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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

REESE RIVER BASIN CITIZENS
AGAINST FRACKING, LLC,

Plaintiff,

v.

THE BUREAU OF LAND
MANAGEMENT, et al.,

Defendants.

Case No. 3:14-cv-00338-MMD-WGC

ORDER

(Pl.'s Amended Motion for Preliminary
Injunctive Relief – dkt. no. 18)

I. INTRODUCTION

This action challenges Defendant Bureau of Land Management's ("BLM") decision to propose oil and gas leasing in central and southwest Nevada. Plaintiff asks the Court to preliminarily enjoin Defendants from issuing oil and gas leases due to allegedly defective environmental analyses. Although BLM has conducted a lease sale, it retains discretion to issue any leases resulting from the lease sale. Because Plaintiff seeks to enjoin an agency decision that is not yet final, the Court finds that it lacks subject matter jurisdiction to review BLM's action. Plaintiff's Amended Motion for Preliminary Injunctive Relief ("Motion") (dkt. no. 18) is therefore denied.

II. BACKGROUND

Plaintiff, Reese River Basin Citizens Against Fracking, brings this action on behalf of its members, a group of property owners with ranching and farming land, water rights, and grazing rights in proximity to and over land that BLM has proposed for oil and gas leasing. (Dkt. no. 8 ¶¶ 1, 4.)

1 BLM began the process of offering parcels for oil and gas leasing in September
2 2013. (Dkt. no. 20 at 3-4.) On February 12, 2014, BLM posted a preliminary
3 Environmental Assessment (“EA”) for public review and comment. (*Id.* at 5.) BLM
4 received 5,100 comments during a thirty-day period while the EA was posted, but most
5 were nearly identical form letters. (*Id.*) BLM has also posted a draft Finding of No
6 Significant Impact for the July 2014 Competitive Oil and Gas Lease Sale (“FONSI”) and
7 a draft Decision of Record.¹ (Dkt. no. 8 ¶ 53; see dkt. nos. 36-2, 36-3.)

8 BLM has updated the EA several times since it was first posted in February
9 2014. (Dkt. no. 20 at 6.) In fact, the most recent update appears to have occurred on
10 August 14, 2014. (Defs.’ App. 3, AR 016319-463.) BLM also updated the unsigned
11 FONSI and Decision of Record on the same date. (Dkt. no. 20 at 6; AR 016464-71.)

12 On April 14, 2014, BLM published its Notice of Competitive Oil and Gas Lease
13 Sale (“Notice of Lease Sale”), identifying the final list of 102 parcels available for
14 competitive auction. (Dkt. no. 32-4.) The available parcels cover approximately 174,021
15 acres in Lander, Nye, and Esmeralda Counties. (*Id.*) The Notice of Lease Sale identified
16 the competitive sale date (July 17, 2014) and explained the right of the public to protest
17 BLM’s decision to include certain parcels in the lease sale. (*Id.*) BLM received four
18 protests, including a protest from William Gandolfo, a member of Plaintiff. (Dkt. no. 20 at
19 5.) BLM has sixty (60) days after the lease sale to make a decision on the protest and
20 “will issue no lease for a protested parcel until the State Director makes a decision on
21 the protest.” (Dkt. no. 32-4 at 9.) The lease sale occurred on July 17, 2014, but the
22 leases, if issued, will not be issued before September 15, 2014. (Dkt. no. 15-1 ¶ 4.)

23 Plaintiff’s Amended Complaint asserts claims for violations of the National
24 Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321-4347, and the
25 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. (Dkt. no. 8 at 21-23.)
26 Plaintiff argues that BLM violated NEPA by preparing an inadequate EA, adopting an

27 ¹The record does not clarify when BLM first posted the FONSI and Decision of
28 Record.

1 incomplete FONSI, and failing to prepare an environmental impact statement (“EIS”) for
2 the proposed lease sale. (*Id.*) The Amended Complaint requests that the Court enjoin
3 the lease sale and “any leases issued pursuant to such sale.” (*Id.* at 24.)

4 Shortly after initiating this action on June 27, 2014, Plaintiff moved for an
5 emergency preliminary injunction to enjoin BLM from proceeding with the July 17, 2014,
6 lease sale. (Dkt nos. 1, 5.) The Court ultimately denied emergency relief, finding that
7 based on the evidence presented, Plaintiff could not demonstrate irreparable harm
8 because the lease sale would not result in the automatic issuance of any leases. (Dkt.
9 no. 16.) The Court permitted Plaintiff to amend its motion to address other deficiencies.
10 The Court heard oral argument on Plaintiff’s Motion on September 3, 2014.

11 **III. DISCUSSION**

12 During oral argument, Plaintiff’s counsel clarified that Plaintiff seeks to
13 preliminarily enjoin the issuance of the leases. Plaintiff essentially concedes, however,
14 that because the leases have not been issued, no final agency action has occurred.
15 Plaintiff instead contends that the issue is ripe because the record is fixed and because
16 its members will suffer hardship if any leases are issued. BLM argues that no final
17 agency action will exist until it decides whether to issue the leases. Absent a final
18 agency action, BLM contends, the Court lacks subject matter jurisdiction to review
19 BLM’s environmental analyses under the APA.

20 “NEPA imposes only procedural requirements,” *Salmon River Concerned*
21 *Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994) (citation omitted); it does not
22 provide a private right of action. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814
23 (9th Cir. 2006). Thus, “[t]he judicial review provision of the APA is the vehicle” for
24 challenging an agency’s decision under NEPA. *Turtle Island Restoration Network v.*
25 *U.S. Dep’t of Commerce*, 438 F.3d 937, 942 (9th Cir. 2006); *Gros Ventre Tribe*, 469
26 F.3d 814. Where, as here, review of an agency action is sought not based upon a
27 “specific authorization in the substantive statute, but only under the general review
28 provisions of the APA, the ‘agency action’ in question must be ‘final agency action.’”

1 *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); see *Or. Natural Desert Ass'n v.*
2 *U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (because the substantive statute
3 under which plaintiff sought relief did not provide for judicial review, plaintiff needed to
4 challenge a final agency action under the APA).

5 Moreover, final agency action is a jurisdictional prerequisite to obtaining judicial
6 review. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591
7 (9th Cir. 2008). Therefore, as a threshold matter, the Court must first determine whether
8 the BLM action challenged here is a final agency action under the APA.

9 The Supreme Court has determined that for an agency action to be deemed
10 "final," two requirements must be satisfied: (1) "the action must mark the
11 'consummation' of the agency's decisionmaking process — it must not be of a merely
12 tentative or interlocutory nature"; and (2) "the action must be one by which 'rights or
13 obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*,
14 520 U.S. 154, 177-78 (1997) (citations omitted). Within this
15 framework, the Ninth Circuit has identified certain factors that may indicate finality —
16 "whether the [action] amounts to a definitive statement of the agency's position, whether
17 the [action] has a direct and immediate effect on the day-to-day operations of the party
18 seeking review, and whether immediate compliance [with the terms] is expected." *Indus.*
19 *Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (2005)
20 (alteration in original) (*quoting Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 909
21 (9th Cir. 2003)) (internal quotation marks omitted).

22 Applying these factors here, the Court agrees with Defendants that BLM's
23 decision to issue the leases is not yet final. Although BLM has conducted the lease sale,
24 BLM retains discretion to issue the leases. (Dkt. no. 15-1 ¶ 4); see 30 U.S.C. §
25 226(b)(1)(A). There is no dispute that BLM has received four protests regarding the
26 leases, one of which was submitted by Mr. Gandolfo, Plaintiff's member. The Notice of
27 Lease Sale makes clear that BLM will resolve these protests before any lease is issued
28 for a protested parcel. (Dkt. no. 32-4 at 9.) The Notice of Lease Sale also informs

1 potential bidders that if BLM “uphold[s] a protest and withdraw[s] the parcel from
2 leasing, [BLM] will refund your first year’s rental, bonus bid and administrative fee.” (*Id.*)
3 Taken together, the evidence before the Court indicates that BLM is still in the process
4 of evaluating the four protests and has not decided whether to issue any lease, let alone
5 to identify stipulations that may be included in any lease issued. BLM has not taken any
6 action that “mark[s] the consummation” of its decision-making process and that may be
7 subject to judicial review. *Bennett*, 520 U.S. at 178.

8 Plaintiff essentially concedes that BLM has not taken any final action on the
9 leases, but argues that BLM’s actions, such as amending the EA, show that it is
10 prepared to defend its inevitable decision to issue the leases. However, Plaintiff points
11 to no evidence suggesting that the EA amendment, or any other action taken by BLM
12 since the lease sale, amounts to a “definitive statement” of BLM’s position on the leases
13 at issue. *Indus. Customers of Nw. Utils.*, 408 F.3d at 646. Even if BLM is in the process
14 of augmenting its environmental analysis because it is prepared to issue the leases,
15 until BLM completes its decision-making process, its decision is not subject to judicial
16 review under the APA. Thus, even if Plaintiff’s theory were true, the Court nevertheless
17 lacks jurisdiction to review BLM’s decision until BLM actually makes a final decision to
18 issue the leases.

19 Because the Court determines that it lacks subject matter jurisdiction to review
20 Plaintiff’s challenge to BLM’s decision to conduct the lease sale and issue the leases,
21 the Court does not reach the merits of Plaintiff’s arguments about BLM’s alleged
22 violations of NEPA and the APA.

23 Moreover, the Court is compelled to dismiss this action *sua sponte* for lack of
24 subject matter jurisdiction. *Franklin v. State of Or., State Welfare Div.*, 662 F.2d 1337,
25 1342 (9th Cir. 1981) (“[A district court] may dismiss an action *sua sponte* for lack of
26 subject matter jurisdiction.”). In opposing Plaintiff’s Motion, Defendants raised a
27 jurisdictional argument to assert that Plaintiff cannot demonstrate a likelihood of
28 success on the merits. Surprisingly, Plaintiff failed to respond in its reply brief. Plaintiff,

1 moreover, had ample opportunity to address the jurisdictional issue during the oral
2 argument. Yet, rather than respond to jurisdictional questions specifically raised by the
3 Court, Plaintiff focused on ripeness, virtually conceding that there is no final agency
4 action. Because Plaintiff had notice of the jurisdictional defect and an opportunity to
5 respond, the Court finds that it is appropriate to dismiss this action on its own motion
6 without waiting for Defendants to file a motion to dismiss.


7 **IV. CONCLUSION**

8 It is therefore ordered that Plaintiff's Amended Motion for Preliminary Injunctive
9 Relief ("Motion") (dkt. no. 18) is denied.

10 It is further ordered that this action is dismissed for lack of subject matter
11 jurisdiction.

12 The Clerk is instructed to close this case.

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14 DATED THIS 8th day of September 2014.

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18 MIRANDA M. DU
19 UNITED STATES DISTRICT JUDGE
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