



ELY SHOSHONE TRIBE

178 IBLA 37

Decided July 27, 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

ELY SHOSHONE TRIBE

IBLA 2009-93

Decided July 27, 2009

Appeal from a decision of the State Director, Nevada State Office, Bureau of Land Management, denying an Indian Tribe's request to be designated a cooperating agency in the preparation of an Environmental Impact Statement in connection with a State water agency's request for grants of rights-of-way over Federal land for a groundwater development project. N-78803.

Motion to dismiss denied; decision affirmed; petition to intervene denied as moot.

1. National Environmental Policy Act of 1969: Environmental Statements--Regulations: Applicability

A new Departmental regulation at 43 C.F.R. § 46.225(c), which provides that a denial of a request for cooperating agency status in preparation of an Environmental Impact Statement is not subject to any internal administrative appeals process, may not be applied retroactively to a denial of a request issued before the regulation became effective and that was administratively appealable at the time the regulation became effective.

2. National Environmental Policy Act of 1969: Environmental Statements

To be eligible to be designated as a cooperating agency in the preparation of an Environmental Impact Statement under Council on Environmental Quality Rules at 40 C.F.R. §§ 1501.6 and 1508.5, an Indian Tribe must have either jurisdiction by law over a proposal or special expertise with respect to any environmental impact involved in a proposal, and the anticipated effects of a proposal must occur on the Tribe's reservation lands.

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; Amy Lueders, State Director, Nevada State Office, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEATH

The Ely Shoshone Tribe has appealed an October 9, 2008, decision (Decision) of the State Director, Nevada State Office, Bureau of Land Management (BLM), denying the Tribe's July 8, 2008, request to be designated a cooperating agency in the preparation of the Environmental Impact Statement (EIS) for the application of the Southern Nevada Water Authority (SNWA) for grants of rights-of-way (ROWs) over Federal lands for pipelines and other facilities to be constructed as part of the Clark, Lincoln, and White Pine Counties Groundwater Development (GWD) Project. BLM filed a motion to dismiss on February 12, 2009. SNWA filed a petition to intervene on March 4, 2009. For the reasons explained below, we deny BLM's motion to dismiss, affirm the State Director's Decision, and deny SNWA's petition to intervene as moot.

#### BACKGROUND

SNWA submitted its application (N-78803) on August 23, 2004, under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), for ROWs necessary 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 that will serve as part of the water supply for Las Vegas and surrounding areas. *See Confederated Tribes of the Goshute Reservation*, 177 IBLA 171, 173 (2009) ("*Confederated Tribes*"). The GWD Project, if fully completed, would enable SNWA to draw more than 170,000 acre feet of water per year from five hydrographic basins, specifically, the Delamar Valley and the Dry Lake Valley in Lincoln County, Nevada; the Cave Valley and the Spring Valley in Lincoln and White Pine Counties, Nevada; and the Snake Valley in White Pine County, Nevada, and Tooele, Juab, and Millard Counties, Utah. Statement of Reasons (SOR) at 3 and Attachment E.<sup>1</sup>

On April 8, 2005, BLM filed a notice of its intent to prepare an EIS under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and to initiate the public scoping process. Petition to Intervene at 3. The Tribe submitted written comments in the scoping process on July 18, 2005. SOR Attachment F. BLM is in the process of preparing the draft EIS.

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<sup>1</sup> See [http://www.snwa.com/html/system\\_gdp.html](http://www.snwa.com/html/system_gdp.html) and [http://www.snwa.com/html/system\\_gdp\\_map.html](http://www.snwa.com/html/system_gdp_map.html).

From January to March 2005, BLM designated or granted cooperating agency status to four other agencies of the Department of the Interior (DOI) (namely, the Bureau of Indian Affairs (BIA), the National Park Service, the Fish and Wildlife Service, and the Bureau of Reclamation), Nellis Air Force Base, the U.S. Forest Service, the Central Nevada Regional Water Authority, the State of Nevada Department of Wildlife, Clark, Lincoln, and White Pine Counties in Nevada, Tooele, Juab, and Millard Counties in Utah, and the State of Utah. On July 8, 2008, more than 3 years after it submitted its comments in the scoping process, the Tribe submitted a request to the BLM Nevada State Office to designate the Tribe as a cooperating agency in preparing the EIS and to extend the deadline for the draft EIS, which the Tribe understood to be in September of that year. SOR Attachment A.

