CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

193 IBLA 333 Decided October 30, 2018
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Affirmed.

1. Mining Claims: Plan of Operations;
   National Historic Preservation Act: Consultation: Native American Tribes

Where the area of proposed mining operations and related activity potentially contains historic properties having traditional religious and cultural importance to a Native American tribe, BLM properly fulfills its obligation, under section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108 (2016), and its implementing regulations, 36 C.F.R. Part 800, to consult with a tribe by, inter alia, affording it notice of the preparation of a draft and final EIS and an opportunity to participate in the environmental review and decision-making process, by identifying and evaluating cultural resources, and by seeking to resolve any adverse effects to such resources prior to the approval of the proposed activity. BLM will not be deemed to have failed to fulfill its consultation obligation where it requires a Native American tribe to enter into a data sharing agreement, designed to protect the confidentiality of cultural resources information gathered by BLM, before fully sharing that information with the tribe.

A BLM decision to approve a plan of operations will be affirmed where BLM prepared an EIS that took a hard look at the significant environmental consequences of constructing, operating, maintaining, and reclaiming an open-pit gold mining project and reasonable alternatives thereto, and the appellant has failed to carry its burden to demonstrate, with objective proof, that BLM did not, as required by section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2012), adequately consider the likely effects on cultural resources.


OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE ROBERTS

The Confederated Tribes of the Goshute Reservation (CTGR), a Federally-recognized Indian tribe, has appealed from an April 7, 2015, Record of Decision (ROD) of the District Manager, Elko (Nevada) District Office, Bureau of Land Management (BLM), approving the Plan of Operations (POp)\(^1\) for the Long Canyon Mine Project (Project) in Elko County, Nevada. Newmont Mining Corporation (Newmont) is the Project applicant. BLM analyzed the environmental impacts of the Project in a January 2015 Final Environmental Impact Statement (EIS),\(^2\) prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA)\(^3\) and its implementing regulations.\(^4\) CTGR contends that BLM’s approval of the POp violates the

\(^{1}\) NVN-91032.
\(^{2}\) DOI-BLM-NV-E030-2013-006-EIS (citations herein are to the Final EIS, unless otherwise indicated).
\(^{4}\) 40 C.F.R. Chapter V (Council on Environmental Quality) and 43 C.F.R. Part 46 (Department).
historic property assessment requirements of section 106 of the National Historic Preservation Act (NHPA)\(^5\) and NEPA.

**SUMMARY**

Section 106 of the NHPA requires a Federal agency to consider the effect of its undertakings on properties included or eligible for inclusion on the National Register of Historic Places. A Federal agency is required to make a reasonable and good faith effort to identify historic properties within an undertaking’s Area of Potential Effects (APE), assess the effects of the undertaking on any included or eligible historic properties, determine whether the effects will be adverse, and avoid or mitigate any adverse effects. In carrying out its responsibilities, a Federal agency is required to consult with any Indian tribe that attaches religious and cultural significance to such properties. Before us is CTGR’s appeal from BLM’s approval of a POA for an open-pit gold mine and related facilities. CTGR argues that BLM precluded it from a fair and reasonable opportunity to engage in section 106 consultation, and that BLM failed to assess and resolve adverse effects on historic properties. Our review shows that BLM sought to engage CTGR in the consultation process regarding the identification and evaluation of historic properties in the APE, but that CTGR refused meaningful participation in the NHPA process. Further, through Class III surveys of the Project area, BLM identified 103 cultural resources that were eligible or potentially eligible for listing on the National Register, and through adoption of a Programmatic Agreement (PA), provided for the Project to avoid all historic properties if reasonably practical, or if not reasonably practical, to mitigate any adverse effects. We conclude that BLM met its obligations under section 106 of the NHPA.

Section 102(2)(C) of NEPA requires a Federal agency to prepare a “detailed statement” addressing the potential environmental impacts of a proposed action and alternatives thereto for any major Federal action that “significantly affect[s] the quality of the human environment[.]” CTGR contends that the EIS does not reflect the requisite hard look at the impacts of mining and related activity on cultural resources of significance to it and other Native American tribes. But CTGR did not identify any cultural resources of traditional or religious significance to itself or any other tribe that might be affected by Project activities. Nor did CTGR substantiate its claim that damage to or destruction of cultural resources is likely. CTGR argues that BLM’s refusal to provide it with cultural resources information violated NEPA. To protect the confidential nature of that information, BLM deemed it necessary to condition release of the

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information on CTGR entering into a data sharing agreement, or, in the absence of such agreement, to furnish the confidential information to CTGR with sensitive portions redacted. We conclude that CTGR has not met its burden to show, with objective proof, that BLM failed to consider a substantial environmental question of material significance.

I. BACKGROUND

A. Newmont’s Plan of Operations

Newmont originally submitted its POP for the Project on March 22, 2012, pursuant to the Mining Laws of the United States. It also sought rights-of-way (ROWs) for a natural gas pipeline, electrical transmission line, and water pipeline, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA). BLM will consider ROW grants separate and apart from issuing the ROD.

The Project is an open-pit gold mine and related facilities on a total of approximately 3,879 acres of land in the Pequop Mountains and Goshute Valley. Approximately 1,707 acres are public land administered by BLM. The Project would encompass an open-pit mine, a cyanide heap leaching pad and mill, a waste rock storage facility, a tailings storage facility, water supply wells, construction material borrow pits, access and haul roads, a natural gas pipeline, an electric power generating plant and transmission line, and ancillary facilities. Mining is expected to last 8 to 14 years, including construction, mining and ore processing, together with concurrent reclamation, and final closure and reclamation.

B. BLM’s Cultural Resource Inventory and Related NHPA Compliance

Between 2006 and 2013, BLM conducted Class III surveys for cultural resources in the Project area, generating a total of 8 cultural resources reports in connection with proposed exploration and mining operations. Through these surveys, BLM identified a

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8 See ROD at 2.
9 Id.
10 Id.
11 Id.
13 EIS at 3-176; see Montana Wilderness Association v. Connell, 725 F.3d 988, 1006
total of 308 cultural resource sites, 103 of which were deemed historic properties that are eligible or potentially eligible for listing on the National Register of Historic Places (National Register).\textsuperscript{14} The potentially eligible sites, termed “unevaluated (pending further research),” were “treated as eligible until further investigation is conducted and an official determination of eligibility can be made.”\textsuperscript{15} BLM did not identify any Traditional Cultural Properties (TCPs).\textsuperscript{16} TCPs are properties eligible for inclusion on the National Register because they have “traditional religious and cultural importance to an Indian Tribe.”\textsuperscript{17}

Early in its decision-making process, BLM sought to engage in consultation with Native American tribes who might be interested in the Project. BLM had initial discussions regarding the Project with representatives of CTGR on March 2, June 15, and July 6, 2012.\textsuperscript{18} By letter dated July 19, 2012,\textsuperscript{19} BLM formally sought consultation with 10 Native American tribes, including CTGR, all of whom were thought to “have a cultural affiliation based on traditional use, ancestral ties, and/or oral histories . . . with

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\textsuperscript{14} See EIS at 3-176.
\textsuperscript{15} Id.
\textsuperscript{16} See id. at 3-176, 3-190, 4-123.
\textsuperscript{18} See Notes of Mar. 2, 2012, Meeting (Administrative Record (AR), Doc. LC1256); Notes of July 6, 2012, Meeting (AR, Doc. LC1257); Notes of June 15, 2012, Meeting (AR, Doc. LC1324).
\textsuperscript{19} AR, Doc. LC39.
the [Project] area.” In responding, CTGR expressed its desire to enter into consultation with BLM.

BLM also consulted with the Nevada State Historic Preservation Office (SHPO) regarding potential impacts to historic properties eligible for inclusion on the National Register. BLM and SHPO developed a Project-specific Programmatic Agreement (PA) pursuant to 36 C.F.R. § 800.14(b), which provided for further compliance with section 106 of the NHPA during the life of the Project. The Advisory Council on Historic Preservation (ACHP) elected not to participate in developing the PA. CTGR was invited by letter dated July 11, 2013, to participate in the PA as a Concurring Party, but it did not respond to the letter and did not participate.

BLM and SHPO, as Signatory Parties, and Newmont, as a Concurring Party, signed the PA on June 11, 2013. The PA would be in effect for 10 years. CTGR and other Indian Tribes (Te-Moak Tribe of the Western Shoshone Indians of Nevada, Duckwater Shoshone Tribe, Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, Elko Band Council, and Wells Band Council) were specifically invited to participate in the PA as Concurring Parties, but none of them responded.

The PA provides for the identification of historic properties, their evaluation for National Register eligibility, and the resolution of any adverse effects of the Project on them. Specifically, the PA requires BLM and Newmont to ensure that appropriate cultural resource inventories are conducted with respect to the Project’s APE, which originally included the Project area and a one-mile wide buffer. The PA further

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20 EIS at 3-189; see id. at 1-9 (“Government-to-government consultation with potentially interested Tribes . . . was initiated by BLM during scoping and will continue through issuance of the ROD.”); ROD at 26-27.
21 See AR, Docs. LC1258 and LC1259.
22 AR, Doc. LC1124.
24 AR, Doc. LC1125.
25 See PA at 13; Declaration (Decl.) of Bryan A. Mulligan, Assistant Field Manager, Wells Field Office, BLM, dated Aug. 4, 2015 (Ex. 1 to BLM Answer), ¶ 6, at 2; Decl. of Paul Echo Hawk, Exhibit (Ex.) 6 to Statement of Reasons (SOR) and Petition for Stay, at 3.
26 See PA at 2, 14-15.
27 See id. at 3, 4, 5; 36 C.F.R. § 800.16(d) (“Area of potential effects”) (An APE is defined as “the geographic area . . . within which a[] [Federal] undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.”).
provides that BLM, in consultation with SHPO, will review the National Register eligibility of identified cultural resources prior to the initiation of any activities that might adversely affect such resources.  

The PA requires BLM, in consultation with SHPO, to ensure that Newmont avoids all eligible or potentially eligible historic properties where it is reasonably practical. Where avoidance is not reasonably practical, Newmont must mitigate any adverse effects in accordance with a Historic Properties Treatment Plan (HPTP) that must be approved by BLM prior to undertaking any activity that might adversely affect historic properties. The HPTP will provide for “data recovery” to ensure that any historic property that Newmont cannot avoid will be documented and removed from the Project area for safekeeping and storage. BLM approved the HPTP in 2014, which is supplemental to the HPTP approved by BLM in 2011 for exploration operations. The PA requires Newmont to immediately cease all Project activities within a 50-meter radius of any previously unidentified cultural resource discovered by Newmont, CTGR, and/or others, during the course of the Project. Upon discovery, Newmont must secure the site and notify BLM, which will, in consultation with SHPO, determine the appropriate mitigation for the resource, which must be successfully completed before any activities will be allowed to resume.

Finally, the PA requires BLM to consult with CTGR in fulfilling its obligation to identify, evaluate, and resolve adverse effects to any historic properties of traditional

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28 See PA at 6, 7.
29 Id. at 7.
30 See id. at 7, 8; EIS at 4-124, 4-125 to 4-126.
31 PA at 7.
32 See Newmont Opposition to Petition for Stay (Newmont Opposition) at 8, 9; Affidavit (Aff.) of Daniel Anderson, Regional Environmental Affairs Manager, Newmont, dated May 14, 2015 (Ex. 2 to Newmont Opposition), ¶ 17, at 4 (“Implementation of the 2014 HPTP currently is ongoing, and involves the participation of third-party archaeologists and up to four tribal monitors—including two from the Tribes—who are involved in the treatment decision-making process for every cultural resource site identified in the Class III surveys[.]”), ¶ 20, at 5 (“[The archaeological and tribal monitors] literally walk behind the heavy machinery that is conducting the ground disturbing activities where required to identify potential cultural resources that may be located beneath the surface.”).
33 See PA at 9; ROD at 10; EIS at 2-44, 4-124 to 4-125; Letter to CTGR from BLM, dated Apr. 7, 2015 (AR, Doc. LC1358), at 4, 7; Newmont Opposition at 9.
34 See PA at 9, 10; ROD at 10; EIS at 2-44, 4-125; Newmont Opposition at 9-10.
religious or cultural importance to CTGR that might be affected by the Project, whether previously identified or discovered during the course of the Project.  

The PA was amended on November 21, 2014, expanding the APE to include a 1,663-acre area encompassing the 42.3-mile-long route of a natural gas pipeline, which runs south from an existing pipeline to the Project area, and a 183,503-acre area extending in a 12-mile radius from the open-pit mine, in which cultural resources might be indirectly affected by the Project. BLM invited CTGR to participate in the amendment, as a Concurring Party, by letter dated November 7, 2014, but received no response.

C. BLM’s NEPA Review and Ongoing Discussions with CTGR

To assess the likely environmental impacts of the Project and reasonable alternatives thereto, BLM began preparing the EIS. Cooperating agencies were Elko County; the Cities of West Wendover, Wells, and Elko, Nevada, and Wendover, Utah; the Nevada Department of Wildlife (NDOW); and the U.S. Environmental Protection Agency (EPA).

An interdisciplinary team of resource experts analyzed the potential direct, indirect, and cumulative impacts of the Project (Proposed Action), one action alternative (North Facilities Alternative), and a No Action Alternative under which the Project would not be approved. BLM considered nine additional alternatives, but did not analyze them in detail because they were not technically or economically feasible or would not result in lesser or no environmental impacts.

Under the Proposed Action, BLM would approve the POp as submitted by Newmont. Under the North Facilities Alternative, BLM would approve Project activities as outlined in the Proposed Action, but Project facilities would be relocated to the northeastern quadrant of the Project area. BLM designated the North Facilities

35 See PA at 1, 4, 5, 6, 7, 8, 10, 11, 13.
36 See EIS at 3-171; EIS, Appendix 2E (PA Amendment One).
37 AR, Doc. LC1197.
38 See Mulligan Decl., ¶ 6, at 2.
40 See EIS at 2-1 to 2-42 (Proposed Action), 2-51 to 2-56 (North Facilities Alternative), 2-56 to 2-57 (No Action Alternative); ROD at 22-24.
41 See EIS at 2-57 to 2-62; ROD at 24-25.
Alternative as its Preferred Alternative because it would have a lesser environmental impact.\textsuperscript{42}

The Proposed Action and North Facilities Alternative were both subject to various project design features (or environmental protection measures (EPMs)) that Newmont committed to in its POp, and various mitigation measures (MMs) identified in the EIS.\textsuperscript{43}

BLM published a Notice of Intent to prepare the EIS in the Federal Register on July 19, 2012, initiating a 45-day public scoping period.\textsuperscript{44} In August 2012, BLM convened public scoping meetings in Wendover, Utah; Elko, Nevada; and Wells, Nevada.\textsuperscript{45} CTGR did not participate in any of these public meetings\textsuperscript{46} or submit any scoping comments,\textsuperscript{47} but it did meet with BLM on May 3, 2013, to discuss the Project.\textsuperscript{48}

On July 25, 2013, CTGR and BLM entered into a Memorandum of Understanding (MOU) (hereinafter, Cooperating Agency Agreement (CAA)),\textsuperscript{49} establishing a cooperative agency relationship designed to coordinate review of Native American religious concerns and cultural resource issues during the EIS process. By entering into the MOU, CTGR “bec[a]me a cooperating agency,” and thereafter participated in the preparation of the EIS, in accordance with 40 C.F.R. §§ 1501.6 and 1508.5.\textsuperscript{50} CTGR was charged with reviewing and advising BLM regarding the “technical adequacy and completeness” of “any technical documents, including that portion of the Draft EIS concerning Native American religious concerns and cultural resource issues[].”\textsuperscript{51} BLM did not consider CTGR’s participation in the NEPA process to be government-to-government consultation, with BLM acting on behalf of the United States and CTGR acting as a sovereign entity, as occurs under the NHPA.\textsuperscript{52}

