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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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIM BY CARLIN RESOURCES, LLC

June 15, 2017

ACRONYMS USED HERE and in PRIOR FILINGS

ACHP -- Advisory Council on Historic Properties

APE -- Area of potential effect

ATP – Authorization to Proceed

BLM -- Bureau of Land Management

BMP -- Best Management Practice

BOR -- Bureau of Reclamation

DEIS – Draft Environmental Impact Statement

FEIS – Final Environmental Impact Statement

IBLA -- Interior Board of Land Appeals

NEPA – National Environmental Policy Act

NHPA -- National Historic Preservation Act

NOI – Notice of intent (to prepare an EIS)

NRHP – National Register of Historic Properties

PA – Programmatic Agreement

SHPO -- State historic preservation officer

TCP -- Traditional Cultural Property

TQWG -- Tosawihi Quarry Working Group

WCRM -- Western Cultural Resources Management, Inc.

INTRODUCTION

The Cross-Claim filed on behalf of Carlin Resources, LLC ("Carlin") (ECF No. 98) seeks to challenge BLM's designation of Traditional Cultural Properties (TCP) on the grounds that BLM failed to consult with Carlin on designations that, Carlin alleges, could interfere with Carlin's ongoing mining operations. In our motion to dismiss (ECF No. 103) we showed that

1. Carlin's rights and obligations under the National Historic Preservation Act (NHPA) are wholly defined by the parties' Programmatic Agreement (PA) which, in the circumstances presented by Carlin's Cross-Claim, provides Carlin no consultation rights;
2. The injuries Carlin alleges as flowing from the TCP designations are wholly speculative and uncertain, and thus fail to meet applicable tests for Article III standing; and
3. Carlin likewise fails to state a claim because its alleged injuries are wholly economic and therefore outside the zone of interests protected by NHPA.[1]

Carlin's opposition memorandum (ECF No. 112) does not meaningfully undercut any one of these points.

ARGUMENT

A. The PA Gives Carlin no Consultation Rights on the TCPs at Issue

Carlin repeatedly insists that BLM's TCP determinations (reached in concurrence with the State Historic Preservation Officer (SHPO)) "violated the . . . NHPA . . . and its implementing regulations; 43 CFR Part 3809, including §§ 3809.431 and .602 . . . ." ECF No. 112 at 1-2; *see also id*. at 3 ("Pursuant to the NHPA, implementing regulations . . . the BLM was

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[1] Although Federal Defendants framed the zone of interests issue as a question of prudential standing in their motion to dismiss Carlin's cross claim, the Supreme Court has held that "prudential standing is a misnomer." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–676 (D. C. Cir. 2013) (concurring opinion)). Rather, "[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id*. (internal quotation marks omitted). Because "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," *id*. at 1387 n.4, Federal Defendants "prudential standing" argument is properly understood as moving to dismiss Carlin's cross claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

legally obligated to consult with Carlin during the agency's process of considering designation of new TCPs in the Project area"); *id*. at 5 ("The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact") (citation omitted); *id*. at 7 (invoking NHPA's alleged conferral of consultation rights).

But as Carlin itself acknowledges, the PA supplanted the requirements of NHPA Section 106 and implementing regulations. *See* Cross-Claim (ECF No. 98) ¶ 12 ("The requirements of the PA satisfied and supplanted the requirements imposed by the NHPA implementing regulations."). Carlin's admission is correct: 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).

And, as we showed in our moving papers (ECF No. 103 at 7-9), the PA does not give Carlin consultation rights in the circumstances here at issue. The PA plainly makes Carlin (the "Operator") a consultee in the context of the operator's Class III inventory, but it does not give the Operator the ongoing consulting role that it gives tribal interests and the SHPO. *Id*. In this respect, the PA continues a long-standing relationship between BLM and the Western Shoshone. *See* ECF No. 112-1 at 5 ("It is also important to note that BLM has been in the forefront of initiating tribal consultation with the Western Shoshone and its associated Bands for nearly 25 years in order to gather information on potential TCP values in and around the Tosawihi Quarries.")

Carlin does not seriously dispute these facts.[2] Instead, Carlin relies heavily upon a statement in BLM's November 20, 2015 letter to the Advisory Council on Historic Preservation (ACHP) regarding potential future TCPs. In that letter Jill Silvey, BLM Elko District Manager,

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[2] Carlin baldly states that Federal Defendants "misconstrue[] cited provisions from the PA . . .." ECF No. 112 at 12-13, but offers no explanation as to which provisions have been misconstrued or how.

stated that "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." ECF No. 112-1 at 7. But the quoted statement simply will not carry the weight Carlin places on it. Ms. Silvey was *not* purporting to interpret the PA, as Carlin repeatedly suggests, ECF No. 112 at 3-4, 13. She was instead only noting Carlin's potential interest and making a statement of her current intentions. Certainly Ms. Silvey's letter cannot change the plain meaning of the PA, which gives Carlin no ongoing consultation rights outside the context of Carlin's Class III inventory.

