November 5, 2018

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

Re: Protest of BLM Nevada December 2018 Competitive Oil and Gas Lease Sale, DOI-BLM-NV-L000-2018-0002-EA & Finding of No Significant Impacts, and DOI-BLM-NV-W010-2018-0033-DNA

Dear Responsible Official(s):

The Center for Biological Diversity ("Center"), Sierra Club, Western Watersheds Project, WildEarth Guardians, and Basin and Range Watch hereby file this Protest of the Bureau of Land Management's ("BLM") proposed 11 December 2018 Competitive Oil and Gas Lease Sale, DOI-BLM-NV-L000-2018-0002-EA & Finding of No Significant Impacts, and DOI-BLM-NV-W010-2018-0033-DNA, for the following 17 parcels containing 32,923.96 acres of federal public lands and split estate mineral rights administered by BLM in Nevada:

NV-18-12-001, 1920.000 Acres
NV-18-12-002, 1920.000 Acres
NV-18-12-003, 1920.000 Acres
NV-18-12-022, 2556.180 Acres
NV-18-12-025, 2560.000 Acres
NV-18-12-045, 1809.930 Acres
NV-18-12-054, 1251.400 Acres
NV-18-12-056, 1280.000 Acres
NV-18-12-115, 1963.760 Acres
NV-18-12-118, 1968.280 Acres
NV-18-12-173, 2560.000 Acres
NV-18-12-189, 2540.640 Acres
NV-18-12-193, 1278.170 Acres
NV-18-12-204, 1280.000 Acres
NV-18-12-207, 2034.360 Acres
NV-18-12-208, 1928.240 Acres
NV-18-12-211, 2153.000 Acres

I. Protesting Parties: Contact Information and Statement of Interests

This Protest is filed on behalf of the protesting parties by their authorized representative:

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The Center for Biological Diversity is a national, nonprofit conservation organization with over 1.6 million members and online activists dedicated to the protection of endangered species and wild places. The Center has members and employees living in Nevada who have visited the parcels and adjacent public lands for recreational, scientific, educational, and other pursuits; they will continue to do so in the future. The Center, its members, directors, and staff have worked and advocated to conserve and protect public lands and wildlife in Nevada, including greater sage-grouse and the Railroad Valley springfish.

Sierra Club was founded in 1892 and is the nation's oldest grass-roots environmental organization. It is a national nonprofit organization of over 775,000 members, and has chapters across the United States, including the Toiyabe Chapter of the Sierra Club, representing about 5,800 members in Nevada and the Eastern Sierra. Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and use all lawful means to carry out these objectives.

Western Watersheds Project is a non-profit organization with more than 5,000 members and supporters. WWP's mission is to protect and restore western watersheds and wildlife through education, public policy initiatives and legal advocacy. Western Watersheds Project has staff and members in Nevada who use and enjoy public lands and their wildlife, cultural and natural resources for health, recreational, scientific, spiritual, educational, aesthetic and other purposes. WWP also has a direct interest in mineral development that occurs in areas with sensitive wildlife populations and important wildlife habitat, as well as long-standing interests in preserving and conserving Nevada wildlife and watersheds.

WildEarth Guardians is a nonprofit environmental advocacy organization dedicated to protecting the wildlife, wild places, wild rivers, and health of the American West. On behalf of our members, Guardians has an interest in ensuring the BLM fully protects public lands and resources as it conveys the right for the oil and gas industry to develop publicly-owned minerals. More specifically, Guardians has an interest in ensuring the BLM meaningfully and genuinely takes into account the all of the implications of its oil and gas leasing decisions, including impacts to public health, air quality, water quality and quantity, and our climate from the release of more greenhouse gas emissions known to contribute to global warming.

Basin and Range Watch is a 501(c)(3) non-profit organization working to conserve the deserts of Nevada and California and to educate the public about the diversity of life, cultures, and history of the desert, as well as sustainable local renewable energy alternatives. The group works to conserve desert wildlands and species, protect groundwater resources, dark night skies, culturally important landscapes, and local ways of life. Basin and Range Watch is a group of desert advocates from diverse backgrounds united by their love of arid lands.