BLM's February 11, 2009, motion to dismiss asserted that the Tribe's appeal was barred by new DOI NEPA rules codified at 43 C.F.R. § 46.225(c), promulgated on October 15, 2008 (73 Fed. Reg. 61292, 61320), discussed further below. BLM did not respond to the substance of the Tribe's arguments in the SOR. SNWA's Petition to Intervene asserted that granting cooperating agency status to the Tribe would adversely affect SNWA by unduly and unnecessarily extending the time for preparation of both the draft and final EIS and causing procedural setbacks. Petition to Intervene at 5-6. SNWA did not file an answer with its petition to intervene.

The State Director's October 9, 2008, Decision denied the Tribe's request.<sup>2</sup> For unexplained reasons, the Decision was addressed to the Tribe's Chairperson at "16 Shoshone Circle, Ely, UT 84034." Decision at 1. There is no town named Ely in Utah, and the correct address for the Tribe is 16 Shoshone Circle, Ely, Nevada 89301. The Tribe ultimately received the Decision on October 27, 2008. The Tribe submitted its Notice of Appeal on November 21, 2008, which the BLM Nevada State Office received on November 24, 2008.

## ANALYSIS

### I. *BLM's Motion to Dismiss*

[1] BLM argues that the Tribe filed its Notice of Appeal "after the new 43 CFR 46 regulations took effect." Motion to Dismiss at unpaginated 1. BLM cites the new

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<sup>2</sup> The Confederated Tribes of the Goshute Reservation filed an appeal from a separate BLM decision denying its request for cooperating agency status in preparing the EIS, docketed as IBLA 2008-260. We affirmed BLM's decision in that case. *Confederated Tribes*, 177 IBLA at 186. Salt Lake County, Utah, also appealed from a separate BLM decision denying its request to be designated as a cooperating agency, docketed as IBLA 2008-253. We affirmed BLM in that case in an Order dated Apr. 30, 2009.

43 C.F.R. § 46.225(c), which addresses requests by eligible governmental entities (including Indian tribes) to participate as cooperating agencies in preparation of an EIS.<sup>3</sup> It provides:

(c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the environmental impact statement. *Denial of a request 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.*

73 Fed. Reg. at 61320 (emphasis added). BLM argues that the italicized phrase bars the Tribe's appeal to this Board in this case.

As noted previously, this regulation was promulgated on October 15, 2008. It became effective on November 14, 2008. 73 Fed. Reg. at 61292. The Decision was issued on October 9, 2008, before the new rule was promulgated and more than a month before it became effective, and the Tribe received the Decision on October 27, 2008. The Tribe's Notice of Appeal was filed with the BLM Nevada State Office 10 days after the new rule became effective. While the new rule unquestionably applies to denials of requests for cooperating agency status issued after the rule's effective date, BLM's position would apply it to a denial of a request issued before the rule's effective date that was appealable under 43 C.F.R. § 4.410 at the time it was issued. In substantive effect, BLM seeks to apply the new rule retroactively.

In *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court explained:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928). By the same principle, a statutory grant of legislative

<sup>3</sup> The NEPA regulations of the Council on Environmental Quality (CEQ) at 40 C.F.R. §§ 1501.6 and 1508.5 regarding cooperating agencies that the new DOI rule supplements are discussed below.

rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. at 208-09. Nothing in the language of the new 43 C.F.R. § 46.225(c) requires that it be construed to have retroactive effect. Nor does any provision in NEPA—or the CEQ rules regarding agency procedures at 40 C.F.R. § 1507.3—contemplate, much less expressly grant, retroactive rulemaking authority.

The Tribe had the right under 43 C.F.R. § 4.410 to appeal the Decision to the Board at the time the Decision was issued. BLM reads 43 C.F.R. § 46.225(c) as cutting off that right while the Tribe could still exercise it. Neither the text of the rule nor any other principle of law justifies that result. Accordingly, we deny BLM's motion to dismiss.

## II. *The Merits of the Tribe's Appeal*

Although BLM has not filed an answer under 43 C.F.R. § 4.414 or otherwise responded to the substance of the Tribe's arguments, for the reasons explained below we find that the existing record is sufficient to resolve this appeal and that our decision in *Confederated Tribes* controls its disposition.

### A. *Eligibility Criteria for Cooperating Agencies*

[2] CEQ rules implementing NEPA provide, at 40 C.F.R. § 1501.5, that a "lead agency" shall "supervise the preparation of an environmental impact statement" if more than one Federal agency is involved in the same action or group of related actions. Title 40 C.F.R. § 1508.16 defines the "lead agency" as "the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement." In the instant case, BLM, the agency that would grant or deny the requested ROWs, is the lead agency in preparation of the draft EIS.

Title 40 C.F.R. § 1501.6, captioned "Cooperating agencies," provides in the introductory paragraph in relevant part:

Upon request of the lead agency, any other 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.  
[Emphasis added.][<sup>4</sup>]

The CEQ regulations define “cooperating agency” as follows:

“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 Sec. 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). The regulations further define the term “jurisdiction by law” as “agency authority to approve, veto, or finance all or part of the proposal.” 40 C.F.R. § 1508.15. The term “special expertise” is defined as “statutory responsibility, agency mission, or related program experience.” 40 C.F.R. § 1508.26.

As noted previously, the new DOI rules at 43 C.F.R. § 46.225 regarding selection of cooperating agencies, which became effective in November 2008, do not apply. Therefore, the CEQ regulations at 40 C.F.R. §§ 1501.6 and 1508.5 quoted above are the regulations applicable here.<sup>5</sup> Under those provisions, for an Indian tribe to be eligible to become a cooperating agency, it must have either jurisdiction by law over some part of a proposal or special expertise with respect to some

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<sup>4</sup> Paragraph (a) of the same section provides that the lead agency “shall: . . . (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.”

<sup>5</sup> We noted in *Confederated Tribes*, 177 IBLA at 179, that BLM has promulgated rules applicable to land use planning under FLPMA which provide that BLM will invite “eligible” state and local agencies and Indian tribes to participate as cooperating agencies when developing, revising, or amending a resource management plan (RMP). 43 C.F.R. §§ 1601.0-6, 1610.3-1(b). Because the proposed action here is not approval or amendment of an RMP, these rules do not apply. Consequently, the Tribe’s reliance on these rules as allegedly mandating cooperating agency status for the Tribe, SOR at 23-28, is misplaced.

environmental impact involved in a proposal.<sup>6</sup> These mirror the criteria for becoming a cooperating agency that BLM established during the scoping process. *See* Decision at 2; *Confederated Tribes*, 177 IBLA at 181. Further, under section 1508.5, the anticipated environmental effects must occur “on a reservation” for a tribe to be eligible to become a cooperating agency.

Even if a tribe is eligible to become a cooperating agency, that does not imply that BLM must grant a request for cooperating agency status. As we explained in *Confederated Tribes*: “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.” 177 IBLA at 180 (citing *Wyoming v. U.S. Department of Agriculture*, 570 F. Supp. 2d 1309, 1334 (D. Wyo. 2008)). Thus, the Tribe bears the ultimate burden to demonstrate that BLM committed an error of law in denying the Tribe’s request, or to establish, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or did not consider all relevant factors and act on the basis of a rational connection between the facts found and the choice made. *Id.*; *Oregon Natural Desert Association*, 176 IBLA 371, 380 (2009); *American Mustang & Burro Association, Inc.*, 144 IBLA 148, 150 (1998).

#### B. *Application of Eligibility Criteria in the Instant Case*

With respect to whether the Tribe is eligible to become a cooperating agency, the State Director explained:

I have not found anywhere in your [July 8, 2008] letter where you describe that you have jurisdictional authority within the areas identified that may be impacted by the proposed action. BLM has

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<sup>6</sup> We note that the new DOI rules continue this approach. Title 43 C.F.R. § 46.225(a) defines an “eligible governmental entity” that may be a cooperating agency:

(a) An “eligible governmental entity” is:

(1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15;

(2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or

(3) Any non-Federal agency (State, *tribal*, or local) *with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section.*

[Emphasis added.]

identified six hydrologic basins that may be directly or indirectly impacted by the proposed right-of-way application. These include Snake Valley, which is shared by Nevada and Utah; and Spring Valley, Cave Valley, Delamar Valley, Dry Lake Valley, and Coyote Spring Valley, which are all in Nevada.

Decision at 2. The Ely Shoshone reservation lands are located “on the southwest and southeast sides of the City of Ely,” with four “newly acquired parcels” that are located “outside the city limits on the southwestern, southern, and northern sides of Ely.” SOR at 3, 15.<sup>7</sup> The City of Ely and the reservation lands are located in the Steptoe Valley. The State Director observed: “Our current analysis does not show projected impacts to occur in Steptoe Valley.” Decision at 2. If the State Director is correct, it implies that the Tribe does not have jurisdiction by law and that the anticipated environmental effects would not occur “on [the] reservation.” With regard to special expertise, the State Director said: “I have not found in your letter where you describe that you have special expertise specific to the area of impact described above.” *Id.*

In disputing these conclusions, the Tribe in its SOR asserts several arguments, many of which, however, are either irrelevant or at best tangential to the questions before the Board in this appeal, *i.e.*, whether the Tribe is eligible to become a cooperating agency, and, even if it is, whether BLM effectively abused its discretion in denying the Tribe cooperating agency status in light of the Tribe’s burden of proof discussed above. The Tribe expresses dissatisfaction with BLM’s consultations and government-to-government relationship with the Tribe (SOR at 6, 9, 12-13, 16-17, 21-22), anticipates that BLM will not protect claimed tribal water rights in the future (*id.* at 6-7, 35-37), and alleges that BLM has failed to comply with Federal environmental mandates and regulations (*id.* at 8-9, 33-34). The Tribe also alleges various breaches of the Department’s trust responsibility to the Tribe (*id.* at 9-12, 18, 34-38) and failure to fulfill requirements to consult with the Tribe under sections 101(d)(6) and 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470a(d)(6) and 470f (2006) and related regulations (*id.* at 28-32). None of these

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<sup>7</sup> These lands are relatively small isolated parcels in or near the City of Ely located principally in secs. 15, 21, and 22, T. 16 N., R. 63 E., Mt. Diablo Meridian, White Pine County, Nevada, and together (before the addition of the “newly acquired parcels”) totaled approximately 105 acres. See <http://www.geocommunicator.gov/blmMap/Map.jsp?MAP=LAND> for T. 16 N., R. 63 E., Mt. Diablo Meridian. With regard to the area of the reservation lands, see [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-context=dt&-ds\\_name=DEC\\_2000\\_SF1\\_U&-CHECK\\_SEARCH\\_RESULTS=N&-CONTEXT=dt&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_P001&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_P003&-tree\\_id=4001&-transpose=N&-all\\_geo\\_types=Y&-redoLog=true&-caller=geoselect&-geo\\_id=label&-geo\\_id=25000US1040&-geo\\_id=27300US1040320339428023500&-search\\_results=25000US1040&-format=&-\\_lang=en&-show\\_geoid=Y](http://factfinder.census.gov/servlet/DTable?_bm=y&-context=dt&-ds_name=DEC_2000_SF1_U&-CHECK_SEARCH_RESULTS=N&-CONTEXT=dt&-mt_name=DEC_2000_SF1_U_P001&-mt_name=DEC_2000_SF1_U_P003&-tree_id=4001&-transpose=N&-all_geo_types=Y&-redoLog=true&-caller=geoselect&-geo_id=label&-geo_id=25000US1040&-geo_id=27300US1040320339428023500&-search_results=25000US1040&-format=&-_lang=en&-show_geoid=Y).

arguments bears on the questions of whether the Tribe may be or must be designated as a cooperating agency in preparing an EIS.

1. “*Jurisdiction by Law*” and *Location of Effects*

In considering whether the Tribe has established its eligibility to become a cooperating agency, we address first its arguments relevant to the requirements that the Tribe have “jurisdiction by law” and that effects occur “on [the] reservation.” The Tribe asserts that “pumping and diverting hundreds of thousands of acre feet of water per year by SNWA will affect the normal flow patterns of that carbonate rock groundwater thus reducing the amount of groundwater and recharge that flows into the Ely Indian Reservation.” SOR at 3. According to the Tribe,

the diversion of water from one basin will affect the other basins. The project describes only seven groundwater basins; however, groundwater basins are separated into aquifers, which are undisputedly hydrologically interrelated. This interrelation may take the form of water movement from one aquifer to another. When differentials in water quality exist, pumping from one of the aquifers can cause water movement that may be associated with degradation of its quality.

*Id.* at 4 (citation omitted). The Tribe maintains that “[e]ven a basic understanding of geographic and hydrological science proves that when groundwater is removed from one basin, then it depletes the water table of surrounding basins.” *Id.* at 22.

The Tribe, however, has offered nothing more than conclusory allegations. It has not submitted any evidence that drawing groundwater from one or more of the Project basins would affect the Steptoe Valley or aquifers underlying the Steptoe Valley. It has submitted no evidence that the groundwater underlying the Steptoe Valley basin is connected to or flows in a common aquifer with groundwater underlying one or more of the basins that are part of the Project or that BLM expects will be affected by the Project. The Tribe simply assumes the effects it asserts will occur, but has offered nothing to show error in BLM’s determination.

The Tribe also asserts that it has at least some “veto” authority over Project operations. The Tribe states:

In February 2008, there was a meeting held again with the BLM, where the Ely Tribe was present. The BLM told the tribes that they would have the authority to essentially control the effects of the groundwater being diverted, specifically the BLM assured the Tribes that, “[i]f the tribes see some effects that they are not comfortable with or if there are effects that the federal government has concerns with, then . . . [SNWA

will have some] flexibility to reduce those effects and to help minimize any other potential effects that might occur.” See Attachment H.

SOR at 5. Later, the Tribe goes further and asserts: “[T]he Tribe, in the February 2008, meeting was assured that if there were negative effects as a result of the groundwater diversion or concerns the Tribe would be able to limit the amount of water being pumped by SNWA.” *Id.* at 16.

However, the meeting notes submitted as Attachment H to the SOR do not imply what the Tribe infers from them. The material the Tribe quotes is found on page 2 of the meeting notes. The quoted statement was a response to the question, posed by a representative of the Confederated Tribes of the Goshute Reservation: “Can the groundwater production wells be shut off?” The meeting notes state that the response was:

If the tribes see some effects that they are not comfortable with or if there are effects that the federal government has concerns with, then having the additional wells will allow SNWA to essentially operate the system with some flexibility to reduce those effects and to help minimize any other potential effects that might occur.

SOR Attachment H at 2. It is not clear that this response was even directed to the Ely Shoshone Tribe (as opposed to the Confederated Tribes of the Goshute Reservation, whose representative asked the question). Certainly, nothing in this statement grants or acknowledges any supposed authority for the Tribe to veto any part of the Project.

The Tribe further asserts that it has “jurisdiction by law” because part of the Project lands are within what the Tribe characterizes as its “treaty lands” or “aboriginal lands.” Referring to the treaty between the United States and the Western Shoshone of October 1, 1863, the Tribe argues:

The Ely Tribe’s treaty lands encompass a vast area of land, much larger than the Tribe’s reservation. A portion of the proposed GWD project studied under the EIS is located on the Tribe’s treaty lands. As a result of its treaty lands, the Ely Tribe has jurisdictional authority to veto parts of the SNWA project and specifically has power to regulate the environment in Indian country as the primary regulator. . . . Any mass diversion of water or the granting of rights-of-ways through the reservation will infringe and detrimentally affect the Ely Tribe’s ability to exercise its treaty rights.

SOR at 16. The Tribe asserts “jurisdictional authority geographically over the treaty and aboriginal lands. The BLM has not asserted anything to rebut the Tribe’s jurisdiction over its treaty or aboriginal lands . . . .” *Id.* at 17.

As a preliminary note, the Tribe does not explain how all the lands that were the subject of the October 1, 1863, treaty between the Federal Government and the western Shoshone are “treaty lands” or “aboriginal lands” of only the Ely Shoshone Tribe. The members of the Ely Shoshone Tribe are not the only Shoshone who are present-day descendants of the western Shoshone of 1863.

More importantly, the extent of the Tribe’s or its predecessors’ “aboriginal” or “treaty” lands is irrelevant. The Tribe does not have legal jurisdiction over all of what it calls its original “aboriginal lands” or “treaty lands.” Under the Tribe’s theory, it would have legal jurisdiction of some kind over the majority of Nevada, parts of southern California, part of northwestern Utah, and part of southern Idaho. There is no legal basis for such a notion. We rejected a similar argument in *Confederated Tribes*:

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).

177 IBLA at 182.<sup>8</sup>

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<sup>8</sup> The Tribe even claims jurisdiction by law on the basis of “ancestral history”: The boundaries being contemplated for the SNWA project not only fall within the aboriginal jurisdiction of the Ely Tribe, but also affect the inherent interests of the Ely Tribe’s ancestral history. Even though the BLM may find that the physical boundaries do not fall within the jurisdiction of the Tribe, there is evidence to suggest that, at the very least, the Ely Tribe reserves an historical interest in the location of the pipeline, which gives the Ely Tribe jurisdictional authority over the geographical boundaries of the proposed GWD project.

SOR at 18. This argument is a *non sequitur*, and we rejected a similar argument in  
(continued...)

In short, the Tribe has not shown that it has “jurisdiction by law” under 40 C.F.R. §§ 1501.6, 1508.5, and 1508.15 over any part of the Project. Nor has the Tribe demonstrated on the present record that the Project will have effects on Ely Shoshone reservation lands.

## 2. “*Special Expertise*”

The Tribe also maintains that it has “special expertise.” The Tribe argues:

On or around July 14, 2008<sup>9</sup>, the Goshute Tribal elders, close relatives of the Ely Shoshone Tribe, accompanied BLM to a site within the geographical boundaries of the GWD Project to examine an American Indian bead, a culturally significant item that was found near a meteorological station, which is at the very least within the aboriginal territory of the Ely Shoshone Tribe. See Attachment J. The Goshutes and the Shoshone Tribes are historically related.

SOR at 7. Along the same lines, the Tribe later argues that

as part of the inspection of the surrounding land, a firm contracted by the BLM found a bead that is believed to be an Indian artifact around the area designated for the pumping station. . . . The BLM is aware of the importance that this bead holds for the Ely Tribe because the Ely Tribal Elders along with the Goshute Tribal Elders all agree that the bead holds significant cultural value to the surrounding tribes.

*Id.* at 18-19. See also *id.* at 22. In substance, the Tribe is arguing that it has special expertise because someone BLM hired found one presumed Indian bead somewhere in an area larger than the State of Connecticut and members of a different tribe looked at it and said it was significant. To call this argument strained is an understatement.

The Tribe also argues that it has “special knowledge concerning its fauna and flora. Additionally, the Ely Tribe is able to determine the value of each of these plants in terms of medicinal purposes or cultural resources.” SOR at 17. However,

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<sup>8</sup> (...continued)

*Confederated Tribes*: “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.” 177 IBLA at 182.

<sup>9</sup> This date is 6 days after the Tribe submitted its request to become a cooperating agency.

the Tribe has not shown that it is likely that plants or animals on its 105-plus acres will be affected by the Project.

Therefore, the Tribe has not demonstrated that it has relevant “special expertise” under 40 C.F.R. §§ 1501.6, 1508.5, and 1508.26. It follows that the Tribe has failed to show that it meets the eligibility criteria to be a cooperating agency.

### 3. *Other NEPA Regulatory Provisions and other Asserted Mandates*

Finally, the Tribe argues that other NEPA provisions or other legal mandates compel BLM to designate the Tribe as a cooperating agency. The Tribe argues: “Failure to include the Tribe as a cooperating agency or to even effectively collaborate with the Tribe is also inconsistent with the government-to-government mandates of NEPA, the federal trust responsibility, and tribal treaty rights.” SOR at 17. The Tribe does not explain what it means by the phrase “government-to-government mandates of NEPA” or cite such supposed mandates. Nothing in the general Federal trust responsibility to Indian tribes compels BLM to designate the Tribe as a cooperating agency. *See* the discussion in *Confederated Tribes*, 177 IBLA at 185, and cases cited. The Tribe has not identified what tribal treaty provision or right supposedly compels such a designation, and we know of none.

The Tribe cites CEQ regulations at 40 C.F.R. § 1503.1(a)(2)(ii) for the proposition that “the lead agency on an EIS must obtain comments from the affected tribe if the environmental effects of a proposed federal action ‘*may* be on a reservation.’” SOR at 20 (emphasis in original). That section does direct an agency that prepares a draft EIS to request the comments of Indian tribes “when the effects may be on a reservation.” That does not imply that the Tribe must be designated a cooperating agency. Moreover, simply because the Tribe is not designated as a cooperating agency does not mean it cannot challenge an EIS as inadequate or in violation of particular requirements.

Because the Tribe has not shown that it is eligible to be a cooperating agency under the governing CEQ regulations, and has not cited any other provision of law that would compel BLM to designate it as a cooperating agency, it necessarily follows that BLM did not commit an error of law and could not have abused its discretion or failed to act rationally in rejecting the Tribe’s request.

*CONCLUSION*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's motion to dismiss is denied and the decision appealed from is affirmed. SNWA's petition to intervene is denied as moot.

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge