



EARTH POWER RESOURCES, INC.

181 IBLA 94

Decided May 12, 2011



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

EARTH POWER RESOURCES, INC.

IBLA 2010-126

Decided May 12, 2011

Appeal from a decision by the Nevada State Office, Bureau of Land Management, rejecting a noncompetitive geothermal lease application for public land within the Sulphur Hot Springs area of Ruby Valley in northeastern Nevada. Motion to Limit Disclosure under 43 C.F.R. § 4.31. NVN-74307.

Decision set aside and remanded; motion to limit disclosure denied; motion to compel arbitration denied.

1. Administrative Procedure: Generally--Confidential Information--
Rules of Practice: Generally

Under 43 C.F.R. § 4.24(a)(4), no Board decision may be based upon any record, statement, file, or similar document, which is not open to inspection by the parties except as provided in 43 C.F.R. § 4.31, which establishes a procedure for submitting documents containing confidential information. Paragraph (a) of § 4.31 provides a basis for submitting information that is not to be disclosed to the *public* (and that is exempt from the mandatory public disclosure requirements of FOIA), but that may be disclosed under paragraphs (b) and (c) *to a party* to the appeal who agrees under oath in writing not to disclose the information except in the context of the proceeding and to return all copies at the conclusion of the proceeding. Where BLM asserts that the record cannot be disclosed to a party to the case, notwithstanding that party's willingness to abide by the conditions included in 43 C.F.R. § 4.31(c), BLM must satisfy the requirements of 43 C.F.R. § 4.31(d). The Board will not grant a motion for nondisclosure to a party to the proceeding of any record, statement, file, or document constituting the basis for the decision on appeal, unless the movant demonstrates that such disclosure is prohibited by law, notwithstanding the protection provided under 43 C.F.R. § 4.31(c). 43 C.F.R. § 4.31(d).

2. Geothermal Leasing: Discretion to Lease--Geothermal Leases:
Generally

Generally, a decision by BLM to refrain from leasing certain lands for geothermal resources will be upheld when the record shows the decision to be a reasoned analysis of the factors involved based upon considerations of public interest and when no sufficient reason to disturb the decision is demonstrated. A BLM decision exercising the agency's discretionary authority to reject a geothermal lease application based solely upon a citation to the National Historic Preservation Act and the fact of the existence of a Traditional Cultural Property in the project area is insufficient to support rejection because, as a procedural rather than a substantive statute, the National Historic Preservation Act does not require absolute protection for a Traditional Cultural Property.

APPEARANCES: Gary E. Di Grazia, Esq., Elko, Nevada, for appellant; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

I. *Summary of the Decision*

Earth Power Resources, Inc. (Earth Power) has appealed from and petitioned for a stay¹ of the effect of an April 19, 2010, decision of the Nevada State Office, Bureau of Land Management (BLM), rejecting its February 27, 2001, noncompetitive geothermal lease application, NVN-74307, filed pursuant to the Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-1028 (2006), for 2,140.58 acres of public land within the Sulphur Hot Springs area of Ruby Valley in northeastern Nevada (Decision). The public lands are situated in secs. 2, 3, 10, 11, and 14, T. 31 N., R. 59 E., Mount Diablo Meridian, Elko County, Nevada.² BLM based its rejection on an ethnographic

¹ By Order dated June 25, 2010 (Stay Order), the Board denied the Petition for Stay.

² BLM has administrative jurisdiction of the mineral interest in 1,511.11 acres of land described in the application. The surface of those lands is privately owned, with a reservation of "all minerals," including geothermal resources. *See* Stay Order. The remaining 629.47 acres are within the Humboldt National Forest, which is under the

(continued...)

study of the entire Ruby Valley area, entitled “The People and Places of Ruby Valley” (ethnographic study), which confirmed BLM’s “previous conclusions that the area in and round Sulphur Hot Springs^[3] in Ruby Valley is culturally and spiritually significant to members of the Te-Moak Tribe of Western Shoshone.” Decision at 2. BLM considers this general area a Traditional Cultural Property (TCP)⁴, extending 1-2 miles in all directions from the Springs. *Id.*

In support of its decision, BLM provided the Board a compact disc of the ethnographic study in a file marked “Proprietary/Confidential Information.” BLM has not made the ethnographic study available to Earth Power, either prior to this appeal, as a matter of public disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (2006) (FOIA), or as part of the administrative record for this appeal. *See* Statement of Reasons (SOR) at 2, 4 (citing letter to Gary E. Di Grazia, Esq., from State Director, dated Nov. 2, 2009, responding to Earth Power’s FOIA request (Ex. B attached to SOR)).⁵ BLM filed a motion to limit disclosure of the entire ethnographic study, requesting that the Board “review the evidence contained within the ethnographic

² (...continued)

administrative jurisdiction of the Forest Service, U.S. Department of Agriculture.

³ Sulphur Hot Springs is located on private lands in sec. 11, T. 31 N., R. 59 E., Mount Diablo Meridian, Nevada.

⁴ Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6 (2006) requires a Federal agency to “take into account the effect of [a proposed Federal] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places].” 16 U.S.C. § 470f (2006); *see* 36 C.F.R. Part 800 (2006); BLM Manual, § 8100 *et seq.*; *Escalante Wilderness Project v. BLM*, 176 IBLA 300, 307-08 (2009). Eligible historic properties may include “[p]roperties of traditional religious and cultural importance to an Indian tribe,” known as TCPs. 16 U.S.C. § 470a(d)(6)(A) (2006); *see Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999); *Pueblo of Sandia v. United States*, 50 F.3d 856, 859-60 n.2 (10th Cir. 1995).

⁵ The State Director’s letter provides two bases for withholding the requested ethnographic study: (1) Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), prohibiting release of records that are exempted by statute, citing the Archaeological Resources Protection Act, 16 U.S.C. § 470hh (2006) (ARPA), and the NHPA, 16 U.S.C. § 470f (2006), and (2) Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5) (2006), which permits the agency to withhold documents containing material that is deliberative and pre-decisional. Letter to Gary E. Di Grazia, Esq., from State Director, dated Nov. 2, 2009, at 1-2.

study as a basis for its decision without disclosing such study to Appellant or any other parties.” Motion to Limit Disclosure at 3, citing 43 C.F.R. § 4.31(d)(2).

Earth Power responded with an Additional Statement of Reasons for Appeal (Additional SOR), asserting that denying it access to evidence upon which BLM relied is “inconsistent with procedural due process,” and deprives it “of the opportunity to propose any mitigation process.” Additional SOR at 1-2. As discussed below, we deny BLM’s motion, as BLM has failed to adhere to the regulatory procedures at 43 C.F.R. § 4.31 for requesting nondisclosure of evidence in a proceeding to a party of record.

The Decision states that exploration drilling and associated construction would likely cause direct and indirect adverse impacts to a traditional area that continues to be used by Native Americans for spiritual reasons. Decision at 2. It concludes that a protective, no surface occupancy stipulation and directional drilling would not be a feasible option, given the size and scope of the TCP. *Id.* We find the dearth of analysis in the Decision’s conclusory discussion and determination of impacts and possible mitigation, the failure to analyze the public interest, and the dearth of analysis and specific factual support in the record unreasonable. *See John L. Stenger*, 175 IBLA 266, 279-80 (2008). Therefore, we set aside and remand the Decision for further consideration and analysis.⁶

II. Background

After receiving Earth Power’s noncompetitive geothermal lease application in 2001, BLM initiated consultation with a number of Tribal chairpersons, including the Tribal Chair of the Te-Moak Tribe of the Western Shoshone (the Tribe), alerting them to the proposal and requesting information about any potential sacred or sensitive locations or TCPs. BLM also sent a letter to the Forest Service seeking its consent to the proposed geothermal lease.⁷ To assess the environmental impacts of the proposal, the Elko District Office, BLM, prepared the 2002 Ruby Lake Geothermal Lease Sale Environmental Assessment (EA) (BLM/EK/PL-2002/011), pursuant to

⁶ Appellant requests that the Board order the parties to participate in alternative dispute resolution, submitting correspondence indicating that BLM opposes such motion. Motion to Compel Arbitration dated Aug. 20, 2010; Letters from Nancy S. Zahedi, Esq., dated Aug. 3, 2010, and July 30, 2010. The motion is denied.

⁷ The Forest Service’s concurrence with leasing is necessary for BLM to issue a lease for National Forest lands. *See* 30 U.S.C. § 1014(b) (2006); 43 C.F.R. § 3201.10(a).

section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).

The EA Subchapter 4.1.2.3 addresses impacts from the Proposed Action to cultural resources, finding that exploration and subsequent development actions could cause direct impacts to cultural resources, looting, loss of research value, and visual impairment of the setting.⁸ The EA notes the history of communications with a number of bands and tribes requesting information on potential sacred or sensitive locations or TCPs, and reports that the Sulphur Hot Spring “has been identified as a possible sacred site for the Western Shoshone.” EA at 3.1.3. It refers generally to concerns and comments raised regarding possible alteration or destruction of a culturally and spiritually significant site and impacts to ceremonial uses of the hot springs, the sacredness of water, opposition to geothermal leasing in the area, and the importance of confidentiality. *Id.* The EA notes that significant impacts to Native American concerns would be avoided under the no action alternative, but that if the Proposed Action were selected, future site-specific environmental analyses, cultural and paleontological resource inventories, archeological surveys, and tribal consultations would be required. *Id.* at 2.2.1, 4.3 to 4.3.3. As TCPs are present, the EA states, “BLM is obligated to assess direct, indirect and cumulative impacts to these locations. Methods to mitigate impacts to these locations must be discussed through Government-to-Government consultation unless the ‘no action’ alternative is chosen.” *Id.* at 4.1.3. In a 2004 Finding of No Significant Impact/Decision Record (FONSI/DR) at 1, BLM selected the “no action” alternative, because of “the strong possibility of a historically and culturally significant site being irreparably altered.” It stated that reconsideration would require an extensive study of the geologic hydrothermal system that expresses at Sulfur Springs to ensure the springs would not be impacted, an extensive ethnographic study and formalizing of information from the Native American tribes that were consulted, and indicated that these actions might lead to nomination of the Sulfur Hot Springs and associated area to the National Register. FONSI/DR at 1.

By decision dated December 21, 2005, the Nevada State Office rejected the lease application, because the lease area “encompass[es] the Sulfur Hot Springs that has been identified as a culturally and spiritually significant location by the Te-Moak Tribe of the Western Shoshone.” Earth Power appealed, and in a September 17,

⁸ The project area falls within Visual Resource Management (VRM) Classes III and IV. EA at 3.1.13. The VRM Class III objective is to partially retain the existing character of the landscape with moderate levels of change. *Id.* at 3.1.13. The Class IV VRM objective is to allow for management activities that involve major modification of the existing character of the landscape. *Id.*; *see also id.* at 4.1.13.

2007, order, we affirmed BLM's December 2005 decision, but on a different basis. The Board determined that most of the lands sought to be leased were within a Known Geothermal Resources Area (KGRA), and thus subject only to competitive leasing, and the remaining lands fell below the 640-acre minimum required for noncompetitive leasing. See Order, *Earth Power Resources, Inc.*, IBLA 2006-145 (Sept. 17, 2007, Order), at 3.⁹ Earth Power sought reconsideration, asserting that the lands were not within a KGRA, and in a December 19, 2007, Order, we vacated our September 2007 Order, and set aside BLM's December 2005 decision. BLM delayed further adjudication of Earth Power's geothermal lease application during a contractor's preparation of the ethnographic study and a programmatic environmental impact statement for geothermal leasing.¹⁰ See Answer at 7, n.3¹¹

On April 19, 2010, the Chief, Branch of Minerals Adjudication, Nevada State Office, issued the Decision on appeal, rejecting Earth Power's geothermal lease application.

The results of additional ethnographic research confirm [the Elko District Office's] and the Nevada State Office's [NSO's] previous

⁹ In dictum, we opined that BLM had failed to substantiate its determination that leasing was likely to adversely affect the Sulphur Hot Springs, stating that "[w]ithout any analysis of potential effects from geothermal activities in the proposed lease area, we are simply unable to affirm BLM's stated rationale for rejecting this lease application." Order at 2. We found the record devoid of any analysis, information, or support for BLM's determination that leasing the lands in question would adversely affect the Sulfur Hot Springs. *Id.* (citing *California Geothermal, Inc.*, 37 IBLA 172, 181-82 (1978); *Christian F. Murer*, 24 IBLA 383, 385-86 (1976).

¹⁰ During that period, BLM and the Forest Service jointly prepared a Final Programmatic Environmental Impact Statement for Geothermal Leasing in the Western United States (PEIS) (October 2008), and a Record of Decision (ROD) was approved on Dec. 17, 2008. However, BLM explains, "[a]lthough USFS deferred consent on the lease application pending completion of [the PEIS], this lease was not actually included in that PEIS, thereby necessitating further site specific NEPA analysis." Answer at 14, n.11. It follows, therefore, that, in the ROD, BLM did not determine that the lease area is unavailable for geothermal leasing.

¹¹ By letter dated Nov. 30, 2009, the Forest Service advised BLM that it would not take further action to determine the availability of Forest Service land in connection with the application, noting that BLM's Field Office had recommended that leasing be denied on BLM-managed lands and that it would be unlikely that the Forest Service lands could be independently developed.

conclusions that the area in and around Sulphur Hot Springs in Ruby Valley is culturally and spiritually significant to members of the Te-Moak Tribe of Western Shoshone as the NSO had previously determined in the December 21, 2005, decision. Results of consultation with tribes led BLM to the conclusion that the property is a [TCP] eligible for the National Register under criterion “a.”^{12]} The boundaries of this TCP would likely extend for a distance of 1-2 miles in all directions from a point centered at Sulphur Hot Springs. It is incumbent upon BLM to determine whether leasing the lands within geothermal lease application N-74307 surrounding Sulphur Hot Springs would cause adverse impacts to the traditional lifeways that are of importance to the Western Shoshone community. First, indirect visual impacts represent potential adverse effects equal in importance to direct effects. The construction of buildings, an associated powerline, upgrading of roads, and noise would all create adverse impacts to the traditional area that continues to be used by Native Americans for spiritual reasons. Second, the waters located at Sulphur Hot Springs, both surface and underground, are an important spiritual component to the TCP. Exploration drilling that would precede development would likely cause both direct and indirect adverse effects to the TCP, and, absent [] data that demonstrates otherwise, could cause the hot springs to cease flowing, thereby causing irreparable harm to the TCP. Because of the size and scope of the TCP, and the high potential of both direct and indirect adverse effects occurring to the TCP through geothermal leasing, directional drilling is not a feasible option. Thus, a “no surface occupancy” stipulation attached to a lease would not be a feasible option for the proponent.

Decision at 2. It stated that “issuance of a lease for the lands contained in geothermal lease application N-74307 would cause unnecessary or undue degradation to public lands and resources” under 43 C.F.R. § 3201.11(a). Recognizing that “[t]he issuance of a geothermal lease is a discretionary federal action,” the Decision rejected the lease application. *Id.* at 3. Earth Power timely appealed. We begin our analysis with consideration of BLM’s motion to limit disclosure of the ethnographic study.

¹² The regulation at 36 C.F.R. § 60.4, defines criterion “a” as: “The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location design, setting, materials, workmanship, feeling and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history.”

III. Failure to Adhere to 43 C.F.R. § 4.31

A. The Regulations at 43 C.F.R. § 4.31

[1] Ordinarily, the administrative record that forms the basis of a decision by the Board consists of public records that are open to inspection by the public as provided in 5 U.S.C. § 552 (2006). *See Center for Native Ecosystems*, 161 IBLA 135, 138 (2004). Under 43 C.F.R. § 4.24(a)(4), no Board decision may be based upon any record, statement, file, or similar document,¹³ *which is not open to inspection by all parties*, except as provided in 43 C.F.R. § 4.31. Promulgated in 1988, 43 C.F.R. § 4.31 establishes a procedure for submitting documents containing confidential information. 53 Fed. Reg. 49,658, 49,661 (Dec. 9, 1988); *see also* proposed rulemaking at 52 Fed. Reg. 20,755 (June 3, 1987). The confidentiality regulations were intended to codify the standard for disclosure of confidential information that the Board had applied since its decision in *Southern Union Exploration Co.*, 51 IBLA 89, 92-95 (1980).¹⁴ *See* 53 Fed. Reg. 49,658-59; 52 Fed. Reg. at 20,755.

The regulations at 43 C.F.R. § 4.31 “distinguish between disclosing information to the general public and release of information to parties engaged in a proceeding before the Department.” *Yates Petroleum Corp.*, 175 IBLA 44, 47 n.4 (2008); *see* 53 Fed. Reg. at 49,659. Paragraph (a) of this section provides a basis for submitting information that is not to be disclosed to the *public* (and that is exempt from the mandatory public disclosure requirements of FOIA), but that may be disclosed under paragraphs (b) and (c) *to a party* to the appeal who agrees under oath in writing not to disclose the information except in the context of the proceeding and to return all copies at the conclusion of the proceeding. 43 C.F.R. § 4.31(a).

In the case before us, BLM asserts that the record cannot be disclosed even to appellant, notwithstanding any willingness on the part of Earth Power to abide by the conditions included in 43 C.F.R. § 4.31(c), and notwithstanding the rule at

¹³ When referring generally to the provisions of 43 C.F.R. § 4.31, we use the term “document” to denote “record, statement, file, or document.”

¹⁴ “[T]he appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness if disputed on appeal.” *Southern Union Exploration Co.*, 51 IBLA at 92 (citations omitted).

43 C.F.R. § 4.31(a)(2)(i), allowing BLM to serve upon appellant a copy of the ethnographic study from which confidential information has been redacted. BLM, thus, makes its request under 43 C.F.R. § 4.31:

(d) If any person submitting a document in a proceeding under this Part other than a hearing conducted pursuant to 5 U.S.C. 554 claims that a disclosure of information in that document to another party to the proceeding is prohibited by law, notwithstanding the protection provided under paragraph (c) of this section, such person:

(1) Must indicate in the original document that it contains information of which disclosure is prohibited;

(2) Must request that the presiding officer or appeals board review such evidence as a basis for its decision without disclosing it to the other party or parties, and serve the request upon the parties to the proceeding. The request shall include a copy of the document or description as required by paragraph (a)(2)(i) of this section and state why disclosure is prohibited, citing pertinent statutory or regulatory authority. If the prohibition on disclosure is intended to protect the interest of a person who is not a party to the proceeding, the party making the request must demonstrate that such person refused to consent to the disclosure of the evidence to other parties to the proceeding.

(3) If the presiding officer or an appeals board denies the request, the person who made the request shall be given an opportunity to withdraw the evidence before it is considered by the presiding official or board unless a [FOIA] request, administrative appeal from the denial of a request, or lawsuit seeking release of the information is pending.

As indicated in subsection (d)(2), the person requesting nondisclosure even to a party to the proceeding before the Board must “include a copy of the document or description as required by paragraph (a)(2)(i) of this section.” The copy, permitted to be served upon the party in lieu of the entire document, is a redacted version— “[a] copy of the document from which has been deleted the information for which the person requests nondisclosure.” 43 C.F.R. § 4.31(a)(2)(i). If, however, “it is not practicable to submit such a copy of the document because deletion of the information would render the document unintelligible, a description of the document may be substituted.” *Id.* Finally, if the presiding official or Board denies the nondisclosure request, the rules provide an opportunity for the person who made the request “to withdraw the evidence” before consideration by the Board. 43 C.F.R. § 4.31(d)(3).

Thus, the rules at 43 C.F.R. § 4.31 recognize certain circumstances under which the Board may grant a *request for nondisclosure to the public* of confidential material submitted as part of the administrative record, and, under more limited circumstances, may grant a request for nondisclosure *to a party to a proceeding*, such as Earth Power, or may direct that such material be made available to the party only *in redacted form or by description*. We turn now to an examination of BLM's motion and its adherence to these rules.

B. *BLM's Description of the Study*

BLM states that “[a]s it is not practicable to submit a redacted copy of the Ethnographic Study since deleting protected information would render the document largely unintelligible for the purposes for which it was prepared, a description of document is substituted instead as required under 43 C.F.R. § 4.31(d)(2).” Motion to Limit Disclosure at 2-3. BLM describes the ethnographic study in two paragraphs. The first refers to the study as “a two volume report that identifies, describes and provides recommendations as to the significance (*e.g.*, eligibility for listing on the National Register of Historic Places or qualification as sacred sites under Executive Order 13007) of locations in Ruby Valley having traditional, sacred, ceremonial, religious or ritual significance to the Shoshone people.” Motion to Limit Disclosure at 3. It states that “[i]nformation was gathered from historical and ethnographic documents and from interviews with Western Shoshone elders who are familiar with Ruby Valley.” *Id.* The remainder of the description follows:

The report contains a variety of sensitive information protected from disclosure, including descriptions and map plots of special places and their uses, personal information about the interviewees (name, age, birth place, names and birthdates of parents, siblings, etc.). Many of the locations contain archeological components, in addition to historic ones. Other locations (not identified as such) are also likely to contain archeological components, but have not been visited or recorded by an archeologist.

Id.

We find this description wanting. Since, however, BLM is permitted to serve that description upon appellant as a substitute for the ethnographic study *only after* BLM has made certain requisite showings (*i.e.*, disclosure of the document to appellant is prohibited by law; demonstration that any person, who is not a party to the proceeding and whose interest BLM seeks to protect by a prohibition on disclosure, has refused to consent to disclosure to parties; and submission of a redacted copy of the document is impracticable), we focus our attention on BLM's

compliance with those threshold requirements of 43 C.F.R. § 4.31(d).

C. BLM Fails to Show that Disclosure of the Ethnographic Study in Whole or in Part is Prohibited by Law

As indicated, BLM did not seek to utilize the protections afforded by 43 C.F.R. § 4.31(b) and (c). Instead, BLM requests “non-disclosure of the study in its entirety,” claiming that this study includes information concerning the nature, location, character and ownership of archeological and historical resources that are protected from disclosure” under the ARPA, 16 U.S.C. § 470hh (2006),¹⁵ and the NHPA, 16 U.S.C. § 470w-3 (2006). Motion to Limit Disclosure at 2.

Generally, the ARPA prohibits disclosure of information concerning the nature and location of archeological resources unless it determines that such disclosure would “further the purposes” of the Act and would “not create a risk of harm to such resources or to the site at which such resources are located.” 16 U.S.C. § 470hh(a)(1)-(2) (2006). BLM asserts that disclosure of the ethnographic study to appellant or the public “would not fall within the exception to the prohibition on disclosing information concerning the nature and location of archeological resources under ARPA.” Motion to Limit Disclosure at 2.

The NHPA provides that BLM is prohibited, under certain circumstances, from disclosing information to the public concerning “the location, character or ownership of a historic property” if disclosure may cause a significant invasion of privacy, risk of harm to the historic resources, or impede the use of a traditional religious site by practitioners.” 16 U.S.C. § 470w-3(a) (2006). BLM states that disclosure of the ethnographic study to appellant or the public “would be inconsistent with the confidentiality provisions of NHPA.” Motion to Limit Disclosure at 2.

BLM has the discretionary authority to grant or deny a geothermal lease application, but appellant has the right to appeal BLM’s decision rejecting its application, and, to borrow from *Southern Union Exploration Co.*, 51 IBLA at 95, “[r]efusal to inform a good-faith appellant of the basis for rejection” of its application “renders the right of appeal, which the Secretary has afforded, virtually meaningless.” Similarly, a geothermal applicant contending that mitigation measures may protect sensitive resources must be advised of the basis for BLM’s determination regarding mitigation in order to challenge that decision. If BLM would deny Earth Power

¹⁵ ARPA provides certain protections for any “material remains of past human life or activities,” which are found on public lands, are of archeological interest, and are at least 100 years old. 16 U.S.C. § 470bb(1) (2006).

information that the agency relied upon to summarily dismiss the possibility of mitigation and to deny Earth Power's application, the agency must clearly demonstrate that disclosure of that information, not just to the public, but specifically to a party to a proceeding before this Board, is prohibited by law.¹⁶

Identification of the specific location of a property subject to protection, as well as its nature or character, is fundamental to the public disclosure concerns in both statutes, just as it is fundamental to a geothermal applicant's ability to devise potential mitigation strategies to protect important resources. In its description of the ethnographic study, BLM states generally that "[m]any of the locations contain archeological components, in addition to historic ones," and that "[o]ther locations (not identified as such) are also likely to contain archeological components, but have not been visited or recorded by an archeologist." Motion to Limit Disclosure at 3.

BLM refers apparently colloquially, without reference to statutory definitions, to "archeological components, in addition to historic ones." Motion to Limit Disclosure at 3. BLM does not explicitly aver, in this description or any pleading, that the ethnographic study at issue identifies any "archeological resources" (as defined at 16 U.S.C. § 470bb(1) (2006)) potentially subject to the protections afforded by ARPA, nor does it point to any other record evidence of such "archeological resources" or "the site at which such resources are located." It does not show how disclosure to Earth Power of the nature and location of any such "archeological resources" would fail to further the purposes of the ARPA and create a risk of harm to such resources or to the site at which such resources are located. See 16 U.S.C. § 470hh(a)(1)-(2) (2006).

On the other hand, the ethnographic study does identify sites that may be eligible for inclusion in the National Register as a TCP, but even here, BLM has failed to demonstrate that it is prohibited by law from disclosing to appellant *any specific, much less all*, information regarding "the location, character or ownership of a historic property." 16 U.S.C. § 470w-3(a) (2006); see also 36 C.F.R. § 800.11(c). BLM fails to follow the systematic, procedural steps mandated by Congress as necessary to show that certain information is prohibited from disclosure under the NHPA.

¹⁶ As a preliminary matter, it is not clear whether the nondisclosure provisions of either ARPA or NHPA are properly applied not only to the public, but also to a party to a proceeding before us. We need not, however, consider this issue further, as, even assuming the applicability of those statutory provisions, we find that BLM has otherwise failed to justify its reliance on ARPA and NHPA for its conclusory assertions that BLM is prohibited by law from disclosing the ethnographic study in whole or in part to appellant.

Section 304 of the Act states that

[t]he head of a Federal agency . . . , *after consultation with the Secretary*, shall withhold from disclosure to the public information about the location, character, or ownership of a historic resource *if the Secretary and the agency determine that disclosure may—(1) cause a significant invasion of privacy; (2) risk of harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners.*

16 U.S.C. § 470w-3(a) (2006) (emphasis added); *see also* 36 C.F.R. § 800.11(c)(1). After determining that information should be withheld, “the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this subchapter.” 16 U.S.C. § 470w-3(b). The statute then states: “When the information in question has been developed in the course of an agency’s compliance with section 470f . . . of this title [as this information certainly was], the Secretary shall consult with the Council [Advisory Council on Historic Preservation] in reaching the determinations under subsections (a) and (b) of this section.” *Id.* § 470w-3(c). Under the Council’s NHPA regulations at 36 C.F.R. § 800.11(c), because the proposed project is on Federal lands, BLM also must provide the Council with the views of the Nevada State Historic Preservation Officer and the Tribe, related to the confidentiality concern. 36 C.F.R. § 800.11(c)(2).

BLM does not assert and the record does not reflect that BLM consulted with the Secretary or authorized delegate to determine whether any information regarding “the location, character or ownership of a historic property” meets the three criteria for nondisclosure under 16 U.S.C. § 470w-3(a) (2006); that the Secretary or authorized delegate determined who may have access to the information; and that the Secretary or authorized delegate consulted with the Council, the Nevada State Historic Preservation Officer, and the Tribe in making those determinations. Without following these procedures, BLM cannot make a nondisclosure determination, cannot demonstrate that disclosure is prohibited by law, and cannot sustain a request under 43 C.F.R. § 4.31(d). BLM has not “met its burden of proving the materials included within [the study] are the type described in the Act.” *Hornbostel v. U.S. Dept. of the Interior*, 305 F. Supp. 2d 21, 32-33 (D.D.C. 2003), *as amended*, (Feb. 18, 2004), *aff’d* 2004 WL 1900562 (D.C. Cir. 2004).¹⁷ Thus, BLM has not supported its assertions

¹⁷ In *Hornbostel v. U.S. Dept. of the Interior*, 305 F. Supp. 2d at 32-33, the Court held, in part, that the Department did not meet its burden of proving that research information was protected from disclosure by FOIA Exemption 5 (on the basis that
(continued...))

that the NHPA prohibits the agency from disclosing the ethnographic study to appellant. Accordingly, BLM has not justified its reliance on 43 C.F.R. § 4.31(d) by demonstrating that disclosure of information in the ethnographic study “to another party to the proceeding” is prohibited by law, notwithstanding the protection provided under paragraph (c) of this section.”¹⁸ The Board will not grant a motion for nondisclosure to a party to the proceeding of any record, statement, file, or document constituting the basis for the decision on appeal, unless the movant demonstrates that such disclosure is prohibited by law, notwithstanding the protection provided under 43 C.F.R. § 4.31(c). 43 C.F.R. § 4.31(d).

D. BLM Fails to Justify Submission of a Description of the Study

In light of our determination that BLM has not justified its reliance on 43 C.F.R. § 4.31(d) to withhold the ethnographic study from appellant on the grounds stated, it is clear that BLM was not authorized to serve upon appellant merely a description of the study. In the event that BLM could support the withholding of particular information, such as names and addresses, the regulations, at 43 C.F.R. § 4.31(d)(2), provide for service of a redacted copy of the study. Only if that is not practicable, would BLM be authorized to substitute a description for the study. 43 C.F.R. § 4.31(a)(2)(i). Instead, BLM served Earth Power only a description of the study, mirroring the language of the rule in contending that “it is not practicable to submit a redacted copy of the ethnographic study since deleting protected information would render the document largely unintelligible for the purposes for which it was prepared.” Motion to Limit Disclosure at 2-3.¹⁹ BLM failed

¹⁷ (...continued)

disclosure would be forbidden by the NHPA and thus not permitted under civil discovery rules), because *the Secretary had not determined*, as required by the NHPA, that disclosure of the information about the resources would fit into one of the three subcategories of 16 U.S.C. § 470w-3(a) (2006).

¹⁸ We further note that BLM does not aver or provide evidence that it has complied, as appropriate, with the provision of 43 C.F.R. § 4.31(d)(2), which states that “[i]f the prohibition on disclosure is intended to protect the interest of a person who is not a party to the proceeding, the party making the request must demonstrate that such person refused to consent to the disclosure of the evidence to other parties to the proceeding.”

¹⁹ BLM offers no justification for this contention. For example, BLM does not attempt to distinguish between the “two volumes” of the study—the text, which is not marked “confidential,” and the appendices, only some of which are marked

(continued...)

to justify service upon appellant of only a description of the study.

We acknowledge BLM's sensitivity to the confidentiality concerns of tribes, and to its mandate under Federal law to afford protections to certain information under discrete circumstances. We also are cognizant of the difficulties that BLM faces as a public land management agency in gathering, through consultation and research, information on sites or artifacts sacred or otherwise important to Native Americans, and in relying on that information to make wise and informed land use decisions, when release of spiritually, culturally or archeologically significant information is often considered to have grave consequences in the tribal community, whether or not it is prohibited from disclosure by law. Nevertheless, our task is to assess the motion before us, in light of statutory requirements and duly promulgated Departmental regulations. Because BLM has not meaningfully adhered to the procedures provided in 43 C.F.R. § 4.31 for requesting nondisclosure of record evidence to a party to the proceeding, the motion is denied. The denial of BLM's motion under 43 C.F.R. § 4.31 means that we cannot issue a decision that is based on evidence, "which is not open to inspection by the parties to the hearing or appeal." 43 C.F.R. § 4.24(a)(4).

Ordinarily, we would provide BLM "an opportunity to withdraw the evidence before it is considered" by the Board, since, to our knowledge, there is no pending

¹⁹ (...continued)

"confidential." Nor does it distinguish between documents within those volumes, such as maps identifying specific locations of places that may be eligible for nomination to the National Register and attachments of historical documents, such as a treaty. In its motion, BLM states that certain information in the study "was gathered from historical and ethnographic documents," some of which, it seems clear, are within the public realm, and yet BLM does not explain why all of that information is prohibited by law from disclosure to appellant, or why it would be impracticable to redact as appropriate. As noted, BLM does not claim, in the case of ARPA, that any particular information concerns "archeological resources" as defined in ARPA,

16 U.S.C. § 470bb(1) (2006), and does not attempt to protect assertedly confidential information with a confidentiality agreement under 43 C.F.R. § 4.31(c) or by redaction. With respect to NHPA, we have determined that BLM failed to support its claim that the Act prohibits disclosure of the ethnographic study to appellant. We note further that, although BLM points to the need to protect "personal information about the interviewees" (Motion to Limit Disclosure at 3), it gives no explanation why that material is not easily segregable and redacted from the study. BLM declined to engage in a reasoned analysis, claiming summarily that it was impracticable to redact material prohibited from disclosure by law and that the resulting document would be unintelligible. Even a cursory look at the study proves otherwise.

“[FOIA] request, administrative appeal from the denial of a request, or lawsuit seeking release of the information.” 43 C.F.R. § 4.31(d)(3). However, we are mindful of the protracted time and process that have ensued since Earth Power submitted its application for a noncompetitive geothermal lease on February 27, 2001. Accordingly, for the sake of administrative justice and economy, and in light of our determination explained below, we proceed to adjudicate the appeal.

IV. Analysis

[2] Decisions whether to grant or reject an application for geothermal lease, and whether to attach stipulations to a lease are committed to the discretion of BLM. *Evans-Barton, LTD*, 175 IBLA 29, 34-35 (2008); *Atlantic Richfield Co.*, 63 IBLA 263, 264-65 (1982); *Oxy Petroleum, Inc.*, 36 IBLA 59, 60 (1978) (citing *Cortex Inc.*, 34 IBLA 239 (1978); *Eason Oil Co.*, 24 IBLA 221 (1976)). “Generally, a decision by BLM to refrain from leasing certain lands for geothermal resources will be upheld when the record shows the decision to be a reasoned analysis of the factors involved based upon considerations of public interest and when no sufficient reason to disturb the decision is demonstrated.” *Earth Power Corp.*, 55 IBLA 249, 255, 88 I.D. 609 (1981) (citing *California Geothermal, Inc.*, 37 IBLA 172 (1978)); see *Southern Union Production Company*, 27 IBLA 54, 56 (1976); *Eason Oil Co.*, 24 IBLA at 224-25.

This case involves an application for a renewable energy resource on land open to geothermal leasing under the applicable RMP. BLM does not contend that there are any statutory or land use plan restrictions on geothermal leasing in the project area.²⁰ Nevertheless, BLM’s Decision seeks to protect the entire project area from geothermal leasing in order to protect a TCP, identified only generally in the Decision and without analysis, as “likely extend[ing] for a distance of 1-2 miles in all directions from a point centered at Sulphur Hot Springs.” Decision at 2. Appellant contends that BLM has not adequately explained and supported the basis for the conclusion that the proposed lease will degrade a spiritually and culturally significant site, and that this claim, without analysis of the public interest, does not constitute a reasoned decision. SOR at 4-5. We agree. BLM does not explain, in any detail in the Decision or in the record, how appellant’s geothermal leasing proposal is likely to impact the entire project area, including the vaguely-defined “1-2 mile-wide TCP,” in light of the existing environmental baseline, *i.e.*, it does not describe how and to what extent geothermal leasing would impact specific values in specific places. In

²⁰ For instance, BLM chose not to include the project area in an area of critical environmental concern by which BLM identifies “areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to historic, cultural, or scenic values.” 43 U.S.C. § 1702(a) (2006).

addition, BLM's Decision does not provide a reasoned explanation for summarily discounting the possibility and adequacy of protective stipulations, and does not provide a reasoned analysis of the factors involved based upon considerations of public interest.

We have stated that, in reaching its decision to refrain from leasing certain lands for geothermal resources, "BLM may follow the recommendation in an [environmental analysis]. However, BLM should set forth in its decision appropriate references to the particular [environmental analysis] and other relevant documents in order to provide sufficient basis for its determinations." *California Geothermal Inc.*, 36 IBLA at 180-81. BLM has not adequately done so here. The Decision on appeal relies on the 2002 EA and the ethnographic study (Decision at 3), but its general references to both do not constitute a reasoned, well-supported analysis.²¹ Appellant, as the recipient of a BLM decision, is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. *John L. Stenger*, 175 IBLA at 279 (quoting *The Pittsburgh & Midway Coal Mining Co. v. OSM*, 140 IBLA 105, 109 (1997)).²²

Furthermore, BLM's Decision also does not provide a "reasoned analysis of the factors involved based upon *considerations of public interest*." *Earth Power Corp.*, 55 IBLA at 255 (emphasis added). It is undisputed that protecting the cultural values of Native Americans, and not impeding their land-based exercise of religion is a

²¹ As indicated above, BLM prepared the 2002 EA prior to contracting for preparation of the ethnographic study. It determined that the EA provided only enough information regarding impacts to cultural resources for the agency to decide it could not make a finding of no significant impact. Although it recognized the possibility of mitigative measures, it deferred identification and analysis of any such measures, as well as specific impacts in light of stipulations, anticipating that additional site-specific environmental analyses would be required in the future, as would an ethnographic study. EA at 2.1, 11; FONSI/DR at 1; Answer at 3, n.2 ("[I]t appears that further NEPA analysis in the form of an Environmental Impact Statement (EIS) would have been the next step if BLM had not issued its decision to deny the application.").

²² And while "[t]he burden is on the geothermal lease applicant to show that exploration and development activity would not adversely affect the land" (*Atlantic Richfield Co.*, 63 IBLA at 264-65), BLM cannot rely on appellant's responsibility to justify keeping from appellant a reasoned decision that would allow it to understand, accept or appeal it.

matter of importance for the Department, and may, as here, be an appropriate public interest consideration. See *Evans-Barton, LTD*, 175 IBLA at 34-35. However, as appellant avers and BLM does not dispute, even if the Decision reasonably demonstrated that the proposed project is likely to adversely impact a TCP covering the entire project area, BLM cannot simply cite the NHPA and rely on the fact of a TCP's existence to reject a geothermal application, because, as a procedural rather than a substantive statute, the NHPA does not require absolute protection for a TCP. See *Coliseum Square Association, Inc. v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007); *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 347-48 (2005). It was incumbent upon BLM to reasonably explain in the Decision, as supported by the record, how geothermal leasing would be incompatible with a particular public purpose and how the public interest clearly favors preserving the status quo. *George G. Witter*, 129 IBLA 359, 363 (1994). A BLM decision exercising the agency's discretionary authority to reject a geothermal lease application must do more than implicitly favor one public interest over another. It must clearly reflect and articulate a reasonable public interest analysis, supported in the record.

BLM, responding to appellant's assertion that there is a public benefit to establishing "environmentally-friendly sources of energy," and that geothermal development would result in job creation (SOR at 7), states "BLM considered the available information, including the 2009 ethnographic study, and has determined that the public interest does not demand that this TCP be sacrificed to the needs of Appellant's geothermal project." Answer at 18. Although BLM cites the Decision, it provides no page number, and we could find no discussion of or reference to the public interest in the Decision.

Indeed, as appellant's application was for a renewable energy resource, we might have expected BLM to give far more consideration to the public interest analysis than is evident in the Decision or record. In *Earth Power Corp.*, 55 IBLA at 255, we remanded the case to BLM "for further study to determine if geothermal resources leases can reasonably be issued with less onerous stipulations than the no surface occupancy stipulations originally proposed, without destroying the scenic and recreational values of the site." We did so "in light of the recently expressed policy of the Congress in support of the multiple use of land and of the development of geothermal resources [Geothermal Steam Act], and in light of the report of the Geological Survey that the lands sought are indeed valuable for geothermal resources." Since then, Departmental policy has continued to recognize the importance of renewable energy. On March 11, 2009, Secretary Salazar issued Secretarial Order No. 3285 (SO), recognizing that "[e]ncouraging the production, development, and delivery of renewable energy is one of the Department's highest

priorities.” SO, sec. 4. He established a policy that “[a]gencies and bureaus within the Department will work collaboratively with each other, and with other Federal agencies, departments, states, local communities, and private landowners to encourage the timely and responsible development of renewable energy and associated transmission while protecting and enhancing the Nation’s water, wildlife, and other natural resources.” *Id.* And the Secretary established a task force to track progress and “identify and resolve obstacles to renewable energy permitting, siting, development, and production.” SO, sec. 5.

Furthermore, we recognize, as we have before, that “[c]omplete rejection of a lease offer is more extreme than the most stringent stipulation imposed for the protection of the environment, and when an offer is rejected to protect the environment the record should show that BLM considered imposing stipulations to protect the public interest.” *George G. Witter*, 129 IBLA at 365 (citing *Robert G. Lynn*, 76 IBLA 383, 385 (1983); *Connie Mull*, 63 IBLA 317, 319 (1982); *Stanley M. Edwards*, 24 IBLA 12, 18, 88 I.D. 33, 35 (1976)); *see also Earth Power Corp.*, 55 IBLA at 255. In this appeal, BLM is similarly obliged to fully analyze whether protective stipulations would be appropriate. BLM acknowledges as much in its Answer at 17, when it quotes *Atlantic Richfield Co.*, 63 IBLA at 265, where the Board stated that “lease offers should not be rejected because of the presence of other values without prior consideration being given to the feasibility of imposing special stipulations to achieve the same protection.” But BLM’s mere acknowledgment of this responsibility in its Answer and in the Decision, where it made passing reference to the asserted impossibility of directional drilling, fails to satisfy its burden of providing a reasoned analysis supported in the record. We, therefore, find that Earth Power has sustained its burden of showing that BLM’s discretionary Decision does not provide a “reasoned analysis of the factors involved based upon considerations of public interest.” *Earth Power Corp.*, 55 IBLA at 255.

Accordingly, 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 limit disclosure under 43 C.F.R. § 4.31 is denied, appellant's motion to compel arbitration is denied, and the Decision is set aside and remanded for action consistent with this decision.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge