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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BATTLE MOUNTAIN BAND of the TE-MOAK TRIBE of WESTERN SHOSHONE INDIANS, Plaintiff, v. UNITED STATES BUREAU OF LAND MANAGEMENT and JILL C. SILVEY, in her official capacity as Bureau of Land Management Elko District Manager, Defendants. and CARLIN RESOURCES, LLC Defendant-Intervenor and Cross-Claimant.	3:16-cv-268-LRH-WGC FEDERAL DEFENDANTS' CORRECTED MOTION TO DISMISS CROSS-CLAIM BY CARLIN RESOURCES, LLC AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

April 6, 2017

FEDERAL DEFENDANTS' CORRECTED MOTION TO DISMISS CROSS-CLAIM BY CARLIN RESOURCES, LLC

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) the United States and Jill C. Silvey (in her official capacity) (collectively, Federal Defendants) respectfully move the Court to enter an order dismissing the Cross-Claim filed by Carlin Resources, LLC (ECF No. 98). The grounds for Federal Defendants' motion are set forth in the Memorandum of Points and Authorities that immediately follows this motion.

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FEDERAL DEFENDANTS' CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIM BY CARLIN RESOURCES, LLC

INTRODUCTION

For background, we refer to the Court's December 9, 2016 Order dismissing the counterclaim filed by intervenor Carlin Resources, Inc. ("Carlin") (ECF No. 94):

> This action involves the various agency decisions and federal permits issued by the BLM authorizing the construction of a power transmission line on land located in Elko County, Nevada that has been identified by the Battle Mountain Band as its traditional cultural property ("TCP") and has recently been deemed eligible by the BLM for inclusion on the National Register of Historic Places ("National Register").
>
> Plaintiff Battle Mountain Band is one of four bands that comprise and make up the Te-Moak Tribe of Western Shoshone Indians ("Te-Moak Tribe"), a federally recognized Indian tribe. The Band currently resides on colony lands in close proximity to the Tosawihi Quarries. The Band contends that the entirety of the quarries, including the specific TCPs at issue in this action, are a vital spiritual, cultural, and economic center for the Band and other member bands of the Te-Moak tribe.
>
> Defendant BLM is the federal agency responsible for overseeing and administering public lands, including the public lands on which the Tosawihi Quarries and the identified TCPs exist. As part of its administration of these lands, the BLM is authorized to issue permits and leases for use of the land.
>
> Intervenor Carlin is the current owner of certain mining rights within the Tosawihi Quarries. Approximately eight years ago, Carlin's predecessors-in-interest applied for a permit from the BLM to convert certain land in the quarries from an exploratory mining area into a functional mining operation. Carlin, as the current owner of the mining rights, is the interested party to the various agency decisions and federal permits issued by the BLM.
>
> All of the various BLM decisions in this action arise from and/or relate to the Hollister Mine Project ("the project"). The project is a now approved mining project located in and around the Tosawihi Quarries in Elko County, Nevada. As part of the project, an approximately 4.5-mile electric power transmission line would need to be placed and run to the mine from a newly constructed power substation at the entrance to the Tosawihi Quarries.

After BLM completed its review of the power line project under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), and after BLM had authorized Carlin to proceed with building the power line, BLM and the Te-Moak Tribe and the Nevada State Historic Preservation Officer (SHPO) determined that the area in which the power line would be built included property eligible for inclusion on the National Register of Historic places as a "Traditional Cultural Property" (TCP) under 54 U.S.C. § 307103(a) and 36 C.F.R. § 800.16(l)(1). Because BLM had already given Carlin authorization to proceed with the power line, and because BLM had fully complied with NEPA and NHPA during a six-year review process, BLM did not regard the new TCP designation as affecting Carlin's right to proceed with the power line. *See* ECF No. 60 (Order denying plaintiff's motion for preliminary injunction on the grounds that the new TCP did not trigger additional NHPA review responsibilities, making it unlikely that the Te-Moak Tribe would prevail on the merits.) The power line is now complete. *See Battle Mountain Band of the Te-Moak Tribe of W. Shoshone Indians v. U.S. Bureau of Land Mgmt.*, No. 16-16016, 2017 WL 655797 (9th Cir. Feb. 17, 2017) (dismissing as moot the Te-Moak Tribe's appeal of this Court's denial of injunctive relief).

The TCP located in the vicinity of the power line is one of several new TCP designations agreed upon by BLM and the Nevada SHPO. The gravamen of Carlin's Cross-Claim is the allegation that the identification of these new TCPs was substantively and procedurally improper and contrary to Carlin's rights under BLM's March 31, 2014 Record of Decision approving the mining plan. Carlin Resources, LLC's Crossclaim Against Bureau of Land Management and Jill C. Silvey ¶ 3, ECF No. 98 ("Cross-Claim").

ARGUMENT

Carlin's Cross-Claim must be dismissed for Carlin's want of standing.

Carlin claims two injuries flowing from the new TCP designations. First, Carlin alleges that it was not consulted about the new TCPs before those TCPs were designated by BLM and the SHPO. Second, Carlin alleges that the new TCP designations are (or will be) somehow detrimental to its mining operation. These allegations fail to establish either Article III standing or prudential standing.

Our Article III argument is hybrid. First, Carlin's allegations that its mining operation has somehow been compromised are speculative and theoretical and therefore, as a matter of law, fail to establish the concrete and particularized harm that is essential to Article III standing. Carlin's claim that it was wrongfully denied a consultative role fails to satisfy Article III standing requirements as a factual matter, because the governing Programmatic Agreement on its face denies Carlin any such role.

Carlin also fails to establish prudential standing with respect to the claim that its mining operation has been compromised. The alleged injury is purely economic; because purely economic interests fall outside the zone of interests with which NHPA is concerned, Carlin's claims fail the test for prudential standing as well.

A. The Applicable Standards for Standing

To meet the Article III standing requirements, a plaintiff must establish three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, it must show that it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). Plaintiff's injury must be "certainly impending" and cannot rely "on a highly attenuated chain of possibilities." *Clapper v.*

Amnesty Int'l USA, 133 S. Ct. 1138, 1143, 1148 (2013). Allegations of possible future injuries are not sufficient. *Id.* at 1147; *Ctr. For Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). Second, a plaintiff must establish a causal connection between the injuries complained of and the BLM's action. Those injuries must be "fairly . . . trace[able]" to the BLM's recognition of new TCPs. *Lujan*, 504 U.S. at 560-61 (citations omitted). Third, a plaintiff must show it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision of the Court. *Id.* at 561. Moreover, a "'plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008).

In addition to constitutional requirements, standing also involves prudential limits on the exercise of federal jurisdiction. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Prudential limits require a plaintiff to show the grievance arguably falls within the zone of interests protected or regulated by the statutory provision invoked in the suit. *Id.*

B. The Applicable Standards for Federal Defendants' Motion to Dismiss

Fed. R. Civ. P. 12(b)(1). In reviewing a 12(b)(1) motion to dismiss attacking the existence of subject matter jurisdiction as a matter of law, the allegations in a plaintiff's complaint are taken as true. *Whisnant v. United States*, 400 F.3d 1177, 1179 (9th Cir. 2005). Where a 12(b)(1) motion asserts that the allegations on which jurisdiction depends are not true as a matter of fact, there is no presumption of truth to plaintiff's allegations and the court may resolve factual disputes. *Thornhill Publ'g Co. v. GTE*, 594 F.2d 730, 733 (9th Cir. 1979) (citations omitted). In such case, the moving party may "submit affidavits or any other evidence properly before the court" to attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency. *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778

(9th Cir. 2000) (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). "It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Id*. (quoting *St. Clair*, 880 F.2d at 201).

The instant motion is hybrid. To the extent Carlin's complaint rests on the allegation that the Programmatic Agreement gave it a right to be consulted regarding the TCPs at issue in this case, our motion asserts that that allegation cannot be squared with the plain language of the Agreement itself and is therefore a challenge to the truth of the factual allegations in the cross-claim related to the Programmatic Agreement. To the extent the instant motion alleges that Carlin has otherwise failed to plead injury-in-fact sufficient to establish Article III standing, it asserts lack of jurisdiction as a matter of law.

Fed. R. Civ. P. 12(b)(6). A prudential standing challenge asserting that a plaintiff's alleged injury does not come within the invoked statute's zone of interests "is properly analyzed under . . . FRCP 12(b)(6). . . ." *Chandler & Newville v. Quality Loan Serv. Corp. of Wash.*, No. 03:13-CV-02014-ST, 2014 WL 2526564, at *4 (D. Or. June 3, 2014); *Guerrero v. Gates*, 442 F.3d 697, 707-08 (9th Cir. 2006) (where a party cannot satisfy the applicable prudential standing requirement(s), the party cannot state a claim upon which relief can be granted). "Rule 12(b)(6) authorizes courts to dismiss a complaint for 'failure to state a claim upon which relief can be granted.'" *In re Rigel Pharm., Inc. Securities Litig.*, 697 F.3d 869, 875 (9th Cir. 2012) (quoting Fed. R. Civ. P. 12(b)(6)). "To avoid dismissal, the complaint must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] plaintiff must allege sufficient factual matter . . . to state a claim to relief that is plausible on its face." *OSU Student*

All. v. Ray, 699 F.3d 1053, 1061 (9th Cir. 2012) (quoting *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011) (internal quotation marks omitted)). "In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff." *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1142-43 (9th Cir. 2012) (citing *Bell Atl. Corp.*, 550 U.S. at 555-56).

C. Because The Programmatic Agreement Does Not Give Carlin Consultation Rights With Respect to TCPs Other Than Those Identified By Carlin and Its NHPA Survey Contractor(s), BLM's Not Consulting With Carlin Caused No Justiciable Injury

Regarding known or potential TCPs the Programmatic Agreement ("PA", Ex. A hereto) gives local tribes, and the Nevada SHPO ongoing rights of consultation.[1] With respect to interested Tribes, for example, Section 2(f) provides that "[t]he BLM shall consult with BLM - identified Tribal Governments, tribal groups, and interested persons within the tribal communities of interest to identify TCPs or properties of traditional religious and cultural significance." Ex. A at 5. Section 12(c) similarly provides:

> Consultation with Consulting Parties. The BLM shall consult with Tribal Governments, concurrently with SHPO consultation, about TCPs, Historic Properties, and other concerns potentially affected by the Project. Consultation with Tribal Governments shall be on-going. Additional consultation will take place during Section 106 evaluation, regarding specific alternatives in the Project EIS, as part of monitoring and discovery situations, and for development and implementation of treatment plans. Tribes shall have 30 calendar days from receipt to review and comment on any documentation.

[1] A PA is an alternative procedure that an agency may develop "to implement section 106 and substitute them for all or part" of the typical section 106 regulations. *See* 36 C.F.R. § 800.14(a). As for legal effect, "[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency. . . ." *Id.* § 800.14(b)(2)(iii). *See* Cross-Claim ¶ 12. ("The requirements of the PA satisfied and supplanted the requirements imposed by the NHPA implementing regulations.")

Ex. A at 10. Neither provision includes Carlin (the "Operator") as having ongoing consultation rights concerning TCPs.

Instead, the PA lays out specific consultation obligations and rights of participation for the Operator only in the context of Section 3, which lays out Carlin's obligation to contract for a "Class III inventory" of the "Area of Potential Effect."[2] Once the survey is complete, Section 3 the PA provides that

> The BLM, in consultation with the SHPO, Tribal Governments, *and other Consulting Parties* shall evaluate all Cultural Resources (including TCPs) identified within the applicable APEs for Eligibility to the NRHP (utilizing criteria found in 36 C.F.R. 60.4) as inventories and revisits are completed.

Ex. A at 5 (emphasis added). Regarding the Carlin-sponsored inventory, Carlin will be include in TCP-related consultations as a "Consulting Party." In that context it is Carlin's contractor's responsibility to make the initial proposals for eligible TCPs. *Id*. § 3 (a). At that point "[t]he BLM shall apply the [National Historic Register] criteria to properties proposed as TCPs in consultation with Tribal Governments and other Consulting Parties." *Id*. § 3(b). Again Carlin, as a "Consulting Party," is included. But Carlin is not included in the ongoing consultation process regarding TCPs as specified in Sections 2(f) and 12(c), quoted above.

Even in Section 3 itself, the extent of Carlin's consultation rights is limited. Section 3(d) provides that BLM is empowered to authorize "an evaluation plan" under the Archaeological Resources Protection Act (ARPA), "which may involve minor

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[2] A Class III survey is an "[i]ntensive" survey that involves "a professionally conducted, thorough pedestrian survey of an entire target area . . . intended to locate and record all historic properties" and that "provides managers and cultural resource specialists with a complete record of cultural properties." BLM Manual 8110.2.21.C.1, C.3. *See Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005-06 (9th Cir. 2013).

excavation, archaeological probes or tests." ARPA authorization, the section provides, will be given "in consultation with the SHPO and Tribal Governments" – with no reference to the Operator as a "Consulting Party." *Id.* § 3(d). The PA is very careful to make clear where Carlin does, or does not, have TCP-related consultation rights. And in the context of this case, involving a TCP that came to light wholly outside the Class III inventory process during the course of BLM's ongoing consultations with the Te-Moak Tribe and the SHPO, Carlin has no such rights.

In fact, Carlin does not meaningfully allege otherwise. Carlin alleges that "the BLM was legally obligated to consult with Carlin during the agency's process of considering designation of new TCPs in the Project area" (Cross-Claim ¶¶ 2, 23; *see id.* ¶¶ 36, 40) but identifies no provision in the PA that creates any such obligation.

BLM's alleged failure to consult with Carlin creates no justiciable injury because Carlin had no right to consultation. *Cf. Coal. of 9/11 Families, Inc. v. Rampe,* No. 04 CIV. 6941 (JSR), 2005 WL 323747, at *2 (S.D.N.Y. Feb. 8, 2005) ("[W]hile Stipulation 5 and Stipulation 7 [in the Programmatic Agreement] specifically refer to the consulting parties in ways that arguably create third-party rights, Stipulation 1 does not mention the consulting parties at all (dismissing NHPA claims for want of standing) (citing *Tyler v. Cuomo,* 236 F.3d 1124, 1135 (9th Cir. 2000) (finding that plaintiffs, non-signatories to a Memorandum of Agreement undertaken pursuant to the NHPA, had standing to enforce only the section of the Agreement that specifically granted "member[s] of the public" a right to be heard but did not have standing to enforce another section of the Agreement that obligated only the signatories without mentioning anyone else); *see also Friends of the Astor, Inc. v. City of Reading,* No. 98-CV-4429, 1998 U.S. Dist. LEXIS 14935, at *37-38 (E.D. Pa. Sept. 17, 1998) (dictum to same effect))).

D. Because Carlin Alleges No Particularized, Concrete Injury It Lacks Article III Standing

Carlin has not adequately alleged injury in fact. Its injury allegations are numerous, but none of them pass Article III muster.

Carlin asserts that the March, 2014 Record of Decision (ROD) has somehow been changed, and that any such change violates Carlin's vested rights. *See* Cross-Claim ¶ 28 ("Carlin has invested substantial resources and planning in reliance on the finality of the ROD which included the PA and issuance of the ROW, and has been conducting operations pursuant to the ROD and consistent with the PA, including construction of the distribution line authorized under the ROW grant"); ¶ 29 (Carlin "did not agree to modifications of its ROD that are impliedly and effectively imposed by the Decision and the Band's claims thereunder"); ¶ 30 ("[t]his action by the BLM fundamentally alters Carlin's rights and unilaterally modifies the ROD and the PA and activities approved by the ROD"); ¶ 31 ("[t]he Decision causes Carlin immediate harm by injecting uncertainty into its plans and finality of its vested rights under the ROD"); ¶ 32 ("[i]f the Decision is allowed to stand, it could be construed to open the door to additional unilateral modifications on the Project approved by the ROD and ROW grant already issued to Carlin"); ¶ 33 (the Decision "causes Carlin harm by limiting, modifying, undermining or otherwise impacting its rights under the ROD and PA.")

These allegations fail to indicate that BLM's decision has caused Carlin any concrete harm whatsoever.

- The power line, which is in the area of the new TCP at issue in the Te-Moak Tribe's lawsuit, is fully built and operational. *Battle Mountain Band of the Te-Moak Tribe*, No. 16-16016, 2017 WL 655797 (9th Cir. Feb. 17, 2017) (dismissing as moot the Te-Moak Tribe's appeal of this Court's denial of injunctive relief). Designating the new TCPs had no effect on the power line.

- Carlin's numerous insinuations that the ROD has been changed are illusory – nowhere does Carlin identify a single word in the ROD that has been changed or whose effect has been modified.
- Carlin's fear of "additional unilateral modifications" is pure speculation. An abstract injury is not enough; "the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal quotation marks and citation omitted).
- The allegation that "[t]he BLM has confirmed to Carlin that it will apply the alleged "new" TCPs to exploration plans and activities approved in the ROD, and has established a protocol for applying the alleged "new" TCPs (Cross-Claim ¶ 34) impliedly concedes that BLM has to date *not* "applied" the TCPs to any "exploration plans and activities." Whether BLM's doing so will cause Carlin cognizable injury is a matter of speculation.
- Carlin nowhere indicates that the identification of the new TCPs is interfering, or will interfere, in any way, with any mining-related activity. The Te-Moak Tribe's original lawsuit tried to use one of the TCPs to block Carlin's power line, but the construction and operation of the power line is a *fait accompli*.

More fundamentally, Carlin's theory of injury (apart from the failure to consult claim, addressed above) boils down to the notion that Carlin acquired vested rights in the ROD that somehow handcuffed BLM and prevent BLM from continuing to fulfill its legal obligations under NHPA to consult with tribes about traditional cultural properties. As implausible as any such theory may be, it is flatly contradicted by the ROD itself, which specifically recites that -- with respect to TCPs -- "[t]he monitoring and mitigation processes, procedures, and protocols as defined within the PA and in coordination with Tribes are designed to address issues raised by the Tribes during consultation **and may continue to be adjusted by the BLM based on continuing consultation**." March 31, 2014 Record of Decision (Exhibit B) at 25 (emphasis added). The notion that the ROD somehow fixed all then-known TCPs and prevented the

recognition of additional TCPs is simply incorrect, because the ROD specifically allowed that TCP-related "monitoring and mitigation processes, procedures, and protocols" "may continue to be adjusted" based on ongoing tribal consultation.

Similarly, Section 2(f) of the PA provides that "[t]he BLM shall consult with BLM - identified Tribal Governments, tribal groups, and interested persons within the tribal communities of interest to identify TCPs or properties of traditional religious and cultural significance." Ex. A at 5. The PA does not say that this process will be arbitrarily halted the moment BLM issues an ROD or a permission to proceed with any component of the mining project.

Carlin has failed to allege injury in fact, and for that reason has failed to establish its standing.

E. Carlin's Alleged Economic Injury Does Not Confer Standing Under NHPA

The PA gives Carlin no right to consult regarding TCPs that are identified independently of Carlin's own Class-III NHPA survey. Carlin therefore has no claim that BLM somehow breached the PA. Independent of the PA, Carlin's claimed injuries also fail to pass the test for prudential standing, because Carlin's alleged injuries – if there are any – are purely economic and therefore lie outside the zone of interests with which NHPA is concerned.

Carlin brought its cross-claim under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, which provides for judicial review of federal agency action. *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dep't of Agric.*, 266 F.3d 889, 894 (8th Cir. 2001) (hereafter *Grazing*). Cross-Claim ¶ 1. The APA is a procedural statute and provides only the "framework for judicial review of agency action." *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (citing *Defenders of Wildlife v. Adm'r, EPA*, 882 F.2d 1294, 1303 (8th Cir.

1989)). A suit brought under the APA must be based upon the violation of a separate statute whose violation forms the basis for the complaint. *Id.* Thus, in order to establish standing, a plaintiff seeking judicial review must also show the injury complained of falls within the zone of interests sought to be protected by the statutory provision. *Bennett*, 520 U.S. at 162–63.

"In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

In the highly analogous context of NEPA the rule is well established that purely economic interests are not within the zone of interests protected, and that parties seeking to vindicate economic interests therefore lack standing to challenge the government's NEPA compliance. *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." (citation omitted)) Parties motivated solely by "their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest . . . ." *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976); *Grazing*, 266 F.3d at 896-97 (ranchers lacked standing to seek review under NEPA of an agency decision reducing the number of acres available for grazing in the Fort Pierre National Grasslands, because plaintiffs' interests were solely economic).

In the NHPA context, the same rule applies. In *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), for example, the United States summarily invalidated a Tribal lease under which a developer, Sun Prairie, had invested millions. Sun Prairie challenged the

government's action under, *inter alia*, NHPA. In part because Sun Prairie's injury was purely economic, the court dismissed the claim as lying outside the zone of interests protected by NHPA. *Id.* at 1039 ("Sun Prairie makes no attempt to demonstrate how its economic interests fall within the zone of interests protected or regulated by NHPA.") Other courts agree. *See Role Models Am., Inc. v. Geren*, 514 F.3d 1308, 1312 (D.C. Cir. 2008) ("The Preservation Act does not protect Role Models' right to acquire property for its own use when the use is unrelated to the Preservation Act's purpose. . . . It follows that Role Models lacked prudential standing to pursue this claim" (footnote omitted) (citing *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970), *Rosebud Sioux*, 286 F.3d at 1039, *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157–58 (9th Cir. 1998))).

In the *Presidio Golf Club* Case, the Ninth Circuit concurred with these general principles. *See* 155 F.3d at 1157–58:

> Purely economic interests do not fall within the zone of interests to be protected by NEPA or NHPA (quoting *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902–03 (9th Cir. 1996) ("NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions.")).

Presidio Golf Club also illustrates the exception to this rule where a plaintiff's interest are not purely economic but also significantly overlap with NHPA's goals. In that case the plaintiff golf club owned an historic 100-year old Tudor structure that it used as its club house. The club's 1919 articles of incorporation specifically stated that the "purposes for which [the Club] is formed are to acquire, improve and maintain grounds and buildings for athletic purposes and to acquire and maintain a club house for social intercourse among its members . . . ." 155 F.3d at 1158. Plaintiff sought to challenge the government's NHPA compliance with respect to a new modern clubhouse proposed to be built next to the historic structure. Because plaintiff sought to vindicate its aesthetic interests in its historic building – interests obviously within NHPA's zone

of interests -- the fact that plaintiff *also* had economic incentives did not undermine plaintiff's standing. *Id. See also Role Models Am., Inc. v. Harvey*, 459 F. Supp. 2d 28, 38 (D.D.C. 2006), *aff'd on other grounds*, 514 F.3d 1308 (D.C. Cir. 2008) ("The purpose of the NHPA is to preserve historic sites for public use. . . . A party dedicated to preserving such resources has standing to sue under the statute" (citations omitted)) (dicta). Here, by contrast, the interests Carlin seeks to vindicate are purely economic.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that Carlin's Cross-Claim be dismissed.

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Certificate of Service

I hereby certify that on April 6, 2017, I filed the above pleading with the Court's CMS/ECF system, which will send notice of such to each party.

s/Peter Kryn Dykema
PETER KRYN DYKEMA