CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

177 IBLA 171 Decided April 30, 2009

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

CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

IBLA 2008-260 Decided April 30, 2009

Appeal from a decision issued by the State Director, Nevada State Office, Bureau of Land Management, denying a request to be a cooperating agency for an environmental impact statement. N-78803.

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

   Under rules implementing NEPA, Federal agencies, State and local agencies, and Indian tribes may become cooperating agencies in the preparation of an EIS by agreement with the lead agency but only if they have either "jurisdiction by law" or "special expertise" with respect to an environmental impact to be addressed. Once an agency or Indian tribe becomes a cooperating agency, it must be given a meaningful role in the NEPA process by the lead agency.

2. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Land-Use Planning--National Environmental Policy Act of 1969: Environmental Statements

   A decision granting or denying a request to become a cooperating agency under NEPA is within the discretionary authority of the lead agency. An appellant challenging the approval or rejection of a cooperating agency request bears the ultimate burden of demonstrating either an error of law or, by a preponderance of evidence, a material error in factual analysis, a failure to consider relevant facts, or the lack of

a rational connection between the facts found and decision made.

3. Environmental Quality: Environmental Statements--Indians: Trust Responsibility--National Environmental Policy Act of 1969: Environmental Statements

The United States owes a general trust responsibility to Indian tribes, but standing alone, this responsibility does not impose a duty on the Government to take action beyond complying with applicable statutes and regulations. Unless there is a specific duty that has been placed on the Government with respect to Indians, the trust responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes. When BLM complies with applicable NEPA requirements for a project on Federal lands, it has fulfilled its Indian trust responsibility with respect to those requirements.

APPEARANCES: Paul H. Tsosie, Esq., West Jordan, Utah, for appellant; William G. Myers III, Esq., Boise, Idaho, and Janet L. Rosales, Esq., Las Vegas, Nevada, for Southern Nevada Water Authority, intervenor; 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 JACKSON

The Confederated Tribes of the Goshute Reservation (Goshute), a Federally-recognized Indian tribe, has appealed from a decision by the State Director, Nevada State Office, Bureau of Land Management (BLM), dated June 18, 2008. This decision denied Goshute's requests to participate as a cooperating agency in preparing an environmental impact statement (EIS). The EIS at issue is being prepared by BLM pursuant section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), and implementing rules promulgated by the Council on Environmental Quality (CEQ). It involves Federal rights-of-way (ROWs) for the Clark, Lincoln, and White Pine Counties Groundwater Development Project (Project) proposed by the Southern Nevada Water Authority (SNWA).[1]

[1] SNWA moved to intervene in this appeal on Mar. 3, 2009, and later submitted a proposed answer to Goshute's statement of reasons (SOR); Goshute opposes that (continued...)

Background

SNWA filed an ROW application (N-78803) for the Project on August 23, 2004, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2000), to construct and operate 115 to 195 wells, 345 miles of underground pipelines, and certain other facilities on public land for the production and transmission of groundwater.[2] The Project and these ROWs involve pipelines for collecting and carrying extracted groundwater from several hydrogeologic basins to Las Vegas and surrounding areas. Its purpose is to ensure a reliable water supply for southern Nevada, one of the fastest growing areas in the Nation.

BLM initiated a public scoping process for its environmental review of the Project in 2005. Goshute submitted scoping comments on July 25, 2005, which expressed concern "that the natural water recharge will be incapable of supporting the increased use" envisioned by the Project (*i.e.*, 220,280-acre feet per year),[3] its

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[1] (...continued)
motion. Based on the pleadings herein and SNWA's claimed interest in avoiding further delay in approving its ROWs pending completion of the NEPA process, we hereby permit intervention by SNWA and accept its answer.

[2] Additional ROWs would also be needed to cross Federal lands administered by the Department of Defense, U.S. Fish and Wildlife Service (FWS), as well as State and private lands.

[3] The Goshute Business Council, the governing body of the Goshute Indian Reservation, later adopted and approved Resolution No. 07-G-69, which states that the Department should "conduct a study of the water aquifer under the Goshute Indian Reservation . . . before making a final decision on the SNWA Project." Administrative Record (AR) Tab 26. The Bureau of Indian Affairs (BIA) responded to this resolution by letter dated Dec. 14, 2007. AR Tab 14. BIA expressed its desire "to meet with the Tribe to discuss and agree on a work plan to address [Goshute's] concerns" and to work "with the Tribe to increase our combined understanding of the Reservation's water resources and to help develop and protect these valuable resources." *Id.* at 4, 5. It also informed Goshute that BIA had entered into a Cooperating Agency Agreement to participate in BLM's NEPA process, representing that BIA will provide input on Indian trust resources and other related issues, had requested that the Deep Creek Valley portion of the Reservation be included in the EIS study area, and would actively participate in the NEPA process to "protect the trust resources of the Tribe." *Id.* at 2, 3.

opposition to the Project,[4] and intent "to take any steps necessary to protect the Tribe's priority legal rights to sufficient water to fulfill the present and future purposes of the reservation." AR Tab 35 at 1, 4. At a September 2006 tribal coordination meeting in Ely, Nevada, Goshute and two other Tribes, Duckwater Shoshoni and Moapa Paiute, indicated an interest in participating in the NEPA process for the Project. AR Tab 30.

BLM representatives attended a regularly scheduled Goshute Tribal Council Meeting in December 2007 to discuss the Project and on-going NEPA activities. AR Tab 18. When informed by BLM that BIA was a cooperating agency, the Tribal Council Chair and Vice Chair responded by stating that BIA does not speak for the Tribe and that it had neither consulted with the Tribe nor included it in that process. They then expressed a desire for Goshute also to be designated as a cooperating agency. *Id.* During a February 2008 Tribal Information Meeting, attended by Goshute, Ely Shoshoni, and Duckwater Shoshoni in Ely, Nevada,[5] BLM representatives discussed water and groundwater-related issues and reiterated their commitment to consult with the Tribes "as often as you need in order to make sure you are fully informed about the project." AR Tab 1 at 2-5. They also indicated that the EIS would consider "the aboriginal roaming grounds of various tribes" and that Tribal members could participate on the cultural committee to be established in support of the EIS's ethnographic assessment. *Id.* at 4, 6.

By correspondence dated January 18, 2008, Goshute again raised water and groundwater concerns. AR Tab 10. It also requested to be designated a cooperating agency, explaining that:

> We feel it necessary to request Cooperating Agency status because for reasons unknown to us, the Bureau of Indian Affairs has failed to grieve the exclusion of Deep Creek Valley from the EIS, even though the BIA signed the Stipulated Agreement[[6]] calling for inclusion of Deep Creek Valley in the protected and analyzed area.

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[4] The Goshute Business Council thereafter adopted and approved Resolution No. 06-G-39 on June 16, 2006, which states it "strongly opposes" the Project and urges members of Congress to do the same. AR Tab 33.

[5] Similar Tribal Information Meetings were held with members of other tribes in Elko and Las Vegas on Jan. 23 and Feb. 26, 2008.

[6] The referenced Stipulated Agreement was entered into on Sept. 8, 2006, to resolve protests made by BLM, BIA, FWS, and others to the Nevada State Engineer holding a hearing on water rights in Spring Valley, Nevada, which overlies certain groundwater basins to be used for the Project. *See* n.3, n.7, *infra*.

Id. at 2. Goshute reiterated this request at a Tribal Consultation Meeting on June 6, 2008, and also then requested that it be a co-lead on the EIS and that BLM delay the EIS for 2 years. SOR at 2-3; Answer at 5.

The State Director responded to Goshute's requests by decision dated June 18, 2008 (Decision). After addressing Goshute's groundwater concerns [7] and reiterating BLM's continuing commitment to consult with the Tribe, the State Director denied these requests,[8] stating with regard to cooperating agency status that:

> During scoping for this project, we set up criteria for cooperating agency status. We have granted cooperating agency status only to those governments or governmental agencies who have a jurisdictional authority over some part of the project (i.e., SNWA seeks a permit, easement or the like from the entity) or whose jurisdictional authority geographically overlies one of the basins from which water is proposed to be withdrawn (i.e., Coyote Spring, Dry Lake, Delamar, Cave, Spring or Snake valleys). The Confederated Tribes of the Goshute Reservation fall outside this boundary and, therefore, do not meet the criteria for cooperating agency status.

Decision at 2. The State Director also urged Goshute to work with BIA "to insure your views are considered" and represented that any information submitted by

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[7] The State Director explained that none of the basins to be used by the Project underlay the Reservation and were isolated from the Reservation's groundwater basins. Decision at 2.

[8] The State Director also denied Goshute's oral requests that it be designated a co-lead and that BLM delay its EIS:

> We have, thus far, not invited any co-leads for our EIS. BLM will only make this role available to another agency or governmental entity that has a significant permitting process that would go hand-in-hand with BLM's right-of-way process. As yet, we have not identified an agency or governmental entity that would meet these criteria. An example of a co-lead could have been the State of Nevada because they play a significant role in granting the water rights for the SNWA. To date they have not requested co-lead status.
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> . . . .
>
> Due to anticipated Colorado River shortages and significant water issues within the State of Nevada, it is important that the project remain on schedule and that the draft EIS be placed in front of [] all the people of the United States in a timely fashion.

Decision at 2-3.

Goshute, Ely Shoshoni, or Duckwater Shoshoni would be used "to supplement our 'Native American Concerns' or ethnographic discussions portion of the EIS." *Id.; see also* BLM corresp. dated June 23, 2008, AR Tab 4 (Goshute invited to participate in the EIS's Ethnographic Assessment). This appeal followed.[9]

NEPA, Implementing Rules, and Cooperating Agencies

NEPA requires an EIS for any major Federal action significantly affecting the quality of the human environment and directs the Federal official responsible for an EIS to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(C) (2000).[10] CEQ rules implement this NEPA requirement by specifying that agencies preparing a draft EIS must "[o]btain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" and by imposing a duty on such agencies "to comment on statements within their jurisdiction, expertise, or authority." 40 C.F.R. §§ 1503.1(a)(1), 1503.2. Comments from other Federal agencies, State and local agencies, affected Indian Tribes, and the public generally need only be requested; they are not obligated to comment on a draft EIS. 40 C.F.R. § 1503.1(a)(2)-(4).

These rules were promulgated by CEQ to reduce paperwork, minimize delays, and achieve better decisions. *See* 43 Fed. Reg. at 55978. A component of those rules was a new concept, that of a cooperating agency. To implement NEPA's consultation requirement, these rules impose affirmative obligations on the Federal agency preparing an EIS, referred to as the "lead agency," and on certain sister Federal agencies:

> **§ 1501.6 Cooperating agencies.**
>
> The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other

[9] BLM responded to the SOR by moving to dismiss or to consolidate this appeal with the appeal of a separate BLM decision filed by Salt Lake County (Utah) and docketed as IBLA 2008-253. We denied these motions by orders dated Feb. 20, 2009, and Mar. 10, 2009; BLM then filed its answer herein.

[10] Implementing rules promulgated by CEQ specify that the term "Federal agency" extends only to States, local governments, and Indian tribes that assume "NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974." 40 C.F.R. § 1508.12; *see* 43 Fed. Reg. 55978, 55988 (Nov. 29, 1978). Since Goshute has not assumed such responsibilities, it is not a Federal agency under CEQ rules.

> Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.
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> (a) The lead agency shall:
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> (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
>
> (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.
>
> (3) Meet with a cooperating agency at the latter's request.
>
> (b) Each cooperating agency shall:
>
> (1) Participate in the NEPA process at the earliest possible time.
>
> (2) Participate in the scoping process (described below in § 1501.7).
>
> (3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.
>
> (4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.
>
> (5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.
>
> (c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

40 C.F.R. § 1501.6; *see* 43 Fed. Reg. at 55981-82, 55984-85; *see also* 40 C.F.R. §§ 1500.4(n) (reducing paperwork) and 1500.5(b), (h) (reducing delay). During scoping, the lead agency is to "[a]llocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies," and to "[i]dentify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently

with, and integrated with, the environmental impact statement as provided in § 1502.25." 40 C.F.R. § 1501.7(a)(4), (6).[11]

[1] The above-described regulatory requirements implement mandatory consultation under NEPA. Lead agencies must designate sister Federal agencies with jurisdiction by law as cooperating agencies, but are not required to do so if they have only special expertise. Federal agencies with special expertise must nonetheless be consulted with under NEPA and are duty-bound to provide comments on a draft EIS under 40 C.F.R. § 1503.2. CEQ rules also allow lead agencies to allocate NEPA responsibilities to state and local agencies and to Indian tribes by including them in its definition of a "cooperating agency":

> *Cooperating agency* means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in 1501.6. *A State or local agency of similar qualifications or when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.*

40 C.F.R. § 1508.5 (emphasis added). If a lead agency exercises its discretion by entering into a cooperating agency agreement with a State or local agency or Indian Tribe, their participation in the NEPA process and the delegation of EIS responsibilities to them must then be meaningful. *See International Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1262 (D. Wyo. 2004),[12] *citing* 40 C.F.R. § 1507 and *quoting Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d 1197, 1219 (D. Wyo. 2003); *cf. North Buckhead Civic Assoc. v. Skinner*, 903 F.2d 1533, 1545 (11th Cir. 1990).

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[11] To the fullest extent possible, a draft EIS is to be prepared concurrently with related surveys and studies under the National Historic Preservation Act, 16 U.S.C. §§ 470-470w (2006) (NHPA). 40 C.F.R. § 1502.25.

[12] In that case, the National Park Service (NPS) included cooperating agencies in its NEPA process, but the Court found NPS had not given "any meaningful delegation of duty to [them]," had failed "to involve and seriously consider [their] comments," and had "indicate[d] a prejudged, political decision to ban snowmobiles," concluding that "[o]nce the NPS had decided to ban snowmobiles from the Parks, the remainder of the NEPA process was nothing more than *pro forma* compliance." 340 F. Supp. 2d at 1262, 1264.

BLM has promulgated rules applicable to land use planning under FLPMA which specify that an EIS is required to approve a resource management plan (RMP) and that BLM will invite "eligible" state and local agencies and Indian tribes to participate as cooperating agencies when developing, revising, or amending RMPs. 43 C.F.R. §§ 1601.0-6, 1610.3-1(b).[13] BLM has gone further than required by NEPA or CEQ rules by specifying that state/local agencies and Indian tribes with jurisdiction by law or special expertise will be cooperating agencies when BLM prepares, revises, or amends an RMP; CEQ rules allow (but do not require) cooperating agency status to be extended to such entities. Morever, BLM allows entities that are not even "eligible" (*i.e.*, agencies and Indian tribes that lack jurisdiction or expertise) to be granted such status upon request. To facilitate implementation of these land use planning requirements, BLM issued "A Desk Guide to Cooperating Agency Relationships" in 2005 (Desk Guide). The Desk Guide expressly recognizes that those requirements do not apply to project-level EISs. Desk Guide at 4.

Discussion

Goshute contends BLM erred in denying its request for cooperative agency status. It claims BLM should have exercised its discretion under applicable CEQ rules to designate it a cooperating agency so as to be consistent with Departmental rules, the Desk Guide, other guidance, BLM obligations under the NHPA, and the Department's fiduciary trust responsibility to Indian Tribes. BLM counters that it established reasonable criteria for selecting cooperating agencies and applied those criteria fairly, consistent with applicable rules, guidance, and its trust responsibility to Goshute. SNWA shares and expands on the positions advanced by BLM, adding that since Goshute first asserted "special expertise" under applicable CEQ rules on appeal, this claim should not be here considered, but even if this issue is considered, Goshute has not demonstrated it possesses the expertise envisioned by those rules. For the reasons discussed below, we affirm the State Director's decision.

[2] Cooperating agency status in the NEPA process is determined by the lead agency preparing an EIS. Federal agencies with jurisdiction by law are cooperating agencies if requested by the lead agency; others may become cooperating agencies

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[13] BLM defines an "eligible cooperating agency" in 43 C.F.R. § 1601.0-5(d) as:

> "(1) A Federal agency other than a lead agency that is qualified to participate in the development of environmental impact statements as provided in 40 C.F.R. 1501.6 and 1508.5 or, as necessary, other environmental documents that BLM prepares by virtue of its jurisdiction by law as defined in 40 C.F.R. 1508.15, or special expertise as defined in 40 C.F.R. 1508.26; or
>
> (2) A federally recognized Indian tribe, a state agency, or a local government agency with similar qualifications.

only by agreement with the lead agency. 40 C.F.R. § 1508.5. If a state/local agency or Indian tribe requests to become a cooperating agency, it is up to the discretion of the lead agency to grant or deny that request. *Wyoming v. U.S. Department of Agriculture,* 570 F. Supp. 2d 1309, 1334 (D .Wyo. 2008).[14] We have held in this vein that:

> Where a decision is committed to the sound discretion of BLM, acting within the limitations of its statutory authority, an appellant challenging the decision bears the ultimate burden to demonstrate an error of law or to establish, by a preponderance of the evidence, that "BLM committed a material error in its [factual] analysis, or that the decision generally is not supported by a record that shows that BLM considered all relevant factors and acted on the basis of a rational connection between the facts found and the choice made."

Oregon Natural Desert Association, 176 IBLA 371, 380 (2009), *quoting American Mustang & Burro Association, Inc.*, 144 IBLA 148, 150 (1998). Thus, the issue presented is whether the State Director properly exercised his discretion in denying Goshute's request that it be designated a cooperating agency.

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[14] *Wyoming v. U.S. Department of Agriculture* is the only case of which we are aware where the lead agency's denial of cooperating agency status was reversed. The requests there were submitted early in the scoping process, yet the U.S. Forest Service (Forest Service) "did not see fit to respond . . . until after the draft EIS was released," and failed to provide any good reason for rejecting those requests when it did respond. 570 F. Supp. 2d at 1334. The Forest Service's rejection rationale (*i.e.*, not wanting to work at too great a level of detail) was derided and characterized by the Court as tantamount to telling State governors "[y]ou are good enough to work for us, but not good enough to work with us." *Id.* at 1334 n.24, 1335. It found the Forest Service's rejection of these requests to be arbitrary and capricious, explaining that:

> This finding is not premised on a conclusion that the Forest Service had a duty to grant cooperating agency status to any of the states that requested that status, nor does it provide a judicial gloss on the lead federal agency's discretionary authority to grant cooperating agency status. Rather, the finding is based on the fact that the Roadless Rule affected 53.37 million acres of land, or 92% of the total inventoried roadless areas, in those ten most affected states, and the Forest Service did not find it worth its time to explain why it was denying cooperating agency status to those states.

Id. at 1334-35. Similarly egregious circumstances are not here presented.

BLM developed a list of potential cooperating agencies in early 2005, commenced its public scoping process in April 2005, and reopened that process in mid-2006. 70 Fed. Reg. 18043 (Apr. 8, 2005); 71 Fed. Reg. 41042 (July 19, 2006); *see* Answer at 3. During scoping, BLM established criteria for cooperating agencies (*i.e.*, a cooperating agency must either have jurisdiction by law or overlie at least some portion of a groundwater basin to be used by the Project). Decision at 2; Answer at 9. Utilizing these criteria, BLM entered into cooperating agency agreements with BIA,[15] FWS, NPS, the Bureau of Reclamation, the Department of Defense (Nellis Air Force Base), the Forest Service, the Central Nevada Regional Water Authority, the Nevada Department of Wildlife, six counties in Nevada and Utah,[16] and the State of Utah. AR Tab 2; Answer at 3, 9. Thereafter, Goshute submitted its request to be added as a cooperating agency, asserting it has "jurisdiction over much of the Deep Creek Valley" and claiming that impacts to the Deep Creek Valley should be included in the EIS because the Project's wells would extract groundwater in the Spring Valley, which could affect groundwater flows within the Great Salt Lake Desert Regional Flow System and impact groundwater on the Reservation. AR Tab 10.

We recognize the Goshute Reservation's groundwater may be affected by the Project, *see* Order dated Mar. 10, 2009, at 6 (denying BLM's motion to dismiss for lack of standing), but do not find that such effects give Goshute "jurisdiction by law," a term defined by CEQ as the "authority to approve, veto, or finance all or part of the proposal." 40 C.F.R. § 1508.15. BLM did not limit itself only to jurisdiction by law in establishing its criteria. Rather, it provided that counties and Indian Reservations could be cooperating agencies if such entities overlie basins from which groundwater would be extracted for the Project, even though they do not have jurisdiction by law over that groundwater.[17] The fact that BLM went further than required by CEQ rules belies Goshute's suggestion that BLM acted unreasonably, irrationally, arbitrarily, or

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[15] BLM initially requested BIA participation as a cooperating agency on Feb. 25, 2005; they entered into a cooperating agency agreement in September 2007. AR Tabs 2, 39.

[16] Two other Utah counties overlie the Project's groundwater basins but declined to participate as cooperating agencies; Eureka County (Nevada) requested designation as a cooperating agency, but since it does not overlie any Project basins, its request was denied on Apr. 6, 2005. AR Tab 37. Salt Lake County (Utah) also requested cooperating agency status, which was denied by BLM and appealed to this Board. *See* n.9.

[17] Water rights, as well as groundwater quantity and quality, are within the jurisdiction and purview of the Nevada State Engineer. *See* SNWA Answer at 8, *citing* the Nevada Revised Statutes *and Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983).

capriciously by not going further to establish even broader criteria so that any county or Reservation overlying a potentially affected regional aquifer flow system could also become a cooperating agency. We therefore find no error in BLM establishing the criteria it applied in this case. Nor do we find that BLM erred in applying those criteria to the facts found, as Goshute does not contest BLM's determination that the Reservation does not overlie any of the basins "from which water is proposed to be withdrawn (*i.e.*, Coyote Spring, Dry Lake, Delamar, Cave, Spring or Snake valleys)." Decision at 2.

Goshute claims BLM should have granted it cooperating agency status because it has rights to a much larger area than its Reservation (*i.e.*, tribal, aboriginal, and/or ancestral lands), including lands directly affected by the Project. Goshute asserts rights to lands under the treaty entered into by the Shoshoni-Goship at Tuilla Valley on October 12, 1863, as well as lands "within the aboriginal jurisdiction of the Goshute Tribe." SOR at 6-7. We reject Goshute's suggestion that its claimed aboriginal rights or the Tuilla Valley Treaty grant it jurisdiction by law to lands outside its Reservation. *Cf. United States v. Goshute Tribe or Identifiable Group*, 512 F.2d 1398 (Ct.Cl. 1975) (affirming award of $7,253,122 based on the Tuilla Valley Treaty). Goshute may have a continuing interest in protecting religious, cultural, and other historic sites outside its reservation, but that interest does not give it jurisdiction by law over activities in this larger area. We therefore find that BLM properly rejected Goshute's request for cooperating agency status to the extent that request was based on jurisdiction by law.

Goshute also claims its request should have been granted because it has the "special expertise" under 40 C.F.R. § 1508.5, as defined by 40 C.F.R. § 1508.26 (*i.e.*, "statutory responsibility, agency mission, or related program experience"). It asserts it "can offer its special expertise to ensure that tribal resources, land, habitat, and artifacts be preserved" and that BLM complies with the NHPA, claiming the Project area "holds historical artifacts remaining from Indian travel and Indian gatherings" and a very high likelihood that this area "will contain culturally significant sites (burial and ceremonial sites), vegetation, and other artifacts." SOR at 8, 11, 18. Goshute contends its special expertise should be presumed, just as its expertise could be presumed by BLM when preparing, revising, or amending an RMP. SOR at 13, *citing* Desk Guide at 19.

SNWA counters that Goshute first asserted it possesses special expertise under CEQ rules in its SOR. SNWA Answer at 20-21. Since this issue was neither raised in Goshute's written request on January 18, its oral request on June 6, nor addressed by the State Director in denying those requests on June 18, 2008, we need not consider that issue here. *See* 43 C.F.R. § 4.410(c). More substantively, however, the criteria established to identify cooperating agencies for this EIS were limited to entities which either had jurisdiction by law or overlie one of the Project's groundwater basins; no

criterion for a cooperating agency was established based solely on special expertise. Since these criteria are reasonable and were consistently applied by BLM, we find no merit in Goshute's claim that it should have been invited to participate as a cooperating agency.[18]

The Departmental rules relied on by Goshute, as well as the Desk Guide it cites, apply when BLM is preparing, revising, and amending an RMP and are therefore neither binding nor controlling in this case.[19] After the public scoping process for this EIS was initiated, the Departmental Manual was revised to encourage cooperative conservation. 516 DM 2.5 (Cooperating Agencies); *see* 70 Fed. Reg. 13203, 13204 (Mar. 18, 2005). These revisions supplanted guidance for more actively soliciting cooperating agencies. *Compare* 516 DM 2.5 *with* 516 DM 2.5 (May 27, 2004); *see* n.14 *infra*. As revised on June 21, 2005, the Departmental Manual directed bureaus to "invite eligible governmental entities to participate as cooperating agencies," "consider any requests by eligible governmental entities to participate," and "either accept or deny such requests." 516 DM 2.5E. Thus, even if these latter revisions had been applicable to this EIS, express recognition that requests by "eligible governmental entities," including Indian tribes, may be denied belies any suggestion that BLM was required to extend cooperating agency status to each and every governmental entity which is or may be "eligible" to be designated as a cooperating agency. In sum, the rules, guidances, and other materials relied on by Goshute neither compelled nor impelled BLM to grant its request for cooperating agency status.[20]

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[18] Goshute claims its participation in the NEPA process would also aid BLM in fulfilling its obligations under the NHPA. BLM correctly notes that Goshute has identified no violation of the NHPA. Answer at 9-10. To the extent Goshute fears BLM's contractor may miss sites or artifacts and adversely affect Goshute or any other Tribe, such a claim is not yet ripe; to the extent BLM eschewed Goshute's offer of assistance, we find no error.

[19] Goshute also contends that EPA and CEQ guidance addressing environmental justice concerns should have been applied to grant it cooperating agency status, but neither of these guidance documents impelled the granting of its cooperating agency request. The EPA guidance deals with its own "internal management," and the CEQ guidance only encourages (but does not require) agencies to solicit greater Indian tribe participation in the NEPA process.

[20] During the pendency of this appeal, the Department replaced 516 DM Chapters 1-6 with 43 C.F.R. Part 46 (Implementation of the National Environmental Policy Act of 1969) to reflect Departmental policies and procedures for compliance with NEPA, stating that new 516 DM Chapters 1-3 would be issued to provide "explanatory guidance on these regulations." 73 Fed. Reg. 61292 (Oct. 15, 2008). As a result,

(continued...)

[3] The Indian trust responsibility claims broadly asserted here are similar (if not identical) to those advanced in *Morongo Band of Mission Indians v. Federal Aviation Administration*, 160 F.3d 569 (9th Cir. 1998), where that Tribe challenged the Federal Aviation Administration's compliance with NEPA and the NHPA in preparing an EIS for a proposed airport expansion. As there explained:

> The Tribe argues that the United States bears a trust responsibility toward Indian tribes, "which, in essence, consists of acting in the interests of the tribes." *Skokomish Indian Tribe v. FERC,* 121 F.3d 1303, 1308 (9th Cir.1997). It is true that agencies of the federal government owe a fiduciary responsibility to Indian tribes. *Id.; Inter Tribal Council of Arizona, Inc. v. Babbitt,* 51 F.3d 199, 203 (9th Cir.1995); *Covelo Indian Community v. FERC,* 895 F.2d 581, 586 (9th Cir.1990); *Nance v. EPA,* 645 F.2d 701, 710 (9th Cir.1981). The court in *Skokomish,* however, also stated that the FERC must exercise this responsibility in the context of the Federal Power Act; therefore, the agency properly declined to afford the tribe "greater rights than they otherwise have under the FPA and its implementing regulations." 121 F.3d at 1309. Moreover, in *Nance,* we noted that procedures provided by the Clean Air Act and EPA regulations (such as consulting with the tribe before taking action) were sufficient to fulfill the EPA's fiduciary responsibility. 645 F.2d at 711.
>
> . . . .

[20] (...continued)
516 DM 2.5 was replaced by 43 C.F.R. § 46.225. Like the DM it replaced, this rule requires bureaus to invite eligible governmental entities to participate, consider their requests to participate, and if cooperating agency status is neither extended nor granted, state its reasons "in the environmental impact statement." These rules specify that after their effective date of Nov. 14, 2008:

> Denial of a request to or not extending an invitation for cooperating agency status is not subject to any internal administrative appeals process, nor is it a final agency action subject to review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

43 C.F.R. § 46.225(c). While we apply rules that existed when actions were taken or decisions made, this rulemaking expresses Departmental policy that decisions concerning cooperating agency status are committed to the sound discretion of those delegated the authority to act on a proposed project and who are responsible for ensuring compliance with NEPA. *See* 43 C.F.R. § 46.30; *see also* 73 Fed. Reg. 126 (Jan. 2, 2008) (proposed 43 C.F.R. Part 46).

> Thus, *although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.*

161 F.3d at 574 (emphasis added). *Cf.* 73 Fed. Reg. at 61297, 61312, 61313 (discussing Indian tribes and new Departmental rules under NEPA). The Ninth Circuit recently applied *Morongo Band* over objections raised by Indian tribes:

> [T]he Tribes contend that the government still maintains a general trust responsibility towards them and this responsibility exists for any federal action that relates to Indian tribes. Therefore, in their view---despite Ninth Circuit caselaw to the contrary---this general trust obligation cannot be satisfied simply through facial compliance with statutory and regulatory requirements. And, for APA [Administrative Procedure Act, 5 U.S.C. § 701 (2006)] claims for non-monetary damages, the general trust obligation imposes duties on the federal government even in the absence of a specific treaty, agreement, executive order, or statute. However, we are not in a position to overrule prior precedent [*Morongo Band of Mission Indians,* 161 F.3d at 574] . . . . This is the law of the circuit, and this is the law we must follow.

Gros Ventre Tribe v. United States, 469 F.3d 801, 810-12 (2006). We conclude that BLM's Indian trust responsibilities to Goshute were met by its compliance with applicable NEPA requirements under the circumstances of this case.

In sum, we are unpersuaded that BLM was required to grant Goshute's request for cooperating agency status as a matter of law or that the State Director's denial of that request violated NEPA, its implementing rules, or the Department's Indian trust responsiblity by committing a material error in its analysis of the facts, omitting consideration of a relevant factor, or failing to articulate a rational connection between the facts found and the decision made. *See Oregon Natural Desert Association*, 176 IBLA at 380. Morever, we find this case stands in marked contrast to the lone case where the denial of cooperating agency status by a lead agency was reversed, *Wyoming v. U.S. Department of Agriculture*, 570 F. Supp. 2d at 1334-35.

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 June 18, 2008, decision by the State Director, Nevada State Office, is affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge