



EVANS-BARTON, LTD

175 IBLA 29

Decided June 26, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

EVANS-BARTON, LTD

IBLA 2008-17

Decided June 26, 2008

Appeal from a Decision Record and Finding of No Significant Impact issued by the Winnemucca, Nevada, Field Office, Bureau of Land Management, approving the issuance of a geothermal lease subject to site-specific stipulations. NV-020-07-EA-19.

Affirmed.

1. Environmental Quality: Environmental Statements--  
Geothermal Leases: Environmental Protection: Generally--  
Geothermal Leases: Leases and Permits: Generally--  
Geothermal Leases: Stipulations--National Environmental  
Policy Act of 1969: Environmental Statements

The Bureau of Land Management has authority to require the execution of special stipulations to protect environmental and other land use values for lands where those values are present. A decision imposing a 1/2-mile NSO stipulation for the protection of a site of religious and cultural importance to Native American Tribes will be upheld when the record shows it to be the result of a reasoned analysis of all pertinent factors with due regard for the public interest and reflects a reasonable means to accomplish a proper Departmental purpose.

APPEARANCES: David M. Evans, Managing Member, Evans-Barton, LTD, Reno, Nevada; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Evans-Barton, LTD (Evans-Barton), has appealed from the September 14, 2007, Decision Record (DR) and Finding of No Significant Impact (FONSI) issued by the Winnemucca, Nevada, Field Office, Bureau of Land Management (BLM), based

upon environmental assessment (EA) NV-020-07-EA-19, approving issuance of a geothermal lease, with site-specific stipulations, for lands in the Kyle Hot Springs area in Mt. Diablo Meridian, Pershing County, Nevada. Evans-Barton seeks relief from the stipulation providing for no surface occupancy (NSO) within ½ mile of Kyle Hot Springs. As explained below, we affirm BLM's decision to impose that stipulation.

### I. BACKGROUND

Kyle Hot Springs is located near the center of a 160-acre tract of privately owned property situated in secs. 1 and 12, T. 29 N., R. 36 E., Mt. Diablo Meridian. The surrounding lands in secs. 1 and 12, as well as adjacent secs. 2 and 11, are public lands. On August 10, 2000, Evans-Barton filed application NV-76438 for a noncompetitive geothermal lease to encompass approximately 2,400 acres of public lands in secs. 1, 2, 11, and 12. The public lands involved are managed by BLM under the Sonoma-Gerlach Management Framework Plan (MFP). This MFP provides that lands within the Sonoma-Gerlach Resource Area are open to geothermal and oil and gas leasing with specified restrictions, including an NSO stipulation for "S-1 cultural and historical sites." Sonoma-Gerlach MFP, Sec. III, Minerals 5.5.

On September 10, 2002, BLM issued a DR/FONSI as a result of a programmatic EA to consider the leasing of geothermal resources within the Sonoma-Gerlach and Paradise-Denio Resource Areas and to update geothermal lease stipulations. In that decision, the Field Manager deferred geothermal leasing of several areas having high potential for significant impacts until more extensive, site-specific environmental analysis could be completed. DR/FONSI at 2. One area deferred was the Kyle Hot Springs lands due to "Native American Religious concerns." *Id.* BLM also decided to update the standardized Geothermal Lease Stipulations as a result of its programmatic EA. A copy of that update was attached to the DR/FONSI, which provided in pertinent part: "For development and production phases, surface occupancy may be limited to a specific distance or precluded at hot springs, pending conclusion of the native consultation process." Attachment to DR/FONSI at 6. The lease at issue, NV-73698, was among those identified as a pending lease for which the NSO stipulation would be evaluated. *Id.* Also included was a general cautionary provision that "[a]ll development activities proposed . . . are subject to the requirement for Native American consultation prior to BLM authorizing the activity, [which] may extend time frames for processing . . . , as well as, changes in the ways in which developments are implemented." *Id.*

BLM initiated site-specific analysis in May 2006 and sought public comment to help identify potential environmental and socioeconomic impacts and issues during a scoping period held August 21 through September 22, 2006. By letters sent September 28, 2006, BLM apprised the following Native American Tribes of the ongoing environmental analysis: Lovelock Paiute Tribe, Winnemucca Paiute Shoshone

Tribe, Fallon Paiute Shoshone Tribe, Pyramid Lake Paiute Tribe, and Battle Mountain Band of the Te-Moak Band of the Western Shoshones. EA at 8.

In the ensuing EA, BLM described the Native American relationship with Kyle Hot Springs as follows:

Kyle Hot Springs has been used from ethnographic times through recent times by the Lovelock Paiute for medicinal and spiritual purposes. Past consultation efforts and ethnographies document the importance of hot springs to the Native American tribes in this area. Hot springs have long been an integral part of Native American medicinal, social, and spiritual activities within northern Nevada. Kyle Hot Springs has been identified as a Traditional Cultural Property (TCP) by the Lovelock Paiute because of the healing and spiritual qualities of the springs and the associated mud. The Lovelock Tribe and the Battle Mountain Band of the Te-Moke Band of the Western Shoshones have previously expressed concerns regarding geothermal leases and activities in the vicinity of the hot springs, and Kyle Hot Springs in particular.

EA at 8-9, sec. 3.1.5 (Native American Religious Concerns). BLM then discussed establishing lease stipulations based upon its consultation with the Native American Tribes:

In their response to the consultation letter for this lease, the Fallon Tribe also expressed concerns about impacts to the hot springs, and the fragile ecosystems surrounding them, from drilling and other geothermal activities. In past consultations, the Lovelock Tribe has recommended a 1 mile “protection zone” around Kyle Hot Springs. The Battle Mountain Band, the Fallon Paiute Shoshone Tribe, and the Pyramid Lake Tribe have all stated that they support the Lovelock Tribe’s position. The Lovelock Tribe has also expressed concerns about access to hot springs and other traditional areas in the past.

*Id.* Noting that the springs are located on private land, BLM outlined its authority to impose protective restrictions on leasing by observing that “Executive Order 13007, ‘Indian Sacred Sites’ also applies to Kyle Hot Spring[s]. This Executive Order requires Federal agencies to ‘avoid adversely affecting the physical integrity of such sacred sites.’” *Id.*

BLM determined that there would be no direct impacts on “Native American Religious Concerns” as a result of issuing the lease but that indirect impacts may occur because Kyle Hot Springs “could be adversely impacted [by] exploration and

development activities as well as by associated roads, pipelines and electrical powerlines constructed during the utilization phase.” EA at 15. BLM reasoned that “most impacts that Native American Tribes have expressed concerns about would be prevented through implementation of a series of stipulations,” including, *inter alia*: “No surface occupancy: Surface occupancy would not be allowed within one-half mile of Kyle Hot Springs.” *Id.* BLM concluded that the “Proposed Action would not incrementally increase impacts to Cultural Resources and Native American concerns if monitoring and mitigation measures are implemented . . . .” EA at 21. Based upon the EA analysis, BLM determined that impacts of geothermal leasing pursuant to application NV-73698 would not be significant, provided the identified stipulations are implemented.<sup>1</sup>

## II. ARGUMENTS OF THE PARTIES

Evans-Barton does not challenge BLM’s decision on the basis that the EA is deficient under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000),<sup>2</sup> but rather on the basis that BLM’s inclusion of the

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<sup>1</sup> The EA also included stipulations concerning water temperature and outflow of water from Kyle Hot Springs; the requirement that surface disturbing activities cease should previously unidentified human remains or funerary objects be discovered during such activities; the safeguarding of access by Native Americans to sacred sites and traditional cultural properties on and through geothermal leases; the requirement for Native American consultation prior to development activities; and procedures to be followed should the lease be found to contain historic properties and/or resources protected under the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), and other authorities. *Id.* at 15-16; *see also id.* at 23-25 (adopting these stipulations as mitigation measures).

<sup>2</sup> BLM is required by section 102(2)(C) of NEPA to consider the potential environmental impacts of a proposed action in an environmental impact statement (EIS) when it intends to engage in a major Federal action which significantly affects the quality of the human environment. 42 U.S.C. § 4332(2)(C) (2000); *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985). In making the threshold determination of whether an EIS is necessary, the agency may prepare an EA documenting its consideration of all relevant matters, and the agency may go forward with the project if the analysis in the EA establishes that the project will not have a significant impact on the human environment. 40 C.F.R. § 1504.4; *Gerald H. Scheid*, 173 IBLA 387, 395-96 (2008).

BLM’s obligation to comply with section 102(2)(C) of NEPA extends to a decision to issue a geothermal resources lease. *E.g., Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006) (preleasing environmental analysis was

(continued...)