The mailing addresses for individual protestors are as follows:

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II. Statement of Reasons Why the Proposed Lease Sale Is Unlawful

A. BLM's use of Determinations of NEPA Adequacy to authorize oil and gas leasing for parcels in Winnemucca District, and its failure to prepare an Environmental Impact Statement or Environmental Assessment for those parcels, violates the National Environmental Policy Act.

B. IM 2018-034 violates the National Environmental Policy Act, Federal Land Policy and Management Act, and Administrative Procedure Act by requiring BLM's unlawful use of determinations of NEPA adequacy and unlawfully limiting public participation.

C. BLM violated Section 7 of the Endangered Species Act by failing to ensure that agency actions will not jeopardize the continued existence of species listed under the Endangered Species Act, including the Railroad Valley springfish.

A. BLM's use of Determinations of NEPA Adequacy to authorize oil and gas leasing for parcels in Winnemucca District, and its failure to prepare an Environmental Impact Statement or Environmental Assessment for those parcels, violates the National Environmental Policy Act.

BLM has proposed three parcels for leasing from the Winnemucca District, NV-18-12-001, -002, and -003. While these parcels clearly have been under evaluation for some time, since they have the lowest parcel numbers of this sale, they were not included in the Environmental Assessment and have been authorized for leasing through the use of a Determination of NEPA Adequacy (DNA). The use of DNAs unlawfully circumvents the substantive requirements of NEPA, avoiding any site-specific environmental analysis or impacts disclosure, gutting the very heart of the law.

Rather than perform the environmental review as required, BLM asserts that all significant impacts of the proposed action are covered by the 2015 Winnemucca Resource Management Plan FEIS and ROD and a 2005 environmental assessment (NV-020-05-EA-21) for oil and gas leasing across the Winnemucca District.[1] However, none of the parcels proposed for leasing in the December 2018 oil and gas lease sales were analyzed under the 2005 EA or any other previous NEPA documents cited by BLM in its DNAs. This is unlawful. BLM is required to analyze all foreseeable environmental impacts, human health and safety risks, and seismic risks, posed by unconventional extraction techniques before leasing.

[1] DOI-BLM-NV-W010-2018-0033-DNA at 2.

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

In order to determine whether a project's impacts may be "significant," an agency may first prepare an Environmental Assessment ("EA"). 40 C.F.R. §§ 1501.4, 1508.9. If the EA reveals that "the agency's action may have a significant effect upon the . . . environment, an EIS must be prepared." Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (internal quotations omitted). If the agency determines that no significant impacts are possible, it must still *adequately* explain its decision by supplying a "convincing statement of reasons" why the action's effects are insignificant. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (emphasis added). Here, however, BLM's DNAs lack any analyses of site-specific impacts.

In issuing its DNAs, BLM failed both of NEPA's "twin aims": not only did BLM fail to ensure that the agency takes a "hard look" at the environmental consequences of its proposed action, it also failed to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA's procedural requirement is not merely a formality, but is there to allow the agencies and the public to understand the consequences of the proposed lease auction.

BLM's deferral of site-specific analysis until the APD stage is unlawful under NEPA, its implementing regulations, and legal precedents. Courts have repeatedly rejected BLM's claim that it is not required to conduct any site-specific environmental review until after the parcels are leased and a proposal is submitted by industry. See, e.g., Center for Biological Diversity & Sierra Club v. BLM, 937 F. Supp. 2d 1140, 1158 (N.D. Cal. 2013) (". . . BLM asserts the now-familiar argument that there is no controversy because any degradation of the local environment from fracking should be discussed, if ever, when there is a site-specific proposal. But the Ninth Circuit has specifically disapproved of this as a reason for holding off on preparing an EIS."); and Conner v. Burford, 848 F.2d 1441, 1450 (9th Cir. 1988) ("The government's inability to fully ascertain the precise extent of the effects of mineral leasing … is not, however, a justification for failing to estimate what those effects might be before irrevocably committing to the activity.").

BLM is required under NEPA to perform and disclose an analysis of environmental impacts of the parcels offered for lease *before* there are any "irreversible and irretrievable commitments of resources." Center for Biological Diversity, 937 F. Supp. 2d at 1152 (citing Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988) ("Our circuit has held that an EIS must be prepared *before* any irreversible and irretrievable commitment of resources.") (emphasis added). "[N]on-NSO leases, even if subject to substantial government regulation, do constitute an 'irretrievable commitment of resources.' As a result, unless the lease reserves to the agencies an '*absolute right* to deny exploitation of those resources,' the sale of [] non-NSO leases … constitutes the go or no-go point where NEPA analysis becomes necessary." Id at 1152. In other words, the specific environmental effects of oil and gas leasing in the project area must be analyzed and disclosed now, at the leasing stage.

In Center for Biological Diversity & Sierra Club v. BLM, 937 F. Supp. 2d 1140, 1152 (N.D. Cal. 2013), BLM also attempted to defer NEPA analysis of hydraulic fracturing (hereinafter referred to as "fracking") on the parcels at issue until it received a site-specific proposal, because the exact scope and extent of drilling that would involve fracking was unknown. The district court held BLM's "unreasonable lack of consideration of how fracking could impact development of the disputed parcels went on to unreasonably distort BLM's assessment," and explained:

> "[T]he basic thrust" of NEPA is to require that agencies consider the range of possible environmental effects before resources are committed and the effects are fully known. "Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"

Center for Biological Diversity, 937 F. Supp. 2d at 1157 (citing City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975)).

As the courts have made clear time and again, NEPA requires that "assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made." N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 717-18 (10th Cir. 2009) (citing 42 U.S.C. § 4332(2)(C)(v)); compare with Center for Biological Diversity, 937 F. Supp. 2d at 1152 (N.D. Cal. 2013) ("Agencies are required to conduct this review at the 'earliest possible time' to allow for proper consideration of environmental values. . . A review should be prepared at a time when the decisionmakers 'retain a maximum range of options.'"). In Richardson, BLM argued there also that it was not required to conduct any site-specific environmental reviews until the issuance of an APD. The court looked to the Ninth and D.C. Circuits in concluding that "NEPA requires BLM to conduct site-specific analysis before the leasing stage." Richardson, 565 F.3d at 688. Richardson then offered a two-part test to determine whether NEPA has been satisfied: First we must ask whether the lease constitutes an "irretrievable commitment of resources." The Tenth Circuit, again citing to

the Ninth and D.C. Circuits, concluded that issuing an oil and gas lease without an NSO stipulation constitutes such a commitment. Second, the agency must ask whether all "foreseeable impacts of leasing" have been taken into account before leasing can proceed. Id. Given the utter lack of any site-specific review of the present surface-occupancy-permitting parcels, for this lease sale, such impacts have not been taken into account.

B. IM 2018-034 violates the National Environmental Policy Act, Federal Land Policy and Management Act, and Administrative Procedure Act by requiring BLM's unlawful use of determinations of NEPA adequacy and unlawfully limiting public participation.

Over the past year, the Trump Administration has steadily disregarded the notion, enshrined in federal law, that public lands exist for the benefit of all American people. In the name of "energy dominance," the new Administration has made sweeping changes to its land management practices to prioritize oil and gas development above all else, eroding basic principles of government transparency, public participation, and balanced stewardship of our public lands. In doing so, the Administration has flouted the law.

IM 2018-034 is one such change. Rather than promulgating regulations to overhaul its oil and gas leasing procedures, BLM issued this "Instruction Memorandum" on January 31, 2018—without any public notice, comment, or environmental review—directing BLM offices to sharply limit public involvement in oil and gas leasing decisions. The IM lists public involvement as an "unnecessary impediment" to domestic energy production and imposes new barriers to public input in the leasing process. These include making comment periods optional at the discretion of BLM field staff and restricting the former 30-day protest period to just 10 days.

As the one federal court to review the issue has found, these changes unreasonably inhibit protestors—and all Americans—from weighing in on decisions affecting their public lands. On Friday, September 21st, the U.S. District Court for the District of Idaho issued a Memorandum Decision and Preliminary Injunction in *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB (D. Idaho Sept. 21, 2018), attached as Exhibit 1. That injunction enjoins and restrains the Bureau of Land Management from implementing certain specified provisions of BLM Instruction Memorandum 2018-034 ("IM 2018-034") for fourth quarter/December 2018 (and succeeding) oil and gas lease sales "contained in whole or in part within the Sage-Grouse Plan Amendments' recognized 'Planning Area Boundaries,'" Exhibit 1 at 50.

Under the Preliminary Injunction, BLM has postponed its leasing of those parcels originally proposed for the December 2018 lease sale that contain greater sage-grouse Priority or General Habitat. The reasoning of the court's order, however, is equally applicable to all actions tainted by the unlawful procedures of IM 2018-034 – including the inadequate 10-day protest period being offered for the instant lease sale. For the reasons set forth below, the Protestors

hereby request that the Nevada BLM cancel all parcels in its proposed December competitive oil and gas lease sale unless and until it complies with the Preliminary Injunction and addresses the legal deficiencies identified therein.

Although the binding legal force of the Preliminary Injunction on BLM "applies *only* to oil and gas lease sales contained in whole or in part within the Sage-Grouse Plan Amendments' recognized 'Planning Area Boundaries' encompassing 'Greater Sage-Grouse Habitat Management Areas,'" Exhibit 1 at 56, its reasoning which applies with equal force to all oil and lease sales proposed under the unlawful requirements of IM 2018-034.

In its September 21 Memorandum Decision and, the court ruled that plaintiffs are likely to succeed on the merits of both substantive and procedural challenges to IM 2018-034 under the Federal Land Policy and Management Act ("FLPMA), 43 U.S.C. §§ 1712(a) & (h), 1739(e), the National Environmental Policy Act ("NEPA") 43 U.S.C. § 4332(C), 40 C.F.R. § 1506.6, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). The court reviewed BLM's IM 2018-034 and concluded it constitutes final agency action with respect to several critical elements of the BLM's oil and gas leasing process, including (a) BLM decisions whether or not to permit public involvement, (b) length of public review and comment, and (c) length of public protests of oil and gas lease sales. Exhibit 1 at 23-34. As the court noted, "the burden of such constraints upon public participation and compressed protest periods falls most heavily upon members of the public, as those who have nominated potential lease parcels and BLM have had far more time to evaluate and consider the details of such parcels." Exhibit 1 at 25.

In reviewing the Center and WWP's claims, and BLM's defenses, under the standards applicable to review of motions for preliminary relief, the court determined that the plaintiffs are likely to succeed on the merits of the claim that IM 2018-034's constraints on public participation are (1) procedurally invalid, because BLM imposed binding requirements for oil and gas leasing on BLM-administered lands and minerals without required public notice and comment, Exhibit 1 at 33-34, and (2) that IM 2018-034 "improperly constrains public participation in BLM oil and gas leasing decisions," Exhibit 1 at 36.

The court concluded plaintiffs are likely to succeed on the fundamental question of whether BLM's statutory obligations require a minimum level of public involvement in leasing decisions with irrevocable, long-lasting consequences for the lands and minerals BLM manages on behalf of the public, and that the IM 2018-034 procedures adopted in early 2018 fall short of those obligations. The court found:

> It is well-settled that public involvement in oil and gas leasing is required under FLPMA and NEPA. . . . On a very fundamental level, it strains common sense to see how these requirements are fulfilled when just comparing IM 2018-034 to IM 2010-117. That is, how can it be said that IM 2018-034 provides the required public participation 'to the fullest extent possible' and 'to the extent practicable,'

> when it is dramatically more restrictive (at least on the issue of public participation) than the previously-established IM (IM 2010-117) it only recently replaced?

Exhibit 1 at 36-37. The court went on to state:

> IM 2018-034 jettisoned prior processes, practices, and norms in favor of changes that emphasized economic maximization to the detriment if not outright exclusion of pre-decisional opportunities for the public to contribute to the decisionmaking process affecting the management of public lands. That choice was problematic when considering the Congressional directives for public involvement contained in FLPMA and NEPA and the apparent shortcomings of IM 2018-034 in allowing for public participation in BLM oil and gas leasing decisions.

Exhibit 1 at 40-41. Reviewing the record, the court further concluded that:

> in this case, the record contains significant evidence indicating that BLM made an intentional decision to limit the opportunity for (and even in some circumstances to preclude entirely) any contemporaneous public involvement in decisions concerning whether to grant oil and gas leases on federal lands. . . . The evidence illustrates that the intended result of the at-issue decisions was to dramatically reduce and even eliminate public participation in the future decision-making process. Doing so certainly serves to meet the stated "purpose" of IM 2018-034 – that is, reducing or precluding public participation will "streamline the leasing process to alleviate unnecessary impediments and burdens, to expedite the offering of lands for lease . . . ." Yet, the route chosen by BLM to reach that destination is problematic because the public involvement requirements of FLPMA and NEPA cannot be set aside in the name of expediting oil and gas lease sales. The benefits of public involvement and the mechanism by which public involvement is obtained are not 'unnecessary impediments and burdens."

Id. at 41 (emphasis added). Because of the court's clear legal conclusion that BLM, through IM 2018-034's new procedures, unlawfully eliminated required minimum levels of public involvement in mineral leasing decisions, any subsequent leasing decisions carried out under the procedures of IM 2018-034 will be either (a) a direct violation of the court's injunction, if within the Greater Sage-Grouse Planning Areas, or (b) of at best questionable legality, and potentially subject to being vacated, if outside the direct geographic scope of the Preliminary Injunction. As the court noted, "In not being allowed to participate at the leasing decision stage, or in having to hurriedly clamber to do so because of IM 2018-034's changes because of the limited time frame and other constraints upon public participation, oil and gas leases have been (and will be) issued without the full benefit of public input." Exhibit 1 at 42-43 (emphasis added). Although

the court, in balancing hardships under Fed. R. Civ. P. 65, declined to vacate third-quarter oil and gas lease sales that have already taken place, Exhibit 1 at 46-49, BLM is now fully on notice of the serious legal deficiencies inherent in the restricted public involvement procedures of IM 2018-034.

In summary, in its haste to implement "energy dominance" policies and to curtail or eliminate public involvement in lease sale decisions, the BLM and Department of Interior ran afoul of NEPA, FLPMA, and the APA in both its promulgation of the January IM, and in subsequent lease sales employing its procedures. Past participation in landscape-scale planning decisions, or the possibility of subsequent participation in permitting decisions once irrevocable commitments of development rights have already been conveyed, are no substitute for the legally-required duty on BLM to provide meaningful public participation in leasing decisions.

Because the entire process of identifying, reviewing, and offering oil and gas lease sales for the BLM's fourth quarter 2018 mineral leasing process is fundamentally compromised by the unlawful provisions of IM 2018-034, the appropriate course of action is for BLM to cancel its proposed fourth-quarter lease sale in its entirety, pending either (a) promulgation of final rules establishing for public participation in leasing decisions, or (b) at a minimum, interim compliance with the procedures applicable under IM 2010-117. Should BLM move forward without addressing these deficiencies, any leasing decisions that continue to proceed under the lawful IM 2010-117 regime will be, at the very least, legally suspect and subject to being vacated.

Specifically, BLM must open or re-open, as applicable, a 30-day public comment period on all NEPA compliance documents – whether Environmental Assessments or Determinations of NEPA Adequacy – for all proposed December 2018 oil and gas leases. In addition, it must allow for a 30-day public protest period on any final lease sale notice, as provided for in Section III.H of IM 2010-117. Should compliance with these requirements not be possible under BLM's currently-proposed auction schedule, BLM must, at a bare minimum, defer the proposed leasing action to allow for compliance with the court's Preliminary Injunction as to <u>all</u> proposed parcels.

C. BLM violated Section 7 of the Endangered Species Act by failing to ensure that agency actions will not jeopardize the continued existence of species listed under the Endangered Species Act, including the Railroad Valley springfish.

BLM's failure to consult with the Fish and Wildlife Service regarding impacts to listed species including the Railroad Valley springfish is unsupported and violates Section 7 of the Endangered Species Act. Specifically, the BLM's failure to conduct site-specific consultation with the Fish and Wildlife Service regarding proposed parcels 207, 208, and 211 violates ESA §7. BLM must not only evaluate the indirect and cumulative effects on special status species under NEPA, it must also (a) consult with the Fish and Wildlife Service under Section 7

regarding the effects of oil and gas development and water use on listed species and critical habitat, and (b) evaluate the effects on sensitive species under its own sensitive species policy.

While BLM did reinitiate consultation with FWS on the 2008 Ely RMP in 2017, the resulting Biological Opinion was, of necessity, a high-level document which was never intended to provide site-specific analysis or guidance on the potential impacts of oil and gas leasing and development on the Railroad Valley springfish. BLM is proposing to lease parcels in Railroad Valley in the September lease sale which lie within the same hydrographic basin as Duckwater and Lockes Ranch springs, both of which are designated critical habitat for the Railroad Valley springfish. The potential impacts of fracking to these springs, including impacts to groundwater quality, groundwater quantity, and resulting changes to surface waters, clearly warrant consultation with FWS about the specific lease parcels and how fracking at those parcels may affect the Railroad Valley springfish.

Congress enacted the Endangered Species Act (ESA) in 1973 to provide for the conservation of endangered and threatened fish, wildlife, plants and their natural habitats. 16 U.S.C § 1531, 1532. The ESA imposes substantive and procedural obligations on all federal agencies with regard to listed and proposed species and their critical habitats. *See id*. §§ 1536(a)(1), (a)(2) and (a)(4) and § 1538(a); 50 C.F.R. § 402. Under section 7 of the ESA, federal agencies must "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical."16 U.S.C. § 1536(a)(2).

The definition of agency "action" is broad and includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including programmatic actions. 50 C.F.R. § 402.02. Likewise, the "action area" includes "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." *Id.*

The duties in ESA section 7 are only fulfilled by an agency's satisfaction of the consultation requirements that are set forth in the implementing regulations for section 7 of the ESA, and only after the agency lawfully complies with these requirements may an action that "may affect" a protected species go forward. *Pac. Rivers Council v. Thomas,* 30 F.3d 1050, 1055-57 (9th Cir. 1994). The action agency must initially prepare a biological assessment (BA) to "evaluate the potential effects of the proposed action" on listed species. 50 C.F.R. § 402.12. If the action agency concludes that the proposed action is "not likely to adversely affect" a listed species that occurs in the action area, the Service must concur in writing with this determination. *Id*. §§ 402.13(a) and 402.14(b). If the Service concurs in this determination, then formal consultation is not required. *Id*. § 402.13(a). If the Service's concurrence in a "not likely to adversely affect" finding is inconsistent with the best available data, however, any such

concurrence must be set aside. *See id*. § 402.14(g)(8); 5 U.S.C. § 706(2). If the action agency concludes that an action is "likely to adversely affect" listed species or critical habitat, it must enter into "formal consultation" with the Service. 50 C.F.R. §§ 402.12(k), 402.14(a). The threshold for triggering the formal consultation requirement is "very low"; indeed, "any possible effect ... triggers formal consultation requirements."

Formal consultation commences with the action agency's written request for consultation and concludes with the Service's issuance of a "biological opinion." 50 C.F.R. § 402.02. The biological opinion states the Service's opinion as to whether the effects of the action are "likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id*. § 402.14(g)(4). [2] When conducting formal consultation, the Service and the action agency must evaluate the "effects of the action," including all direct and indirect effects of the proposed action, plus the effects of actions that are interrelated or interdependent, added to all existing environmental conditions – that is, the "environmental baseline." *Id*. §§ 402.14 and 402.02. The environmental baseline includes the past and present impacts of all Federal, state, and private actions and other human activities in the action area…."*Id*. The effects of the action must be considered together with "cumulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id*.

If the Service concludes in a biological opinion that jeopardy is likely to occur, it must prescribe "reasonable and prudent alternatives" to avoid jeopardy. *Id*. § 402.14(h)(3). If the Service concludes that a project is not likely to jeopardize listed species, it must nevertheless provide an incidental take statement (ITS) with the biological opinion, specifying the amount or extent of take that is incidental to the action (but which would otherwise be prohibited under Section 9 of the ESA), "reasonable and prudent measures" (RPMs) necessary or appropriate to minimize such take, and the "terms and conditions" that must be complied with by the action agency to implement any reasonable and prudent measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

The ESA requires federal agencies to use the best scientific and commercial data available when consulting about whether federal actions will jeopardize listed species. *See* 16 U.S.C. § 1536(a)(2). Accordingly, an action agency must "provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species of critical habitat." 50 C.F.R. § 402.14(d). Likewise, "[i]n formulating its biological opinion…the Service will use the

[2] To "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id*. § 402.02.

best scientific and commercial data available." *Id.* § 402.14(g)(8). However, if the action agency failed "to discuss information that would undercut the opinion's conclusions," the biological opinion is legally flawed, and the ITS will not insulate the agency from ESA Section 9 liability. S*ee Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1127-28 (9th Cir. 2012).

Section 7(d) of the ESA provides that once a federal agency initiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d). The purpose of section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under section 7(a)(2) that the action will not result in jeopardy to listed species or adverse modification of critical habitat.

BLM must use the existing readily available data to identify which sensitive species that are of critical concern with regards to the lands included in, or in immediate proximity to, the proposed sale parcels.

In addition, BLM must consult with the Service regarding the impacts of the lease sale on affected listed species, in compliance with its section 7 obligations under the ESA. To the extent that BLM relies on its section 7 programmatic consultations for the several management plans governing the lease sale, that reliance is not proper for any of the listed species affected by BLM's action. In any case, it must formally consult over the lease sale's potential adverse effects on listed species and consider the full scope of fracking and other drilling activities that could affect these species.

The law is clear that, in the context of oil and gas leasing, "agency action" under the ESA includes not just the legal transaction of lease issuance, but also all resulting post-leasing activities from exploration, through production, to abandonment:

> we hold that agency action in this case entails not only leasing but leasing and all post-leasing activities through production and abandonment. Thus, section 7 of the ESA on its face requires the FWS in this case to consider all phases of the agency action, which includes postleasing activities, in its biological opinion. Therefore the FWS was required to prepare, at the leasing stage, a comprehensive biological opinion assessing whether or not the agency action was likely to

> jeopardize the continued existence of protected species, based on "the best scientific and commercial data available." *16 U.S.C. § 1536(a)(2).*[3]

The Ninth Circuit's decision in *Conner v. Burford* is similarly clear that the consultation requirement is not obviated by uncertainty about the precise location and extent of future drilling: "Although we recognize that the precise location and extent of future oil and gas activities were unknown at the time, extensive information about the behavior and habitat of the species in the areas covered by the leases was available."[4] Similarly, the inclusion of a general Threatened and Endangered Species stipulation in the standard lease terms cannot substitute for the ESA Section 7 obligation to prepare a comprehensive biological opinion at the initial leasing stage:

> Appellants ask us, in essence, to carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion -- in this case one addressing the effects of leasing and all post-leasing activities -- be completed before initiation of the agency action. They would have us read into the ESA language to the effect that a federal agency may be excused from this requirement if, in its judgment, there is insufficient information available to complete a comprehensive opinion and it take upon itself incremental step consultation such as that embodied in the T & E stipulations. We reject this invitation to amend the ESA. That it is the role of Congress, not the courts.[5]

The BLM's refusal to consult at the lease stage, and proposal to defer consultation to the APD stage, is precisely the sort of incremental step consultation decisively rejected as inconsistent with the ESA in *Conner v. Burford*. The refusal to consult at the lease stage further precludes reliance on the earlier Ely RMP and any related plan-level consultation, because that plan-level consultation does not include site-specific evaluations for individual activities. Under *Conner*, the individual activity in question is clearly the issuance of a (non-NSO) lease, and consultation must occur prior to lease issuance if the resulting activities may affect listed species or critical habitat.

A deep carbonate aquifer that underlies the majority of the Great Basin flows underneath the proposed lease parcels, generally trending from northeast to southwest. This aquifer is largely comprised of "fossil water," which accumulated underground during the Pleistocene and continues to flow and discharge to this day. Above the carbonate aquifer are basin-fill or alluvial aquifers, which move precipitation from the region's numerous mountain ranges to the valley floors. As groundwater flow meets resistant layers of rock, both systems give rise to surface expressions of groundwater, generally in the form of springs and wetlands. These surface water

[3] *Conner*, 848 F.2d at 1453.
[4] *Id.* at 1453.
[5] *Id.* at 1455.

expressions are the most vital resources in the desert, supporting the vast majority of Nevada's robust biodiversity, and frequently harboring species protected or proposed for protection under the Endangered Species Act.

We have outlined in specific detail the ways that oil drilling and fracking may impact ground and surface water quantity and quality in our supplemental comment letter on the EA, which is incorporated here by reference. None of those concerns have been substantively addressed in the Final EA.

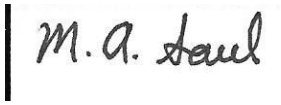
In light of the critical importance of groundwater and surface water resources, it is incumbent upon the BLM to include a rigorous analysis of potential impacts to these resources, and the cascading effects such impacts would have on the region's wildlife and biodiversity. Instead, what BLM offers in the EA is a minimization of potential impacts, and a delay on any actual analysis until the APD phase. As described above and below, this is an unlawful circumvention of NEPA's hard look requirement. Impacts to the quality and quantity of groundwater, and thus to the surface expression of those waters, are reasonably foreseeable and must be analyzed.

Based on the forgoing information and the proximity of parcels 207, 208, and 211 to the critical habitat for the Railroad Valley springfish, there is substantial basis to conclude that leasing and post-leasing activities may affect the threatened Railroad Valley springfish. Therefore, under ESA §7, BLM must have site-specific consultation with FWS prior to leasing.

III. Conclusion

The expansion of fossil fuel leasing into vast areas of previously-unleased Nevada public lands serves no legitimate public purpose, but threatens both the waters and native wildlife of the area and the climate at large. Unconventional oil and gas development not only fuels the climate crisis but entails significant public health risks and harms to the environment. BLM has violated NEPA and FLPMA by forgoing any substantive environmental analysis of the proposed lease sale and by unlawfully utilizing DNAs. Accordingly, BLM should cancel the lease auction, or else prepare an EIS that thoroughly analyzes the effects of the proposed lease auction, as compared to the alternative of no new fossil fuel leasing and no fracking or other unconventional well stimulation methods within the Ely and Winnemucca District planning areas.

As authorized representative on behalf of Protestors:



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