Second, Carlin confusingly cites Section 12(c) of the PA, arguing that "[d]espite 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." ECF No. 112 at 10. Carlin is correct that this section refers only to the SHPO and tribal entities, which is precisely the point: tribes, and the SHPO, have ongoing consultation rights regarding TCPs. Carlin does not.[3]

B. Carlin's Alleged Injuries are Purely Speculative

In its motion to dismiss Carlin's cross-claim (ECF No. 104) Plaintiff argues, *inter alia*, that Carlin has failed to exhaust administrative remedies. In that context Plaintiff cites the July 29, 2016 decision by BLM's Interior Board of Land Appeals (IBLA). *Carlin Resources, LLC*, IBLA No. 2016-198 (2116) (copy attached hereto as Exhibit A). In the referenced decision, the IBLA dismissed Carlin's challenge to a May 15, 2016 letter from Jill Silvey regarding newly-

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[3] Section 12(c) provides (ECF No. 103-1 at 7):

> 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.

identified TCPs that might affect Carlin's mining operations.[4] Ms. Silvey's May 15 letter, and the IBLA decision dismissing Carlin's appeal, vividly demonstrate Carlin's lack of cognizable injury such as would confer Article III standing.

Ms. Silvey notes, first, that "newly designated TCPs" will have no effect on Carlin's right to build and operate the power line that is the subject of Plaintiff's claims in the instant case.

> As we discussed on May 3, 2016, the power line was analyzed in the EIS and permitted through the Record of Decision, and therefore Carlin Resources has a valid existing mining right to this activity and any activity already permitted to date. The power line or any other previously permitted activity is not affected by the newly designated TCPs. The ROD and PA prescribe avoidance for the TCPs that were in existence when the ROD was signed.

ECF No. 112-2 at 2.[5] In other words, Carlin's existing Authorization to Proceed (ATP) is unaffected by the new TCPs.

Ms. Silvey goes on to assure Carlin that, should any *future* request for an ATP pose a threat to newly designated TCPs, "BLM will work with Carlin Resources on a case-by-case basis" to assure compliance with the PA (and thus with NHPA Section 106):

> 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 effect that qualify individual TCPs for eligibility. If a proposed activity might adversely affect a newly designated TCP some of the avoidance strategies might include timing restrictions or a request to adjust a pad location in order to reach a determination of 'no adverse effect'.

Id. at 2-3. The key point here is that no newly designated TCPs have had any effect on Carlin's mining operations. They do not affect the power line ATP, and whether new designations will affect future requests for ATPs is a matter of speculation.

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[4] The letter, attached to Carlin's Opposition memo as Exhibit 2 (ECF No. 112-2), is undated, but it was sent by certified mail and according to Carlin (ECF No. 112 at 5) was received on May 15, 2016.

[5] We note that Ms. Silvey's letter (introduced to the record by Carlin), and her reference to BLM's discussion with Carlin on May 3, 2016, demonstrate that BLM did in fact confer with Carlin regarding the new TCPs, albeit after BLM had made the TCP determinations.

Indeed, that is the precise basis for the IBLA's dismissal of Carlin's challenge to Ms. Silvey's May 25, 2016 letter. As it does here, Carlin complained in the IBLA appeal that in considering the possibility of new TCPs BLM "failed to properly consult with Carlin." Exh. A at 7. After finding that BLM had not yet formally recognized new TCPs, *id*. at 9[6], the IBLA found that the question whether new TCPs would have any effect on Carlin's mining operations could not be answered until new ATPs were requested.

> In the Letter, BLM merely outlined what might happen in the future, making clear that any need for restrictions will not arise until BLM decides to go forward with a future ATP. Thus, it remains to be determined what effect, if any, new TCPs will have on any aspect of the power line. Contrary to Carlin's argument, there is no indication in the Letter that BLM sought to "revise" or "modify" the ROD or the PA. When and if BLM takes an action that is deemed to adversely affect Carlin's interests, Carlin may then appeal to the Board.

Id. at 10 (footnote omitted). Having noted that "appellate review authority cannot be invoked simply because someone may object to something BLM is doing," and that "there must be an identifiable decision, the appellant must be a 'party' to the case, and the appellant must be 'adversely affected,'" *id*. at 8-9, quoting *Southern Utah Wilderness Alliance*, 122 IBLA 17, 20 (1992) (quoting 43 C.F.R. §4.410), the Board concluded that Carlin was in fact seeking a prohibited advisory opinion regarding future potentialities:

> [W]e do not exercise any supervisory authority over BLM, and will not issue directives intended to guide or control future BLM decisions. Nor will the Board issue advisory opinions, which would plainly be the effect of a ruling on whether and how BLM may seek to ensure the absence of adverse effects on a new TCP.

Id. at 11-12 (footnotes omitted).

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[6] IBLA appears to have been mistaken on this point. BLM's letter to the Nevada SHPO was received on April 25, and SHPO's concurrence letter was mailed that same day. ECF No. 112-3 (Silvey letter to SHPO); April 25, 2016 letter, Rebecca L. Palmer to Jill Silvey (attached hereto as Exhibit B). Hence, as of the date of Ms. Silvey's May 25, 2016 letter to Carlin (ECF 112-2), the determinations had in fact been made.

While the IBLA may have been mistaken about the status of BLM's new TCP designations (fn. 6 *supra*), the potential effect of the new TCPs on future Carlin ATP requests is no less a matter of speculation now than it was when Carlin brought the same complaint to the IBLA. While Carlin insists that it "has suffered tangible, imminent harm," ECF No. 112 at 2, it provides no substantiating facts and the cases Carlin itself cites confirm the conclusion that future potentialities will not support standing. *See, e.g.*, *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("A further flaw in plaintiffs' threat-of-prosecution argument is the absence of any threat by the government to prosecute them. Plaintiffs bear the burden of showing that the Crime Control Act is actually being enforced") (citations omitted).

The newly designated TCPs may or may not have a concrete impact on Carlin's operations in the future. Unless and until they do, Carlin lacks standing to challenge them.[7]

C. Because Carlin's Alleged Prospective Injuries are Purely Economic, Carlin's Cross Claim Fails to State a Cause of Action

In our moving papers we collected NEPA and NHPA caselaw uniformly holding that purely economic injury does not confer standing because economic interests are not within the zone of interests protected by those statutes. ECF No. 103 at 12-15; see *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *Churchill Truck Lines, Inc. v. United*

[7] Carlin attaches as an exhibit a letter from BLM to the SHPO, ECF No. 112-3, arguing that a reference in that letter to the routine destruction of extra copies of sensitive cultural information somehow works Carlin an injury. This is a red herring. The Archaeological Resources Protection Act obligates Interior, among other things, carefully to safeguard information regarding the location and content of Native American archaeological sites. 16 U.S.C. § 470hh. BLM's request that extra copies of such information be strictly controlled is therefore a statutory duty, and the SHPO's dutiful cooperation in that effort (see Exhibit B at 2) is unremarkable. Indeed, this Court recognized the importance of strictly controlling such sensitive cultural information by approving Plaintiffs' motion to file documents referencing sensitive TCP information in this case under seal. See Order dated May 5, 2016, ECF No. 9.

States, 533 F.2d 411, 416 (8th Cir. 1976); *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dep't of Agric*., 266 F.3d 889, 896-7 (8th Cir. 2001); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1039 (8th Cir. 2002); *Role Models Am., Inc. v. Geren*, 514 F.3d 1308, 1312 (D.C. Cir. 2008). We stand on that discussion and the basic principle it recites, which Carlin does not meaningfully address or refute.[8] Instead, Carlin asserts that "[t]his Court has long recognized economic harm as sufficiently imminent to meet Article III standing requirements," for which Carlin cites *San Diego County Gun Rights Committee*, 98 F. 3d at 1130, and *V. Real Estate Group v. U.S. Citizenship and Immigration Services*, 85 F. Supp. 3d 1200, 1207 (D. Nev. 2015). But neither of those cases involved either NEPA or NHPA. *San Diego Gun Rights* involved a facial challenge to the Violent Crime Control and Law Enforcement Act of 1994 – and the court concluded that plaintiffs *lacked* standing. *V. Real Estate Group* involved the government's revocation of work visas. Neither case sheds light on the viability of Carlin's cross-claim.

Carlin also argues that it passes the zone of interests test because "[t]he NHPA has long recognized the importance of including those with ownership interests in the lands at issue in the identification process." ECF No. 112 at 19 & n.7 (citing 54 U.S.C. §302105(a) (formerly codified at 16 USC § 470a)). But Carlin does not own the land at issue. Carlin requires BLM permits or ATPs precisely because the federal government owns the land. December 9, 2016 Order dismissing Carlin Resources, Inc. counterclaim (ECF No. 94) ("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.")

[8] As noted in footnote 1 above, the zone of interest defense entails a failure to state a claim rather than "prudential standing" as erroneously articulated in our original motion.

Carlin also argues (ECF No. 112 at 20-21) that its interests coincide with the goals of NHPA because, under the PA, Carlin has various resource-protection responsibilities. The argument collapses of its own weight: the goal of Carlin's cross-claim is to eliminate or limit, not to foster, protection of historic properties that have been now been identified as TCPs. To suggest otherwise is cynical.

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 June 15, 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
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