1/2-mile NSO stipulation is arbitrary and excessive. Evans-Barton challenges the stipulation based upon its geological knowledge of the area and because it feels that this “restriction would eliminate some of the most prospective and productive parts of the lease for the generation of geothermal electrical power.” Statement of Reasons (SOR) at 1. Evans-Barton attaches a one-page explanation by geologist William J. Ehni regarding “[g]eothermal production wells targeting basin and rang[e] fault systems,” dated November 3, 2007.<sup>3</sup> Based upon Ehni’s report, Evans-Barton contends that the ½-mile NSO restriction is arbitrary and excessive, asserting that its implementation would foreclose geothermal development. Evans-Barton proposes a compromise, stating that it would be willing to accept an NSO zone of the greater of 660 feet from the property line or .375 miles from Kyle Hot Springs.

In its Answer, BLM argues that Evans-Barton has not shown that the disputed stipulation “was premised on a clear error of law, demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance.” Answer at 7-8. BLM further asserts that Evans-Barton has not shown that a reduced protective zone would be adequate to mitigate the potential adverse

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<sup>2</sup> (...continued)

required, in that case an EIS because the impacts were significant, before geothermal leases could be extended); *St. James Village*, 154 IBLA 150 (2001) (BLM decision approving a geothermal lease without either an EIS or EA analyzing the potential environmental impacts of leasing vacated and remanded).

<sup>3</sup> Ehni describes the geothermal resources within the Basin and Range geologic province as controlled by high angle normal faults varying from near vertical (90 degrees) to 65 degrees. Ehni reports that the fault for Kyle Hot Springs probably dips between 70 and 80 degrees, possibly 85 degrees. He explains that if the fault is 75 degrees in slope, an exploration well located 2,500 feet away from the surface trace of the slope, Kyle Hot Springs in this instance, would have to be drilled to a total depth of 9,330 feet in order to intercept the fault. If the fault dips at 80 degrees, he states, the well would have to be drilled to 14,178 feet. Ehni advises: “The optimum target for production is to target the fault zone at [the] depth that has the highest permeability . . . with the highest temperatures. In addition, the top portion of the hole must be vertical in order to set pumps in it. . . . Directional drilling is typically not an option.” Attachment to SOR at ¶¶ 4, 5. Ehni attaches a diagram depicting this concept. He concludes in his report that the cost of drilling to the depths shown on the model would effectively prohibit exploration of this geothermal system.

effects on Kyle Hot Springs.<sup>4</sup> Referencing the model diagram submitted by Evans-Barton, BLM notes that the fault passes through the Kyle Hot Springs location on a north-south direction, and that the diagram depicts wells placed in a westerly direction from the Springs. BLM questions why wells could not be installed beyond the 1/2-mile NSO boundary in a north or south direction from the springs where the drilling depths would not be so prohibitive. BLM contends that Evans-Barton has selected the most cost-prohibitive example to support its appeal, and concludes that Evans-Barton does not demonstrate that BLM's stipulation is unreasonable. *Id.* at 9.

### III. DISCUSSION

[1] Statutory authority for the leasing of geothermal resources is provided by the Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-1028 (2000 & Supp. V 2005). The statute provides that the Secretary "may" issue geothermal resources leases. 30 U.S.C. § 1002 (2000). The decision of whether or not to issue a geothermal lease for a given tract of land is within the discretion of the Secretary. *E.g.*, *Western Oil Shale Corporation*, 41 IBLA 105, 107 (1979). Several statutes establish the authority for the Department's involvement in the protection of properties of traditional and cultural importance. *E.g.*, The Antiquities Act of June 8, 1906, 16 U.S.C. §§ 431, 432 (1970); The Historic Sites Act, 16 U.S.C. §§ 461-467 (1970). Most pertinently, as BLM emphasizes, section 106 of the NHPA, 16 U.S.C. § 470f (2000), requires BLM to consult with Native American Tribes and to mitigate

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<sup>4</sup> We note that BLM based its arguments on a mistaken observation that appellant is asking for the NSO stipulation to be reduced from 1/2-mile to 660 feet. *See* Answer at 7. Thus, there is no discussion distinguishing the level of protection between a 1/2-mile and a 3/8-mile NSO zone.

We note further that BLM does not explain adopting the 1/2-mile NSO rather than accepting the recommendation of 1 mile in full. A preliminary "rough draft" of the EA dated Aug. 16, 2007, did not include any type of measured NSO boundary. However, the 1/2-mile NSO protection zone appears in the next "rough draft" prepared on Sept. 3, 2007. Between these two drafts, Peggy McGuckian, an archeologist, states on a BLM's *Cultural Resources Inventory Needs Assessment* form, signed Aug. 21, 2007, that "Kyle Hot Springs is an unevaluated TCP and stipulations should be added to insure protection of the aquafer [sic] temperature and flow." In any event, the Tribes have not challenged the 1/2-mile NSO as inadequate for the protection of the Kyle Hot Springs, nor has Evans-Barton shown error in BLM's decision to impose a 1/2-mile NSO in light of the Tribes' concerns and BLM's recognition that the Springs had not been evaluated as a TCP.

potential adverse impacts to properties of traditional and cultural importance.<sup>5</sup> This Board has repeatedly upheld decisions to issue geothermal leases with special stipulations designed to protect environmental and other land use values. *E.g.*, *Western Oil Shale Corporation*, 41 IBLA at 107. “Such stipulations have been upheld where the records showed that they were the result of a reasoned analysis of all pertinent factors with due regard for the public interest and reflected a reasonable means to accomplish a proper Departmental purpose.” *Draco Mines, Inc.*, 75 IBLA 278, 282 (1983), *citing James M. Chudnow*, 67 IBLA 360, 362 (1982); *Earth Power Corp.*, 55 IBLA 249, 88 I.D. 609 (1981).

Evans-Barton asserts that BLM’s adoption of the 1/2-mile NSO zone is arbitrary. As noted, Evans-Barton suggests a compromise—a minimum NSO boundary of 3/8-mile, a difference of only 660 feet but still 1,980 feet away from the Springs. However, Evans-Barton has not shown that its recommended protection zone would adequately mitigate the potential adverse effects on the Kyle Hot Springs to the same (or a similar) degree as a 1/2-mile NSO boundary. BLM questions Evans-Barton’s assertion that the 1/2-mile NSO zone is so cost prohibitive as to render the geothermal lease unviable, and, as noted above, asks why wells could not be installed beyond the NSO area in a north or south direction from the Springs, parallel to the fault rather than perpendicular to it, as posited in Evans-Barton’s cross-sectional figure, resulting in a well being drilled to the same depth as the shorter hole shown on Evans-Barton’s diagram. *See Answer at 8, Attachment 1-1.* BLM asserts that Evans-Barton “selects the most cost-prohibitive scenario in support of its appeal, when there are other, less costly drilling alternatives as well.” *Answer at 9.* Evans-Barton has not rebutted that assertion or responded to the questions posed by BLM on appeal.

BLM argues that Evans-Barton has not shown that the 1/2-mile NSO restriction is unreasonable or unnecessary to mitigate the potential adverse effects of geothermal leasing near the Kyle Hot Springs. BLM contends that the stipulation is proper, given its obligation under section 106 of the NHPA to consult with Native American Tribes and to mitigate potential adverse impacts to Kyle Hot Springs, a site of religious and cultural importance to the Lovelock Paiute and the Battle Mountain Band of the Western Shoshone Tribes, among others. BLM also cites as a basis for its action Executive Order 13007, 61 Fed. Reg. 26,771 (May 24, 1996), which requires Federal agencies to “avoid adversely affecting the physical integrity of such sacred sites.” Consistent with its obligations, BLM consulted with the Native American Tribes whose traditional territory encompasses Kyle Hot Springs and the adjacent

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<sup>5</sup> The NHPA imposes a series of requirements on Federal agencies designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. *See The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 351 (2005).

public lands. These Tribes, identifying the Springs to be a traditional site having cultural and religious significance, expressed concerns regarding geothermal lease activities near the springs. BLM acted accordingly.

*IV. CONCLUSION*

Based upon this record, we conclude that Evans-Barton has failed to meet its burden to demonstrate that BLM's decision to impose the 1/2-mile NSO restriction does not reflect a reasoned analysis of all pertinent factors, including the protection of a site of importance to Native American Tribes. Imposition of the stipulation is reasonably designed to protect the Kyle Hot Springs.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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/s/  
James F. Roberts  
Administrative Judge

I concur:

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/s/  
James K. Jackson  
Administrative Judge