyzed claim in the DNA that "[t]here is no new information or circumstance that would substantially change the Tonopah RMP . . . analyses of areas open to oil and gas lease sales" is simply not credible or founded on any current factual basis. *See* June 21, 2017 DNA at page 2 (making this statement). Contrary to the requirements in the Departmental Manual, there is no valid basis to claim the proposed action is adequately covered by the existing NEPA analysis in the RMP and that there are no new circumstances, information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis.

IM 2010-117 makes it clear that only up to date RMPs can be used to support oil and gas lease sale decisions. "While an RMP may designate land as "open" to possible leasing"—as is the case here pursuant the outdated Tonopah RMP—"such a designation does not mandate leasing." IM 2010-117 at 3. Nevertheless, in the DNA the BLM treats the RMP as mandating leasing. June 21, 2017 DNA at 1. While under the IM the BLM is to determine whether leasing would be in in conformance with an RMP, it is also to determine whether leasing is "still appropriate and provide[s] adequate protection of resource values." IM 2010-117 at 8 (emphasis added). New and updated inventory information is to be used. *Id.* at 8-9. These requirements have not been met here, and thus the DNA is invalid.

In recognition of the need to update the Tonopah RMP, the BLM has announced that it will prepare a new RMP for the Battle Mountain District that will replace the Shoshone-Eureka and Tonopah RMPs. https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=9552. The new RMP will "allow management to reflect the changed needs of the planning area" and is needed "to respond to new policies, including but not limited to, energy, demand for limited resources, appropriate protection of sensitive resources, increases in conflict between competing resource values and land uses, and other issues that have surfaced since approval of the existing RMPs." *Id.* This is akin to what we asked for in our protest of the June 2017 oil and gas lease sale, as discussed above. Clearly the existing Tonopah RMP cannot support the DNA BLM has developed for the September 2017 lease sale. By BLM's own admission, there are changed needs in the planning area and there are a number of new policies in place that were adopted subsequent to adopting of the Tonopah RMP in 1997. Thus, under the provisions in the Departmental Manual and the BLM NEPA Handbook the existing Tonopah RMP cannot be used to support the DNA for the September 2017 oil and gas lease sale.

III. The Environmental Assessment Prepared for the June 2017 Lease Sale Also Does Not Provide an Adequate Environmental Analysis in Support of the Determination of NEPA Adequacy for the September 2017 Lease Sale

The second NEPA-based document that the BLM attempts to rely on to support the DNA for the September 2017 lease sale is the lease sale EA that BLM prepared for the June 2017 oil and gas lease sale. June 2017 Competitive Oil and Gas Lease Sale, DOI-BLM-NV-B020-2017-0002-EA. This document too cannot support the DNA. Based on this EA, BLM reviews seven "NEPA Adequacy Criteria" and claims that all of them have no significant environmental impacts, and therefore the DNA is appropriate. This is not the case.

In two instances BLM can only say that resource conditions or the adjacency of lease parcels are "sufficiently similar", leading it to claim there are no significant environmental impacts. June 21, 2017 DNA at 2, 3. In another instance it claims cumulative impacts are "substantially the same", leading it to a claim that environmental impacts are not sufficient enough to warrant preparation of an EA or EIS. *Id.* at 3. But BLM cannot rely on these inconclusive, evasive statements to support a DNA. Being "sufficiently similar" or "substantially the same" does not meet the requirements of adequate underlying NEPA, as required by BLM's guidance, and does not address whether there is new information or issues in play, which would also preclude use of a DNA.

NEPA dictates that BLM take a "hard look" at the environmental consequences of a proposed action and the requisite environmental analysis "must be appropriate to the action in question." *Metcalf v. Daley*, 214 F.3d 1135, 1151 (9th Cir. 2000); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). In the context of oil and gas leasing, it is well-established the BLM must rely on a current, valid EIS to support decisions to make lands available for leasing. *See, e.g., New Mexico v. Bureau of Land Management*, 565 F.3d. 683, 718 (10th.Cir.2009); *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004)). Accordingly, BLM cannot remedy the lack of a current, valid EIS underlying the Tonopah RMP by preparing a DNA, which, as stated in BLM's own guidance "does not itself provide NEPA analysis". Consequently, BLM cannot proceed with leasing until a new EIS is prepared.

The use of DNAs is intended to be limited. They are only to be used when the proposed action is adequately covered in existing analyses and there are no new circumstances, information, or unanticipated or unanalyzed environmental impacts that warrant supplemental analysis. Departmental Manual Part 516 section 11.6. Here it is apparent there are at least several conditions that exist in the vicinity of the protested parcels that make the DNA for the September 2017 lease sale invalid. That is, there is new information or the June lease sale EA does not adequately cover these issues. These include:

1. Different impact area: The three parcels being protested in the September 2017 lease sale are near one parcel that was offered in the June 2017 lease sale, parcel NV-17-06-106 (hereinafter "parcel 106"). The BLM claims in the DNA that the presence of parcel 106 near the three September 2017 parcels makes use of the June 2017 EA to support the

DNA valid. However, what has occurred is that BLM has transformed what had been a situation where there was only one 640-acre parcel (a one square mile area) into a six-square-mile impact area—it is now a 3,680-acre area rather than 640 acres. That is, the impact area has increased more than fivefold. This is clearly a different situation than existed in June, and makes summary reliance on the June 2017 EA in support of the DNA inappropriate.

The June 2017 lease sale encompassed 106 parcels that covered 195,732 acres. June 2017 EA at 17. The September 2017 lease sale covers three parcels, which as mentioned cover 3,680 acre. Only one of the 106 June lease parcels (parcel 106) is found anywhere near the three September parcels. One-hundred-five of these parcels are located miles away from parcels 101, 102, and 103 (not to mention parcel 106). Yet BLM is claiming in the DNA that the environmental analysis for these 106 parcels is sufficiently similar to, and related to, the environmental conditions adjacent to the three September parcels that no additional environmental analysis is needed. This is an absurd claim. As shown in the attached map, aside from parcel 106, the closest parcel from the June EA is 57 miles away as the crow flies. There is a large cluster of parcels 80 miles away, and the largest cluster of parcels is 100 miles away. Further, these lands are all separated by multiple ranges and valleys. An environmental analysis that applies to 192,052 acres of public lands that are nowhere near the 3,680 acres in the September lease sale simply cannot possibly be "sufficiently similar" to allow this reliance.

2. Presence of Railroad Valley tui chub: The June 2017 EA claims that the Railroad Valley tui chub, a BLM Nevada sensitive fish species, was not found on parcel 106 but was instead found "more than two miles from the parcel." June 2017 EA at 15. But now, the chub could well be found within one of the lease parcels, which expand the impact area by about two miles to the south and east, as well as about a mile to the north. The DNA does not consider this new condition.[2] In addition, BLM should consider how the fish would be protected from potential water use, including both utilization and diversion of spring flow for pumping should be analyzed by BLM.[3]

---

[2] The Railroad Valley Springfish, a threatened species, is also found in the Railroad Valley where the three protested lease parcels are located, and this species is undergoing a downward trend and the continued viability of the species could be at risk. June 2017 EA at 177. The Railroad Valley globemallow, a special status plant species, and the Railroad Valley Skipper, a special status insect, are found in Railroad Valley as well. June 2017 EA at 179, 183. We have also been informed that a new species of toad, or perhaps a subspecies or variety, has been identified by scientists in the Railroad Valley. Cleary this area is home to many rare and unique species, making reliance on the DNA inappropriate because of the large number of significant environmental issues found in the vicinity of these lease parcels.

[3] In an APD filed for another proposed well in the Railroad Valley in 2016, the project proponent proposed utilizing a substantial amount of surface flow from the adjacent Butterfield Spring for drilling operations (up to 12,600 gallons of water every 24 hours, or some 8.75 gallons per minute). The Railroad Valley tui chub, which was present in this spring, was supposed to be protected by sealing the intake hose with ¼" grating. This is clearly an unacceptable set of circumstances for an endemic and BLM sensitive species.

3. Increased level of environmental impacts: Under the Partial Deferral Alternative in the June 2017 EA, the entirety of parcel 106 would have been deferred from sale, making any impacts related to its sale a moot issue. June 2017 EA at 160. Now there is no proposal to defer the sale of the three September 2017 parcels, making impacts greater than presented in the June 2017 EA. The impacts will extend to 3,680 acres and these impacts would no longer be mooted out.

4. Increased likelihood of development: Parcels 101, 102, and 103 (as well as parcel 106 from the June 2017 lease sale) are in the Railroad Valley area, which is one of the few areas under consideration for leasing in Nevada that BLM recognizes harbor significant oil and gas resources, and which has a history of development activity. As stated in the June 2017 EA, "it would be highly speculative to assume that production wells and additional oil fields would be developed within the [Tonopah Field Office] in areas other than Railroad Valley in the eastern part of the field office area, where the potential is moderate to high and where current well fields exist. June 2017 EA at 20 (emphasis added). This raises significant concerns about language in the DNA claiming that development of oil and gas on these leases is unlikely or speculative. This makes the DNA inappropriate because development in this area is far from speculative or uncertain.

Clearly the BLM has not "adequately incorporated the most current program specific guidance," which must be done before a DNA can be used under the terms of IM 2010-117. IM 2010-117 at 12. Moreover, BLM has not met the conditions in the Departmental Manual for using a DNA, because there are new circumstances and the proposed action is not adequately covered in existing NEPA analyses. Departmental Manual Part 516 Section 11.6. Nor is this action adequately analyzed in existing NEPA documents as required by the BLM NEPA Handbook. BLM NEPA Handbook H-1790-1 at 22.

IV. A New Finding of No Significant Impact Must Be Issued Before the Protested Lease Parcels can be Sold

Another issue that must be considered is that BLM has issued this DNA without issuing a new finding of no significant impact (FONSI), which it had done for the June 2017 EA. This is contrary to BLM's guidance for DNAs. BLM says in the DNA, "[b]ased on the review documented above, I conclude that this proposal conforms to the applicable land use plan as amended, and that the NEPA documentation fully covers the proposed action and constitutes BLM's compliance with the requirements of NEPA." June 21, 2017 DNA at 4. But in discussing DNAs, BLM's NEPA Handbook provides:

> 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.

BLM NEPA Handbook H-1790-1 at 25 (emphasis added). The three protested lease parcels in the September 2017 lease sale were not specifically a feature of the selected alternative in the June 2017 lease sale EA nor were they a feature of the alternative that was selected in the June 2017 lease sale. Therefore, a new FONSI "must" be prepared to comply with the BLM NEPA Handbook. That has not been done.

V. There Must be a Public Comment Period for this Determination of NEPA Adequacy

Another problem with the DNA for the September 2017 lease sale is that it was adopted without allowing for public comment on the proposed action, the sale of the three lease parcels. As stated in BLM's NEPA Handbook relative to DNAs, "[i]n general, where the new proposed action has not already been discussed during the public involvement for the existing EA or EIS, some additional public involvement for the new proposed action will be necessary." BLM NEPA Handbook H-190-1 at 23. The three new lease parcels were not part of the public involvement process for the June 2017 lease sale EA. And Under the BLM's oil and gas reform IM, "field offices will provide a 30-day public review and comment period" for a leasing EA and FONSI, and here, as discussed above, the BLM must issue a new FONSI for this project even it if does not issue a new EA. IM 2010-117 at 12. And providing for a public comment period is favored under the Council on Environmental Quality's (CEQ) NEPA regulations. *See, e.g.*, 40 C.F.R. § 1506.6(a) (providing that agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures"). BLM should not proceed with the sale of the protested lease parcels before allowing a public comment period on the sale.

VI. The BLM's Owes the Public an Explanation for the Validity of Using Determinations of NEPA Adequacy for Oil and Gas Lease Sales

In closing, we want to reiterate our concerns with BLM using DNAs to approve oil and gas lease sales. The DNA procedure and concept is not mentioned in the CEQ NEPA regulations, or in NEPA itself. DNAs seem be an internal creation of BLM that is mostly used to avoid full compliance with NEPA where use of a categorical exclusion cannot be justified, while excluding the public from the process. Using such a shortcut seems especially inappropriate where the agency is making an irretrievable commitment of resources by issuing an oil and gas lease. *See Pennaco*, 377 F.3d at 1159 ("Agencies are required to satisfy the NEPA "before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values."" Citing *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988)). In this case, the DNA is being used to pile an even worse analysis (this DNA) on top of an already alarmingly deficient analysis in the Tonopah RMP and an utterly insufficient EA prepared for the June lease sale - essentially adding insult to injury as far as the public is concerned. That could be corrected by dropping this DNA and preparing an EA for the September 2017 oil and gas lease sale, once an updated RMP is prepared, as is clearly needed.

VII. Conclusion

We hope to see BLM complete needed analysis and fully comply with applicable law and guidance prior to proceeding with leasing the protested parcels.

Sincerely,

Nada Culver, Director and Senior Counsel
BLM Action Center
The Wilderness Society
1660 Wynkoop Street, #850
Denver, CO 80202
303-225-4635
nada_culver@tws.org

Attachment 1: Map of June and September 2017 Lease Sale Parcels

June 2017 parcels shown in green; September 2017 parcels shown in purple (in lower right corner of map). The vast majority of the parcels evaluated for the June lease sale are more than 50 miles away from the September parcels, and separated by multiple basins and valleys.