\textsuperscript{42} See EIS at 2-81.
\textsuperscript{43} See id. at 2-42 to 2-51 (EPMs), 2-72 to 2-81 (MMs), Appendix 2C (Mitigation Plan).
\textsuperscript{44} See 77 Fed. Reg. 42505 (July 19, 2012).
\textsuperscript{45} See ROD at 25; EIS at 1-9, 6-3.
\textsuperscript{46} See EIS, Appendix IA (Scoping Report), at C-1 to C-11.
\textsuperscript{47} See id. at D-ii.
\textsuperscript{48} See Mulligan Decl., ¶ 4, at 1.
\textsuperscript{49} AR, Doc. LC0761.
\textsuperscript{50} Notice of Appeal and SOR at 3; see CAA at 2 (“The cooperating agency relationship established through this MOU shall be governed by all applicable statutes, regulations, and policies, including . . . 40 CFR 1501.6 and 1508.5.”); 43 C.F.R. § 46.225; EIS at 1-1.
\textsuperscript{51} CAA at 1.
\textsuperscript{52} See Letter to CTGR from BLM, dated Oct. 20, 2014 (AR, Doc. LC667), at unpaginated (unp.) 2; CAA at 2.
On September 6, 2013, BLM and Newmont met with representatives of CTGR to discuss the Project.53 On September 12, 2013, CTGR requested a copy of BLM’s cultural resources reports, in order that it might have “a reasonable opportunity to develop meaningful changes and recommendations for the EIS.”54 BLM declined to provide the reports unless CTGR entered into an MOU for Information Sharing.55 In a September 18, 2013, e-mail, BLM indicated that, while it preferred to have a data sharing agreement in place prior to the release of any cultural resources information, it would consider providing CTGR with a copy of the reports, but with the location of the sites redacted.56

In a May 7, 2014, e-mail, CTGR again requested a copy of BLM’s cultural resources reports.57 BLM provided a copy of the MOU for Information Sharing to CTGR on May 8, and again on July 24, 2014.58 BLM reiterated, in a May 27, 2014, e-mail, that a data sharing agreement was necessary before it could release the cultural resources reports to CTGR.59 In a September 2, 2014, letter,60 CTGR again requested BLM’s cultural resources reports and commented on the Draft EIS. BLM later informed CTGR, at a February 6, 2015, meeting, that it “would like [CTGR] to transmit a data sharing agreement [since] we want to transmit the . . . [cultural [resources] information[] to you.”61

BLM informed CTGR on October 20, 2014, that it “currently has 13 data sharing agreements and consultation protocols with Nevada Tribes.”62 It has also made clear that the purpose of such a data sharing agreement is “to provide a process for the exchange, maintenance, and protection of information shared between BLM . . . and the

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53 See Mulligan Decl., ¶ 5, at 1 (citing Notes of Sept. 6, 2013, Meeting (AR, Doc. LC1264)).
54 SOR at 4; see Record of Phone Conversation between BLM and CTGR, dated Sept. 12, 2013 (AR, Doc. LC1266).
55 See Record of Phone Conversation between BLM and CTGR, dated Sept. 12, 2013 (“We discussed the need for an information sharing agreement with [CTGR]. I am legally prohibited from sharing protected cultural [resources] information without an information sharing agreement in place.”).
56 See E-mail to CTGR from BLM, dated Sept. 18, 2013 (Part of AR, Doc. LC1131).
57 See E-mail to BLM from CTGR, dated May 7, 2014 (Part of AR, Doc. LC1271).
58 See E-mails to CTGR from BLM, dated May 8, and July 24, 2014 (Part of AR, Doc. LC1272).
59 See E-mail to CTGR from BLM, dated May 27, 2014 (AR, Doc. LC1275).
60 AR, Doc. LC549.
61 Notes of Feb. 6, 2015, Meeting (AR, Doc. LC1324), at 2.
Tribe related to cultural resources on public lands in the state of Nevada.\textsuperscript{53} That information would be “used . . . in government-to-government consultations between the Tribe and BLM relating to specific projects under review or consideration by the BLM.”\textsuperscript{54} The agreement specifically states that BLM would, upon request and BLM’s approval, “provide the Tribe . . . with reasonable access to BLM . . . cultural resources information on a project-specific basis, consistent with applicable [F]ederal laws, in order to assist the Tribe in consulting with the BLM on land-use applications[.]”\textsuperscript{55} Under the agreement, CTGR would maintain the confidentiality of any cultural resources information received from BLM “by ensuring all information is kept in a centralized secure location, with access limited to the Tribal Chair and designated Tribal Representative for the sole purpose of consultation with the BLM.”\textsuperscript{56} The agreement made clear that the information “will not be duplicated or shared outside of the Tribe and will not be used for any purpose other than consultation with the BLM.”\textsuperscript{57}

CTGR did not enter into a data sharing agreement with BLM. CTGR submitted a modified agreement, along with a February 25, 2015, letter, in an effort to gain full access to the cultural resources reports.\textsuperscript{58} At a March 21, 2015, meeting with CTGR, BLM provided comments on CTGR’s proposed modifications to the agreement.\textsuperscript{59} BLM reported, in an April 7, 2015, letter to CTGR, that, while it was “committed to executing a Data Sharing MOU with [CTGR],” CTGR had not resolved BLM’s concerns regarding the modified agreement.\textsuperscript{70}

Meanwhile, BLM’s NEPA review proceeded on schedule. On March 21, 2014, BLM published a Notice of Availability of the Draft EIS in the Federal Register.\textsuperscript{71} The Notice provided for a 45-day public comment period.\textsuperscript{72} CTGR submitted no comments on the Draft EIS during the comment period. In April 2014, BLM again convened public meetings in Wendover, Utah; Elko, Nevada; and Wells, Nevada. BLM prepared detailed

\textsuperscript{53} MOU for Information Sharing (AR, Doc. LC1305) at 1-2, 2.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 2 (emphasis added).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} See Letter to BLM from CTGR, dated Feb. 25, 2015 (AR, Doc. LC1333).
\textsuperscript{59} AR, Docs. LC1238 and LC1338; see E-mail to CTGR from BLM, dated Mar. 17, 2015 (AR, Doc. LC1311); Notes of Mar. 21, 2015, Meeting (AR, Doc. LC1343), at unp. 1; E-mail to BLM from CTGR, dated Apr. 3, 2015 (Part of AR, Doc. LC1359).
\textsuperscript{70} Letter to CTGR from BLM, dated Apr. 7, 2015, at 3, 5.
\textsuperscript{72} Id.
responses to all public comments and revised the EIS to address identified issues.\textsuperscript{73} Public comments on the Draft EIS and BLM’s responses are set forth in Chapter 7 and Appendix 7A of the Final EIS.

BLM issued letters on May 2, 2014,\textsuperscript{74} notifying CTGR that it intended to issue a permit for archaeological excavations and data recovery at 76 sites likely to be adversely impacted by the Project in the Project area.\textsuperscript{75}

CTGR provided comments on the Draft EIS months after the close of the comment period, in its September 2, 2014, request for BLM’s cultural resources reports. In its letter, CTGR stated that the entire Project area had traditional historical significance for CTGR, being part of its aboriginal territory that stretched across Nevada and Utah. CTGR asserted that “there will be irreparable environmental impacts . . . that are not disclosed nor mitigated,” and that “some impacts, especially the large-scale cultural and historical resource destruction, were not analyzed properly nor disclosed.”\textsuperscript{76}

CTGR stated that “[f]or over one year now, while the Project EIS was still in planning stages, [CTGR] . . . has been asking the BLM to allow us to examine the cultural resources inventories so that we can provide the proper input and recommendations.”\textsuperscript{77} CTGR asserted that access to the inventories “was essential so that [it] could examine where the historic resources were located, what significance those resources had for [the] Tribe, and [how the Project could be redesigned] . . . in order to avoid impacts on cultural resources[.]”\textsuperscript{78} CTGR claimed that the Project “[did not] take into account any of [the] significance that [the Tribe] place[s] on the Project Area”\textsuperscript{79} and that without its input, the traditional historical significance of the identified cultural resources would be compromised, since the “preeminent criterion that defines [its] cultural ties to the Project Area often are not portrayed in the cultural resources inventories[.]”\textsuperscript{80} CTGR specifically asked BLM to provide a copy of all cultural resources inventories used in the development of the EIS.\textsuperscript{81}

\textsuperscript{73} ROD, Ex. 1, at 3.
\textsuperscript{74} AR, Doc. LC1159.
\textsuperscript{75} See Mulligan Decl., ¶ 6, at 2.
\textsuperscript{76} Echo Hawk Decl., Ex. 1 to SOR and Petition for Stay, at 2.
\textsuperscript{77} Letter to BLM from CTGR, dated Sept. 2, 2014, at 3.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 6.
\textsuperscript{81} See id. at 5.
In an e-mail dated September 3, 2014, BLM responded to CTGR’s request for information. BLN stated that, in the absence of a data sharing agreement, CTGR’s representative would be permitted to view all of BLM’s cultural resources information at BLM’s Elko District office, but would not be allowed to copy or take any of the information from the office. CTGR designated a representative, but, as of April 7, 2015, when BLM issued its ROD approving the Project, he had not sought to review the reports.

By e-mail dated September 10, 2014, BLM sought to enter government-to-government consultation with CTGR. It received no response.

By letter dated October 20, 2014, BLM formally responded to CTGR’s September comments on the Draft EIS and again requested CTGR to enter government-to-government consultations, but it received no response prior to issuance of the Final EIS.

BLM issued the Final EIS on January 9, 2015. By letter dated January 30, 2015, following issuance of the Final EIS, CTGR reiterated its ongoing objection to the Project, finally requested government-to-government consultation with BLM, and alleged that BLM had failed to afford CTGR meaningful consultation regarding the adverse effects of the Project on its cultural resources. CTGR asserted that “thousands, perhaps tens or hundreds of thousands, of ancient artifacts . . . were somehow blatantly missed,” or their traditional historical significance to CTGR ignored. CTGR agreed to enter into a data sharing agreement, on condition that the agreement did not limit the cultural resources information afforded to CTGR or restrict CTGR’s use of such information.

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82 Part of AR, Doc. LC1288.
83 See E-mail to CTGR from BLM, dated Mar. 17, 2015; Letter to CTGR from BLM, dated Oct. 20, 2014, at unp. 3.
84 See E-mail to BLM from CTGR, dated Sept. 3, 2014; Letter to CTGR from BLM, dated Apr. 7, 2015, at 3.
85 AR, Doc. LC1292.
86 See Letter to CTGR from BLM, dated Oct. 20, 2014; ROD at 27.
87 See BLM Response to Petition for Stay (Response) at 5.
88 See 80 Fed. Reg. 1430 (Jan. 9, 2015); ROD at 26; EIS at 7-1.
89 AR, Doc. LC1320.
90 See ROD at 27.
91 Letter to BLM from CTGR, dated Jan. 30, 2015, at 3.
92 See id. at 6.
Finally, CTGR asked BLM to place an “immediate hold” on Project approval, pending CTGR’s evaluation of cultural resources and their significance to tribal history.\footnote{Id.}

BLM agreed to meet with CTGR’s representatives, withheld approval of the Project until doing so, and met with them on February 6 and 14, March 21, and April 3, 2015.\footnote{See ROD at 27; Mulligan Decl., ¶ 5, at 2; BLM Response at 4, 5; Newmont Opposition at 5, 31.} At the April 3, 2015, meeting, BLM provided its draft response to the comments in CTGR’s January 2015 letter, and allowed CTGR until April 7 to comment on BLM’s draft response, but CTGR failed to respond.\footnote{See E-mail to CTGR from BLM, dated Apr. 6, 2015 (Part of AR, Doc. LC1359).}

In BLM’s April 7, 2015, letter, issued in conjunction with issuance of the ROD, BLM responded to the concerns CTGR expressed in its January 30, 2015, letter and at their meetings. It declined to further postpone action on the Project POA, considering the numerous opportunities that had been afforded CTGR to provide input into the decision-making process.\footnote{See Letter to CTGR from BLM, dated Apr. 7, 2015, at 2.}

D. BLM’s Record of Decision and CTGR’s Appeal

In its April 2015 ROD, BLM selected its Preferred Alternative, the North Facilities Alternative, which would “allow Newmont to undertake a legitimate use of the public lands in an environmentally sound manner without causing unnecessary or undue degradation to the public lands.”\footnote{ROD at 21; see id. at 8, 28.} Approval of the Project was subject to various EPMs and MMs, which represented “all practicable means to avoid or minimize environmental harm” from the Project\footnote{Id. at 8; see id. at 8-21, 28-29.} and included measures to protect historic properties deemed eligible or potentially eligible for listing on the National Register, including adoption and implementation of the PA and HPTP.\footnote{See id. at 10, 20-21.} BLM also required Newmont to comply with all other applicable Federal, State, and local regulations and obtain all necessary Federal, State, and local permits and other authorizations.\footnote{See id. at 29.}

CTGR filed a timely appeal from and petition for a stay of the ROD. By Order dated June 1, 2015, the Board granted Newmont’s motion to intervene in the appeal; by Order dated July 14, 2015, the Board denied CTGR’s stay petition. Pursuant to 43 C.F.R.

\footnote{Id.}
§ 3809.803, the ROD went into effect immediately upon issuance and has remained in effect throughout the pendency of the appeal.

II. DISCUSSION

CTGR contends that BLM’s approval of the POp violates the historic property assessment requirements of section 106 of the NHPA\(^{101}\) and the environmental review requirements of section 102(2)(C) of NEPA.\(^{102}\) It asks the Board to set aside BLM’s April 2015 ROD.\(^{103}\) As we demonstrate below, the Class III surveys performed for the Project, combined with reasonable and good faith efforts to engage CTGR in the historic property assessment process, fulfilled BLM’s obligations under the NHPA. We also conclude that BLM met its NEPA obligations by taking a hard look at the likely impacts to cultural and historic resources affected by Project activities.

A. BLM Met the Historic Property Assessment Requirements of the NHPA

CTGR’s primary argument is that BLM violated section 106 of the NHPA by not providing CTGR with a fair and reasonable opportunity to participate in both the identification of historic properties and the assessment and resolution of adverse effects of the Project on such properties.\(^{104}\) According to CTGR, BLM violated the NHPA by “refus[ing] to provide cultural resources information” to CTGR, either in draft or final form; requiring “a data sharing agreement” as a prerequisite to providing cultural resources information; and in the absence of a data sharing agreement, providing only “part of the cultural resources information in a redacted version,” especially by excluding any information regarding the location of cultural resources.\(^{105}\) CTGR claims BLM should have afforded CTGR “the opportunity to participate fairly and meaningfully” in BLM’s section 106 compliance process, and that, having failed to do so, BLM did not adequately consult with CTGR.\(^{106}\)

1. Standards for Evaluating BLM’s NHPA Compliance

[1] Section 106 of the NHPA and its implementing regulations require a Federal agency to consider the implications of its actions for historic properties that are included

\(^{101}\) 16 U.S.C. § 470f (2012); see 36 C.F.R. Part 800.
\(^{103}\) See SOR at 45.
\(^{104}\) Id. at 10.
\(^{105}\) Id. at 12, 13, 16.
\(^{106}\) Id. at 14.
or eligible for inclusion on the National Register and within the APE.\textsuperscript{107} Section 106 imposes essentially procedural obligations and does not require the preservation of any historic property or preclude any damage to or destruction of the property.\textsuperscript{108} But it requires the agency to take into account the effect of any Federal undertaking\textsuperscript{109} on any historic properties in the APE.\textsuperscript{110}

In meeting its NHPA obligation, an agency must “take the steps necessary to identify historic properties within the [APE][.]”\textsuperscript{111} An agency is required to “make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.”\textsuperscript{112} An agency’s obligation to identify historic properties includes, \textit{inter alia}, the results of past identification efforts, the magnitude and nature of the undertaking, and the nature and extent of potential effects.\textsuperscript{113}

If the agency identifies historic properties, it must: determine whether such properties are included or eligible for inclusion on the National Register; assess the


\textsuperscript{109} \textit{See} 36 C.F.R. § 800.16(y) (“Undertaking”).

\textsuperscript{110} \textit{See, e.g.,} \textit{Pit River Tribe v. U.S. Forest Service,} 469 F.3d 768, 787 (9th Cir. 2006); \textit{The Mandan, Hidatsa, and Arikara Nation,} 164 IBLA 343, 347 (2005).

\textsuperscript{111} 36 C.F.R. § 800.4(b).

\textsuperscript{112} Id.

\textsuperscript{113} \textit{See id.}
effects of the undertaking upon any included or eligible historic properties found; determine whether the effects will be adverse; and avoid or mitigate any adverse effects. The agency’s reasonable and good faith efforts must address “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” Such effects encompass, inter alia, physical damage or destruction of the property, removal of the property from its historic location, a change of the physical features of the property’s setting that contribute to its historic significance, or the introduction of visual, atmospheric, or audible elements that diminish the integrity of the property’s significant historic features.

The Federal agency must engage in reasonable and good faith efforts that take historic properties into account in consultation with the SHPO, any Native American tribe that attaches traditional religious and cultural significance to historic properties, and the ACHP. The agency is required to afford an affected tribe “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” The goal of consultation is to allow an affected tribe the opportunity to assist the Federal agency in identifying historic properties potentially affected by the undertaking and in assessing and resolving any adverse effects of the undertaking on such properties. The agency is required to seek, discuss, consider the views of the affected tribe, and “where feasible, seek[] agreement with [it].” Efforts to involve an Indian tribe are to commence early in the decision-making process.

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114 See id. §§ 800.4 through 800.6; e.g., Te-Moak Tribe, 608 F.3d at 607; Muckleshoot, 177 F.3d at 805.
115 36 C.F.R. § 800.5(a)(1) (emphasis added).
116 Id.
117 Id. § 800.5(a)(2).
118 See, e.g., 54 U.S.C. §§ 306108 and 302706(b) (2016); 36 C.F.R. §§ 800.1(a), 800.2(a), (b), and (c) (1) and (2), 800.4, 800.5, and 800.6.
119 Te-Moak Tribe, 608 F.3d at 608 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A) (emphasis added)).
120 See 36 C.F.R. § 800.1(a).
121 Id. § 800.16(f) (“Consultation”).
122 Id. § 800.2(c)(2)(ii)(A).
2. BLM Met Its Statutory Obligation to Consult with CTGR

CTGR alleges, *inter alia*, that BLM “repeatedly precluded [it] from having a fair and reasonable opportunity to engage in Section 106 consultation.” In CTGR’s view, its efforts to identify and evaluate historic properties were impeded by BLM’s failure to provide it with all of the cultural resources information gathered and analyzed by BLM. CTGR states: “In order for [CTGR] to have a fair and reasonable opportunity to identify historic properties and evaluate historical significance, they required all of the cultural resources information that was available. But the BLM refused.”

A review of the record shows that the only barrier to BLM’s providing the information sought by CTGR was CTGR’s refusal to enter into a data sharing agreement. We see no validity to CTGR’s argument that requiring it to enter into such agreement violated BLM’s “trust obligation” to CTGR, interfered with CTGR’s “tribal sovereignty,” or required CTGR to “waive [its] legal rights[.]” BLIM did not deny CTGR access to cultural resources information, but deemed it essential to limit the manner in which such information could be provided to CTGR, consistent with BLM’s obligations under both section 304(a) of the NHPA and section 9 of the Archaeological Resources Protection Act of 1979 (ARPA) to maintain the confidentiality of the information.

123 SOR at 10.
124 *Id.* at 14.
125 *Id.* at 12-13.
126 *Id.* at 13.
127 16 U.S.C. § 470w-3(a) (2012) (currently, 54 U.S.C. § 307103 (2016)) (BLM “shall withhold from disclosure to the public[] information about the location, character, or ownership of a historic [property] if [BLM] . . . determine[s] that disclosure may . . . risk harm to the historic [property][.]” (When section 304(a) was re-promulgated in 2014, the original term “resource” was replaced by “property.”); see 36 C.F.R. § 800.11(c) (BLM “shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may . . . risk harm to the historic property[.]”).
128 16 U.S.C. § 470hh (2012) (BLM shall “not . . . ma[k]e available to the public” any “[i]nformation concerning the nature and location of any archaeological resource,” “unless [BLM] determines that such disclosure would . . . (1) further the purposes of th[e] [ARPA] . . . and . . . (2) not create a risk of harm to such resources or to the site at which such resources are located.”); 43 C.F.R. § 7.18(a) (“The Federal land manager shall not make available to the public . . . information concerning the nature and location of any archeological resources,” subject to certain exceptions, *inter alia*, that “disclosure
BLM asserts that it “attempted to share the [cultural resources] information in accordance with non-disclosure provisions under the NHPA and the [ARPA].” BLM explains that its effort to maintain the confidentiality of the information by providing full disclosure only pursuant to a data sharing agreement is consistent with longstanding BLM policy for implementing the NHPA and ARPA:

The BLM is the sole Federal agency responsible for collecting cultural resource information for the lands it manages. It is also responsible for maintaining that information in a secure environment. This information is used to evaluate the significance of these resources and to develop appropriate protection measures in long-term land-use planning documents and in the environmental documentation supporting multiple use decisions. Access to this information is controlled by 43 CFR Part 7 implementing Section 9 of the ARPA and Section 304(a) of NHPA.

On a project-specific basis, Tribes may access this information by executing an agreement with the BLM to facilitate sharing and maintaining information and records related to cultural resources in a manner consistent with ARPA.

Newmont notes that it is “common practice” for BLM in Nevada “to ensure that information about potentially sensitive cultural resources on the public lands is kept confidential in order to protect those resources.”

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will further the purposes of [ARPA] and [43 C.F.R.] [P]art [7][.] . . . without risking harm to the archeological resource or to the site in which it is located.”.

129 BLM Answer at 12.
131 Newmont Answer at 12 (citing Guidelines and Standards for Archaeological Inventory, Nevada State Office, BLM, dated January 2012, at 19 (“The products of the cultural resource inventory are the property of the BLM. BLM may use current data sharing agreements to distribute copies of the report to others (e.g., Tribes, state and local governments, proponents, etc.).”)). The Guidelines and Standards are available at
As an alternative to entering into a data sharing agreement, CTGR was offered access to review the information at BLM’s Elko District Office, and even obtain copies of the information, albeit redacted. We find that BLM met its obligations by providing multiple opportunities and methods for CTGR to obtain BLM’s cultural resources inventory.

In sum, BLM met its obligation to “make a reasonable and good faith effort to identify any Indian Tribes . . . that might attach religious and cultural significance to historic properties in the [APE] and invite them to be consulting parties.” BLM also fulfilled its duty to afford any such tribes a reasonable opportunity to advise BLM regarding the identification and evaluation of historic properties, articulate their views regarding any adverse effects of the Project, and participate in the resolution of adverse effects. BLM also complied with the consultation requirements of the PA, which mirror the statutory and regulatory obligations to consult with CTGR regarding cultural resources.

While BLM cannot require Tribes to consult under the NHPA, it must provide them with a reasonable opportunity for input if they decide to participate in the consultation process. Where, as here, BLM afforded CTGR numerous opportunities to provide input over a three-year NHPA process, and CTGR elected to forego those opportunities until late in that process, we conclude that BLM fully satisfied its obligations under Section 106.

3. BLM Met Its Obligation to Assess and Resolve Adverse Effects on Historic Properties

CTGR claims that BLM failed to assess and resolve, through avoidance or mitigation, the adverse effects of the Project on historic properties, and that BLM did not


132 See BLM Answer at 12-13; Newmont Answer at 24-25.
133 36 C.F.R. § 800.3(f).
134 Id. § 800.2(c)(2)(ii)(A).
135 See, e.g., PA at 13.
136 Newmont Answer at 9.
have the benefit of CTGR’s assessment of the tribal historical significance of any of the cultural resources identified by BLM but not disclosed to CTGR. CTGR asserts that it “was never provided an opportunity to participate at any stage of the cultural resources . . . [[inventories]] . . . nor ‘to provide any tribal interpretations and significance of our Native American history, culture, and feeling and association of our cultural, historical and religious resources/sites.’”138 CTGR concludes that its association with a cultural resource constitutes a “qualifying characteristic[] of a historic property,” and that unless BLM was apprised of that association, it could not properly assess and resolve the adverse effects of the Project on such resource.139

CTGR offers nothing to undermine BLM’s assessment of the adverse effects of the Project. As noted, BLM discovered a total of 308 cultural resources during its various Class III surveys of the Project area, 103 of which were deemed eligible or potentially eligible for listing on the National Register.140 Thereafter, during its NEPA review, BLM concluded that 47 of the eligible or potentially eligible historic properties were likely to be adversely affected by the Project adopted by BLM.141 BLM therefore proposed and adopted various measures for avoiding or mitigating adverse effects on the eligible or potentially eligible historic properties.142

Newmont claims that CTGR does “not identify a single eligible historic property that was improperly evaluated by BLM,” establish the presence of any historic properties in the Project area that were not identified by BLM, identify adverse effects of the Project on any historic properties that were not addressed by BLM, or show that BLM did not consider any particular methods for resolving any adverse effects of the Project on any historic properties.143 Based on our review of the record and pleadings in this appeal, we find these claims well founded and, therefore, conclude that CTGR has not met its burden to show any deficiency in BLM’s NHPA compliance.144

CTGR asserts that the mitigation measures adopted by BLM include the possible removal of an affected historic property “from its historic location,” which constitutes an adverse effect defined by 36 C.F.R. § 800.5(a)(2).145 However, NHPA and its

138 SOR at 21 (quoting Letter to BLM from CTGR, dated Sept. 2, 2014, at 6, 7).
139 Id. at 19, 22 (quoting 36 C.F.R. § 800.5(a)(1)); see id. at 22-23.
140 See EIS at 3-176.
141 See id. at 4-127.
142 See id. at 4-124 to 4-125, 4-128; ROD at 8, 10, 20-21; FEIS at 4-124.
143 See Newmont Answer at 15-16 (citing Beaudreu, 25 F. Supp. 3d at 119; 36 C.F.R. § 800.6(a)).
144 See id. at 16.
145 See SOR at 19, 23.
implementing regulations specifically contemplate data recovery where it is not reasonably practical to avoid adverse effects to historic properties.\textsuperscript{146} The NHPA does not require BLM to forgo all data recovery (e.g., removal of a historic property from its historic location) in order to achieve a specific resolution of adverse effects, since the statute, being procedural in nature, does not compel substantive results.\textsuperscript{147}

In sum, we conclude that BLM met its obligations under the NHPA. The record shows no shortcoming in BLM’s effort to consult with CTGR regarding the identification of cultural and historic properties in the APE. CTGR was afforded multiple opportunities to identify resources of historic and cultural importance to it and other tribes, but did not do so.\textsuperscript{148} There is no indication in the record that CTGR made any appreciable effort to establish the relevance to CTGR of the Project area or any of the cultural resources discovered by BLM or Newmont. Nor has CTGR identified any information it would have brought to BLM’s attention but for allegedly deficient consultation.\textsuperscript{149}

B. BLM Complied with the Environmental Review Requirements of NEPA

CTGR contends that BLM’s approval of the POP violated section 102(2)(C) of NEPA by failing to take a hard look at the significant impacts of the Project on cultural resources and Native American traditional and religious values.\textsuperscript{150} This argument is based primarily upon CTGR’s view that BLM failed in its consultation obligations under section 106 of the NHPA.

1. Standards for Evaluating BLM’s NEPA Compliance

[2] Section 102(2)(C) of NEPA requires a Federal agency to prepare a “detailed statement” addressing the potential environmental impacts of a proposed action and alternatives thereto for any major Federal action that “significantly affect[s] the quality of the human environment[.]”\textsuperscript{151} The statute does not mandate the particular substantive results of agency decision-making, but rather, it imposes procedural

\textsuperscript{146} See 36 C.F.R. § 800.6(a).
\textsuperscript{147} See Newmont Opposition at 25.
\textsuperscript{149} Order, IBLA 2015-148 (July 14, 2015); see Muckleshoot, 177 F.3d at 807; Great Basin Mine Watch, 159 IBLA at 356.
\textsuperscript{150} See generally SOR at 24-33.
\textsuperscript{151} 42 U.S.C. § 4332(2)(C) (2012).
obligations on the agency to ensure that it and the public are fully informed of the likely environmental consequences of the agency's proposed action. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs, [in deciding to go forward with the proposed action]." Section 102(2)(C) of NEPA "does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result."

The adequacy of an EIS must be judged by whether it constituted a “detailed statement” that took a “hard look” at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. The EIS must contain “a reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action and alternatives thereto. In deciding whether an EIS adequately addresses the environmental consequences of a proposed action so that the decisionmaker may be fully informed, the Board uses a “rule of reason.”

An appellant challenging a BLM decision following preparation of an EIS must carry its burden to demonstrate by a preponderance of the evidence and with objective proof that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. The appellant must make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance,” and

153 Backcountry Against Dumps, 179 IBLA at 161 (quoting Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1990)).
154 Id.; see Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)), and cases cited.
155 State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).
156 County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Bristlecone Alliance, 179 IBLA 51, 60 (2010); Wyoming Outdoor Council, 176 IBLA at 25; Northern Alaska Environmental Center, 153 IBLA 253, 256 (2000); see Northwest Environmental Advocates v. National Marine Fisheries Service, 460 F.3d 1125, 1139 (9th Cir. 2006) ("NEPA requires not that an agency engage in the most exhaustive environmental analysis theoretically possible, but that it take a 'hard look' at relevant factors.").
157 See, e.g., Backcountry Against Dumps, 179 IBLA at 161.
cannot simply “pick apart a record with alleged errors and disagreements[.]”158 The fact that the appellant has a differing opinion regarding the nature or significance of likely environmental impacts or simply prefers that BLM take another course of action does not demonstrate that BLM violated the procedural requirements of NEPA.159

2. BLM Took a Hard Look at Likely Significant Impacts on Native American Cultural Resources and Values

CTGR argues that BLM failed to take a hard look at the likely significant impacts of the Project on cultural resources and Native American traditional and religious values.160 In CTGR’s view, BLM did not regard any identified cultural resources as specifically attributable to CTGR or any of the other tribes deemed by BLM to potentially have an interest in the Project area.161 CTGR takes issue with BLM’s statement, at page 4-129 of the EIS, that there were “no known potential places of cultural . . . interest to CTGR within or near the [P]roject area.”162 CTGR contends that by its failure to recognize the significance of identified cultural resources to CTGR, BLM disregarded CTGR’s Draft EIS comments expressly identifying the “cultural significance of the Project Area” to CTGR.163 CTGR asserts that the area constitutes its “aboriginal homelands,” which CTGR and its members continue to utilize to the present day.164 CTGR claims that, in disregarding CTGR’s connection with the cultural resources, and the historical significance of those resources to CTGR, BLM failed in its “hard look” obligations to, inter alia, “describe the environment of the area[] to be affected” by the Project, and “provide [a] full and fair discussion of significant environmental impacts” of the Project.165 CTGR states that, “in this case, the Project Area locale [i]s of great cultural significance to the [Tribes][.]”166

Based upon our review of the record, we conclude that BLM took the requisite hard look at the likely direct, indirect, and cumulative impacts of mining and processing operations and related activity on Native American values, and known and not yet

159 Western Watersheds Project, 184 IBLA 106, 121 (2013).
160 See SOR at 24-33.
161 Id. at 25.
162 Id.
163 Id. (quoting Letter to BLM from CTGR, dated Sept. 2, 2014, at 1).
164 Id.
165 Id. at 26 (quoting 40 C.F.R. §§ 1502.1 and 1502.15).
166 Id. at 29; see id. (quoting 40 C.F.R. § 1508.27(a)).
discovered cultural resources. BLM determined that none of the identified cultural resources, including those considered eligible or potentially eligible for listing on the National Register, could be considered a TCP, on the basis of traditional religious and cultural importance to any Indian tribe. BLM determined that, with data recovery and other forms of mitigation, any impacts to cultural resources “would likely be minor to moderate and long-term.”

CTGR makes no effort to identify any traditional cultural places or resources that BLM should have considered in the EIS. It asserted, in its January 2015 letter to BLM, that it had “recently” discovered “over 6,000 tribal artifacts” in the Project area, noting that this is “only a fraction of what has been discovered recently[.].” But these “artifacts,” uncovered in the course of Newmont’s ongoing activities at the Project area, constitute previously unidentified cultural resources that are subject to the PA and HPTP. As Newmont contends, the discovery of these artifacts does not demonstrate any inadequacy in BLM’s Class III cultural resources inventories, but shows the effectiveness of the measures BLM and Newmont adopted for the identification, evaluation, and resolution of adverse effects on historic properties that were not, and indeed likely could not have been, discovered prior to the initiation of mining and related activity in the Project area.

CTGR’s general allegations that there may exist other tribal artifacts in the Project area that may be negatively impacted by the Project, which BLM failed to address in the EIS, do not establish any error or deficiency in the EIS. BLM is not required to consider impacts that are remote and highly speculative, either because the resource thought to be affected has not been shown to be present in the affected area or, even if present, there is no reason to suspect that the resource is likely to be affected. Any tribal artifacts that are discovered in the future will, in fact, be covered by the applicable

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167 See EIS at 3-171 to 3-186 (cultural resources), 3-186 to 3-191 (Native American values), 4-122 to 4-129 (cultural resources), 4-129 to 4-131 (Native American values), 5-67 to 5-72 (cumulative impacts to cultural resources).
168 Id. at 4-123.
169 Id. at 4-127.
171 See id. at 3-4.
172 See Anderson Aff., ¶ 18, at 4-5.
173 See Beaudreux, 25 F. Supp. 3d at 120 (“[T]he comments . . . stated in general terms that ‘other [historic] properties’ existed. This is not enough to render the [Federal agency’s] identification efforts inadequate.”).
provisions of the PA regarding the identification, evaluation, and resolution of adverse effects.

Despite BLM’s repeated requests, CTGR did not identify any cultural resources of traditional or religious significance to itself or any other tribe. As Newmont notes, the U.S. District Court in Havasupai Tribes concluded that there was no violation of NEPA where the complaining tribe did not, despite numerous opportunities afforded by the Government, identify sites of traditional or religious significance that might be affected by proposed mining operation. There is no indication in the record that CTGR made any appreciable effort to establish the relevance to CTGR of the Project area or any of the cultural resources discovered by BLM or Newmont.

CTGR alludes to a statement made by BLM at the March 21, 2015, meeting to the effect that it looked at the likely impacts on cultural resources from “a Caucasian perspective.” But BLM’s administrative record does not show any disregard of the interests of CTGR or any other tribe, or a failure to appreciate the nature, magnitude, or significance of impacts on cultural resources. The record makes clear that BLM was well aware that the Project area had been used by many different persons and groups of persons. We find no evidence that BLM disregarded the historical significance of any cultural resources, or the significance of the overall area in which they were found, to CTGR or any other tribe.

CTGR also argues that BLM erred in failing to consider the intensity (or severity) of the likely impacts of the Project on cultural resources, in terms of the degree to which the Project “may establish a precedent for future actions with significant effects”; the degree to which the Project “affects . . . [the] health” of the Tribal community; the degree to which the Project area has “[u]nique characteristics . . . such as proximity to historic or cultural resources”; and the degree to which the Project “may adversely affect

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175 See Beaudreu, 25 F. Supp. 3d at 120; Havasupai Tribes, 752 F. Supp. at 1493-1500.
176 See Newmont Answer at 20 (citing Havasupai Tribes, 752 F. Supp. at 1500); see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. at 553-54.
177 SOR at 29 (quoting Letter to BLM from CTGR, dated Apr. 8, 2015 (Ex. 9 attached to SOR), at 3).
178 See Notes of Mar. 21, 2015, Meeting, at unp. 1 (“[T]he BLM[] interpreted [the cultural resources information] through an archeological stand[]point and the [T]ribes might interpret the same information differently.”).
179 See EIS at 3-174 to 3-176, 3-190.
districts, sites, . . . or objects listed in or eligible for listing in the National Register of Historic Places[.]”

The Project establishes no precedent for the approval of any other project proposed by Newmont or any other party. Any future project, including any expansion of this Project, must undergo its own NEPA and NHPA review and decision-making processes before BLM decides whether to approve the project. However, this case reaffirms precedent that BLM acts lawfully when it makes timely, repeated, and good faith efforts to involve a Tribe in the NHPA and NEPA processes.

CTGR asserts that the “massive numbers” of cultural resources and their associated cultural history mean that the Project area has “unique characteristics.” CTGR offers only its conclusory assertion that, had BLM conducted a “proper inventory” for cultural resources, or allowed CTGR to offer its own evidence, the Project area would have been viewed as having unique characteristics because of the considerable presence of cultural resources. BLM did not discover “massive numbers” of cultural resources in the Project area, or identify any resources associated with CTGR’s cultural history that are of particular uniqueness. As we have noted, BLM provided CTGR with numerous opportunities to offer its own evidence, but at no point did CTGR avail itself of that opportunity.

CTGR claims that Project activities may result in “the permanent, irreparable destruction of [T]ribal cultural resources,” which could affect the “emotional, spiritual, and physical health” of Tribal members. But CTGR offers no support for its claim that the destruction of cultural resources is likely, or that the emotional, spiritual, or physical health of the Tribal community is likely to be affected. BLM took appropriate measures, including adoption of a PA and an HFTP, to ensure that no resource of any historic or cultural significance to any Native American tribe is destroyed or damaged. At best,

180 SOR at 29, 30, 30-31 (quoting 40 C.F.R. §§ 1508.27(b)(2), (3), (6), and (8)).
181 See Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1162-63 (9th Cir. 1998); Mary Lee Dereske, 162 IBLA 303, 323-25 (2004).
183 SOR at 30.
184 See id. at 30-31; Letter to BLM from CTGR, dated Jan. 30, 2015, at 8; Letter to BLM from CTGR, dated Jan. 30, 2015, at 5.
185 SOR at 29.
CTGR suggests a possible impact that is remote and highly speculative that need not be considered in the EIS.\textsuperscript{186}

3. BLM Properly Considered the Impacts of Data Recovery

BLM concluded, given data recovery and other means for mitigating adverse impacts, that cultural resource impacts “would likely be minor to moderate and long-term.”\textsuperscript{189} BLM acknowledged that the loss of the cultural context for the recovered cultural resources constituted an irreversible impact to the particular affected resource.\textsuperscript{190} BLM did not regard the impacts of data recovery as significant.\textsuperscript{191} Rather, it viewed the removal of cultural resources as necessary for their preservation. The terms of the PA and HPTP require that data recovery include the documentation—with notes, photographs, and other means—of the cultural context in which the removed objects were found. CTGR fails to establish that the data recovery process constitutes an impact that BLM failed to address.

4. BLM’s Data Sharing Agreement Requirement Does Not Violate NEPA’s Cooperating Agency Requirements

CTGR complains that imposing the data sharing agreement effectively undermines CTGR’s ability “to participate fully and fairly in the NEPA process as a cooperating agency.”\textsuperscript{192} According to CTGR, by requiring a data sharing agreement, “BLM specifically

\textsuperscript{186} See, e.g., Coeur d’Alene Audubon Society, Inc., 146 IBLA at 70 (citing Trout Unlimited v. Morton, 509 F.2d at 1283).
\textsuperscript{187} See SOR at 32-33.
\textsuperscript{188} Id. at 33 (quoting Letter to BLM from CTGR, dated Sept. 2, 2014, at 8).
\textsuperscript{189} EIS at 4-127.
\textsuperscript{190} See id. (“Mitigation of impacts through data recovery would . . . constitute an irreversible commitment of that resource. . . . []information and data retrieved through . . . []data recovery[] would represent short-term use of cultural resources at the expense of future research opportunities.”).
\textsuperscript{191} Id.
\textsuperscript{192} SOR at 35.
sought to compromise [CTGR's] legal rights[.]”\textsuperscript{193} CTGR takes particular exception to the provision requiring cultural resource information be “kept in a centralized secure location, with access limited to the Tribal Chair and designated Tribal Representative for the sole purpose of consultation with the BLM.”\textsuperscript{194} CTGR also objects to the restriction on “duplicat[ing] or shar[ing]” cultural resource information “outside of CTGR,” and on using that information “for any purpose other than consultation with the BLM.”\textsuperscript{195} Since the information is “about the [Tribes'] own tribal history,” CTGR claims it should be permitted to use it “to educate their people, to enhance their understanding of their own history, to protect their historical resources and ancestral connections,” and for other purposes.\textsuperscript{196}

BLM has an overriding statutory obligation to protect cultural resources from the risk of harm.\textsuperscript{197} BLM properly sought to fulfill that obligation by requiring CTGR to enter into a data sharing agreement. CTGR has not persuaded us that it has any “legal rights” that were negatively affected by the cited provisions of the data sharing agreement.\textsuperscript{198} CTGR has not shown that the information concerning the use of a substantial area over many years is “about the [Tribes'] own tribal history[.]”\textsuperscript{199} CTGR has not shown a proprietary or other interest in any of the cultural resources that would be sufficient to compel BLM to disclose their characteristics and current location.

BLM made clear that CTGR was permitted, at all relevant times, to review the information at BLM's Elko District Office, and even obtain copies of the information, albeit redacted.\textsuperscript{200} However, CTGR was not permitted to review all of BLM's cultural resources information, including their specific location, unless CTGR entered into an approved data sharing agreement.\textsuperscript{201} Given the confidential nature of the information sought by CTGR, we find that BLM took reasonable steps to protect it from public disclosure. BLM was concerned that such disclosure might result in looting and vandalism of cultural resources.\textsuperscript{202}

\textsuperscript{193} Id. at 40.
\textsuperscript{194} Id. (quoting MOU for Information Sharing at 3).
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 40-41.
\textsuperscript{198} SOR at 40.
\textsuperscript{199} Id.
\textsuperscript{200} See BLM Answer at 12-13; Newmont Answer at 24-25.
\textsuperscript{201} See SOR at 16.
\textsuperscript{202} See BLM Answer at 12 (“The BLM attempted to share the information under conditions that were intended to protect the sensitive nature of the information’’); Newmont Answer at 13 (“[T]he cultural resources [identified by BLM] . . . are located
The CAA specifically states that it “is not intended to limit any Federal . . . laws, rules or regulations or any other requirements or duties under such laws, rules or regulations.” One applicable regulation is 43 C.F.R. § 46.225, which governs cooperating agency relationships. The regulation directs BLM, when preparing an EIS, to enter into MOUs with cooperating agencies. Such MOUs are intended to delineate the “respective roles” of cooperating agencies, as well as “assignments of issues, schedules, and staff commitments so that the NEPA process remains on track.” The regulation requires the use of MOUs “in the case of non-Federal agencies,” adding that the MOU “must include a commitment to maintain the confidentiality of documents and deliberations during the period prior to the public release by the bureau of any NEPA document.” No such commitment was ever obtained from CTGR. BLM sought to include the commitment required by 43 C.F.R. § 46.225 in the data sharing agreement, which was intended to provide for the disclosure of cultural resources information, consistent with BLM’s obligation to maintain the confidentiality of that information, as required by the NHPA and ARPA.

5. A Threatened Violation of State Water Law Does Not Constitute a Significant Impact

CTGR’s final NEPA argument is that BLM failed to consider the depletion and degradation of Nevada’s water resources that Project operations will cause. CTGR asserts that the impacts of the Project are significant because they “threaten[] a violation of . . . State . . . law or requirements imposed for the protection of the environment.”

CTGR explains that the Project requires Newmont to obtain rights to appropriate groundwater underlying the Project area from the State. The appropriated water would be transported by pipeline to the Cities of Wendover, Utah, and West Wendover, Nevada, to make up for the loss of Big Springs as a municipal water source. CTGR

Accordingly, those resources may be subject to looting, disruption, or vandalism if information on the location of those resources is not managed appropriately.

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203 CAA at 2.
204 43 C.F.R. § 46.225(d).
205 Id. (emphasis added).
206 See BLM Response at 5-6; Newmont Opposition at 23.
207 See SOR at 36-38.
208 Id. at 36 (quoting 40 C.F.R. § 1508.27).
209 Id.
claims that it is unlawful under State law to appropriate groundwater that exceeds the perennial yield or safe yield of the water source and that since the current permitted appropriation from the Goshute Valley Basin (11,548.69 acre-feet per year (AFY)) already exceeds the current perennial yield (11,000 AFY), any water appropriation for the Cities by the Project would violate State law.\textsuperscript{210} CTGR concludes that BLM “failed [to] disclose that impacts on groundwater resources were actually significant given the potential to violate state law through over-appropriation.”\textsuperscript{211}

In its EIS, BLM addressed the likely impacts of providing an alternative water supply to the Cities of Wendover, Utah, and West Wendover, Nevada, even though the authorization of water rights was subject to the approval of the State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources.\textsuperscript{212} BLM was not required to assess the environmental impacts of Newmont’s failure to comply with Nevada’s water law because BLM may properly presume, for NEPA purposes, that Newmont will fully adhere to the law.\textsuperscript{213} Nevada water law provides that “[t]he State Engineer shall reject the application and refuse to issue a permit to appropriate water for a specified period if the State Engineer determines that . . . [t]here is no water from the proposed source of supply without exceeding the perennial yield or safe yield of that source[.]”\textsuperscript{214} BLM did not and we do not assume that the State Engineer will fail to ensure that no unlawful appropriation occurs.\textsuperscript{215} CTGR does not demonstrate that the State Engineer would not take steps to ensure that over-appropriation under State water law does not occur.\textsuperscript{216} While CTGR posits a “potential violation,” it fails to establish that there is or will be an actual violation of State water law that BLM should have addressed in the EIS.\textsuperscript{217}

\textsuperscript{210} See id. at 36-37 (citing Nev. Rev. Stat. 533.371 (2017); and EIS at 3-48).
\textsuperscript{211} Id. at 38.
\textsuperscript{212} See ROD at 7, 23 n.2; EIS at 1-7 to 1-8.
\textsuperscript{214} SOR at 37 (quoting Nev. Revised Stat. 533.371 (2017) (emphasis added)).
\textsuperscript{215} See id. at 36 (“[I]n order for the Cities to obtain groundwater rights, their appropriations would first have to be approved by the Nevada State Engineer.”).
\textsuperscript{216} See Newmont Opposition at 36 (“[T]he State will be considering the availability of water supplies when determining whether to approve the Cities’ applications. . . . If the State Engineer determines that sufficient water rights are not available, it may decline to issue the new permits or may condition them accordingly.”).
\textsuperscript{217} SOR at 37.
C. BLM Met Its Trust Responsibility to CTGR

CTGR contends that by failing to fulfill its statutory obligations under section 106 of the NHPA and section 102(2)(C) of NEPA, BLM violated its trust responsibility to CTGR. Since we find that BLM properly complied with section 106 of the NHPA and section 102(2)(C) of NEPA, we see no basis for concluding that BLM violated its trust responsibility to CTGR or its members in addressing the adverse effects of the Project on cultural resources and other aspects of the human environment in which CTGR may have an interest.\textsuperscript{218}

CTGR invokes Executive Order (EO) 13175, dated November 6, 2000,\textsuperscript{219} which generally governs consultation with Indian tribes regarding actions approved by Federal agencies having substantial direct effects on the tribes, and also Secretarial Order 3317, dated December 1, 2011, which implements the EO. CTGR claims that BLM breached its trust responsibility to CTGR by failing to fulfill its consultation obligations under the Executive and Secretarial Orders. But this claim is precluded by the Executive Order, which expressly states: "This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person."\textsuperscript{220} We therefore reject CTGR's claim based on alleged trust responsibilities under the Executive Order, and by implication, its implementing Secretarial Order. The Secretarial Order constitutes policy guidance binding on BLM, which generally requires BLM to justify any deviation from that guidance to show a rational basis for a decision.\textsuperscript{221} But CTGR fails to identify any specific provision of the Secretarial Order from which BLM deviated.

In any event, we are not persuaded that BLM failed to follow the directives of the Executive Order or the Secretarial Order, since BLM afforded CTGR multiple opportunities to provide cultural resources information, identify and discuss the adverse effects of the Project on cultural resources, and otherwise consult with BLM regarding the potential implications of the Project for cultural resources having traditional religious and cultural importance to CTGR. We find nothing in the EO or Secretarial Order that barred BLM from requiring a data sharing agreement as a prerequisite to the sharing of

\textsuperscript{218} See, e.g., Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006), cert. denied, 552 U.S. 824 (2007); Confederated Tribes of the Goshute Reservation, 177 IBLA 171, 184-85 (2009).

\textsuperscript{219} 65 Fed. Reg. 67249 (Nov. 9, 2000).

\textsuperscript{220} Id. at 67252; see Carattini v. Salazar, 2010 U.S. Dist. LEXIS 117233 (W.D. Okla. 2010), *21.

\textsuperscript{221} See, e.g., Biodiversity Conservation Alliance, 174 IBLA 174, 180 (2008); Atlantic Richfield Co., 112 IBLA 115, 127 (1989).
BLM's cultural resources information with CTGR. Requiring that agreement was a proper exercise of BLM's consultation obligations under NHPA and its implementing regulations.

CONCLUSION

We, therefore, conclude that CTGR has failed to establish that BLM violated section 106 of the NHPA, section 102(2)(C) of NEPA, or other applicable law. We therefore affirm BLM's ROD approving the POoP for the Long Canyon Mine Project.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,\(^{222}\) we affirm BLM's decision.

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/s/
James F. Roberts
Acting Chief Administrative Judge

I concur:

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/s/
James K. Jackson
Administrative Judge

\(^{222}\) 43 C.F.R. § 4.1.