



WESTERN WATERSHEDS PROJECT
YOMBA TRIBE OF WESTERN SHOSHONE
TIMBISHA TRIBE OF WESTERN SHOSHONE

175 IBLA 237

Decided July 31, 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

WESTERN WATERSHEDS PROJECT
YOMBA TRIBE OF WESTERN SHOSHONE
TIMBISHA TRIBE OF WESTERN SHOSHONE

IBLA 2005-102 & 2005-107

Decided July 31, 2008

Appeal from the Decision Record and Finding of No Significant Impact issued by the Battle Mountain Field Office, Bureau of Land Management, which approved geothermal leases in the Spencer Hot Springs Area. N-77778, N-77779, N-77780.

Affirmed.

1. Geothermal Leases: Generally--National Environmental Policy Act of 1969: National Environmental Policy Act: Generally--National Environmental Policy Act of 1969: Environmental Statements

In preparing an EA to determine whether an EIS is required under the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), an agency must take a “hard look” at the proposed action and identify relevant areas of environmental concern so that it can make an informed determination as to whether any impacts are insignificant or can be reduced to insignificance by applying appropriate mitigation measures. In considering whether BLM has taken the requisite hard look at the environmental consequences of a proposed action, this Board will be guided by a rule of reason. An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. So long as it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action, the statute’s requirements have been satisfied.

2. National Environmental Policy Act: Generally--National Environmental Policy Act of 1969: Environmental Statements

The purpose of preparing an EA is to determine whether the probable environmental impacts of a proposed Federal action are significant, and if they are significant, whether they can be eliminated or reduced to insignificance so that an EIS is not necessary. Where a FONSI is predicated on a finding that restrictions on a project will eliminate any significant environmental impact, NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance.

3. Geothermal Leases: Generally--National Environmental Policy Act of 1969: National Environmental Policy Act: Generally--National Environmental Policy Act of 1969: Environmental Assessments---National Environmental Policy Act of 1969: Environmental Statements

Where prior to deciding to issue three geothermal leases BLM prepared an EA in which it considered exploration and development, and considered not leasing, leasing less acreage, and leasing with protective stipulations, including no surface occupancy, BLM has fulfilled its pre-leasing obligation under NEPA to consider environmental information before making a decision and before taking action, and to consider and assess reasonable alternatives to such action that would avoid or minimize adverse effects.

4. Geothermal Leases: Generally--National Environmental Policy Act of 1969: National Environmental Policy Act: Generally--National Environmental Policy Act of 1969: Environmental Statements

The concept of “connected actions” generally arises in determining the scope of an EIS. Connected actions should be discussed in the same EIS if they would: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or

(iii) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a). Although geothermal development automatically triggers reclamation responsibilities, it is not true that geothermal exploration automatically triggers development, nor does the issuance of three geothermal leases, without more, constitute interdependent parts of a larger action simply because they might prove productive.

5. National Historic Preservation Act: Applicability--National Historic Preservation Act: Generally--National Historic Preservation Act: Undertaking

Geothermal leasing is an undertaking under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000). When an undertaking may affect properties of religious or cultural significance to any Tribe, the proponent agency must consult with that Tribe when carrying out its NHPA responsibilities to ensure a reasonable opportunity for the Tribe to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. In involving Tribes, the agency is required to make a reasonable and good faith effort to identify any Indian Tribes that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. 36 C.F.R. § 800.3(f)(2).

6. National Historic Preservation Act: Applicability--National Historic Preservation Act: Generally--National Historic Preservation Act: Undertaking

When BLM provided copies of the EA to representatives of a number of Tribes who might be affected by the leasing decision and contacted them to discuss cultural and historic properties that might be found within the lease project area after having initiated some level of consultation with many of the same Native American

groups in preparing the Programmatic EA to which the EA was tiered, even though the record shows that there were some misunderstandings, BLM has not failed to consult or relied on mitigation measures in lieu of consultation.

7. National Historic Preservation Act: Applicability--National Historic Preservation Act: Generally--National Historic Preservation Act: Undertaking

Although remoteness may be a factor in determining whether a Tribe is affected by an undertaking, BLM is required to seek out Tribes who might be affected by the undertaking, recognizing that Tribes residing elsewhere may have known historic ties to the land and may have issues or concerns that could be affected by the decision. Where BLM made a good faith effort to contact and consult with Tribes before the geothermal leases were issued and none of those groups identified the Timbisha, who primarily occupy lands 250 miles from the leased lands, BLM has not violated the National Historic Preservation Act.

8. Endangered Species Act of 1973: Generally--Endangered Species Act of 1973: Consultation

Where BLM consulted with the U.S. Fish and Wildlife Service (FWS) pursuant to section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (2000), when it drafted its geothermal leasing EA, and FWS concurred in BLM's determination that there were no threatened or endangered species in the project area, no section 7 violation is established where appellant has not shown that, contrary to FWS' and BLM's determination, such species are actually to be found in the project area.

9. Federal Land Policy and Management Act of 1976: Generally--Federal Land Policy and Management Act of 1976: Land Use Planning

A geothermal lease conveys only the right to explore for and develop the geothermal resource in the leased lands. A bare allegation that BLM has failed to protect waters reserved for public use does not establish a failure to

prevent unnecessary or undue degradation of the public lands and resources as required by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (2000).

APPEARANCES: Katie Fite, Boise, Idaho, for Western Watersheds Project; Roger Flynn, Esq., and Jeffrey C. Parsons, Esq., Lyons, Colorado, and Nicole U. Rinke, Esq., Reno, Nevada, for the Yomba Tribe of Western Shoshone and the Timbisha Tribe of Western Shoshone; Christopher J. Morley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Western Watersheds Project (WWP), and the Yomba and Timbisha Tribes of Western Shoshone (the Tribes)¹ appeal the Decision Record and Finding of No Significant Impact (DR/FONSI) issued by the Battle Mountain Field Office, Nevada, Bureau of Land Management (BLM), on January 31, 2005, approving the issuance of three noncompetitive geothermal leases in the Spencer Hot Springs area of Lander County in central Nevada, as analyzed in Environmental Assessment NV063-EA04-59 (EA).²

Background

Geothermal leasing in the Shoshone-Eureka area was approved in a Management Framework Plan (MFP) prepared sometime in the early 1970s, perhaps earlier. The MFP provided that “[a]ll areas designated by BLM as prospectively valuable for geothermal steam will be open for exploration and development unless withdrawn or restricted from mineral entry.” See Record of Decision (ROD) (March 1986) for the Shoshone-Eureka Area Resource Management Plan (RMP) at 29.

In the mid-1970s BLM prepared two Regional Environmental Analyses (REAs) to analyze the impacts of geothermal development in the Shoshone and the Eureka

¹ The Yomba Shoshone Tribe of the Yomba Reservation, Nevada, and the Death Valley Timbi-Sha Shoshone Band of California are among the Tribes recognized by the United States. See 73 Fed. Reg. 18553, at 18554, 18556 (Apr. 4, 2008). This opinion refers to the Tribes as they did in their Notice of Appeal and subsequent pleadings, including the variation in the spelling of “Timbi-sha.”

² The leasing of the public lands for geothermal resources is authorized by the Geothermal Steam Act of 1970 (the Act), *as amended*, 30 U.S.C. §§ 1001-1028 (2000). The Act was amended on Aug. 8, 2005. Pub. L. No. 109-58, Title II, Subtitle B, §§ 221 through 236, 119 Stat. 594, 660-674.

Resource Areas. REA 27-060-5-21 (1974) (Shoshone REA); REA 27-060-5-55 (1975) (Eureka REA). Although each noted that the areas with the best likelihood for geothermal development were also those most likely to suffer adverse impacts from that activity, the REAs maintained the MFP's land use decision to lease all lands within the planning area unless they were withdrawn or otherwise closed to leasing. See Eureka REA at 94-95; Shoshone REA at 47-48. The Eureka REA contained a memorandum dated January 9, 1976, from the Battle Mountain District Manager to the BLM State Director, the subject of which is styled a "Decision Document" for that REA. That REA Decision Document stated that a 1973 national Environmental Impact Statement (EIS) on "the proposed Geothermal Leasing Program" and the Eureka REA, "taken together," supported the conclusion that no EIS was required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), and it determined to maintain geothermal leasing in the Eureka planning area. A copy of the 1973 EIS was not provided.³ There is no similar Decision Document in the Shoshone REA or in the record, though we assume that a similar conclusion was reached for the Shoshone planning area. Neither REA contained a meaningful discussion of cultural or Tribal values or resources, nor did they document any consultation regarding historic properties or properties of significance to the Tribes.

In 1986, BLM issued the Shoshone-Eureka RMP, which replaced the MFP in part,⁴ and for which BLM prepared an EIS (RMP/EIS). That RMP/EIS also retained the land use decision initially made in the MFP regarding geothermal leasing, without comment or analysis. ROD at 1. Specifically, the ROD provided that apart from the eight decisions considered in the RMP, the decisions made in the MFP were "brought forward" and incorporated into the RMP, and would "remain unaltered . . . and in effect until expressly changed by a subsequent documented planning action." ROD at 28.⁵ Neither the draft nor final RMP/EIS analyzed the impacts of geothermal leasing

³ We assume that the 1973 EIS to which the Eureka REA alluded is the same 1973 EIS addressed in a recent case on which the Tribes rely. See *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006).

⁴ The RMP was expressly limited in scope to five enumerated issues (RMP at 1-2 to 1-3), ultimately resulting in eight management decisions, none of which included geothermal leasing or development (ROD for RMP at 3-12). The RMP was amended in 1987 to re-examine grazing allotment categorization and impacts on wildlife.

⁵ The management decision in the ROD duplicated the MFP's decision that "[a]ll areas designated by the BLM as prospectively valuable for geothermal steam will be open for exploration and development unless withdrawn or restricted from mineral entry. All public lands disposed of in these areas will have the geothermal resources reserved to the federal government." *Id.*; see also the Programmatic EA NV063-

(continued...)

and development. Nothing in the draft or final RMP/EIS shows that any Tribes were consulted or sent copies of the documents for comment.

BLM recognized that the REAs had not addressed cumulative impacts of geothermal leasing or certain recently designated critical environmental and resource items. EA at 3; *see also* Answer at 2. BLM therefore determined to prepare the PEA to supplement the REAs. PEA at 3. The PEA conformed to the RMP and acknowledged that the Minerals Objectives and Management Decisions were simply “brought forward unaltered from the earlier ‘Management Framework Plan’.” *Id.* at 2. As described therein, the PEA was to serve as the pre-leasing environmental document to which subsequent individual leasing decisions and environmental analysis would be tiered.⁶ *Id.* at 4. The PEA identified 15 Bands or Tribes and the Western Shoshone Defense Project BLM contacted during the drafting process, including the Yomba, but not the Timbisha.⁷ *Id.* at 33. The PEA acknowledged that properties of religious or cultural significance to Tribes could exist within the boundaries of a given geothermal lease, in particular noting the importance of hot springs to Native American religious practices, and described the contacts as follows:

The BLM sent letters and made follow-up telephone calls to solicit input from the tribes on the locations of areas where geothermal leasing and exploration would cause concern. The goal of this preliminary effort was to reduce the potential for conflict and to reduce the amount of time it would take to process an application.

Id. at 13. None of the listed Tribes submitted written comments.

In addition to its environmental analysis, the PEA acknowledged that geothermal exploration has the potential to impact Native American religious sites, and that any geothermal exploration project defined as an undertaking might require

⁵ (...continued)

EA-02-16 (PEA) issued in September 2002, at 2-3.

⁶ The PEA was appealed to this Board and stayed while the appellants were afforded the opportunity to demonstrate standing to maintain the appeal. BLM did not rely on and tier to the PEA while the appeal was pending. Ultimately, the appeal was dismissed for lack of standing on Aug. 12, 2004.

⁷ Those contacted were the Battle Mountain, Elko, South Fork, and Wells Bands of the Te-Moak Tribe of Western Shoshone; Duckwater Shoshone Tribe; Yomba Shoshone Tribe; Fallon Paiute-Shoshone Tribe; Ely Shoshone Tribe; Ft. McDermitt Paiute & Shoshone Tribe; Lovelock Paiute Tribe; Pyramid Lake Paiute Tribe; Summit Lake Paiute Tribe; Walker River Paiute Tribe; Yerington Paiute Tribe; and the Western Shoshone Defense Project.

Native American consultation. *Id.* The PEA also stated that “[i]ssuing leases is exempted from review under Section 106 of the National Historic Preservation Act” (NHPA), 16 U.S.C. § 470f (2000), and stated that casual use exploration activities⁸ “may also be excluded from cultural inventory requirements.”⁹ PEA at 12.

When Western submitted its applications, BLM prepared the Spencer Hot Springs EA, NV063-EA04-59, to analyze the impacts of issuing the leases and exploration at the casual use level.

On January 31, 2005, the Assistant Field Manager issued the DR/FONSI approving the lease applications, and these appeals followed.¹⁰

⁸ These are: “1) Vibroseis, thumpers, and conventional truck-mounted drill rig routes and operations located on constructed roads or well defined existing roads and trails, 2) Pedestrian routes and placement sites for hand carried geophones, cables, or similar equipment, 3) Cross country operations of seismic trucks and support vehicles on bare frozen ground or sufficient snow depth so that the vehicle traffic does not reveal the ground surface and disturb ground, 4) One time pass routes of wheeled vehicles under 10,000 GVW, 5) Above ground seismic blasting (Poulter Method), 6) Helicopter-supported activities, 7) Airborne geophysical surveys, and 8) Exploration activities defined as casual use in 43 CFR 3200.1.” PEA at 12.

⁹ This appears to be derived from the State Protocol Agreement BLM and the Nevada State Historic Preservation Officer (SHPO) executed in 1999 to guide their partnership in complying with NHPA. We note that Appendix F to the Agreement identifies geophysical exploration activities as “categorical no adverse effect situations” for which no SHPO consultation is necessary. *See* Agreement, Section VII.D.1 at 12. The Agreement is predicated on the parties’ agreement that BLM would invite the SHPO to participate, at the beginning of the land use planning process, including plan amendments and specialized management planning, such as fire management and allotment and habitat management. *Id.*, Section III at 2. As stated, nothing in the record documents any such consultation at the land use planning stage. Although BLM maintains that the EA was tiered to the PEA, it has not in this appeal invoked the categorical exemption/no adverse effect determination.

¹⁰ WWP petitioned for a stay in IBLA 2005-102. BLM moved to dismiss the appeal. On Apr. 14, 2005, the Board denied the stay and took the motion to dismiss under advisement. WWP requested reconsideration of the denial of the stay. By order dated Aug. 23, 2005, we denied the request for reconsideration of the stay and the motion to dismiss, and consolidated the two appeals. BLM filed its Answer in September 2005.

Leases N-77778, N-77779, and N-77780 were issued on June 19, 2005, effective July 1, 2005, following the denial of the stay in IBLA 2005-102.¹¹ The leases grant the exclusive right to drill for, extract, remove, utilize, sell, and dispose of all geothermal resources on the lands described, as well as the right to build and maintain necessary improvements on the land for a primary term of 10 years. Numerous stipulations to protect various resources and resource values, including a no surface occupancy (NSO) stipulation covering the 200 acres immediately surrounding the Spencer Hot Springs, monitoring and mitigation measures, standard operating procedures, and Geothermal Resources Operational Orders (GROs) were attached to the leases.

Parties' Arguments on Appeal

WWP and the Tribes are united in their challenge to the sufficiency of the EA's environmental analysis, and both assert that an EIS was required by NEPA, 42 U.S.C. § 4332(2)(C) (2000), before the geothermal leases could be issued. Both raise claims under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2000). WWP attacks the RMP as outdated, complaining more specifically that BLM failed to minimize impacts and prepare a "current inventory" of the condition of various resources and uses of the lands. The Tribes contend BLM violated section 302 of FLPMA, 43 U.S.C. § 1732 (2000), by leasing land that was withdrawn pursuant to Public Water Reserve No. 107. They argue that BLM thus failed to protect waters reserved for public use, and that this failure constitutes undue and unnecessary degradation of the public lands in violation of FLPMA.

WWP separately pursues a claim under section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536 (2000), arguing that BLM failed to adequately consult with the U.S. Fish and Wildlife Service (FWS) regarding the impacts of geothermal development on threatened and endangered species, generally alluding to impacts on aquatic species as an example. WWP SOR at 4.

The Tribes separately argue that BLM violated the NHPA, 16 U.S.C. § 470f (2000), by failing to consult with them or with the SHPO prior to leasing.

¹¹ Leases issued before Aug. 8, 2005, the date the Geothermal Steam Act of 1970 was last amended, are subject to the revised rules implementing the 2005 amendment, "except that such leases are subject to the BLM regulations in effect on Aug. 8, 2005 (43 CFR parts 3200 and 3280 (2004)), with respect to regulatory provisions relating to royalties, minimum royalties, rentals, primary term and lease extensions, diligence and annual work requirements, and renewals." 43 C.F.R. § 3200.7(a)(1). A lessee may elect to be subject to all of the 2005 rules, provided such election is made not later than Dec. 1, 2008. 43 C.F.R. § 3200.7(b).

BLM disputes and denies WWP's and the Tribes' factual allegations and legal conclusions.

Analysis

I. National Environmental Policy Act

[1] In preparing an EA to assess whether an EIS is required under NEPA, an agency must take a "hard look" at the proposed action and identify relevant areas of environmental concern so that it can make an informed determination as to whether any impacts are insignificant or can be reduced to insignificance by applying appropriate mitigation measures. *Native Ecosystems Council*, 160 IBLA 288, 292 (2004); *Southern Utah Wilderness Alliance*, 159 IBLA 220, 234-35 (2003); *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997). In considering whether BLM has taken the requisite hard look at the environmental consequences of a proposed action, this Board has indicated that it will be guided by a rule of reason; as long as an EA contains a reasonably thorough discussion of significant aspects of the probable environmental consequences, NEPA requirements have been satisfied. *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000), (quoting *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992)), and authorities cited. A party challenging BLM's decision has the burden of demonstrating that the decision is based on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of significance to the proposed action. *Great Basin Mine Watch*, 159 IBLA 325, 353 (2003); *Southern Utah Wilderness Alliance*, 158 IBLA 212, 219-20 (2003); *The Ecology Center*, 140 IBLA 269, 271 (1997). As we have stated many times, mere differences of opinion provide no basis for reversal. *Rocky Mountain Trials Association*, 156 IBLA 64, 71 (2001).

A. Adequacy of the Range of Alternatives

The action proposed and analyzed in the EA was the issuance of three geothermal leases. The EA considered two alternatives in detail: the proposed alternative to approve the requested leases, and no action, in which the leases would not be issued. BLM also considered the option of excluding some of the requested lands from the leasing decision, but rejected that alternative without detailed analysis because there were "no unresolved resource conflicts" identified with the proposed action and because "there was no site-specific information which would have supported excluding some of the requested lands from the leasing decision in order to respond to any of the issues or concerns." EA at 6.

WWP and the Tribes complain that the range of alternatives was inadequate. In WWP's case, that complaint is grounded in the perceived shortcomings of the PEA and its failure to consider an alternative that allowed "very limited exploration of a very small area while aquifer studies were being conducted." WWP concludes that

the EA compounds the perceived deficiencies of the PEA, arguing that the EA offers no assurance that “excessive drilling activity outside [the NSO] area will not dry up or irreversibly alter hot springs flows.”¹² WWP SOR at 8. BLM considered excluding some of the requested lands from the leasing decision, but rejected that alternative without detailed analysis because there were “no unresolved resource conflicts.” EA at 6. While WWP has a contrary opinion, it has not shown that BLM erred in its impacts analysis or in its conclusion that there are no resource conflicts that would warrant analyzing an alternative that proposed a smaller lease area. What remains is the Tribes’ assertion that BLM should have considered not leasing the Project Area and/or leasing less acreage “until it fully reviewed the true scope of cultural, historical, religious, and environmental resources and impacts.” Tribes’ SOR at 23. We will postpone a determination on the Tribes’ challenge to the adequacy of the range of alternatives until after we have considered BLM’s compliance with the NHPA.

B. Adequacy of the Impacts Analysis

The EA concluded that there were no direct impacts of the leasing decision, since the proposed action did not entail exploration beyond casual use, which by definition does not lead to any significant disturbance of Federal lands, resources, or improvements. *See* 43 C.F.R. § 3200.1. Because lessees are required to diligently explore the leasehold for geothermal resources until production in commercial quantities is achieved, *see* 43 C.F.R. §§ 3210.13 through 3210.16, the EA also analyzed exploration beyond the casual use level and development as reasonably foreseeable indirect impacts, assuming for its analysis that any operations would comply with stipulations, standard mitigation measures, standard operating procedures, NEPA, and other applicable law. EA at 7. The EA identified 15 resource values that could be affected by the indirect impacts of leasing: air quality; hydrology and water quality and quantity; minerals and soils; cultural resources; special status species; vegetation; wetlands and riparian areas; wildlife; migratory birds; wild horses and burros; invasive non-native species; grazing allotment management; visual resources; recreation; and waste. *Id.* at 9-48. BLM also considered the cumulative impacts to which the project might contribute. *Id.* at 49-51. Although BLM acknowledged that geothermal development could have negative impacts on these resource values, it concluded that such impacts could be avoided or minimized to insignificance by the stipulations attached to the leases, standard operating procedures, GROs, and/or the application of appropriate mitigation. *See* DR/FONSI at 2 (“The No Action Alternative was not selected because the Proposed Action with the attached stipulations would not cause harm or degradation to any resource.”) In each case, WWP in general terms contends that

¹² A challenge to the merits and sufficiency of the PEA is untimely, and we consider such assertions no further.

BLM's assessment was inadequate; the Tribes join WWP in some instances, particularly with respect to hydrology and water quality- and quantity-related claims.

The EA identified changes in water temperature, discharge rates, decrease in the water table level, and surface subsidence as the primary impacts on hydrology, water quality and water quantity. EA at 11-15; Appendix B, Stipulations, at 3. However, WWP and the Tribes have not identified another water-related impact that BLM overlooked. They assert that BLM lacks any knowledge of the hydrology in the area, arguing that it therefore cannot understand potential impacts on resources, and they express apprehension that corrective action may not be possible or may be required by BLM too late. WWP's SOR at 7; Tribes' SOR at 18. While BLM did state that its understanding of the hydrology in the area is incomplete, *see* DR at 8, that is far from an admission that BLM knows nothing about the hydrology and water quality and quantity in the area, as the analysis in the EA at 11-15 clearly shows. The EA states that “[a]lthough insufficient information is currently available to know the exact nature of the geothermal reservoir(s) below Spencer Hot Springs, geothermal reservoir management techniques (such as altering geothermal production and inject [sic] well pressures, locations and depths) do exist and can be used to change the pressure distribution in a geothermal reservoir to modify or reverse adverse pressure changes detected by reservoir monitoring.” EA at 14. Further, the EA concluded that the thermal waters flowing from the hot springs are associated with an aquifer that is isolated from the shallow aquifer from which water wells produce, so that “there is very little potential for development and utilization of the geothermal resources to draw down the water table that supports the existing and proposed shallow water wells in the general area pumped to supply water for wildlife.” EA at 32 (analysis of impacts on wildlife). WWP and the Tribes have not identified or provided a ground for questioning or dismissing these conclusions, nor have they identified available information that BLM should have considered.

Citing the DR/FONSI, the Tribes also broadly assert that BLM failed to review impacts relating to air quality, cultural-historical resources, special status species, hydrology and water-related issues, and invasive non-native species. Tribes' SOR at 19. However, they fail to acknowledge that the pages of the DR/FONSI they cite in support do not purport to be the impacts analysis of the EA; instead, they describe the stipulations and operating procedures applied to the leases to mitigate or eliminate adverse effects. While it is correct that some of the specifications of these measures will await site-specific NEPA analysis (*e.g.*, cultural-historical resources and Native American issues), annual or other reviews of available and emerging information and data (*e.g.*, ESA compliance), the submission of certain information (*e.g.*, a surface water inventory or relevant maps), or some future preventative actions (*e.g.*, the development and implementation of a weed treatment program), with the possible exception of NHPA consultation, discussed below, it is not correct that the EA, as tiered to the PEA, failed to analyze the direct and indirect impacts on the resources

and resource values enumerated by the Tribes. We therefore cannot agree that the EA failed to consider a substantial environmental question of significance to the proposed action.

C. Preparation of an EIS

WWP and the Tribes both contend that NEPA required the preparation of an EIS, but for quite different reasons. WWP's argument stems from its conclusion that the proposed action entails the full gamut of activity, from lease issuance and exploration to development, production, and reclamation, which necessarily impacts the human environment significantly, and from WWP's fundamental disagreement that casual use level exploration activity does not result in significant impacts. WWP SOR at 5-6.

The Tribes argue that an EIS was required because issuance of the leases without an NSO restriction constitutes an irretrievable and irreversible commitment of resources. In support, the Tribes rely on *Pennaco Energy, Inc. v. U.S. Department of the Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441, 1448-51 (9th Cir. 1988); and *Montana Wilderness Association v. Fry*, 310 F. Supp. 2d 1127, 1145 (D. Mont. 2004), as well as Board precedent. Tribes' SOR at 16-21; Tribes' Reply at 24-25, 28-30.

[2] The purpose of preparing an EA is to determine whether the probable environmental impacts of a proposed Federal action are significant or, if they are significant, whether they can be eliminated or reduced to insignificance so that an EIS is not necessary. Where a FONSI is predicated on a finding that restrictions on a project will eliminate any significant environmental impact, NEPA requires an analysis of the proposed mitigation measures and their effectiveness in reducing the impact to insignificance. *Center for Native Ecosystems*, 170 IBLA 331, 350 (2006), and cases cited.

Here, comments on the EA requested a 160-acre NSO stipulation around the Spencer Hot Springs; BLM determined to require a 200-acre NSO stipulation. Appendix B (which duplicates Appendix G of the PEA) contains all the stipulations that are generally applicable to the resources that could be affected by lease issuance, exploration, and development. These include timing and seasonal restrictions (e.g., sage grouse, ferruginous hawks, brooding and nesting habitat); buffer zones (e.g., sage grouse leks and wintering habitat, raptor nests, riparian vegetation); the authority to direct the modification, relocation, or discontinuation or termination of operations (e.g., Native American religious concerns, special status species, wetlands and riparian zones, impacts to surface or subsurface waters, including no use of surface waters and limitations on type of equipment that may be used); inventory and monitoring conditions (e.g., air quality, surface water inventory, temperature and

outflow from local hot springs); and NSO restrictions (e.g., wildlife management areas, herd management areas, playas, grazing allotments, and the Spencer Hot Springs). Appendix C contains standard operating procedures designed to ensure compliance with applicable authorities, the expected effect of which is to mitigate impacts (e.g., dust suppression, scarification and revegetation of surface disturbance as soon as it becomes feasible, and confining traffic to routes that avoid cultural resources). In general, WWP does not adequately acknowledge or address with particularity those mitigation measures or their anticipated effect on impacts, alone or in combination with the standard operating procedures, GROs, and the 200-acre NSO stipulation around the Spencer Hot Springs. WWP therefore has failed to show that the FONSI was not justified or supported by the mitigation measures specified in the EA.

The Tribes dispute the sufficiency of the protective stipulation that allows BLM to modify, relocate, or terminate operations if monitoring shows more than negligible impacts on water temperature or outflow from local hot springs and existing wells, *see* Appendix B to EA at 1, 3-4, yet they do not offer a better or more practicable stipulation. What might constitute a “negligible” change in water temperature or outflow sufficient to trigger BLM’s exercise of authority remains to be seen and is unanswerable in the abstract, but we perceive no reversible error because the stipulation presupposes some physical evidence of an impact before the lessee’s operations are disrupted or relocated.

The Tribes also characterize the NSO restriction around the Springs as “paltry” and inadequate, *see* Tribes’ SOR at 14, 16, because the EA is inadequate as a pre-leasing analysis, *id.* at 16-18, so that, in the absence of an NSO restriction applicable to the entire Project Area, BLM could not defer its NEPA obligations until surface-disturbing activity was proposed and could not rely on the mitigation measures in lieu of fulfilling that obligation, *id.* at 19. Citing *Wyoming Outdoor Council (On Reconsideration)*, 157 IBLA 259, 268 (2002) (Burski, A.J., concurring), the Tribes argue that “[t]he fact that BLM can arguably mitigate environmental impacts in postleasing decisions does not negate BLM’s NEPA obligation to consider them before deciding whether or not to issue the leases and what, if any, lease stipulations might be needed in light of those impacts.” Tribes’ SOR at 19. They attack the sufficiency of two mitigation measures in particular. Although they seem to acknowledge that BLM has fashioned a number of protective stipulations to mitigate any impacts, the Tribes complain that the stipulations can be waived by the Authorized Officer. *Id.* at 19 (*citing* DR at 6). They complain that BLM would protect water resources only after drilling commenced and only after monitoring revealed a circumstance requiring corrective action. They argue that even then, BLM states only that it “**may** require the operator to amend, relocate or discontinue operations.” *Id.* at 20 (*citing* DR at 4 (Tribes’ emphasis)). The Tribes rely on *Pit River Tribe v. U.S. Forest Service*,

469 F. 3d 768, in support. See Tribes' Notice of Supplemental Authority filed Nov. 16, 2006.

None of the authorities cited by the Tribes stands for the proposition that an EIS is required when the impacts of an action are not significant or can be avoided or reduced to insignificance. Nor has BLM chosen to issue leases and defer environmental analysis of that decision. Before the geothermal leases were issued, BLM prepared the EA, which was tiered to the PEA, to identify and consider the likely direct environmental consequences of issuing the three geothermal leases and authorizing casual use level exploration, as well as the indirect consequences of exploration beyond casual use and development. BLM considered not leasing, and only after considering the nature and extent of the important aspects of the probable environmental consequences and the effect of an array of protective stipulations and mitigation, did it determine to issue the three leases, convincingly finding that doing so would not result in significant impacts. *Pit River Tribe v. U.S. Forest Service* does not require a different conclusion.

In that case, the only environmental review that preceded lease issuance in 1988 consisted of the 1973 national geothermal EIS mentioned above, a 1981 EA for casual use level exploration of 266,800 acres of National Forest lands (plus an adjacent 26,750 acres), and a 1984 Supplemental EA for exploration, development, and production phases tiered to the 1973 EIS. The 1981 EA stated that "several staged EAs or EISs would be required to proceed to subsequent phases" of exploration and development. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d at 773. The 1984 EA considered exploration and development, what lands should be leased, and what protective measures would be imposed, and it required a plan of operations (PoO) and further environmental review before the lessee could begin operations. *Id.* at 774. In a 1985 ROD, BLM committed to leasing 41,500 acres in the Resource Area, stating that environmental concerns would be addressed when the PoO was reviewed, and concluding that with appropriate mitigation, geothermal development could occur without significant impacts. *Id.* at 775. BLM issued the leases to Calpine Corporation (Calpine) in 1988 for a 10-year term without initiating any further environmental review. *Id.* In 1995, Calpine submitted its PoO for a proposed exploration project, for which BLM prepared an EA and ultimately issued a FONSI. *Id.* at 776.

Calpine later submitted a plan of utilization for a development project consisting of a power plant that would disturb hundreds of acres and would operate for 45 years. BLM issued a draft EIS in 1997, which was highly criticized. *Id.* at 777. In 1998, BLM extended Calpine's leases for another 5 years, without any environmental review. The final EIS was issued in 1998, and a ROD approving the plan was issued in 2000. *Id.* As mitigation, BLM placed a moratorium on further geothermal development for a minimum of 5 years so that BLM could analyze the

impacts of development. The Pit River Tribe appealed to this Board, and while the appeal was pending, BLM lifted the moratorium. In 2002, it extended Calpine's leases another 40 years, again without conducting any further environmental review. *Id.* at 778. The court of appeals noted that Calpine had an absolute right to develop its leases and, under the leases and lease extensions, that BLM and FS had reserved only

the right to limit development in accordance with general statutory and regulatory requirements, and, critically, "when not inconsistent with lease rights granted," with later regulations and orders. While specific stipulations attached to the leases provide some absolute limits on surface-disturbing activities, these stipulations only cover select portions of the lease parcels or certain periods of the year.

Id. at 782-83.

The court went on to state that BLM could not rely on the EAs, which considered only lease issuance and casual use exploration and not actual development. Quoting its decision in *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994), for the proposition that when an EIS is prepared, "site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development," the court held that the critical decision in *Pit River* occurred when the leases were issued and extended. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d at 784. Those facts confirm that extending the leases and the imminent construction of a geothermal plant in a known geothermal resource area constituted major Federal action with significant environmental effects, so that a FONSI would not have been supportable or sustainable under any view; an EIS thus was required.

[3] In contrast, the instant appeals involve three leases for 4,100 or so acres. The EA considered geothermal development to be reasonably foreseeable, and it discussed the impacts of *exploration and development* in connection with each of the "critical element" resources in the Project Area that had not been analyzed in the broader NEPA documents that preceded the Spencer Hot Springs EA. The EA in fact considered the range of alternatives that are available before a leasing decision is made: it considered not leasing the three parcels, and considered and rejected leasing less acreage, as discussed above, and considered leasing with various protective stipulations. BLM only determined to lease the lands after the analysis showed that, with numerous protective stipulations, leasing would not result in significant environmental consequences. While there is no question that the leases convey the right to explore for and develop geothermal resources, NEPA review will be required before any surface-disturbing activities beyond the casual use level are undertaken. EA at 1. We find that, in these circumstances, the EA is properly

considered adequate as a pre-leasing NEPA document.¹³ We further find that WWP and the Tribes have not shown a basis for concluding that the FONSI was unwarranted, and where the environmental impacts of a Federal action are not significant, the preparation of an EIS is not required.

[4] WWP offers an additional reason why an EIS was required. It argues that BLM improperly segmented the connected actions of leasing, exploration, development, and reclamation. That contention must be rejected. The concept of “connected actions” is generally invoked relative to determining the scope of an EIS. See 40 C.F.R. § 1508.25. Connected actions are closely related and should be discussed in the same environmental impact statement if they include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a). Although development automatically triggers reclamation responsibilities, it is not true that exploration automatically triggers development and utilization of the resource leading to reclamation obligations. Nor are these leases rendered interdependent parts of a larger action simply because they might prove productive. Thus, exploration and development are not connected actions as defined in 40 C.F.R. § 1508.25(a). See *Missouri Coalition for the Environment*, 172 IBLA 226, 247 (2007), and cases cited.

We now turn to the allegations relating to BLM’s compliance with the NHPA, recognizing that, while an agency may use its NEPA process to fulfill its NHPA obligations, the two statutes are separate.

II. *The National Historic Preservation Act*

[5] The NHPA imposes a series of requirements on Federal agencies designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. 16 U.S.C. § 470f (2000); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093-94 (9th Cir. 2005); *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 351 (2005). The statute requires a Federal agency to determine whether the undertaking could “cause effects on historic properties, assuming such properties were present.” 36 C.F.R. § 800.3(a). The issuance of a mineral lease is an

¹³ We accordingly do not inquire into the adequacy of other NEPA documents to which the EA is tiered. That inquiry will await the case in which BLM does not prepare a NEPA document that independently serves as a pre-leasing analysis and instead relies on a “Documentation of Land Use Plan Conformance and NEPA Adequacy” (DNA) worksheet. At that time, the DNA will have to show not only that NEPA review took place, but that it is “adequate” for the issue at hand. *Center for Native Ecosystems*, 170 IBLA 331, 347 (2006).

undertaking. *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA at 351 n.7 (quoting *Montana Wilderness Association v. Fry*, 310 F. Supp. 2d at 1153).

Prior to approving an undertaking, BLM is required to consult with the SHPO, or where a Tribe has assumed the responsibilities of a SHPO with respect to tribal lands, the Tribal Historic Preservation Officer (THPO), to determine what historic and cultural properties are within the area that could be affected by the effects of an undertaking. 36 C.F.R. §§ 800.2(c)(2)(i)(A), 800.4(a).

When an undertaking may affect properties of religious or cultural significance to any Tribe, regardless of the location of the property, the proponent agency must consult with such Tribe when carrying out its NHPA responsibilities. 16 U.S.C. § 470a(d)(6)(B) (2000); 36 C.F.R. § 800.2(c)(2)(ii); *Pit River Tribe v. U.S. Forest Service*, 469 F.3d at 787 (quoting *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 806 (9th Cir. 1999)). The agency is charged with ensuring that consultation with a Tribe constitutes “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii)(A). That consultation must take place early in the planning of the undertaking so that a broad range of alternatives can be considered. *Id.*; *Pit River Tribe v. U.S. Forest Service*, 469 F.3d at 787. In involving Tribes, the agency is required to make a “reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.” 36 C.F.R. § 800.3(f)(2).

Additionally, pursuant to section 106 of the NHPA, 16 U.S.C. § 470f (2000), BLM is required, when authorizing an undertaking, to identify any property eligible for inclusion in the National Register of Historic Places that is located within the project area and which may be affected by the project. *Sierra Club, Angeles Chapter, Santa Clarita Group*, 156 IBLA 144, 149 (2002). The agency is to “determine and document the area of potential effects” in consultation with the SHPO and other consulting parties. 36 C.F.R. § 800.4(a)(1). The regulations require an agency to review existing information, including any information on possible historic properties that have not yet been identified, to seek information as appropriate from consulting parties and knowledgeable persons and organizations, and to gather information from Tribes regarding such properties on or off tribal lands, based on which the agency identifies historic properties within the area of potential effects. 36 C.F.R. § 800.4(a), (b). The agency is expected to make a “reasonable and good faith effort” to identify such properties, which may include research, oral history interviews, sample field investigation, and field survey. 36 C.F.R. § 800.4(b)(1); *Southern Utah Wilderness Alliance*, 164 IBLA 1, 22 (2004). This effort includes gathering

information from and consulting with Tribes to identify historic properties. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d at 805.

Lastly, the regulations expressly contemplate and encourage coordination of compliance under the NHPA with compliance under NEPA. Thus, agencies “should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” 36 C.F.R. § 800.8. Agencies may use the “process and documentation required for an EA/FONSI or an EIS/ROD,” provided the agency notifies the SHPO/THPO and the Council that it intends to do so and meets the standards prescribed in 36 C.F.R. § 800.8(c)(1). Those standards mirror the requirements of 36 C.F.R. §§ 800.3(f), 800.4, and 800.5, described above.

A. Tribal Consultation

We commence the discussion of the merits of BLM’s NHPA compliance with a brief comment on the relevant facts in *Pit River Tribe v. U.S. Forest Service* and the Ninth Circuit’s ruling that BLM and FS had not complied with the NHPA. As in the present cases, the project area in *Pit River* remained culturally significant to contemporary Native Americans. In *Pit River*, the record of NHPA compliance consisted of a four-sentence statement of cultural significance to the Pit River Tribe; the acknowledgment that the project area contained many eligible historic places, several of which had been nominated for inclusion on the National Register of Historic Places; and two short, general sentences purporting to discuss the effects of the proposed leasing on those cultural and historical resources. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d at 774-75. Unlike the present appeal, the sole mitigation measure, declared to be “100% effective,” was consultation with local Native American groups. *Id.* at 775. Yet the EA also admitted the possibility of unavoidable adverse effects and expressed doubt that even continuous consultation throughout all the project’s phases would minimize such impacts. *Id.* Thus, it was “undisputed that no consultation or consideration of historical sites occurred in connection with the lease extensions, although NHPA consultation did occur in the Fourmile Hill Plant approval process.” *Id.* at 787. The court held that the later NHPA review could not cure the earlier failure. *Id.*

In this appeal, prior to releasing the EA, BLM held an “information meeting” in Elko, Nevada, on November 14, 2003, which was attended by Gerald Dixon, BLM’s Native American Liaison; Caleb Hiner, a BLM geologist; the Cortez Gold Mine Tribal Liaison; and representatives from the Wells, Elko, South Fork, and Battle Mountain Bands of Western Shoshone Tribes. The Tribal members informed BLM that “all hot springs are sacred sites and that any development close to the hot springs would be of concern to the tribes.” Dixon Declaration, ¶ 6 at 3. Dixon states that the “tribes did

not tell us about any major site-specific concerns at this time.” *Id.* A second “information meeting” was held on January 29, 2004, in Elko. That meeting was attended by the Western Shoshone Defense Project; the Duck Valley-Sho-Pai Tribes of Nevada and Idaho; the Battle Mountain and South Fork Bands of Western Shoshone; the Cortez Gold Mine Tribal Liason; and the Duckwater Shoshone Tribe. *Id.*, ¶ 8 at 5. A public scoping meeting was held in Austin, Texas, on August 10, 2004.

Dixon arranged to attend the Yomba Council meeting on August 12, 2004, and he informed representatives of the Ely Shoshone Tribe, the Duckwater Shoshone Tribe, and the Battle Mountain Band of Western Shoshone, apparently in an effort to meet with all of them. *Id.*, ¶ 9 at 5-6. BLM believes that attendance at this Yomba Council meeting constituted government-to-government consultation because the Acting Field Manager and the Yomba Tribal Chairperson attended. Dixon avers that after BLM’s presentation, “the tribe was asked if more formal consultation was needed at this time. The Yomba Council and its Chairman, Jerrill Johns, decided at that point that further consultation was not necessary at this stage of the proposed action.” *Id.*, ¶ 10 at 6. Dixon states that the Yomba “decided that if and when an exploration or development application was submitted, the tribes would be interested in additional consultation,” and BLM agreed “it would immediately inform the tribe” if it received such a proposal. *Id.* Dixon further states that “Bonnie Bobb [Environmental Director for the Yomba Tribe of Western Shoshone] did not object to Chairman Johns’ decision to decline the invitation to consult in a formal manner.” *Id.* Dixon declares that he had no knowledge that the Timbisha have a religious interest in Spencer Hot Springs. *Id.*, ¶ 7 at 4, ¶ 11 at 7.

With his Declaration, Dixon provided copies of e-mail to Bobb and to Annette George, Environmental Assistant Director, Duckwater Shoshone Tribe, dated December 30, 2003, in which he gave them a “heads up” on Western’s application, briefly described three issues (historic use as camp site and source of drinking water, and current use for recreation and therapeutic relief; location within a Forest Service wild horse and burro management area; and potential to draw down aquifer levels if hot springs were developed). Dixon acknowledged that the springs have spiritual and healing value to the Tribes, but that he did not know the specifics. He requested their assistance. Dixon also provided copies of his internal e-mail to BLM staff dated July 26, and August 5 and 9, 2004, regarding his telephone conversations with the Ely, Yomba, and Duckwater Tribes and Battle Mountain Band representatives on July 26, about arranging meetings, and about the meeting with the Yomba Council.

The record on appeal includes copies of e-mail communications between Dixon and other BLM employees relevant to BLM’s understanding. *See* e-mail from Kathleen Depukat, dated July 16, 2004 (stating that the press releases had been finalized and charging Dixon with “do[ing] the tribal contacts during the public scoping meeting”); e-mail response from Dixon, dated July 16, 2004 (stating that he

was not certain whether “any type of formal letter to the tribes” had been sent and advising that BLM should be “very careful” moving forward with the press release before formally informing and inviting the Tribes to consult); e-mail response from Gail Givens, dated July 16, 2004 (stating that current timetable for the EA and the public scoping project would remain unchanged, that Dixon had “calls in to the Yomba,” and that they would all be “vigilant to make sure it doesn’t happen again”). Dixon reported that the Yomba Tribe expressed “much anger over the fact that they were informed of the Spencer Hot Springs proposal not by us [BLM], but by someone in Austin who ran into posted information.” E-mail from Dixon, dated July 26, 2004. In his July 26 e-mail, Dixon does not dispute the accuracy of Yomba’s claim; instead he advises that “[w]e should get together and prepare an adequate response to this.” *Id.*

The record shows that by letter dated October 21, 2004, BLM transmitted a copy of the EA to numerous Federal, State, local, and private agencies and organizations and ranchers, including “State Historic Preservation” in Carson City, Nevada, by first class mail. In addition, the EA was sent to 20 Tribal entities and representatives by certified mail, return receipt requested.¹⁴ That letter requested “any information, issues, or concerns you may have regarding the proposed project to facilitate the decision making process,” which had to be received or postmarked by November 22, 2004, to receive “full consideration.” A copy of the EA was also made available on BLM’s website. Among other things, the EA stated that the

BLM-BMFO sent letters and made follow-up telephone calls to solicit input from the tribes on the locations of areas where geothermal exploration, development or utilization subsequent to leasing would cause concern. These BLM-BMFO contacts will continue during the rest of the decision-making process for the issuance of the requested geothermal resource leases.

¹⁴ The EA was sent to Chairpersons of the Battle Mountain, Elko, South Fork, and Wells Bands of the Te-Moak Tribe of Western Shoshone; Duckwater Shoshone Tribe; Yomba Shoshone Tribe; Fallon Paiute-Shoshone Tribe; Ely Shoshone Tribe; to the Chairperson and Vice-Chairperson of the Te-Moak Tribe of Western Shoshone; and to the Chairperson and the Cultural Preservation Specialist of the Shoshone Paiute Tribes of Duck Valley.

The EA was also sent to the Environmental Coordinators for the Elko, South Fork, and Battle Mountain Bands of the Te-Moak Tribe of Western Shoshone, Ely Shoshone Tribe, and the Wells Band Council; the Environmental Assistant Director, Duckwater Shoshone Tribe; the “EPA Director,” Yomba Shoshone Tribe; and the Western Shoshone Defense Project.

EA at 21. No Tribe submitted comments. The list of parties consulted in the preparation of the EA does not identify any Tribes. *Id.* at 54. Indeed, the DR/FONSI states that “[c]onsidering the characteristics or description of the action (geothermal lease) it has been determined that *Native American consultation is unnecessary at this time. Upon the receipt of an application for exploration and development, Native American consultation would be initiated* with the appropriate Tribal governments and other Native American groups.” DR/FONSI at 2 (emphasis added).

Relying on the e-mail and communications described above, BLM contends that “an appropriate level of consultation” occurred before the leases were approved. Answer at 12. BLM argues that the Yomba Tribe “decided that further consultation would occur only when BLM received a proposal for exploration or development.” *Id.*

Bobb perceived the communications and meeting differently, however. In her Supplemental Declaration, submitted with the Tribes’ Reply, Bobb avers that “after discussing the project with other tribes at monthly informational meetings,” Dixon advised her that “the project had been called off because of the large number of Tribal concerns.” Bobb Suppl. Declaration ¶ 7 at 3. She learned that the project was active when she saw a posted notice about the public scoping meeting in the Austin Post Office. *Id.* Bobb further states that, at a Yomba Council meeting, BLM assured the Tribe that “the leases were just exploratory and that the company had to go through another licensing process before breaking ground for a facility,” and the Tribe “would have plenty of opportunity to have its concerns addressed prior to the occurrence of any surface disturbance and that it did not need to involve itself until that time.” *Id.*, ¶ 9 at 3. Bobb states the Yomba Council informed BLM representatives that Spencer Hot Springs and the surrounding area are of cultural and religious significance to the Tribe and are still used for ceremonial purposes, and was again reassured by the Acting Field Manager that the Tribe would have a “long time” to state their concerns. *Id.*, ¶ 10 at 3-4. Finally, Bobb avers that the Council did not vote on the question of consultation, so that there was no formal decision. *Id.*, ¶ 11 at 4.

The NHPA and its implementing regulations place the duty to initiate and conduct consultation on the agency authorizing the undertaking, not on the Tribes to be consulted. BLM accordingly bears the burden of adequately establishing that consultation took place and documenting the reasons why it is or is not appropriate to defer formal consultation. Here, BLM relies on its contacts and discussions with the Tribes, and its understanding that they agreed that more formal consultation was not necessary at the leasing stage, while the Tribes dispute BLM’s assertion that they were consulted within the meaning of the NHPA. Nothing in the record memorializes what actually was said at the Yomba Council meeting or the parties’ understanding regarding consultation. The evidence of the content of BLM’s communications with the other Western Shoshone Tribes does not reveal or establish their positions on the

sufficiency of those contacts as consultation under the NHPA. Bobb avers that no resolution vote was taken on any proposal or agreement that may have been reached, and since nothing in the record suggests that the Yomba were empowered or authorized to speak for or bind any other Shoshone Tribe, BLM could not rely on that meeting to satisfy its obligation to consult with the other Shoshone Tribes.

Nonetheless, it is clear to us that BLM undertook to engage the Tribes on several occasions — meetings were held, communications ensued, views were expressed, and copies of the EA were provided to 20 Tribes and Tribal representatives. It is equally clear that, in the end, the parties misunderstood the import of their communications and expectations regarding what was to happen next and when, and that BLM could have exercised greater care in documenting the discussions.¹⁵ We find that, despite the confusion, BLM solicited the Tribes' assistance and views, and intends to consult further if and when surface-disturbing activities are proposed.

B. Good Faith Effort to Identify Historic Sites

Section 106 of the NHPA requires BLM to make a “good faith” effort to identify sites within the project area that could be eligible for inclusion on the National Register of Historic Places which may be affected by the undertaking. 36 C.F.R. § 800.4(b). Citing *Montana Wilderness Association v. Fry*, 310 F. Supp. 2d 1127, BLM correctly argues that this Board has allowed BLM to adopt phased compliance with this requirement when no surface disturbance will take place until the section 106 process is completed. See *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA at 343, 352. In *Southern Utah Wilderness Association*, BLM argued that it could defer identification of potential sites until a site-disturbing action was proposed. We rejected that assertion, stating:

BLM's analysis overlooks the fact that because it is required to evaluate an APD [application for permit to drill] under section 106 does not mean that it is excused from evaluating the undertaking, albeit with a broader focus and less detail, at the leasing stage. Compliance with section 106 at the leasing stage is intended to ascertain whether the presence of historic properties, including unidentified but identifiable eligible properties. This requires BLM to include stipulations in the lease to protect or mitigate potential impacts which might affect cultural resources should a conflict arise involving citing of a well(s) and surface facilities. Such identification at the leasing stage, based on current records, regardless of whether those records are found with

¹⁵ See BLM Handbook H-8120-1, Chapter V.I. *Guidelines for Conducting Tribal Consultation* (Dec. 3, 2004), and 36 C.F.R. § 800.11.

SHPO or BLM, and notification to Indian tribes and other interested parties seeking to identify potentially eligible properties, is likely sufficient where BLM reasonably requires more site-specific data, including a cultural resource survey, at the APD stage.

164 IBLA at 28.

In contrast, in *The Mandan, Hidatsa, and Arikara Nation*, the Board upheld BLM's efforts where BLM had reviewed its own records and those of the SHPO, which included existing cultural resource inventories, literature, information from the public, and had consulted with Tribes in advance of the oil and gas lease sale. 164 IBLA at 349.

In this case, BLM did not undertake any new inventories, nor is there any documentation of any consultation with the SHPO to identify eligible sites.¹⁶ However, BLM evaluated 6 existing surveys from specific projects to determine that approximately 11% of the project area comprising the 3 leases has been surveyed for cultural resources. EA at 18. Those surveys revealed 2 eligible sites and 7 historic sites whose eligibility had not yet been evaluated. By comparison, in *The Mandan, Hidatsa, and Arikara Nation*, each parcel was individually evaluated before leasing. This case therefore presents less than what was considered sufficient in *The Mandan, Hidatsa, and Arikara Nation*, but more than what was deemed insufficient in *Southern Utah Wilderness Association*.

The question presented is whether the effort BLM made to identify eligible historic sites in the project area was in good faith *and* appropriate to this stage of the project. In *Montana Wilderness Association v. Fry*, BLM argued that issuing oil and gas leases was not an undertaking because the lease sale was not the point when the agency's decision "has the potential to affect historic properties." 310 F. Supp. at 1152. The court stated that oil and gas leasing met the definition of an undertaking, thus requiring BLM to consider whether it has the potential to cause effects on historic properties. The court specifically rejected the conclusion that BLM could omit the consultation process and go directly to imposition of protective stipulations to avoid effects:

By placing stipulations on leases, the agency can avoid affecting historic properties. But like NEPA, NHPA is a procedural statute. The process of identifying properties and consulting with affected tribes as well as members of the public is the goal sought by the statute. Lease stipulations do not accomplish the same goal, and cannot replace the BLM's duties under NHPA. Moreover, it is conceivable that different

¹⁶ See note 9 *ante*.

lease stipulations would evolve from a larger discussion of possible effects on historic tribal lands from oil and gas leasing.

Id. at 1152-53.¹⁷

[6] Unlike *Montana Wilderness Association*, this is not a case where BLM has omitted the consultation step. BLM sent the Yomba and other groups copies of the EA and engaged representatives of a number of Tribes in discussions about cultural and historic properties that might be found within the Project Area. It initiated and participated in some level of discussion with many of the same Native American groups in preparing the PEA. PEA at 13, 33. BLM consulted existing inventories, and it was aware of at least 2 eligible sites and several others that have not been evaluated. The only hot springs in the Project Area are the Spencer Hot Springs (EA at 12) and, in response to the information it had and public comments, BLM imposed an NSO restriction on the 200 acres immediately surrounding the site.

In addition, however, BLM attached a stipulation at lease issuance that requires Western to conduct a cultural resource survey with a qualified archaeologist acceptable to BLM before “each geothermal lease operation with the potential for surface disturbance” will be approved. The survey information thus developed will provide the basis for developing site-specific mitigation and additional stipulations from among those listed in Appendix B. We note, moreover, that the Tribes have not specifically identified an historic or cultural property within the Project Area that

¹⁷ In two leading Federal cases in which courts have allowed agency surface-disturbing action without a complete survey of the affected area, they have done so because the surveys performed prior to surface disturbance were designed to identify all likely historic sites in the project area, so that areas not surveyed were unlikely to have historic sites. See *Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983) (“a complete survey is not required where both the partial survey, and all other evidence, indicate that a complete survey would be fruitless”); *Romero-Barcelo v. Brown*, 643 F.2d 835, 860 (1st Cir. 1981), *rev’d on other grounds*, 456 U.S. 305 (1982) (where preliminary survey acknowledged need for additional work, and further discoveries appeared likely, Navy was required to “follow up on the leads produced by the survey it commissioned”). In *The Mandan, Hidatsa, and Arikara Nation*, the record showed that at the land use planning phase BLM had relied on BLM and SHPO records, inventories and studies, and some Tribal consultation, and on the basis of that information, determined to allow oil and gas leasing with protective stipulations. *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA at 349. At the point of lease sale, existing cultural resource data was examined, and BLM determined that none of it indicated that the lease parcels contained “sensitive cultural resources.” *Id.* at 349-50. The Board concluded that BLM had not deferred NHPA compliance entirely to the APD (application for permit to drill) approval stage. *Id.* at 357.

BLM should have and failed to identify, nor have they pointed to an impact of geothermal leasing on any such property that BLM did not consider or offered a mitigation measure that BLM should have imposed. As we have stated, there were some misunderstandings and missteps between the parties which could have been avoided by exercising greater care, but those circumstances are not tantamount to a failure to consult affected Tribes or an effort to rely exclusively on mitigation measures in lieu of consultation.

BLM does not dispute that it never consulted with the Timbisha Tribe. After the DR/FONSI was released on February 2, 2005, in a letter dated March 1, 2005, the Timbisha Shoshone Tribe wrote to Ron James at State Historic Preservation, to dispute the DR/FONSI's assertion that consultation was unnecessary at that point. BLM states that it did not know that Spencer Hot Springs had religious and cultural significance to the Timbisha Tribe before the Tribe contacted Nevada's SHPO, and had no reason to know because the Tribe primarily occupies lands in the Death Valley Monument area, approximately 250 miles distant. *Id.*

[7] It is BLM's duty to seek out Tribes that might be affected by an undertaking. 36 C.F.R. § 800.2(c)(2)(ii) (the requirement to consult with a concerned Tribe attaches "regardless of the location of the historic property"); *see also* BLM Handbook H-8120-1 at V-6 ("Tribes that reside elsewhere, but have known historic ties to the land, may have issues or concerns that could be affected by the decision. . . . [W]here the manager can reasonably anticipate that such tribes would have issues and concerns with the effects of a proposed decision, these tribes should be contacted also."). BLM's Guidelines for Conducting Tribal Consultation explicitly recognize that tribes may value sites that are remote from their current place of residence, stating: "Tribes and groups with historic ties to the lands in question, *including those that are no longer locally resident*, should be given the same opportunity as resident tribes and groups to identify . . . their issues and concerns regarding the public lands." *Id.* at V-2 (emphasis added).

Remoteness fairly may be a factor in determining whether a tribe is affected by an undertaking. In this case, the importance of the hot springs in the leased area to the culture of the Western Shoshone people was explained to BLM by other Western Shoshone groups, and BLM acted to protect the site. Apparently no one among the individuals and entities BLM did contact identified or suggested the Timbisha as a group that might have an interest in the Spencer Hot Springs area, so that BLM's failure to anticipate the Timbisha's interest was not unreasonable. In light of BLM's good faith efforts to engage the Tribes when the PEA and subsequent EA were prepared and before the geothermal leases were issued and the lease stipulation requiring Western to perform cultural surveys before surface disturbance is permitted, we hold that BLM did not violate the NHPA.

III. *The Endangered Species Act*

[8] WWP's separate argument regarding an alleged violation of the ESA can be addressed summarily. Pursuant to section 7 of the ESA, 16 U.S.C. § 1536 (2000), BLM consulted with FWS when it drafted the EA, and FWS concurred in BLM's determination that there were no threatened or endangered species in the project area. EA at 22-23, 54. In addition, however, FWS directed BLM to the Nevada Natural Heritage Program (NNHP) for a list of species of concern. BLM consulted the NNHP database, which supported FWS' conclusion. *Id.*; see also EA Comment Letter 3. WWP states broadly that BLM failed to address the impacts on "special status species and habitats," which it identifies as sage grouse, pygmy rabbit, burrowing owl, spotted frog, bald eagle, peregrine falcon, and endemic mollusks. WWP's SOR at 11. That assertion is not supported by the record. See EA at 22-26, 30. WWP has not established a section 7 violation because it has not shown that, contrary to FWS' and BLM's determination, these or any threatened or endangered species are actually to be found in the project area. See *Forest Guardians*, 168 IBLA 323, 333 (2006) (holding that the appellant did not establish a violation of section 7 of the ESA where appellant presented no evidence that the threatened or endangered species at issue in the case were present in the project area). Accordingly, this argument is without merit.

IV. *The Federal Land Policy and Management Act*

WWP argues that BLM tiered the EA to the allegedly out-of-date Shoshone-Eureka RMP that does not contain "a current inventory of B[L]M lands, or the weed problems, mining impacts, species habitat losses, growing recreation, roading and other uses of these public lands." WWP SOR at 5, 7.

To the extent that WWP attacks the sufficiency of the RMP/EIS, such a challenge is clearly untimely. To the extent WWP questions the propriety of tiering, its argument is not well-founded. See 40 C.F.R. § 1508.28. Finally, to the extent WWP believes this Board could compel BLM to update its RMP/EIS, it is mistaken. This Board has no general supervisory authority over BLM. See *Defenders of Wildlife*, 169 IBLA 117, 127 (2006). We thus have no authority to require BLM to update its land use plans or to review a BLM decision not to amend its RMP. See *Redding Gun Club*, 171 IBLA 28, 31-32 (2006); *Harold E. Carrasco*, 90 IBLA 39, 41 (1985).

The Tribes separately argue that BLM violated FLPMA by failing to adequately protect waters that are subject to Public Water Reserve No. 107. They claim that BLM admitted that it had not reviewed impacts on hydrology and they question the propriety or utility of requiring monitoring to determine whether to compel the lessee to modify, relocate, or cease operations. Tribes' SOR at 27. The Tribes understate BLM's consideration of effects on water resources in the area. The EA states that

“[f]ew ground water wells, and only the springs of the Spencer Hot Springs, are known in the Proposed Action area or vicinity.” EA at 12. As discussed above, water resources were analyzed in the EA at 11-15. *See also* Appendix E (Hydrographic Abstract showing information and status regarding water rights from springs and wells). Nor do we agree that the Tribes have shown a failure to protect Federal reserved water rights because the protective stipulation is triggered by the detection of an impact through monitoring. Tribes’ SOR at 27. In reality, this argument is a version of the Tribes’ NEPA claims stated differently, but our conclusion that the record belies the assertion that BLM did not consider environmental impacts on hydrology and water resources remains the same.

[9] To the extent the Tribes mean to suggest that BLM authorized or leased a public water resource, a geothermal lease conveys only the right to explore for and develop the geothermal resource in the leased lands. A bare allegation that BLM has failed to protect waters reserved for public use does not establish a failure to prevent unnecessary or undue degradation of the public lands and resources as required by FLPMA, 43 U.S.C. § 1732(b) (2000).

Conclusion

BLM took a “hard look” at the direct effects of issuing geothermal leases and authorizing casual use level exploration, and it considered the impacts of exploration and development as indirect effects before issuing the three geothermal leases. The range of alternatives was adequate in light of the environmental questions and impacts identified and analyzed. The EA demonstrated that the environmental consequences of the action were either insignificant or, if significant, could be eliminated or reduced to insignificance by protective stipulations, GROs, and standard operating procedures, so that an EIS was not necessary. BLM in good faith engaged the Tribes to fulfill its NHPA obligations, and it issued the leases with the acknowledgment that further consultation with affected Tribes will occur and with a stipulation requiring cultural surveys before any surface-disturbing activity beyond casual use level exploration will be authorized. We find no merit to WWP’s and the Tribes’ FLPMA claims, and no merit in WWP’s ESA claim.

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.

_____/s/
T. Britt Price
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge