



OREGON CHAPTER SIERRA CLUB, *ET AL.*  
THE KLAMATH TRIBES

176 IBLA 336

Decided February 11, 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

OREGON CHAPTER SIERRA CLUB, *ET AL.*  
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IBLA 2008-39, 2008-42

Decided February 11, 2009

Appeals from a Decision Record issued by the District Manager, Prineville, Oregon, District Office, Bureau of Land Management, approving the Newberry Geothermal Exploration Project. OR-12437 and OR-40497; EA OR-050-07-075.

IBLA 2008-39 dismissed in part; decision affirmed.

1. Practice Before the Department: Persons Qualified to Practice-- Rules of Practice: Appeals: Dismissal

Practice before the Interior Board of Land Appeals is controlled by 43 C.F.R. § 1.3. An appeal on behalf of an organization brought by a person who does not fall within any of the categories of persons authorized to practice before the Department on behalf of the organization is subject to dismissal.

2. Administrative Procedure: Burden of Proof--Appeals: Generally-- Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements-- Rules of Practice: Appeals: Burden of Proof--National Environmental Policy Act of 1969: Finding of No Significant Impact

A BLM decision based on an EA and FONSI will be affirmed on appeal if the decision considered all relevant factors and is supported by the record which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging a BLM decision must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

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

NEPA regulations specify that agencies should involve the public, to the extent practicable, in the preparation of environmental assessments, and when the record demonstrates that BLM afforded multiple opportunities for public involvement throughout the environmental review process and responded to comments made by members of the public during that process, BLM has complied with NEPA's public involvement directives.

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

The purpose and need statement in an EA prepared to study a project proposed by an applicant and the consequent identification of reasonable alternatives appropriately reflect the goals and objectives of the project.

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

An environmental analysis for proposed geothermal exploration is not required to consider the impacts of production activities and related facilities as connected activities when the proposed exploration has utility independent from production and will not necessarily lead to production.

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

NEPA requires consideration of a reasonable range of alternatives to a proposed action, including a no-action alternative. Appropriate alternatives are those that would accomplish the intended purpose of the proposed action, are technically and economically feasible, and will avoid or minimize adverse effects. A "rule of reason" governs the selection of alternatives, both as to which alternatives an agency must discuss and the extent to which it must discuss them, and an EA discussing only two alternatives is not improper.

APPEARANCES: Asante Riverwind, Eastern Oregon Forest Organizer, Bend, Oregon, for Oregon Chapter Sierra Club; Perry Chocktoot, Jr., Director of Culture and

Heritage, Chiloquin, Oregon, for The Klamath Tribes; Craig D. Galli, Esq., Salt Lake City, Utah, and Sandra A. Snodgrass, Esq., Denver, Colorado, for Northwest Geothermal Company; and Debra Henderson-Norton, Prineville District Manager, Bureau of Land Management, U.S. Department of the Interior, Prineville, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

The Oregon Chapter Sierra Club (Sierra Club) jointly with the League of Wilderness Defenders – Blue Mountains Biodiversity Project (LWD) (collectively Sierra Club/LWD) and the Klamath Tribes (Tribe) have separately appealed the October 26, 2007, Decision Record (DR) issued by the District Manager, Prineville, Oregon, District Office, Bureau of Land Management (BLM), approving the Newberry Geothermal Exploration Project (Project). The proposed action, submitted by Davenport Power LLC (Davenport), operator for the lessee Northwest Geothermal Company (NGC), involves the drilling of up to nine exploration wells on three 5-acre well pads, with a maximum of three wells per well pad, within two existing geothermal leases, OR-12437 and OR-40497, in the Deschutes National Forest,<sup>1</sup> for the purpose of assessing and defining the underlying geothermal resources; it does not include resource development or production. BLM based the DR on an August 2007 environmental assessment (EA) (OR-050-07-075) prepared for the Project in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). Sierra Club/LWD's joint appeal, which challenges the DR as violative of NEPA, has been docketed as IBLA 2008-39.<sup>2</sup> The Tribe's separate appeal, which focuses on geothermal activities'

<sup>1</sup> BLM issues geothermal leases on lands administered by the U.S. Department of Agriculture with that Department's concurrence. 43 C.F.R. § 3201.10(a)(2). Such lands include National Forest lands under the jurisdiction of the U.S. Forest Service (Forest Service). The proposed locations for the wells on the two geothermal leases at issue here, both of which were effective May 1, 1983, include portions of secs. 16, 17, and 29, T. 21 S., R. 12 E., Willamette Meridian, Deschutes County, Oregon, within the Bend Fort Rock Ranger District of the Deschutes National Forest and are located on the western flank of the Newberry Volcano, just west of the Newberry National Volcanic Monument, which was created by Congress in 1990 to protect the Newberry Volcanic Caldera.

<sup>2</sup> Sierra Club/LWD also petitioned for a stay of the effect of the DR. By order dated Feb. 26, 2008, the Board denied the petition for stay, granted NGC's petition to intervene, and ordered Sierra Club/LWD to show cause why their appeal should not be dismissed for lack of standing and why LWD should not be dismissed as an appellant because the person signing the notice of appeal lacks authority to represent  
(continued...)

potential impacts to ancestral territories, has been docketed as IBLA 2008-42. As these two appeals emanate from the same BLM decision, we have consolidated them for review.

Because we conclude that the appeal purportedly brought on behalf of LWD was not brought by a person authorized to practice before the Board on its behalf pursuant to 43 C.F.R. § 1.3, we dismiss its appeal in IBLA 2008-39. We further find that the DR considered all relevant factors and is supported by the record which establishes that a careful review of environmental problems has been made, that all relevant areas of environmental concern have been identified, and that the final determination is reasonable in light of the environmental analysis. Since neither Sierra Club nor the Tribe has shown that the DR was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action, we affirm the DR.

#### *BACKGROUND*

Davenport, on behalf of NGC, filed a Plan of Exploration, dated February 2007 and amended July 2007, with BLM, seeking approval of geothermal exploration activities on two leases held by NGC. Administrative Record Document Number (AR Doc.) 1. The proposed exploration included the drilling of up to nine exploration wells from three 5-acre well pads. The construction of each pad would take up to 8 to 12 weeks and the drilling of each well to a depth of 10,000 feet taking 8-12 weeks of 24-hour drilling, and 5.75 miles of existing logging spur roads would be upgraded. Wells exhibiting indications of sufficient high temperatures and fluids would be flow tested, with possible controlled steam venting for 30-45 days, to acquire more information about the geothermal resource and to determine the potential for future geothermal development.

After receiving the plan, BLM began the environmental review process required under NEPA by sending out scoping letters, dated June 6, 2007, to potentially interested parties, including affected Federal, State, and local agencies, Indian tribes, utility companies, environmental organizations, and members of the public.<sup>3</sup> AR Doc. 14. In addition to describing the proposed activities, these letters requested comments and concerns related to the proposal which would be used for

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

that organization. We address the representation and the standing issues below.

<sup>3</sup> Scoping is “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” 40 C.F.R. § 1501.7.

the site-specific environmental analysis that would form the basis of BLM's decision regarding whether the project would be implemented.

The Tribe and Sierra Club/LWD submitted comments in response to the scoping letter.<sup>4</sup> In its June 20, 2007, letter, the Tribe informed BLM that it could not

support any geothermal exploration within our homelands because of the impacts to Mother Earth and the destruction that is required not only to explore for steam but also to build the facilities that harness[] the steam. It has many byproducts that cannot be tolerated by the Klamath Tribes such as air, land, and water pollution not to mention pollution to the eyes. . . . The area in question has been observed by our people for gathering and is shared by several Oregon Tribes since time immemorial.

AR Doc. 32. In their June 27, 2007, letter, Sierra Club/LWD outlined many concerns with the proposed project, including, among other things, BLM's decision to prepare an EA rather than an environmental impact statement (EIS) and BLM's intention to assess only the impacts of exploration and not cumulative effects of both exploration and development.<sup>5</sup> AR Doc. 33. In response to the comments, BLM prepared a *Scoping Comment Analysis*, dated July 25, 2007, in which it "extracted, numbered, and listed" those comments it "considered to be substantive and relevant" to the proposed action and provided responses to each (two comments from the Tribe's letter and 55 comments from the Sierra Club/LWD's letter).<sup>6</sup> AR Doc. 36. BLM considered these scoping comments in preparing the EA (AR Doc. 83).<sup>7</sup> See EA at 8, 44.

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<sup>4</sup> Oregon Wild submitted the only other response to the scoping letter. AR Doc. 34.

<sup>5</sup> The letter begins "The Oregon Chapter Sierra Club and the League of Wilderness Defender-Blue Mountains Biodiversity Project have reviewed the June 6, 2007 BLM notice . . . ." While this letter was not signed, it was submitted on Sierra Club letterhead.

<sup>6</sup> BLM also offered the Tribe the opportunity to meet to discuss the Project. See Aug. 2, 2007, BLM letter to the Tribe, AR Doc. 38.

<sup>7</sup> As the agency responsible for management and administration of Federal geothermal leases and subsurface activities, BLM was the lead agency for preparation of the EA; the Forest Service, as the agency responsible for managing activities on National Forest land, was a cooperating agency in the environmental analysis. EA at 2.

BLM completed the EA evaluating the impacts of the Project in August 2007.<sup>8</sup> In the EA, BLM stated that the purpose and need of the Project

will be to assess the geothermal resource potential of the area for the generation of electricity. Based on the findings, the applicant will decide if the geothermal resource is sufficient or if there are additional exploration needs. Either of these future scenarios is dependent on drilling results and cannot be determined at this time. Future projects are beyond the scope of this EA but would be subject to a new NEPA review if variations of either scenario were proposed in the future.

EA at 2; *see also* EA at 6 (“The purpose of the Proposed Action is to conduct exploration activities to acquire more information about the geothermal resource at Newberry Volcano, specifically in the area of the two federal geothermal leases identified in Davenport’s Plan of Exploration”).

BLM supported the need for the Project by citing the objectives of the May 2001 National Energy Policy, Executive Order 13212, which directs BLM to expedite projects that will increase the production, transmission, or conservation of energy, and of the Energy Policy Act of 2005, Pub. L. No. 109-58, which promotes the leasing and development of geothermal resources where appropriate on public lands. EA at 6. BLM also pointed out that, under the terms of the Geothermal Steam Act, 30 U.S.C. § 1003 (2006), and its implementing regulations, BLM was required to respond to proposed plans, applications and programs submitted by a geothermal lessee or operator; that the Project conformed to the land use plans completed pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (2006), and the National Forest Management Act, 16 U.S.C. § 1604 (2006), including the 1990 Deschutes National Forest Land and Resource Management Plan (LRMP), as amended, the 2005 Upper Deschutes Resource Management Plan, and the 1994 Newberry National Volcanic Monument Plan; and that, although the Project was a Federal action occurring on Federal land, it was

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<sup>8</sup> Because the proposed action involved activities similar, and in some cases identical, to those analyzed in the June 1994 EIS for the Newberry Geothermal Pilot Project (1994 EIS) prepared in response to proposed plans of development submitted by Cal Energy Exploration Company (Cal Energy) for exploration, development, and production of geothermal resources on Federal leases near those held by NGC, BLM indicated that the EA would incorporate by reference the analysis contained in the 1994 EIS where appropriate and applicable, but added that, where different activities were proposed or resource conditions or effects had changed, the EA would independently analyze the site-specific impacts of the Project. EA at 2.

consistent with the State of Oregon's promotion of enhanced renewable sources of energy including geothermal energy. EA at 6; *see id.* at 8-9.

The EA analyzed two alternatives, the Project as the proposed action and the no-action alternative, under which the Project would be rejected. As described in the EA, the locations of the Project's proposed exploration well pads in sections 16, 17, and 29 were sites previously disturbed by past forest management activities that had been chosen based on compositional variations below the surface of the earth that were measured in geophysical surveys. Although each pad would only embrace 5 acres, the EA studied a 40-acre area around each proposed well pad, for a total of 120 acres, to allow BLM the flexibility to make localized changes to the well-pad sites to minimize impacts. The final location of the well pads would be subject to approval by BLM and the Forest Service. Access to the well pads would be on existing roads with the exception of a ½-mile segment of new temporary road construction. Some existing road segments would require maintenance. The pads were expected to be constructed in 2-3 weeks, with the possibility that they would be constructed concurrently. Well drilling was anticipated to take approximately 50 days and would be followed by "flow testing" for 30 to 45 days to evaluate the fluids and determine the potential for production as a viable geothermal energy resource.<sup>9</sup> The Project would also temporarily reroute up to 8 miles of snowmobile trail onto 1.5 miles of existing road and 2 miles of constructed (brushed) cross-country trail. EA at 11-16. The EA determined that the proposed action would fully meet the purpose and need for the action. EA at 16.

The EA addressed the affected environment and the Project's potential impacts on that environment, including its effects on land use, the Newberry National Volcanic Monument, forest vegetation, cultural and heritage resources, wildlife, water resources, forest recreation, roads, scenic resources, geology, soils, and minerals, noise, and air quality. *See* EA at 25-33. The EA also analyzed past, present, and reasonably foreseeable future action, including timber sales and the Cal Energy geothermal energy project analyzed in the 1994 EIS. EA at 33-34. The EA explicitly noted that the Project consisted of exploration operations on Federal geothermal leases to acquire data about the geothermal resource, but acknowledged that, if the exploration were successful, it could lead to additional exploration and potentially the development and production of discovered geothermal resources in the foreseeable future. It emphasized, however, that "[a]ny proposals for subsequent exploration or development operations would require further environmental analyses and approvals," and that, while information acquired from the proposed exploratory wells would be extremely important to predict the type and location of projects for consideration in future analyses, "[f]uture development of the geothermal resource

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<sup>9</sup> The time frames for pad construction and well drilling set out in the EA differed somewhat from those set out in the Plan of Exploration discussed *supra*.

that may be found as a result of this proposed action is, at this time, speculative, and not ripe for decision because a proposal for development will rely entirely on the nature of the resource found during exploratory drilling.” EA at 34. The EA further discussed compliance with other Acts, hazardous materials, fire prevention, and implementation, and set out required mitigation measures adopted from the 1994 EIS Record of Decision and additional mandatory mitigation measures developed in response to the analysis in the EA. *See* EA at 34-41. The EA also limned the extensive public outreach activities undertaken to advise the public of the Project and to seek public input. EA at 42-44.

On August 31, 2007, the District Manager, Prineville District, BLM, issued a Finding of No Significant Impact (FONSI), concluding that, with appropriate mitigation measures, the proposed action would not significantly affect the quality of the human environment, either individually or cumulatively with other actions in the general area. AR Doc. 84. BLM provided the general public and tribal representatives a 30-day period ending on October 1, 2007, in which to provide comments on the EA and FONSI. *See* AR Docs. 17 and 18; *see also* AR Doc. 20 (EA mailing list).

By letter dated September 29, 2007, and received by BLM on October 2, 2007, Sierra Club-LWD provided 24 numbered comments on the project in addition to a summary of additional concerns identified as “Ecological and Legal Issues in a Nutshell.”<sup>10</sup> AR Doc. 42.<sup>11</sup> Among the concerns raised were the need for additional adequate public notification, including public hearings; the existing scientific controversy regarding geothermal energy renewability and exploration; the unwarranted narrowness of the stated purpose and need for the Project; the EA’s failure to adequately assess impacts to numerous resources, safety issues, fire risk, site reclamation, scenic views and noise, and cumulative impacts; the sufficiency of the identification and assessment of alternatives; and the necessity for preparation of a more detailed EIS.

In an October 2, 2007, telephone conversation between representatives of the Tribe and BLM personnel, representatives of the Tribe stated that the Tribe could not support the Project because the Project was not in the best interest of the Tribe for

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<sup>10</sup> This letter, also on Sierra Club letterhead, was purportedly submitted on behalf of Sierra Club (as represented by Asante Riverwind), Juniper Group – Sierra Club (as represented by Marilyn Miller), and LWD (as represented by Karen Coulter). Only Sierra Club’s representative, Riverwind, signed the letter.

<sup>11</sup> Although the letter itself has not been marked as AR Doc. 42, the list of the documents included in the AR found in the front of the looseleaf binder containing the AR clearly identifies the letter as Doc. 42.

financial, physical, or biological reasons and because the well pads and drilling locations would intrude upon aboriginal territories. *See* AR Doc. 43. BLM arranged an October 12, 2007, field trip to the Project sites for representatives of the Tribe, the Project operator, Forest Service, and BLM. *See* AR Doc. 44, Undated Memo to File reporting Field Visit. After viewing the first of the three sites under consideration, the Tribe's representatives asked to see areas not reclaimed after prior geothermal projects. The representatives expressed concern over these unreclaimed lands and urged that no further development take place until the disturbance from these previous efforts to drill had been reclaimed.<sup>12</sup> *Id.*

After reviewing the comments submitted during the comment period, and modifying the EA and mitigation measures where appropriate in response to those comments, the Prineville District Manager issued the DR approving the Project on October 26, 2007. AR Doc. 85. She explained that approval of the Project was consistent with the purpose for which the lands were leased to NGC and NGC's geothermal resources exploration rights and obligations under the leases, conformed to the initiatives of the Energy Policy Act, and supported the National Renewable Energy Initiative by providing more information about energy production from geothermal resources. DR at 2. She found that the EA had identified no impacts that could not be adequately mitigated or that would justify denial of the NGC's rights under the leases, specifically outlining the potential impacts to ground water, recreation use, noise, the Sharp-skinned hawk, soil compaction, and geothermal liquids and the measures imposed to reduce those impacts to insignificance. *Id.* at 2-3. The District Manager further delineated all of the mitigation measures for geology and soils, water resources, geothermal resources, climate and air quality, scenic resources, noise, land use, recreational resources, traffic and transportation, vegetation, wildlife, cultural resources, and human health and safety, that would be required as part of the DR. *Id.* at 4-10. She also provided detailed responses to the two comment letters and one phone call received during the comment period as part of the DR. Specifically, she comprehensively addressed 19 concerns raised by Sierra Club/LWD and 2 concerns expressed by the Tribe. *See* DR at 11-18, 20.

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<sup>12</sup> These unreclaimed drill pads were part of geothermal operations conducted by Cal Energy under unrelated Geothermal Lease OR-45505. Cal Energy implemented its approved project in 1994 and drilled several exploration wells but the results were not conclusive and Cal Energy suspended the project in 1996. The three well pads still exist but the wells have been plugged. Cal Energy sold the leases along with the project to ORMAT, which continues to maintain the project area in accordance with BLM and Forest Service oversight. *See* EA at 5. The unreclaimed well pads are situated in sec. 21, not in proximity to the proposed exploration sites at issue here. At the Oct. 12, 2007, meeting, BLM advised the Tribe's representatives that it had recently notified ORMAT that it had to start reclamation. Undated Memo to File reporting Field Visit.

These appeals followed. We address each appeal separately.

## DISCUSSION

### Sierra Club/LWD's Appeal, IBLA 2008-39

#### *Procedural Issues*

As we noted in our February 26, 2008, Order (*see note 2, supra*), the Sierra Club/LWD appeal raises two procedural issues: 1) whether Sierra Club and/or LWD has standing to bring the appeal and 2) whether Riverwind, who signed the notice of appeal, was authorized to practice before the Department on behalf of LWD. In our Order, we directed Sierra Club and LWD to show cause why the appeal should not be dismissed as to one or both of them. In response, both organizations provided declarations demonstrating their standing to bring this appeal; neither one, however, proffered any evidence that Riverwind had authority to represent LWD. We find that the declarations submitted by Sierra Club are sufficient to establish its standing to bring this appeal and address this issue no further. We dismiss LWD's appeal, however, because it was not filed by a person authorized to represent that organization.

[1] To invoke the jurisdiction of the Board, the "person who wishes to appeal to the Board must file . . . a notice that he wishes to appeal." 43 C.F.R. § 4.411(a). Riverwind signed the Notice of Appeal, giving his title as "Eastern Oregon Forest Organizer, Oregon Chapter Sierra Club," with the addendum: "and for: Karen Coulter, Director, League of Wilderness Defenders – Blue Mountain Biodiversity Project." Practice before the Board is controlled by 43 C.F.R. § 1.3. *See* 43 C.F.R. § 4.3(a). An individual who is not an attorney may practice in regard to a matter in which he represents himself, a member of his family, a partnership of which he is a member, or a corporation, business trust, or association of which he is an officer or full-time employee. 43 C.F.R. § 1.3(b)(3); *Wilderness Watch*, 168 IBLA 16, 31 (2006). Since there is no evidence that Riverwind is a lawyer or is an officer or full-time employee of LWD or falls within any of the other categories of authorized representatives *vis-a-vis* LWD, he was not qualified to represent LWD under 43 C.F.R. § 1.3, when he filed the notice of appeal. When a notice of appeal is filed by a person who is unqualified to represent a party under 43 C.F.R. § 1.3(b), that notice of appeal is properly dismissed as to the party the person is not qualified to represent. *Helmut Rohrl*, 132 IBLA 279, 281 (1995). We therefore dismiss the appeal as to LWD.

#### *Substantive Issues*

In its statement of reasons (SOR), Sierra Club argues that BLM's process of approving the Project violated section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)

(2006), by failing to provide sufficient opportunity for public participation; approving projects on leases which were not themselves subjected to sufficient NEPA review prior to issuance in 1983; preparing an EA rather than an EIS; defining the “purpose” of the proposed action too narrowly and the “need” too vaguely; improperly segmenting the analysis of the exploration stage from the analysis of the development stage; failing to include a reasonable range of alternatives; and failing to adequately discuss impacts, including the cumulative impact of previous logging on the sites, the impact of heavy equipment on the soils, potentially toxic emissions and smoke, escalated fire risk, noise, potential impact on the water table, impact on wildlife and recreation, and the efficacy of clean-up efforts.

In our February 26, 2008, Order we addressed Sierra Club’s arguments in the course of our discussion of whether a stay of BLM’s decision was warranted based on the likelihood of success on the merits of those arguments. Feb. 26, 2008, Order at 5-8 (applying the stay standards outlined in 43 C.F.R. § 4.21(b)(1)). We reasoned that the arguments, as articulated, would not provide sufficient grounds for us to do anything but affirm BLM’s action. We addressed those arguments, pointing out their shortcomings. Despite our setting forth the deficiencies in its case, Sierra Club has provided no further legal or factual support for its assertion that BLM’s NEPA analysis and decision are in error.

[2] Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), requires Federal agencies to prepare an EIS for a major Federal action significantly affecting the quality of the human environment. In making the threshold determination of whether an EIS is necessary, the agency may prepare an EA documenting its consideration of all relevant matters, and the agency may go forward with the project if the analysis in the EA establishes that the project will not have a significant impact on the human environment. A BLM decision to approve an action based on an EA and FONSI will generally be affirmed if BLM has taken a “hard look” at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impacts will be reduced to insignificance by the adoption of appropriate mitigation measures. *The Wilderness Workshop*, 175 IBLA 124, 132-33 (2008); *Santa Fe Northwest Information Council*, 174 IBLA 93, 107-108 (2008); *Bark*, 167 IBLA 48, 76 (2005).

The Board will ordinarily uphold a BLM determination that a proposed project, with appropriate mitigation measures, will not have a significant impact on the quality of the human environment if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable. *Gerald H. Scheid*, 173 IBLA 387, 396 (2008); *Bark*, 167 IBLA at 76, and cases cited. A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis

failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *The Wilderness Workshop*, 175 IBLA at 133; *Santa Fe Northwest Information Council*, 174 IBLA at 107; *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993). Unsupported differences of opinion provide no basis for reversal. *Bark*, 167 IBLA at 76; *Las Vegas Valley Action Committee*, 156 IBLA at 117-19; *Rocky Mountain Trials Association*, 156 IBLA 64, 71 (2001). Nor is it sufficient for an appellant to simply speculate and request more information or “pick apart a record with alleged errors and disagreements without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance.” *Bark*, 167 IBLA at 76, quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004); see also *Edward C. Faulkner*, 164 IBLA 204, 209 (2004). It is with these principles in mind that we review Sierra Club’s arguments.

### Lease Issuance and NEPA Concerns

As we stated in our February 26, 2008, Order, one of the primary arguments proffered is not within this Board’s jurisdiction to consider: “Five pages (8-12) of the SOR are devoted to arguing that the underlying geothermal leases were issued in 1983 without adequate NEPA review. The issuance of those leases is not before us in this appeal.” Feb. 26, 2008, Order at 6. The time for an administrative challenge to the decision to lease the subject lands or to the adequacy of the environmental documents underlying that decision has long since passed. See 43 C.F.R. § 4.411(a); *Save Medicine Lake Coalition*, 156 IBLA 219, 227 (2002), *rev’d on other grounds*, *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 781 (9th Cir. 2006). We therefore reject Sierra Club’s challenge to the validity of the underlying leases.

### NEPA and Public Participation

[3] Sierra Club next argues that BLM failed to meet the public participation requirements of NEPA because it provided inadequate public notice and failed to host public hearings. Sierra Club raised the same concerns in comments on the EA. BLM’s response to those comments and documents in the AR forwarded to the Board belie that contention and show that BLM clearly provided adequate public notice. See, e.g., DR at 11 (“BLM sent scoping letters to 157 individuals, organizations, agencies, and central Oregon Tribes in June, 2007”); AR Section 2.0 “Public Communication and Involvement,” Docs. 11-31.<sup>13</sup>

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<sup>13</sup> These documents include a copy of the scoping notice and the mailing list for the scoping notice, as well as copies of local newspaper articles concerning the Project, the transmittal letter and request for comments on the EA, and the EA mailing list.

BLM is required under section 102(2)(C) of NEPA and its implementing regulations to encourage and facilitate public involvement in the NEPA process. See 40 C.F.R. § 1500.2(d). The regulations also direct agencies to “involve environmental agencies, applicants, and the public, to the extent practicable,” in the preparation of EAs, 40 C.F.R. § 1501.4(b), and to “[p]rovide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.” 40 C.F.R. § 1506.6(b). In addition, 40 C.F.R. § 1506.6(d) mandates that Federal agencies “[s]olicit appropriate information from the public.” When BLM has engaged in some type of public process and an appellant alleges that public notice and comment procedures were inadequate, this Board will scrutinize that process on a case-by-case basis to determine its adequacy. See *The Wilderness Workshop*, 175 IBLA at 141; *Lynn Canal Conservation, Inc.*, 169 IBLA 1, 5-7 (2006). The documents in the record cited above amply demonstrate that BLM adequately sought, encouraged, and facilitated public participation in the NEPA process.

As to Sierra Club’s complaint that BLM neglected to hold public hearings, the regulations state at 40 C.F.R. § 1506.6(c) that public hearings or meetings should be held “whenever appropriate or in accordance with statutory requirements applicable to the agency.” There are no statutory requirements that such a meeting or hearing be held for a geothermal exploration plan. To help agencies determine whether a hearing or meeting is appropriate, the regulations state that the relevant criteria include whether there is “[s]ubstantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.” 40 C.F.R. § 1506.6(c)(1). The evidence presented by Sierra Club to support its claim that such a controversy exists consists of three exhibits accompanying its SOR: a handwritten 1990 “Report” titled “Tapping Earth’s Geothermal Energy: ‘Green’ Panacea Or Pandora’s Box?” written by Riverwind (Ex. A); a 2007 typewritten “Updated Summary Article” of the Report by Riverwind (Ex. B); and a compact disk of a Sierra Club 2007 Power Point Show on Geothermal Energy and its Impacts (Ex. G).<sup>14</sup> While these exhibits support the fact that Sierra Club is concerned with development of geothermal resources, they do not establish either a substantial environmental controversy or a substantial interest in holding a hearing about an exploration project. Accordingly, we find that the record demonstrates that BLM met its obligation to provide meaningful public participation in the environmental review process.

#### EA’s Purpose and Need Statement

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<sup>14</sup> There is no indication that any of these items have been peer-reviewed, published or otherwise distributed to the public.

[4] Sierra Club suggests that the statement of purpose and need in the EA should be written more broadly to encompass whether, consistent with multiple use management directives, these public lands should be managed for energy development. SOR at 14. This argument overlaps its assertion that the leases were inappropriately issued in 1983 and its belief that geothermal activity should not be undertaken in the Newberry Volcanic Caldera area. We find that BLM accurately identified the purpose and need of the proposed project and that it properly relied on that stated purpose and need as the basis for its environmental analysis and choice of alternatives.

The purpose and need statement for an EA prepared to study a project proposed by an applicant, as opposed to an agency-proposed action, appropriately reflects the goals and objectives of the applicant. *Northern Alaska Environmental Center*, 153 IBLA 253, 263-64 (2000), and cases cited. In reviewing applications for licensing, permitting, authorization to proceed, etc., the authorizing agency is obligated to base the scope of review and range of alternatives considered on the needs and purposes as defined by the applicant.

An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.

*Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991). In addition, the Council on Environmental Quality (CEQ) has stated that the agency should not "disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives." CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34267 (July 28, 1983).

The EA in this case analyzed the potential impacts of implementing proposed geothermal exploration activities within the Bend-Fort Rock Ranger District of the Deschutes National Forest to assess the geothermal resource potential of the area for the generation of electricity and to acquire more information about the geothermal resource at the Newberry Volcano. EA at 2, 6. Sierra Club contends that this statement of purpose and need is too narrow because it eliminates consideration of whether leasing or production should be allowed at all. Admittedly, the EA did not discuss prohibiting geothermal leasing or banning geothermal activities, nor was it required to do so. As noted above, the decision to issue the geothermal leases had

already been made and was final for the Department. Moreover, a general ban on geothermal activity would necessitate other action, *e.g.*, amendment of the applicable land use planning document, which is beyond the scope of this appeal. Since the purpose and need statement appropriately reflected NGC's goals and objectives, we find no error in that statement.

#### Connected Activities

[5] Sierra Club argues that BLM improperly segmented the proposed exploration activities from related geothermal energy production. According to Sierra Club, exploration and production are connected activities because "eventual plans for a geothermal energy electrical production plant are the only rationale for conducting the planned geothermal exploration on these two leases," and thus the suitability of the area for such production and the full impacts of that production must be considered in tandem with exploration activities. SOR at 16. We disagree.

Under 40 C.F.R. § 1508.25(a)(1), actions are closely related or "connected" and should be jointly analyzed in a single EIS or EA, "if they: (I) Automatically trigger other actions which may require [environmental review][;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." The object of the regulation is to avoid segmenting interrelated projects such that cumulatively significant environmental impacts are overlooked or deliberately ignored in violation of section 102(2)(C) of NEPA. *Larry Thompson*, 151 IBLA 208, 213 (1999); *Wilderness Watch*, 142 IBLA 302, 305 (1998).

Sierra Club has not demonstrated that the authorization of the proposed exploration will inevitably lead to the construction of geothermal facilities and production activities, and thus that review of the impacts of geothermal production must be undertaken in conjunction with the exploration project. The proposed action has independent utility apart from production activities since it will provide information about geothermal resources in the area and the feasibility of production regardless of whether such production operations ever occur. Even if exploration supports the practicability of proceeding with geothermal production, there are many other factors that could well induce a determination not to proceed; thus, any future production activities are purely speculative at this point. If, after considering the gathered information, NGC decides to proceed with geothermal development, it would be required to submit a new proposal which, as the EA explicitly advised, would be subject to new, independent NEPA review. EA at 2. Since the exploration project will neither cause nor automatically trigger production activities, exploration and development are not connected actions under 40 C.F.R. § 1508.25(a)(1), and the EA did not err in focusing its analysis on the proposed exploration project. See *Western Watersheds Project*, 175 IBLA 237, 253 (2008).

## Range of Alternatives

BLM considered two alternatives in the EA, the Project as the proposed action and the no-action alternative. Sierra Club argues that BLM failed to consider a reasonable range of alternatives, such as 1) exchanging the current leases for different geothermal lease locations farther removed from the Monument (including elsewhere in Oregon on Federal lands); 2) reducing the number of exploration sites; 3) withdrawing some or all of the greater Newberry Caldera area from geothermal leasing, exploration, and/or development; 4) sequentially conducting lease site exploration with subsequent site exploration contingent on the successful reclamation of completed sites and subject to modification in response to monitoring and assessment of actual environmental impacts from preceding site exploration; and 5) withholding a decision pending completion of foundational NEPA analysis on the suitability of the area for geothermal exploration and production, including the analysis of impacts to natural resources and human community concerns in the area. SOR at 13, 21-22. This argument is intertwined with both its complaint about the narrowness of the purpose and need statement and its assertion that BLM should have considered production as well as exploration in the EA. We find that BLM addressed an appropriate range of alternatives and reject Sierra Club's arguments to the contrary.

[6] The Board's standard for determining the adequate range of alternatives to be considered was recently outlined in *The Wilderness Workshop*, 175 IBLA at 135:

BLM is required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), to consider "appropriate alternatives" to a proposed action, as well as their environmental consequences. See 40 C.F.R. §§ 1501.2(c) and 1508.9(b); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972); *Santa Fe Northwest Information Council, Inc.*, 174 IBLA at 116, and cases cited. Appropriate alternatives are those that are reasonable alternatives to the proposed action, will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 C.F.R. § 1500.2(e); 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981); *Headwaters, Inc. v. BLM*, 914 F.2d at 1180-81; *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d at 834; *Biodiversity Conservation Alliance*, 174 IBLA 1, 24-25 (2008); *Santa Fe Northwest Information Council, Inc.*, 174 IBLA at 116. This ensures that the BLM decisionmaker "has before him and takes into proper account all possible approaches to a particular project." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). As the Board recently stated, "[t]o show a failure to consider sufficient alternatives, an appellant must posit an alternative

that would meet the test described above.” *Biodiversity Conservation Alliance*, 174 IBLA at 25.

The statement of the purpose and need for the project and the project’s stated goals determine the range of reasonable alternatives. *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997). An agency is not required to consider a range of alternatives that extends beyond those reasonably related to the purpose of the project and alternatives that do not accomplish the purposes of the project may be rejected. *See Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974); *Arizona Past and Present Future Foundation, Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983). As we stated in *Arizona Zoological Society*, 167 IBLA 347, 359 (2006): “[W]hen the EA discusses in detail the environmental impacts of the project, BLM need not address a plethora of possible alternatives; setting forth the implications of both its proposed action and the no action alternative, which form the ends of the spectrum, will suffice.” *See also Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d at 1246. The burden is on the challenging party to present objective proof demonstrating error in BLM’s selection and assessment of alternatives; mere disagreement or a difference of opinion does not suffice to establish error in BLM’s alternatives analysis. *Mary Byrne, D/B/A/ Hat Butte Ranch*, 174 IBLA 223, 237 (2008); *Great Basin Mine Watch*, 159 IBLA 324, 354 (2003).

We find that BLM’s consideration of only two alternatives was reasonable in light of the limited nature of the proposed action.<sup>15</sup> None of the alternatives suggested by Sierra Club is reasonable given that the particular purpose and need for this action, which is to determine the geothermal energy potential of the two specific leases. Clearly the alternatives of exchanging the current leases for leases in different locations, withdrawing the area from geothermal leasing, and withholding a decision pending NEPA analysis of the suitability of the area for geothermal development not only conflict with the prior determinations that the lands are suitable for geothermal leasing and that the leases should be issued, but also do not accomplish the purposes of the Project. Sierra Club also has not shown that its posited alternatives of reducing the number of exploration sites or sequentially conducting lease site exploration would have lesser impacts than the no action alternative analyzed in the EA. Accordingly, we find that BLM considered a reasonable range of alternatives in its EA.

#### Purported Errors In BLM’s Analysis of Impacts

<sup>15</sup> BLM stated in the EA that it had considered whether other alternatives could address the proposed action and be significantly different from or have significantly different effects than the proposed action and determined that “[u]pon satisfactory review of the technology, operations, and equipment proposed in the Plan, BLM did not identify other alternatives that would meet the purpose and need.” EA at 17.

Sierra Club presents an extensive litany of alleged errors in the EA's analysis of impacts. These purported errors essentially track the issues it raised in its comments on the EA and include the failure to address existing scientific controversy regarding geothermal energy exploration; the misleading information about the Project's connection to Oregon's goal of increasing renewable energy and the various Federal statutes cited as supporting the need for the Project, and about the energy potential of the area; the lack of adequate analysis of potential increases in seismic activity, of compounded degradation of forest, wildlife, and riparian ecosystems, of water table and aquifer changes, of safety issues surrounding controlled venting and safe testing procedures, of fire risk, of site reclamation and cleanup of toxic spills, of scenic views and noise, and of cumulative impacts; and the need to prepare a more detailed EIS. See SOR at 21-31. BLM addresses each alleged error in its Response, directing the Board's attention to the applicable analysis in the EA or in the 1994 EIS when the analysis in the EIS equally applies to the current Project. See BLM Answer at 3-10. BLM also provided detailed responses to these same arguments in its response to Sierra Club's arguments on the EA. Compare DR at 11-18 (Sierra Club's comments and BLM's response) to SOR at 7-33.

Sierra Club, as the party challenging BLM's decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *E.g., The Wilderness Workshop*, 175 IBLA at 133. Unsupported differences of opinion do not satisfy that burden, nor do simple speculation and lists of alleged errors meet that burden unless those allegations are connected to an affirmative showing that BLM failed to consider a substantial environmental question of material significance. *Bark*, 167 IBLA at 76. Sierra Club has failed to meet its burden of showing error in BLM's EA and DR .

BLM comprehensively addressed each of Sierra Club's concerns in the DR, providing pertinent citations to the EA and the 1994 EIS. See DR at 11-18. Sierra Club has presented no objective proof showing error in BLM's analysis or conclusions that the impacts related to the Project were insignificant or would be reduced to insignificance by appropriate measures; rather it has simply reiterated objections already considered and rejected, and expressed its continuing difference of opinion about the proper management of the area at issue. *Cf. In re North Trail Timber Sale*, 169 IBLA 258, 262 (2006) (if the appealed decision is the denial of a protest, the appellant must establish error in the actual BLM protest decision); *Bark*, 167 IBLA at 76-77 (same); *In re Stratton Hog Timber Sale*, 160 IBLA at 332 (same); see also *Watts v. United States*, 148 IBLA 213, 217 (1999) (an appellant must affirmatively point out error in the decision from which it appeals); *In re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 362 (1991) (BLM "provided a comprehensive decision fully addressing each of the allegations contained in the protest and appellant has not attempted to

show any error in the decision”). In short, Sierra Club has simply speculated and requested more information and attempted to “pick apart a record with alleged errors and disagreements without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance.” *Bark*, 167 IBLA at 76. It therefore has not shown with objective proof that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. Accordingly, we reject Sierra Club’s challenges to the DR.

*The Tribe’s Appeal, IBLA 2008-43*

In its one-page appeal letter, the Tribe objects to the decision because it will allow “exploration for geothermal resources within our ancestral territories.”

We are appealing this decision based on the fact that our opinion was not taken into account where it came to our spiritual beliefs of the proposed project area. Our people cannot allow another project to destroy one of our sacred and holy areas to gather obsidian known as a Mbosaksawaas (Flint Place).

Tribe SOR. The Tribe further states that it opposes the project because other geothermal project sites in the general area have not been reclaimed and asserts that it “would be negligent to allow another project to proceed based on an uncertainty as to whether or not a geothermal resource exists, all at the expense of our native practitioners and the general public that share our connection to the earth.” *Id.* We find that the Tribe has not met its burden of showing error in the DR.

BLM addressed cultural and historical concerns in the EA. The three 40-acre study areas were intensively surveyed to identify the presence of cultural resources, and neither the consultation with the Tribe regarding possible concerns about traditional cultural properties in the area nor the field surveys revealed any issues or cultural properties of concern. EA at 20.<sup>16</sup> The EA acknowledged that cultural resources could be affected by ground disturbing activities but noted that such resources were local and limited in size and that impacts to them could be avoided by considering known cultural resource locations during project design and by incorporating monitors where subsurface deposits were expected. EA at 27, 40. The EA further noted that avoiding impacts supported a “no historic properties affected” determination and satisfied the applicable Regional Programmatic Agreement for implementation of section 106 of the National Historic Preservation Act, 16 U.S.C.

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<sup>16</sup> In a supplement to the EA, BLM noted that a cultural resource find had precipitated the selection of one well pad location to avoid significant impact to that resource. AR Doc. 86, Supplemental Information to the August 2007 EA, at 1.

§ 470f (2006). EA at 28. The EA also incorporated mitigation measures to minimize impacts to cultural resources, directing that “[i]dentified cultural resource sites will be avoided for siting well pads, roads, or other surface disturbance. If previously undocumented sites are discovered during construction, activities will be halted until the resources are examined by a professional archaeologist and direction is given on how to proceed.” EA at 37.

The DR explicitly adopted cultural resource mitigation measures as part of the approved Project, directing that

- [w]ell pads, roads, or other surface disturbance will avoid any identified cultural resource sites. If previously undocumented sites are discovered during construction, activities will be halted until the resources are examined by a professional archaeologist and direction is given on how to proceed.
- Cultural resources are local and limited in size, thus impacts will be avoided by considering known cultural resource locations during project design and by incorporating monitors where subsurface deposits are expected.

DR at 8. The DR also imposed specific restoration and revegetation obligations to ensure reclamation of any disturbances occasioned by the Project. DR at 2.

The DR included the District Manager’s response to the comments made by the Tribe in an October 2, 2007, telephone call <sup>17</sup> (AR Doc. 43) and during the October 12, 2007, field trip (AR Doc. 44).

. . . **Comment:** The Klamath Tribe cannot support any geothermal exploration within our homelands because of the impacts to Mother Earth and the destruction that is required not only to explore for steam but also to build the facilities that harness the steam.

**Response:** The required mitigations are intended to minimize resource impacts. To the extent possible, project features associated with the exploration activities will use existing or previously disturbed sites. Once a project feature is no longer needed it will be restored to its original configuration and revegetated to conform to the surroundings. Any wells that are not needed will be capped. Facilities

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<sup>17</sup> Although the DR states that the phone call was received on Sept. 19, the notes in the record documenting the phone conversation are dated Oct. 2, 2007. AR Doc. 43.

to turn geothermal liquids into electricity are not being proposed at this time, this proposal is for exploratory drilling only.

. . . **Comment:** The Klamath Tribe is concerned the Cal Energy Pads have not been rehabilitated and has the same concern for this project.

**Response:** The BLM is in initial stages of requesting Cal Energy to clean up and rehabilitate their existing drill pads. A large bond has been posted that will be withheld until the rehabilitation work has been accomplished. This drilling proposal has requirements by the Forest Service, BLM and State of Oregon to rehabilitate these drilling pads as soon as they are no longer needed. This includes a bond posted to the BLM [and/or] State of Oregon that covers the cost of the rehabilitation.

DR at 20.

Although the Tribe asserts that the proposed project will destroy “sacred and holy areas,” it has not demonstrated how the Project will do so. To the extent the Tribe is arguing that BLM failed to accommodate the Tribe’s spiritual beliefs, we find that the Tribe’s bald assertion that the Project, which would temporarily occupy only a very small portion of the overall geothermal caldera, might offend tribal members’ spiritual sensibilities and be seen as desecrating a general area falls far short of establishing that approval of the Project use would prevent tribal members from accessing the area for purposes of carrying out religious observances. Nor has the Tribe shown that the Project approval coerces tribal members to act contrary to their religious beliefs under threat of sanctions or conditions any governmental benefit on conduct that would violate their religious beliefs. *See Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1071, 1073, 1078 (9th Cir. 2008) (considered *en banc* with an 8 to 3 majority opinion) (upholding the government’s approval of a proposed land use because such action did not coerce or force the plaintiff tribes to act contrary to their spiritual beliefs under threat of sanctions, condition any governmental benefit on conduct that would violate their religious beliefs, or substantially burden free exercise of religion by tribal members contrary to statute); *see generally Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988). Accordingly, we find that the proposed geothermal exploration project, which is located on disturbed national forest land outside the national monument, would not “substantially burden” free exercise of religion by tribal members contrary to statute and reject any accommodation claims the Tribe may be asserting.

The Tribe has not even articulated, much less shown, specific error in the EA, in the DR, or in BLM’s responses to its comments. The Tribe has provided nothing to contradict any of BLM’s analysis or to establish any error or omission in that analysis. Although it clearly disagrees with BLM’s decision to approve the Project, the Tribe has

not shown that BLM failed to take the requisite “hard look” at the proposed action, and to identify relevant areas of environmental concern so that it could make an informed determination as to whether environmental impacts are insignificant or would be reduced to insignificance by mitigation measures. *See Santa Fe Northwest Information Council, Inc.*, 174 IBLA at 107. Nor does the Tribe’s mere difference of opinion with BLM as to whether the Project should be approved satisfy its burden of demonstrating with objective proof that the decision was premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.<sup>18</sup>

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, IBLA 2008-39 is dismissed in part as to LWD and the decision appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Sara B. Greenberg  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce R. Harris  
Deputy Chief Administrative Judge

<sup>18</sup> On appeal, the Tribe raises for the first time the issue of the destruction of one of its sacred and holy areas for gathering obsidian. BLM acknowledges that the EA and DR did not address this issue, explaining that those documents did not do so because the issue was never raised during the review process. BLM Answer at 2. When BLM has provided an opportunity for participation in its decision-making process, a party may raise on appeal only those issues raised by the party in its prior participation. 43 C.F.R. § 4.410(c)(1). Since the Tribe did not raise this issue in its prior comments or consultations, this issue is not properly before us. In any event, the Tribe has provided no evidence that the Project will affect obsidian gathering or that this concern represents a question of material significance warranting reversal of BLM’s decision. *See Rainer Huck*, 168 IBLA 365, 403 (2006).