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UNITED STATES DISTRICT COURT
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 official capacity as Bureau of Land Management Elko District Manager, **Defendants;** and CARLIN RESOURCES, LLC **Defendant-Intervenor and Crossclaimant.**	Case No. 3:16-cv-0268-LRH-WGC **CARLIN RESOURCES, LLC'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS CROSSCLAIM AGAINST BUREAU OF LAND MANAGEMENT AND JILL C. SILVEY**

Intervenor and Crossclaimant Carlin Resources, LLC ("Carlin"), by and through its undersigned counsel, DAVIS GRAHAM & STUBBS, hereby submits this opposition to Federal Defendants' Corrected Motion to Dismiss Crossclaim (ECF 103).

INTRODUCTION

Carlin filed a crossclaim against Defendants United States Bureau of Land Management and Jill C. Silvey in her official capacity as Bureau of Land Management Elko District Management (together, "BLM") challenging the BLM's decision designating areas underlying the Hollister Mine Project ("Project") as Traditional Cultural Properties ("TCPs"). The Decision violated the National Historic Preservation Act ("NHPA") and its implementing regulations; 43

C.F.R. Part 3809, including §§ 3809.431 and .602; and the Administrative Procedure Act ("APA"). In stunning contrast to the BLM's prior written assertions that it would consult with Carlin on the eligibility of the new TCP values prior to making determinations because of Carlin's obvious interests and under the PA, the BLM now argues Carlin has no such rights. The BLM's motion to dismiss Carlin's crossclaim incorrectly alleges that Carlin lacks standing under Article III and NHPA. In fact, Carlin has suffered tangible, imminent harm as a result of the BLM's failure to consult with Carlin as part of BLM's decision designating the areas underlying the Project as eligible for inclusion on the National Register of Historic places as TCPs in violation of the PA, NHPA, and APA, and Carlin's harm overlaps with NHPA's goals. Therefore, this Court should deny the BLM's motion to dismiss Carlin's crossclaim.

FACTUAL BACKGROUND

Many of the facts relevant to Carlin's counterclaim are set forth in the Court's December 9, 2016, Order (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

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> 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 an 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.

Carlin operates the Hollister Mine ("Project"), which is the subject of the complaint in this action and, as the Court notes is now an approved mining project. After the BLM completed its review of the power line project under the National Environmental Policy Act (NEPA) and the NHPA, and after the BLM had authorized Carlin to proceed with building the power line, the BLM issued a decision ("Decision") designating many areas underlying the Project as eligible for inclusion on the National Register of Historic places as TCPs under 54 U.S.C. § 307103(a) and 36 C.F.R. § 800.16(l)(1). *See* ECF 98-1. The BLM had already completed the work to identify TCPs potentially impacted by the Project and approved the Project in the BLM's Record of Decision signed on March 31, 2014 ("ROD"). The ROD approved not only the mine plan of operations, but also issuance of a right-of-way ("ROW") to construct an electrical distribution line to provide power to the Project in order to mitigate impacts from generators.

Pursuant to the NHPA, implementing regulations, and a Programmatic Agreement ("PA") prepared to comply with the NHPA for the Project, the BLM was legally obligated to consult with Carlin during the agency's process of considering designation of new TCPs in the Project area but failed to do so. 36 CFR 800.2(a)(4); *see generally* PA, ECF 38-3. The BLM has repeatedly acknowledged this obligation: in its November 20, 2015 letter to the Director of the ACHP, BLM stated "**BLM will consult with the Band, as well as the operator, Carlin Resources, on the eligibility of the new TCP values prior to making determinations of eligibility**. . . BLM will consult with Carlin Resources because BLM's determinations may affect

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their interests in the area, as well as the fact that Carlin signed the PA as an invited signatory." **Exhibit 1**, Letter from J. Silvey, BLM District Manager to R. Nelson, Advisory Council on Historic Preservation, at 6 (hereinafter, "Silvey Letter to ACHP"). The PA was negotiated over the course of approximately three years and signed by the BLM, Carlin, the Nevada State Historic Preservation Officer and the Advisory Council on Historic Preservation. For reasons unknown, the BLM reversed course and never completed the required consultation with Carlin – resulting in Carlin's crossclaim at issue.

Carlin filed the crossclaim challenging the BLM's TCP designation as substantively and procedurally improper and contrary to Carlin's rights under the BLM's March 31, 2014 Record of Decision approving the mining plan, the PA and the NHPA. *See* Carlin Resources, LLC's Crossclaim ¶ 3, ECF No.98 ("Crossclaim").

ARGUMENT

The BLM incorrectly argues that Carlin lacks Article III and Prudential Standing despite its own prior acknowledgment that consultation with Carlin was required (and would be completed prior to any BLM decision on the new TCPs) given that Carlin is a consulting party and invited signatory under the PA and given that the determinations "may affect [Carlin's] interest in the area." Ex 1 at 6. BLM's November 2015 acknowledgment of Carlin's right to consultation was consistent with requirements under the NHPA and, that as the permittee, Carlin is expressly recognized by Section 106 regulations as a consulting party -- creating an ongoing right to consultation and clear Article III and prudential standing as set forth by Congress and the Secretary of the Interior. The BLM's latest assertions in its Motion that Carlin merely "speculates" about the impact of the Decision also contradict the BLM's prior assertions to Carlin, that "any future ATPs that may be proposed within the newly designated TCPs" will be evaluated by BLM to "avoid adverse effects that qualify individual TCPs for eligibility." **Exhibit 2**, Letter from J. Silvey, BLM District Manager to D. Lassiter, Carlin Resources, at 2 (undated but received by Carlin May 15, 2016) (hereinafter, "Silvey Letter to Carlin").

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A. Carlin has Article III standing

Carlin satisfies each of the three requirements to establish Article III standing: (1) that it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) a causal connection between the injuries complained of and the BLM's recognition of new TCPs; and (3) it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision of the Court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Moreover, Plaintiffs "alleging procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests," effectively relaxing prongs two and three. *Salmon Spawning & Recovery Alliance v. Gutierrez,* 545 F.3d 1220, 1226 (9th Cir.2008). The BLM does not contest that Carlin's crossclaim meets requirements two and three to satisfy Article III standing – which are relaxed given that Carlin's harm here is a procedural injury – the BLM violated the PA and the NHPA by denying Carlin any involvement or consultation in the decision-making process related to the new TCPs. *See generally* BLM MTD, ECF 103; *see also* Silvey Letter to ACHP; Silvey Letter to Carlin. Therefore, Carlin focuses on the first factor—injury in fact -- which "necessitates a showing of 'an invasion of a legally protected interest' that 'affects the plaintiff in a personal and individual way.'" *Fleck & Assocs., Inc. v. Phoenix,* 471 F.3d 1100, 1104 (9th Cir. 2006) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n. 1 (1992)). "[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins,* __ U.S. __, 136 S.Ct. 1540, 1549 (2016). Here, as discussed below and as BLM previously admitted, Carlin has the procedural right to consultation prior to the BLM's decision on the proposed new TCPs. BLM's failure to complete such consultation resulted in a procedural violation that deprived Carlin of any input in the process as

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clearly required under the NHPA, Section 106 Regulations and PA.

In addition, "[e]conomic injury is clearly a sufficient basis for standing" under the *Lujan* test. *San Diego Cnty. Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1130 (9th Cir.1996). When resolving a motion to dismiss at this stage, the court does "not speculate as to the plausibility of [Plaintiffs'] allegations." *Bernhardt v. Cnty. of Los Angeles,* 279 F.3d 862, 869 (9th Cir.2002) "[I]n order to survive a motion to dismiss," Plaintiffs need only "to plead general factual allegations of injury," for the court presumes that the "'general allegations embrace those specific facts that are necessary to support the claim.'" *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1156 (9th Cir.2000) (quoting *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130). Therefore, an unsupported allegation that defendant's action or inaction has caused economic injury to Plaintiff or Plaintiff's business "surely affects Plaintiffs in a personal and individual way" sufficient to satisfy Article III standing. *V. Real Estate Grp., Inc. v. U.S. Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1200, 1207 (D. Nev. 2015).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," for on a motion to dismiss the Court presumes "that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (internal quotation marks omitted). Only in response to a motion for summary judgment can a plaintiff no longer rely on general allegations. *Id.*

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed.

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Id. at 561–62. Here, Carlin has more than met that burden and its general factual allegations of injury resulting from the BLM's action must be considered.

1. Relevant provisions of the NHPA and Section 106 Regulations

36 CFR §800.2 establishes the "Participants in the Section 106 process." Section 800.2(a)(4) requires the agency involve the "consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process." Paragraph (c) then defines those consulting parties to include an applicant for a Federal permit or other approval (such as Carlin) and further provides that such "applicant is entitled to participate as a consulting party as defined in this part." *Id.* §800.2(c)(4). The regulation further provides for individuals with a demonstrated interest in the undertaking to "participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties . . .." *Id.* §800.2(c)(5). Just as the BLM acknowledged in its November 2015 letter to the ACHP, as an owner of vested property rights in the lands at issue, Carlin's interest cannot be questioned – nor is it under the PA, Section 106 or the NHPA.

The NHPA has long recognized the importance of including those with ownership interests in the lands at issue in the identification process.[1] Congress was clear in the NHPA that it is the "policy of the Federal Government . . . in partnership with States, local governments, Indian tribes . . . and private organizations and individuals, to . . . foster conditions under which our modern society and our historic property can exist **in productive harmony and fulfill the social, economic, and other requirements** of present and future generations . . .." 54 U.S.C.A. § 300101(1) (formerly cited as 16USCA 470-1) (emphasis added). This is not an isolated

[1] For example, 54 U.S.C. §302105(a) (formerly codified at 16 USC § 470a) requires that the Secretary promulgate regulations mandating that before any property may be included in the National Register, the owner "shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property for inclusion or designation." While nomination is not directly at issue here, the purpose of determining eligibility is to evaluate whether a TCP or particular area or resource is eligible for listing on the National Register – as the purpose is preservation of such eligible resources. The PA defines "eligibility" as that of Cultural Resources to the NRHP and defines "Historic Properties" to be "Cultural Resources that are included in, or eligible for inclusion in, the NRHP . . . ." PA, ECF 38-3, at 17.

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concept within the statute but is further expressed in 54 U.S.C.A. §306102 which mandates that each Federal agency establish a preservation program for the identification, evaluation and nomination of historic properties to the National Register and that the agency's "preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes . . . and the private sector." There is no question as to Carlin's procedural rights at issue are well established in the NHPA, Section 106, and the PA, nor is there any question that Carlin is within the zone of interests to be protected under the NHPA which balances preservation with the ongoing social and economic needs of present and future generations as well as existing property owners' interests in the lands at issue.

Moreover, BLM's argument that BLM's application of the TCPs to future authorizations for Carlin is "speculative" or "unknown" is simply wrong. The BLM itself has unequivocally asserted that for "any future ATPs that may be proposed within the newly designated TCPs, the BLM will work with Carlin Resources on a case-by-case basis to avoid adverse effects that qualify individual TCPs for eligibility." The BLM went on to provide examples of restrictions that might be put on future ATPs for mineral exploration previously approved in the ROD. *See* Silvey Letter to Carlin. The BLM has repeatedly acknowledged that the PA was entered into in satisfaction of Section 106, for resolution of adverse effects. Again, Section 106 recognizes the importance of the Operator -- who is obligated to provide for avoidance and mitigation and pay for contractors, work and analysis related to the same – and mandates that the agency "shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party." *Id.* 800.6(a)(2). Here, that is Carlin, as BLM acknowledged.

2. Relevant provisions of the PA

The PA was executed by and among the BLM, the ACHP, the State Historic Preservation Office ("SHPO"), and the Operator, with Carlin included as a signatory and consulting party to the PA. *See* PA, ECF 38-3, at 3, 28. The BLM consulted with SHPO, the ACHP and the other

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Consulting Parties[2] (including Carlin's predecessor) "to create" the PA "pursuant to 36 C.F.R. 800.6 and 800.14(b) of the ACHP's regulations implementing Section 106 of the NHPA, 16 U.S.C. 470f. *Id.* at 1. The PA requires that the BLM participate in and oversee all ongoing Section 106 consultation. *See id.* at 3. Under the PA, the "BLM, the SHPO, the ACHP, and the Operator agree that the Project shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on Historic Properties." *Id.* at 2. Those stipulations include the general and specific measures that the BLM and Operator will undertake "to ensure that the BLM's objectives and responsibilities under the NHPA will be fulfilled." *Id.* at 3(A). This includes necessary survey work, avoidance and mitigation which all are funded by the Operator and affect Carlin's interests and operations and vested rights, as BLM previously acknowledged.

Regarding TCPs, section D(3) of the PA provides that "[t]he 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 . . . as inventories and revisits are completed"; "[t]he BLM shall require the Contractor conducting the Class III inventory to make initial recommendations regarding Eligibility, but determinations of Eligibility will be made by the BLM in consultation with the SHPO, taking into consideration the views of the Consulting Parties"; and "[t]he BLM shall apply the NRHP criteria to properties proposed as TCPs in consultation with Tribal Governments and other Consulting Parties . . . ." *Id.* at 5. Section D(4) of the PA outlines additional consultation requirements pursuant to Consulting Parties related to determining the effects of the project on TCPs, and section D(6) provides that the BLM must consult with Consulting Parties prior to issuing an authorization to proceed where TCPs are at risk. *See id.* at 6-7. Each of these provisions is consistent with the NHPA, Section 106 Regulations and BLM's

[2] The PA defines "Consulting Parties" to include anyone interested in the Project which necessarily includes the project operator who will bear obligations to avoid, minimize or mitigate any adverse impacts to identified eligible Historic Properties. [CITE – PA, Definitions at [ ]]

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November 2015 confirmation that Carlin would be consulted prior to any decision on the proposed TCPs. Yet now, inexplicably, BLM asserts in its Motion that Carlin only gets to be a Consulting Party sometimes, but not others depending on whether TCPs are identified as part of a Class III survey or based on the Band's initiation. But, neither the law nor the PA support this. The one subsection the BLM now cites to support this argument, Section D(2)(f) is within the "Identification" Section which provides requirements for Class III inventories, including identification of TCPs. *See id.* at 4-5.

Section 12 of the PA regarding "Time Frames" addresses "Consultation with Consulting Parties" in subsection (c):

> 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.

Id. at 10. Despite the heading of section 12(c), this section fails entirely to address "Consulting Parties" outside of tribal governments – and instead provides for when Tribal consultation occurs and the timeframe for its completion. The fact that "Consulting Parties" are not mentioned once in the text of this section does not prevent Carlin from enforcing its ongoing consultation rights under the remaining sections of the PA, the NHPA and Section 106, contrary to the BLM's assertions.

"Compliance 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 . . . ." 36 C.F.R. § 800.14(b)(2)(iii). Under NHPA, when an agency has entered into a Memorandum of Agreement, "it has voluntarily assumed an obligation that is enforceable...." *Tyler v. Cisneros*, 136 F.3d 603, 608-09 (9th Cir. 1998); *see also* 36 C.F.R. § 800.6(c) ("A memorandum of agreement...shall govern the undertaking and all its parts."). The

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PA therefore acted as a regulatory substitution for the regulations of 36 CFR Part 800, which implement the NHPA, and the BLM is obligated to comply with the provisions of the PA (as well as the NHPA and Section 106).

3. The BLM's failure to consult with Carlin prior to designating the TCPs caused concrete, particularized, and imminent injury to Carlin

Not only did the BLM fail to consult with Carlin in the process of making the eligibility determination and identification of the TCPs, it requested that material evidence to the agency's determination and concurrence by the SHPO be destroyed by SHPO. As a result, Carlin as a consulting party and operator bound by future obligations related to avoiding and mitigating impacts to the new TCPs is not only excluded from the process but incapable of even understanding or having the decision reviewed. **Exhibit 3**, J. Silvey letter to R. Palmer, SHPO (dated April 25, 2016) (hereinafter, "Silvey Letter to SHPO").

While Carlin recognizes the obvious and critical importance of the Band being consulted in the potential designation of new TCPs, Carlin too is a consulting party and, as the BLM recognized, has rights affected by the Decision and is entitled to review and evaluate the documentation and information the agency relied upon. This is especially important given that significant portions of the new TCPs overlay the mine itself and critical paths for the mine development – much of which has been previously and significantly disturbed in a manner that would call into serious question the integrity of the sites, which is a mandatory criteria in evaluating eligibility.[3] The Secretary of the Interior's Guidelines are clear that the evaluation should state how the particular property meets the integrity requirements – including a

[3] *See* National Register Bulletin of the U.S. Department of the Interior, *How to Evaluate the Integrity of a Property*, available at https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_8.htm#assessingintegrity (last visited May 18, 2017) (recognizing the importance of a site's retention of integrity of the features that represent its significance).

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determination that the property retains its integrity – in its current condition.[4] Here, in addition to the existing mine disturbance, the BLM's confirmation that the construction of the Power Line was not affected by the new TCP Decision in combination with the Band's position that construction and operation of that power line interferes with the qualities that make the new TCPs significant, raises question as to the integrity.

Yet, incredibly and in contrast to its prior positions in dispute resolution with the ACHP, the BLM alleges that its failure to consult with Carlin creates no injury because Carlin had no right to consultation under the PA. *See* BLM MTD, ECF 103, at 9. The BLM concedes the following in its motion:

> "[r]egarding the Carlin-sponsored inventory, Carlin will be include[d] 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."

BLM MTD, ECF 103, at 8. However, the BLM now argues that, despite Carlin's status as the operator who will be impacted by the Decision with new requirements and mitigation considerations for the Project (as BLM recognized in its November 2015 letter) – particularly given that the new TCPs underlie most of the Project area -- Carlin is "not included in the ongoing consultation process regarding TCPs" as outlined elsewhere in the PA, and its consultation rights are limited by the language of the PA. BLM MTD, ECF 103, at 8. In support, the BLM cites several non-binding cases from other jurisdictions, and misconstrues cited provisions from the PA. *See* BLM MTD, ECF 103, at 9. Moreover, the BLM argues that Carlin failed to allege that designation of the TCPs has caused it harm because the power line has been constructed, and the new designation has no effect on

[4] Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines for Evaluation (the process of determining whether identified properties meet defined criteria of significance for eligibility), Criteria, found at https://www.nps.gov/history/local-

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the power line; that the ROD has not been changed; and that Carlin's claims regarding harm are speculative. *See* BLM MTD, ECF 103, at 10-11. But, as explained above, BLM's own letter to Carlin confirms there is no speculation – the new TCPs will be applied to Carlin's future proposed drill sites for exploration. *See* Silvey Letter to Carlin.

Carlin was a consulting party to the PA. *See* Exhibit 3 to Carlin's Opposition to Renewed Motion for TRO (where Klondex Mines Ltd. has since acquired all interests in Carlin from Carlin's previous owner, Waterton Global Mining Company, LLC). The BLM has acknowledged Carlin's rights as a Consulting Party, stating the following in a letter dated November 20, 2015, and signed by Jill Silvey:

> BLM will consult with the Band, as well as the operator, Carlin Resources, on the eligibility of new TCP values prior to making determinations of eligibility. These determinations arc expected prior to the operator's submittal of plans for the 2016 drilling season, scheduled for April, 2016. **BLM will consult with Carlin Resources because BLM's determinations may affect their interest in the area, as well as the fact that Carlin signed the PA as an invited signatory**.

Silvey Letter to ACHP, at 6 (emphasis added).[5] The BLM's motion to dismiss fails to fully explain the sections which give rise to Carlin's consultation rights thereunder, and its representation that sections 2(f) and 12(c) operate to actually exclude Carlin from ongoing consultation rights is misleading. As a Consulting Party to the PA, Carlin has a legal right to be consulted prior to the TCP designation, and Carlin itself was the object of the government's

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law/arch_stands_3.htm#crit (last visited May 18, 2017).

[5] Carlin notes that this Court may consider invoking judicial estoppel to prevent the BLM from arguing in its motion to dismiss that it was not required to consult with Carlin pursuant to the PA and NHPA, when it previously argued before the ACHP that it would consult with Carlin for the reasons stated in this letter to gain a favorable decision in a contested matter. *See New Hampshire v. Maine*, 532 U.S. 742, 743 (2001) (When considering whether to apply the doctrine of judicial estoppel, courts will consider the following factors: (1) whether a party's later position is "clearly inconsistent with its earlier position;" (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled;" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.").

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foregone action, which, under *Lujan*, creates a situation in which "there is ordinarily little question that the . . . inaction has caused him injury." 504 U.S., at 561-62. This right arises from the ongoing consultation requirements identified in the PA, and under the NHPA and Section 106. Carlin's Crossclaim alleges that the BLM improperly interpreted the PA to make the Decision, and breached the terms of the PA (and violated the NHPA) when it ignored the process under the PA and failed to provide Carlin its procedural rights under the PA and the NHPA. *See Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir.2008) ("Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.") The BLM's consequent breach of the terms of the PA are in turn a violation of the NHPA, and arbitrary, capricious and not in accordance with law in violation of the APA.

The BLM's assertion that Carlin has suffered no harm because the power line has already been constructed avoids a full analysis of Carlin's right pursuant to the Project. As delineated above, the PA requires that the BLM consult with interested persons throughout the project, consult with Consulting Parties in determining TCP eligibility, and apply NRHP criteria to properties proposed as TCPs in consultation with Consulting Parties. By their plain language, these contractual obligations binding the BLM always had the potential to extend beyond mere construction of the power line. Beyond deprivation of the opportunity to participate in the BLM's Decision, the BLM's failure to comply with these consultation requirements have harmed Carlin by interfering with Carlin's ability to conduct operations as set forth in the ROD and ROW grant, subject to the PA, under FLPMA and the 1872 Mining Law and Carlin's vested valid rights thereunder. *See* Carlin's crossclaim, at 5. The new TCPs will be considered relative to ongoing surface exploration and other activities approved in the ROD which creates a Valid Existing Right for Carlin that BLM cannot now undermine or ignore. *See* Silvey Letter to Carlin

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(stating that Carlin is authorized to proceed with staking poles for the power line, but must consider the new TCPs for new exploration site ATPs). Moreover, assuming that the land at issue in the Decision are not actually TCPs, requiring Carlin to go through the additional regulatory burden, as well as avoidance and mitigation issues measures, harms Carlin to satisfy Article III standing in itself. *See Western Exploration, LLC v. U.S. Department of the Interior*, Order Case No. 3:15-cv-00491-MMD-VPC, at 17 (D. Nev. 2017) (finding injury where, due to agency action, plaintiff "would have to go through the additional burden of showing that the disposal of the land needed for the landfill expansion would provide a net conservation gain to the sage-grouse or that disposal of the land would not have any direct or indirect adverse impact on conservation of the sage-grouse.")

When the BLM issued the ROD approving the project on March 31, 2014, the entire Project was approved, including Carlin's plan of ongoing operations for the power line and surface exploration and underground mining and related authorizations for the Project, and no part of the Project remained for an undertaking for purposes of NHPA after approval. *See generally* ROD, ECF 38-1. At that point, Carlin's rights were vested, and the site underlying the Project was not designated a TCP after a six-year NHPA and NEPA process pursuant to the same. Carlin is not arguing the BLM is "handcuffed" by the ROD but instead merely that the BLM must include Carlin in the consultation process as required under the NHPA and PA in the evaluation process, including identification of new TCPs. Moreover, the PA was approved as part of the ROD for the Plan of Operations and as Carlin notes in its crossclaim, the BLM may only modify a plan of operations pursuant to the standards and processes set forth in 43 C.F.R. Part 3809, including §§ 3809.431 and .602—which the BLM did not do here. As such, the Decision and violation of the terms of the PA (or unauthorized unilateral modification of the PA by the BLM) appear to constitute an unlawful modification of the ROD, the PA and Carlin's plan

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of operations. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001), 268 F.3d at 820 ("Contract rights are traditionally protectable interests."). In sum, Carlin is left unsure as to what additional responsibilities and level of operations it may continue with in the face of the BLM's post-Project unlawful designation completed in violation of the PA and NHPA—and stands to lose the significant time and money it has put into the project over the course of a six-year NEPA and NHPA process. In addition, Carlin faces regulatory uncertainty with respect to the new TCPs as well as the process by which identification will be undertaken under the NHPA and PA. The BLM's Decision has undermined and is in conflict with the ROD, the ROW grant, and the PA by designating sites within the ROW and Project area as new TCPs without Carlin's involvement or consultation—interfering with Carlin's rights thereto.

Carlin's injury as a result of the BLM's violation of the PA, ROD, and NHPA is not speculative. As Carlin explains in its crossclaim, it 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. This economic investment and reliance upon regulatory certainty in vested rights in Carlin's ability to continue operations and the BLM's decision designating TCPS interfering therewith have resulted in imminent harm to Carlin. This Court has long recognized economic harm as sufficiently imminent to meet Article III standing requirements.[6] *See, e.g., San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir.1996) ("Economic injury is clearly a sufficient basis for standing" under the *Lujan* test); *see also V. Real Estate Grp., Inc. v. U.S. Citizenship & Immigration Servs.*,

[6] As explained in Part 4, while the harm Carlin has sustained as a result of the BLM's procedurally flawed Decision is partly economic in nature, Carlin's harms as a result of the BLM's disregard of its vested and procedural interest pursuant to the PA overlaps with NHPA's

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85 F. Supp. 3d 1200, 1207 (D. Nev. 2015). Therefore, Carlin's injury is imminent and concrete to satisfy Article III standing requirements.

Substantial portions of Carlin's rights to the Project and under the PA have been adversely affected by the BLM's procedurally flawed designation of TCPs—a designation which necessarily required interpretation and application of the PA, an agreement to which Carlin is a Signatory and Consulting Party. Therefore, Carlin, as a Consulting Party and Signatory to the PA, has standing under *Lujan* as a direct object of the BLM's violation of the terms of the PA.

B. Carlin has prudential standing to initiate this crossclaim

The BLM incorrectly argues that Carlin lacks standing under NHPA because its interests are purely economic in nature, and therefore lie outside the zone of NHPA interests. *See* BLM MTD, ECF 103, at 12-14. Under Rule 12(b)(6), the defendant bears the burden of demonstrating that the plaintiff has not stated a claim upon which relief can be granted. FRCP 12(b)(6). To avoid a Rule 12(b)(6) dismissal, a complaint does not need detailed factual allegations, but it must plead "enough facts to state a claim to relief that is plausible on its face." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). This Court will analyze a prudential standing challenge asserting that a plaintiff's alleged injury does not fall within a statute's zones of interest under FRCP 12(b)(6). *See Guerrero v. Gates*, 442 F.3d 697, 707-08 (9th Cir. 2006).

In addition to Article III requirements, standing also involves prudential limits on the exercise of federal jurisdiction. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). This Court considers violations of the NHPA only within the confines of the APA. *See, e.g., Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009). Accordingly,

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goals.

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Carlin brought this crossclaim under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, which provides for judicial review of federal agency action. The APA, 5 U.S.C. § 702, grants federal court standing to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." The U.S. Supreme Court has interpreted this to require that the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970).

The prudential standing test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388, 399–400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). Therefore, courts construed this test generously, and "a court should deny standing under the 'zone of interest' test only 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." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004). To do so, this Court will look "to the substantive provisions of the [statutes], the alleged violations of which serve as the gravamen of the complaint." *Bennett v. Spear,* 520 U.S. 154, 175 (1997). "Thus, APA plaintiffs need only show that their interests fall within the 'general policy' of the underlying statute, such that interpretations of the statute's provisions or scope could directly affect them." *O'Neill*, 386 F.3d at 1200.

While "[p]urely economic interests do not fall within the zone of interests to be protected by . . . NHPA," where the plaintiff's economic interest also overlaps with NHPA's goals, then a plaintiff is within the zone of interests to satisfy prudential standing. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157-59 (9th Cir. 1998). Here, Carlin's rights are not

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just overlapping with the goals of the NHPA – they are expressly recognized and protected under the NHPA as discussed above.

The NHPA has long recognized the importance of including those with ownership interests in the lands at issue in the identification process.[7] Congress was clear in the NHPA that it is the "policy of the Federal Government . . . in partnership with States, local governments, Indian tribes . . . and private organizations and individuals, to . . . foster conditions under which our modern society and our historic property can exist **in productive harmony and fulfill the social, economic, and other requirements** of present and future generations . . .." 54 U.S.C.A. § 300101(1) (formerly cited as 16USCA 470-1) (emphasis added). This is not an isolated concept within the statute but is further expressed in 54 U.S.C.A. §306102 which mandates that each Federal agency establish a preservation program for the identification, evaluation and nomination of historic properties to the National Register and that the agency's "preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes . . . and the private sector."

Carlin's claim is distinguishable from those in which the Ninth Circuit has concluded that plaintiffs' interests were purely economic. For example, the BLM cites to *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 715 (9th Cir. 1993) for the proposition that Carlin lacks standing because its interests are purely economic, and as such Carlin does not fall within the zone of interests protected by NHPA (though in that case the court was considering the purpose

[7] For example, 54 U.S.C. §302105(a) (formerly codified at 16 USC § 470a) requires that the Secretary promulgate regulations mandating that before any property may be included in the National Register, the owner "shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property for inclusion or designation." While nomination is not directly at issue here, the purpose of determining eligibility is to evaluate whether a TCP or particular area or resource is eligible for listing on the National Register – as the purpose is preservation of such eligible resources. The PA defines "eligibility" as that of Cultural Resources to the NRHP and defines "Historic Properties" to be "Cultural

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of NEPA). BLM MTD, ECF 103, at 13. However, *Nevada Land Action Ass'n* is distinguishable from the present case because the plaintiff had no vested rights in place at the time of the challenged agency decision—despite the U.S. Forest Service soliciting public input, neither plaintiff nor any of its members commented on the proposed plan. 8 F.3d at 715. Therefore, plaintiff's only argument in that case beyond economic injury was the "lifestyle loss" of the NLAA members, where the lifestyle in question was "more likely to frustrate than to further" the environmental objectives of NEPA—leading the court to conclude that the plaintiff lacked standing. *Id.* at 716. In contrast, Carlin has been closely involved with every step of the BLM's decision-making process, and was a consulting party and invited signatory to the PA—conferring NHPA rights on Carlin pursuant to 36 CFR 800.2(a)(4), and as a consulting party and permittee under the NHPA and Section 106. Carlin alleges that the Decision interferes with Carlin's vested rights and procedural rights under the PA—rights which NHPA seeks to protect by requiring that an agency involve "consulting parties . . . in findings and determinations made during the section 106 process." 36 CFR 800.2(a)(4). Therefore, NHPA explicitly contemplates that consulting parties, such as Carlin, will have standing to challenge the Decision at issue – particularly when the agency ignores Carlin's statutory rights under the NHPA. Moreover, Carlin's interests are not more likely to frustrate than further NHPA's goals because all parties to the PA reached the initial TCP eligibility decision over a number of years, as contemplated by the NHPA decision-making process, and the BLM's curtailed and incomplete Decision at issue is in itself a frustration of NHPA goals having ignored statutory directives and regulatory requirements to consider and consult the permittee and owner of affected rights in the lands.

In addition, Carlin fits within the exception to this doctrine on economic loss outlined in

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Resources that are included in, or eligible for inclusion in, the NRHP . . . ." PA, ECF 38-3, at 17.

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Presidio Golf Club because its interests include those which overlap with NHPA's environmental and broad consultation goals. Relative to the first goal, under the ROD, "[Klondex/Carlin] will abide by all stipulations described in the Programmatic Agreement (PA), per 43 CFR §3809.420 regulations. The applicant will be a signatory to the PA and has responsibilities under the agreement to protect historic properties." See ROD, 38-1, at 7. Unlike the plaintiff in *Nevada Land Action Ass'n*, who was bound by no contractual undertaking to protect and preserve the land at issue, and instead asserted lifestyle interests that harmed the land, Carlin has agreed to preserve the historical and cultural foundations as identified in the ROD. As the Operator of the Project, Carlin is intimately concerned with preservation of the cultural and spiritual resources and identification of those resources which includes consideration of site integrity.

Relative to the second goal that overlaps with that of NHPA—necessarily included within the preservation and utilization of all usable elements of the environment is Carlin's interests under the ROD, PA, and ROW, and Carlin, as a consulting party is necessarily included within the class of plaintiffs that stand to be directly affected under 36 C.F.R. § 800. Carlin has expended significant time and resources to work with both BLM and the BMB to acquire interests in constructing and operating the power line in a manner that seeks to best preserve the property. Carlin's predecessor spent nearly three years negotiating a PA, which satisfies Section 106 of NHPA by imposing obligations that meet and exceed the requirements of Section 106. The BLM's early compliance with the consultation requirements of the PA and NHPA yielded great success in reaching a mutually agreeable decision whereby Carlin was permitted to utilize the usable elements of the land to construct a power line to best preserve the resources of the land. *See* Excerpt of Hollister DEIS, ECF 20-3, at § 2.5.2.2 (noting that one Consulting Party's request that the Power Line be installed underground during the EIS process was considered and

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rejected because of the significant disturbance to the environment, cultural resources, and negative long-term environmental effects). The BLM's compliance with ongoing consultation requirements are central to Carlin's interests in this matter, and this interest certainly overlaps with NHPA's Section 106. BLM's failure to continue to consult with Carlin has forced Carlin to file this crossclaim to vindicate its interests in *continued consultation* as a Consulting Party to the PA, a goal that NHPA sought to promote by requiring that an agency involve "consulting parties . . . in findings and determinations made during the section 106 process." 36 CFR 800.2(a)(4). This interest is financial in nature, but not purely so. It also overlaps with NHPA's intent that all interested parties are included in the discussion regarding TCPs to promote the "public and private preservation and utilization" of land.

Moreover, the public's interest has been served by the ROD with respect to the Project, the Power Line, and the preservation of cultural resources. The entire mining industry and all permittees using federal lands would be impaired if BLM is permitted to undermine the ROD and PA, which impart contractual rights to Carlin as a consulting party. Additionally, since 43 C.F.R. Part 3809 outlines a detailed process through which BLM may modify a plan of operations, the underlying goal of this section is that BLM cannot unilaterally modify a PA and ROD. Carlin's rights under the PA and the ROD have vested, and have now been impaired—and as a Consulting Party to the contract, Carlin is within the class of plaintiffs that BLM's violation of 43 C.F.R. Part 3809 impacts. Therefore, Carlin, as an APA plaintiff, has an interest that falls within the general policy of the underlying statute, such that interpretations of the statute's provisions or scope could directly affect them. *See O'Neill*, 386 F.3d at 1200.

BLM mischaracterizes Carlin's claim as one of purely economic interests, when in fact Carlin has alleged injuries that harm the greater public as a whole and overlap with NHPA's goals, thereby falling within the exception outlined in *Presidio Golf Club*. This, when examined

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in conjunction with the U.S. Supreme Court's proclamation in *Clarke* that prudential standing is not meant to be a demanding test, yields the conclusion that Carlin's interests are properly within the zone of interests of a NHPA plaintiff.

C. Courts Routinely Grant Standing to Consulting Parties

Signatories to a PA have standing to enforce the PA in its entirety. This is consistent with Ninth Circuit contract law in general, whereby signatories to an agreement have standing to sue to enforce the agreement, and the court will look to the intent of the signatories to determine what non-signatories have a right to sue under the agreement. *See, e.g., Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006). Moreover, it is worthy to note that the Ninth Circuit has granted standing to enforce PAs to litigants with much less direct involvement than that which Carlin has here—namely, where the litigants were non-signatories but were third party beneficiaries to the PA as nearby homeowners. *See Tyler*, 236 F.3d at 1135. Where the homeowners in *Tyler* were merely members of the public, Carlin is actually a designated Consulting Party and Invited Signatory to the PA—rendering Carlin's claim that is has standing to enforce the PA even more valid. Further, as noted above, the PA in the instant case is replete with provisions calling for the Consulting Parties' participation in the process, BLM previously acknowledged Carlin's right to such consultation and how the Decision would affect Carlin's interests and Carlin was closely involved with the process for several years leading up to negotiation of the PA with the understanding that it would be consulted prior to TCP designations just like the unlawful Decision at issue here.

The parties agree that not only is Carlin a consulting party to the PA, but is also an invited signatory to the PA. *See* PA, ECF 38-3, at 1. As such, there can be no question that, as an invited signatory to the PA, Carlin at least has equal standing as that of an intended, but unnamed, third-party beneficiary to a PA under *Tyler*, where the latter has standing to enforce

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certain terms of a PA and challenge agency procedural violations, and more arguably superior rights to enforce the PA in its entirety, as *Tyler* implies. Therefore, contrary to the BLM's arguments parsing the language of the PA, Carlin's status as an invited signatory gives Carlin standing to enforce the PA in its entirety. Carlin had a contractual right to be consulted prior to TCP designation as a signatory to the PA pursuant to the plain language contained in section 3 of the PA. *See* PA, ECF 38-3 ("The BLM, in consultation with . . . Consulting Parties shall evaluate all Cultural Resources (including TCPs) identified within the applicable APEs for Eligibility to the NRHP . . . as inventories and revisits are completed"; "[t]he BLM shall require the Contractor conducting the Class III inventory to make initial recommendations regarding Eligibility, but determinations of Eligibility will be made by the BLM in consultation with the SHPO, taking into consideration the views of the Consulting Parties"). Carlin is a designated Consulting Party and invited signatory to the PA who operated under the understanding that it would be consulted prior to TCP designations just like the unlawful Decision, and the PA is replete with provisions calling for Consulting Parties' participation in the process—rendering BLM's claims that Carlin lacks standing to sue under the PA entirely without merit.

CONCLUSION

For the reasons above, BLM's motion should be denied in its entirety.

DATED this 18th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, a true and correct copy of the foregoing document was served via the court's electronic service system, addressed to the following:

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