



CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

188 IBLA 102

Decided July 28, 2016



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CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

IBLA 2014-81

Decided July 28, 2016

Appeal from a Record of Decision of the Field Manager, Egan (Nevada) Field Office, Bureau of Land Management, approving a plan of operations and the grant of an electrical transmission line right-of-way for an open-pit gold mining project. NVN-090444 and NVN-091899.

Appeal dismissed.

1. Administrative Procedure: Standing;
Appeals: Generally;
Mining Claims: Plan of Operations;
Rules of Practice: Appeals: Standing to Appeal

The Board properly dismisses an appeal by an Indian tribe from a BLM decision to approve a plan of operations for an open-pit gold mining project where the appellant tribe fails to establish that it has a legally cognizable interest that is substantially likely to be injured by mining operations and related activity.

APPEARANCES: Paul C. EchoHawk, Esq., Seattle, Washington, for appellant; Laura K. Granier, Esq., Reno, Nevada, for Midway Gold U.S., Inc.; Janell M. Bogue, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The Confederated Tribes of The Goshute Reservation (Tribe), a Federally-recognized Indian tribe, appealed from and petitioned for a stay of the December 20, 2013, Record of Decision (ROD) of the Field Manager, Egan (Nevada) Field Office, Ely District, Bureau of Land Management (BLM). The ROD approved Plan of Operations (POp), NVN-090444, for the Pan Mine Project (Project), an open-pit gold mining operation, sought by Midway Gold U.S., Inc. (Midway) and the grant of a 69 kilovolt (kV) electrical transmission line right-of-way (ROW), NVN-091899, for

the Project. By Order dated February 14, 2014, we granted Midway's motion to intervene in the pending proceeding. By Order dated August 19, 2014, we denied the Tribe's petition for a stay.

Midway asserts that the Tribe lacks standing to appeal from BLM's decision to approve the Project, since it has not shown it is adversely affected by that decision, and moves to dismiss the Tribe's appeal.¹

An appellant must have standing to bring an appeal.² To demonstrate standing, an appellant must be a party to the case and adversely affected by the decision it appeals. In demonstrating adverse effect, an appellant must identify a legally cognizable interest that is or is substantially likely to be injured by the decision. "[T]he burden falls upon the appellant to make colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual that are sufficient to establish a causal relationship between the approved action and the injury alleged."³ Here, the Tribe asserts that BLM's decision will adversely affect it because the Project area encompasses its ancestral homelands.⁴ However, the Tribe does not identify, with any specificity, resources that constitute its legally cognizable interest or the harm that will occur from BLM's decision. Therefore, notwithstanding the importance the general area may have to the Tribe, we conclude that, in bringing this appeal, the Tribe has not met its burden to make a colorable allegation that the decision it is appealing injures or is substantially likely to injure any legally cognizable interest of the Tribe, as required by 43 C.F.R. § 4.410. Accordingly, the Tribe does not have standing to appeal and we must dismiss its appeal.

I. Background: BLM Undertook Environmental Analysis and Tribal Consultations for the Project

The Project is located in the Pancake Mountain Range of White Pine County, Nevada, approximately 50 miles west of Ely, Nevada, and 190 miles from the Tribe's Reservation. Under the approved Project, Midway, the owner and operator of the various mining claims encompassed by the Project area, would undertake open-pit gold mining operations, involving two large pits (totaling 439 acres), three smaller satellite

¹ See Opposition to Petition for Stay at 1-2, 6-8; Answer at 1, 4-5.

² 43 C.F.R. § 4.410(a).

³ *Western Watersheds Project (WWP)*, 185 IBLA 293, 299 (2015); see also *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004) (quoting *Fred E. Payne*, 159 IBLA 69, 73 (2003)); *Colorado Open Space Council*, 109 IBLA 274, 280 (1989).

⁴ Statement of Reasons (SOR) at 2.

pits, and related facilities, including crushing facilities, heap leaching pad and associated conveyors, processing facilities and ponds, water supply wells, stockpiles, waste rock disposal areas, haul and access roads, and ancillary facilities.⁵ Mining and associated operations would take place, pursuant to the United States Mining Laws and their implementing regulations.⁶ Electrical power necessary for Project activities would be supplied by means of a 34.6-mile-long 69 kV electrical transmission line. The Project is expected to disturb the surface of a total of approximately 3,301 acres of public land in a 13,650-acre Project area situated in T. 16 N., R. 53 E., Ts. 15-17 N., R. 54 E., and Ts. 16-18 N., R. 55 E., Mount Diablo Meridian, White Pine County, Nevada. Reclamation would be undertaken concurrently during construction and mining operations, concluding after mine closure. The life of the Project is expected to be 48 years, with mining anticipated to last 13 years.

BLM conducted an intensive pedestrian survey intended to locate and record historic properties, known as a Class III survey,⁷ in the Project area, identifying 158 cultural resources, 75 of which were deemed historic properties eligible for listing on the National Register of Historic Places (National Register).⁸ It did not identify any Traditional Cultural Properties--a property having "traditional religious and cultural importance to an Indian tribe," which is subject to consideration for preservation under the National Historic Preservation Act (NHPA).⁹

Early in its decision-making process, BLM sought to engage in regular and meaningful consultation with Native American tribes that might be interested in the Project.¹⁰ It provided notice to 11 tribes, including the Tribe, on June 7, 2012, more than a year before the finalization of the October 2013 EIS and issuance of the December 2013 ROD.¹¹ Only the Duckwater Shoshone Tribe, whose reservation is the closest one to the Project area, being situated approximately 27 miles south, and the Yomba Shoshone Tribe responded to the June 2012 letter.¹² Thereafter, BLM met

⁵ See generally Environmental Impact Statement (EIS) at 2-2 to 2-55.

⁶ 30 U.S.C. §§ 21-54 (2012); 43 C.F.R. Subpart 3809.

⁷ BLM Manual 8110.2.21.C.1, C.3; see *Montana Wilderness Association v. Connell*, 725 F.3d 988, 1006 (9th Cir. 2013).

⁸ See EIS at 3-110 to 3-111.

⁹ 16 U.S.C. § 470a(d)(6)(A) (2012); see EIS at 3-110, 3-112, 3-114; *Western Watersheds Project*, 175 IBLA 237, 253-55 (2008); *Save Medicine Lake Coalition*, 156 IBLA 219, 260 (2002), *aff'd sub nom.*, *Pit River Tribe v. BLM*, 306 F. Supp.2d 929 (E.D. Cal. 2004), *rev'd on other grounds*, 469 F.3d 768 (9th Cir. 2006).

¹⁰ See ROD at 13-14; EIS at 3-113 to 3-115.

¹¹ EIS at 3-113; see ROD at 14.

¹² See ROD at 14; EIS at 3-114; BLM Answer at 9.

with representatives of the Duckwater Shoshone Tribe, which was acting on its own behalf and on behalf of the Yomba Shoshone Tribe, to discuss the proposed Project.¹³

In light of the fact that the Tribe did not respond to the June 2012 letter, BLM did not meet with representatives of the Tribe concerning the proposed Project at any time prior to issuance of the EIS and ROD.¹⁴ Nonetheless, in the ROD, BLM committed to consult further with Native American tribes during implementation of the Project.¹⁵

BLM also consulted with the Nevada State Historic Preservation Office (SHPO) regarding the potential impacts to historic properties eligible for inclusion on the National Register, developing a Project-specific Programmatic Agreement (PA), which provided for further compliance with section 106 of the NHPA.¹⁶ The PA, signed by BLM, Midway, Mt. Wheeler Power, and the SHPO, provided that BLM, in consultation with the SHPO, would ensure that Midway avoided all eligible historic properties where it was reasonably practical, and, where it was not, that Midway mitigated any adverse impacts, in accordance with a Historic Properties Treatment Plan, prior to any ground-disturbing activity.¹⁷ The PA also provided that Midway would immediately cease all activities within a 100-meter radius of any unanticipated cultural resource discovered during the construction phase of the Project. Midway was required to notify BLM, which would, together with the SHPO, determine the appropriate treatment for the resource, which would be completed before any further activities resumed.

In order to assess the likely environmental impacts of the Project and reasonable alternatives thereto, BLM prepared an EIS, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA),¹⁸ and the implementing regulations of the Council on Environmental Quality and the Department.¹⁹ BLM published a Notice of Intent to prepare the EIS in the *Federal Register*, initiated a 30-day public scoping period, held public scoping meetings, issued a draft EIS on March 8, 2013, and held two public comment meetings.²⁰ The Tribe submitted

¹³ See ROD at 14; EIS at 3-114.

¹⁴ Memoranda, dated July 6, 2012, Nov. 1, and Dec. 6, 2013 (BLM Answer, Ex. 1); see EIS at 3-115; BLM “Native American Outreach Contact”.

¹⁵ See ROD at 14; EIS at 7-116 to 7-117.

¹⁶ See EIS at 4-69; *id.* at Appendix 3B.

¹⁷ See *id.*

¹⁸ 42 U.S.C. § 4332(2)(C) (2012).

¹⁹ 40 C.F.R. §§ 1500.1-1518.4; 43 C.F.R. Part 46.

²⁰ See 77 Fed. Reg. 22609 (Apr. 16, 2012); 78 Fed. Reg. 17713 (Mar. 22, 2013); 78 Fed. Reg. 70067 (Nov. 22, 2013).

comments, to which BLM responded.²¹ BLM issued Final EIS L010-2012-0024-EIS (Final EIS) on October 30, 2013, and members of the public were permitted to submit comments on the Final EIS until December 19, 2013.²² The Tribe did not comment on the Final EIS.

In the December 2013 ROD, the Field Manager approved the POp for the construction, operation, maintenance, and reclamation of mining operations and related activity in connection with the Project, and the grant of an ROW for the electrical transmission line, subject to various environmental protection measures, to which Midway had already committed, and mitigation measures as described in the EIS.²³ Midway was not to go forward with any Project operations or related activities until BLM issued a Notice to Proceed.

The Tribe filed a timely appeal from the Field Manager's December 2013 ROD, followed by an SOR, to which BLM and Midway each filed an Answer. The Tribe contends that, in approving the Project, BLM violated the environmental review requirements of section 102(2)(C) of NEPA by failing to take a hard look at the significant impacts of the Project, consider the cumulative impacts of the Project, require appropriate mitigation of the likely adverse significant impacts of the Project, and evaluate a reasonable range of alternatives to the proposed Project.

We now consider whether the Tribe has standing to appeal from BLM's December 2013 ROD.

II. The Tribe has not Demonstrated It has Standing to Appeal

[1] Midway asserts that the Tribe lacks standing since it was not adversely affected by the decision on appeal.²⁴ The Tribe has filed no response to Midway's motion. In order to pursue an appeal from a BLM decision, an appellant is required to have standing to appeal from the decision under Departmental regulations. The rule at 43 C.F.R. § 4.410(a) requires an appellant to demonstrate that it is both a "party to a case" and "adversely affected" by the decision, within the meaning of 43 C.F.R. § 4.410(b) and (d). If either element is lacking, an appeal must be dismissed.²⁵

²¹ See EIS, Appendix 7A, at Comment Number 150, at pages 7-97 to 7-123.

²² See 78 Fed. Reg. 71607 (Nov. 29, 2013).

²³ See ROD at 2.

²⁴ See Answer at 1, 4-5; Opposition to Petition for Stay at 1-2, 6-8.

²⁵ WWP, 185 IBLA at 298; *WildEarth Guardians*, 183 IBLA 165, 170 (2013).

The Tribe is properly deemed to be a “party to a case” because it “has otherwise participated in the process leading to the decision under appeal, e.g., . . . by commenting on an environmental document.”²⁶ However, a party to a case is “adversely affected” by a BLM decision only “when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.”²⁷ An appellant organization must demonstrate either that the organization itself has a legally cognizable interest or that one or more of its members has a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is or may be negatively affected by the decision.²⁸ Finally, the legally cognizable interest must be shown to have been held by the appellant at the time of the decision that it seeks to appeal.²⁹

To demonstrate that it is adversely affected, an appellant must make colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged.³⁰ Although an appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action,³¹ the threat of injury and its effect on the appellant must be more than hypothetical; it must be “real and immediate.”³² “[M]ere speculation that an injury might occur in the future will not suffice.”³³

The Tribe asserts that it is “adversely affected” by BLM’s December 2013 ROD because it has a legally cognizable interest “in the public lands, cultural resources, water, wildlife, plants, and other resources affected by the Pan Mine Project.”³⁴ It notes that BLM determined that 158 cultural resources, including 75 that were deemed historic properties eligible for listing on the National Register, are to be found in the Project area, and approximately 1,938 acres of existing Preliminary Priority Habitat

²⁶ 43 C.F.R. § 4.410(b); *see, e.g., WildEarth Guardians*, 183 IBLA at 171.

²⁷ 43 C.F.R. § 4.410(d); *see, e.g., WWP*, 185 IBLA at 298.

²⁸ *See WWP*, 185 IBLA at 298-99; *Board of County Commissioners of Pitkin County, Colorado*, 186 IBLA 288, 308-10 (2015).

²⁹ *See WWP*, 185 IBLA at 298.

³⁰ *The Fund for Animals, Inc.*, 163 IBLA at 176 (quoting *Fred E. Payne*, 159 IBLA at 73); *Colorado Open Space Council*, 109 IBLA at 280.

³¹ *Donald K. Majors*, 123 IBLA 142, 145 (1992).

³² *Laser, Inc.*, 136 IBLA 271, 274 (1996); *see Legal & Safety Employer Research Inc.*, 154 IBLA 167, 172 (2001); *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992); *George Schultz*, 94 IBLA 173, 178 (1986).

³³ *Colorado Open Space Council*, 109 IBLA at 280.

³⁴ SOR at 2.

and Preliminary General Habitat for the Greater sage-grouse,³⁵ which is considered sacred, are likely to be directly impacted by Project activities.³⁶

The Tribe's 122,085-acre Indian Reservation, straddles the Utah/Nevada border, encompassing lands in White Pine County, Nevada, and Juab and Tooele Counties, Utah. BLM identifies the Reservation as approximately 190 miles east of the Project area.³⁷

In recognition of the Tribe's connection with its ancestral homelands, BLM notified the Tribe, by letter dated June 7, 2012, of the pending Midway proposal to undertake open-pit mining operations and related activities in connection with the Project, and asked the Tribe to identify any cultural resources or sites of the Tribe's ancestors in and around the Project area that might be affected by Project activities. The Tribe submitted no response to BLM's June 2012 letter,³⁸ nor did it identify any such resources in commenting on the Draft EIS.³⁹ In the EIS, BLM concluded that it "is not aware of any unique tribal resources at the [P]roject area that are used by the [Tribe]."⁴⁰

Furthermore, on appeal, the Tribe does not assert that any of its tribal members use any of the public lands encompassed by Project activities or surrounding lands for recreational or other purposes. Nor has it made any colorable allegation that it has an interest in any identified cultural resource or other feature which is within the Project area, or which is likely to be adversely affected by the Project. It has not provided affidavits, declarations, or statements of any tribal members. It asserts general interests attributable to the fact that it is a Federally-recognized Indian tribe "whose current reservation is located in eastern Nevada and western Utah, and whose

³⁵ See EIS at 2-62, 2-63 (Fig. 2.4-1), 2-65.

³⁶ See SOR at 4 (citing EIS at 3-80, 3-110 to 3-111).

³⁷ See EIS at 7-97.

³⁸ See ROD at 14.

³⁹ See EIS at 4-72 ("Various Tribes have been consulted or informed of the proposed [P]roject, and no specific concerns have been raised to date by these various tribes regarding any religious site, sacred site, or [TCP]").

⁴⁰ EIS at 7-97; see *id.* at 3-106 ("The[] traditional territory [of the Goshute] is *thought* to extend" (Emphasis added)), 3-114 ("Indian trust resources are natural resources protected by a fiduciary obligation on the part of the United States. . . . [N]o Indian trust resources have been identified on BLM-administered lands within the [P]roject area. . . . The Duckwater Shoshone Tribe and Te-Moak Tribe of Western Shoshone have been identified as Indian Tribes that may attach religious and cultural significance to cultural resources within the APE [Area of Potential Effects].").

ancestral homelands and current cultural territory encompasses all of the Project area, since time immemorial.”⁴¹ Its statement, without more, is too general to satisfy the requirement to demonstrate a legally cognizable interest that is or is substantially likely to be harmed by BLM’s decision.

III. Conclusion: The Appeal Must Be Dismissed for Lack of Standing

Here, we find that the Tribe has not demonstrated that the Project is likely to injure any resources in which the Tribe has a legally cognizable interest. The Tribe asserts that its ancestral homelands encompass “all of the Project area, since time immemorial.”⁴² We respect the importance of a tribe’s ancestral homeland. However, for purposes of satisfying the regulatory requirements for standing to appeal the BLM decision at issue, more is required. The Tribe has not provided affidavits, declarations, or statements of any tribal members, identifying the specific cognizable interests and making a colorable allegation of how the decision on appeal has caused or is substantially likely to cause injury to that interest. Therefore, notwithstanding the importance the general area may have to the Tribe, we conclude that, in bringing this appeal, the Tribe has not made a colorable allegation that BLM’s approval of the Project injures or is substantially likely to injure any legally cognizable interest of the Tribe, as required by 43 C.F.R. § 4.410. We, therefore, dismiss the Tribe’s appeal from BLM’s December 2013 ROD, because the Tribe lacks standing to appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁴³ we dismiss the Tribe’s appeal from the Field Manager’s December 2013 ROD.

_____/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/
Amy B. Sosin
Administrative Judge

⁴¹ SOR at 2.

⁴² *Id.*

⁴³ 43 C.F.R. § 4.1.