Nos. 10-72552, 10-72356, 10-72762, 10-72768, 10-72775

In the

United States Court of Appeals

for the Ninth Circuit

COALITION OF LOCAL GOVERNMENTS, ON BEHALF OF ITS MEMBERS, INCLUDING LINCOLN COUNTY, WYOMING,
Petitioner,

v.

BUREAU OF LAND MANAGEMENT; DEPARTMENT OF THE INTERIOR,
Respondents,

RUBY PIPELINE, L.L.C.,
Respondent-Intervenor.

On Petition for Review of a Decision of the Bureau of Land Management, Interior; U.S. Fish and Wildlife Service, Interior; U.S. Army Corps of Engineers

BRIEF OF PETITIONER FORT BIDWELL INDIAN COMMUNITY OF THE FORT BIDWELL INDIAN RESERVATION OF CALIFORNIA (No. 10-72768)

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ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Fort Bidwell Indian Community of the Fort Bidwell Indian Reservation certifies that it has no parent companies, subsidiaries or affiliates that issue shares or are publicly traded in the United States or abroad.

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STATEMENT OF JURISDICTION

I. THE STATUTORY BASIS OF SUBJECT MATTER JURISDICTION FOR THE RESPONDENT AGENCIES.

The Bureau of Land Management ("BLM") issued its Record of Decision ("ROD") granting rights-of-way ("ROW") and temporary use permits ("TUP") for the Ruby Pipeline project on July 12, 2010. BLM's ROD approved construction, access to, and operation of the gas pipeline on federal public lands pursuant to Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 ("MLA"), and Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761, *et seq*. ("FLPMA").

On July 12, 2010, the United States Fish and Wildlife Service ("FWS") issued its ROD, pursuant to the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. § 668dd ("NWRAA"), granting: (1) an access easement to approximately 3.64 acres of the Sheldon National Wildlife Refuge ("Sheldon Refuge") in exchange for a 20 acre private inholding in the Sheldon Refuge; and (2) a special use permit ("SUP") to Ruby Pipeline for access through the Sheldon Refuge to the pipeline corridor.

On July 30, 2010, the U.S. Army Corps of Engineers ("ACOE") authorized a "Nationwide Permit" ("NWP") for the Project under the Clean Water Act, 33 U.S.C. §§ 1251, *et seq*. ("CWA"), permitting the Project to dredge and fill wetlands and other waters of the United States.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO SECTION 7(C) OF THE NATURAL GAS ACT.

This Court's Appellate jurisdiction arises pursuant to the 2005 Energy Policy Act amendments to Section 7(c) of the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717r. Section 7(c) provides that the Court of Appeals for the circuit in which a facility subject to 15 U.S.C. § 717f(c) is to be constructed has original and exclusive jurisdiction over a civil action for review of an order or action of a Federal agency, other than the Federal Energy Regulatory Commission ("FERC"), to issue any permit, license, concurrence, or approval required by Federal law. 15 U.S.C. § 717r(d)(1). FERC issued Ruby Pipeline a Certificate of Public Convenience and Necessity for the pipeline on April 5, 2010, pursuant to 15 U.S.C. § 717f(c). Thus, this Court has original and exclusive jurisdiction over this action.

III. THIS APPEAL IS TIMELY.

Petitioner Fort Bidwell Indian Community ("Fort Bidwell Tribe" or "Tribe") filed a Petition for Review of the Respondent Agencies' final actions on September 10, 2010. The Tribe's petition challenges BLM's ROD, FWS's ROD, and the ACOE's NWP authorization, which are federal permits and approvals of the Project. The Petition is timely under Fed. R. App. P. 4(a)(1)(B) and 15 U.S.C. § 717r(b) because it was filed within the 60 day time period.

STATEMENT OF THE ISSUES

1. Whether BLM violated NEPA by adopting FERC's FEIS that failed to consider the impact of the project on the Fort Bidwell Tribe's human environment and failed to analyze a full range of alternatives?

2. Whether BLM, FWS, and ACOE violated the NHPA by failing to consult with the Tribe on a meaningful government-to-government basis as required by the Section 106 regulations?

3. Whether BLM violated the NHPA by adopting FERC's deferred approach to identification and evaluation of historic properties after project alternatives were eliminated from the project and allowing construction to proceed in a manner that precludes a broad range of alternatives for mitigation of adverse effects to historic properties before they are identified or evaluated?

4. Whether BLM violated the FLPMA by adopting FERC's FEIS, which failed to analyze project alternatives as required by NEPA, and therefore failing to take action necessary to prevent unnecessary or undue degradation of public lands?

5. The Fort Bidwell Tribe adopts issues 2 through 4 in the Center for Biological Diversity's ("CBD") and Defender of Wildlife's ("Defenders") joint opening brief filed on December 8, 2010 (Dkt. No. 54 in Case No: 10-72356).

STATEMENT OF ADDENDUM

Pursuant to Fed. R. App. P. 28(f) and Circuit Rule 28-2.7, relevant parts of all statutes, rules, regulations and agency policies are set out in a separately bound Addendum to this Opening Brief.

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE.

The Fort Bidwell Tribe seeks judicial review of BLM's ROD, FWS's ROD, and ACOE's NWP authorization pursuant to 15 U.S.C. § 717r(d)(1). RE 21-61; RE 5-20; 1-4. These agency approvals and permits authorize construction, operation and access to the Ruby natural gas pipeline on federal public lands and in waters of the United States pursuant to the MLA, FLPMA, NWRAA and CWA. In addition to the authorities and requirements imposed by those statutes, the construction of the pipeline and the Respondent Agencies' approvals are subject to the requirements of the NEPA, NHPA, RFRA, American Indian Religious Freedom Act, numerous Executive Orders, and the Federal Indian Trust Responsibility.

II. THE COURSE OF THE PROCEEDINGS BELOW.

On January 27, 2009, Ruby Pipeline LLC, a subsidiary of El Paso Gas, Inc., ("Ruby Pipeline"), filed an application with FERC pursuant to Section 7 of the NGA, 15 U.S.C. § 717f, for a Certificate of Public Necessity and Need for the

pipeline. *See* 74 Fed. Reg. 7412 (Feb. 17, 2009). On June 19, 2009, FERC published the Draft Environmental Impact Statement ("DEIS") for the pipeline. *See* 74 Fed. Reg. 30,560 (June 26, 2009). The Tribe provided comments on the DEIS raising concerns over the project's impact on the Tribe's environment, wildlife, water resources, cultural resources, burial sites, ceremonial sites, and the social, cultural and religious impact on its Tribal members. The comments also addressed the Respondent agencies' and FERC's failures to consult with the Tribe over the project and questioned whether important steps in the process had been excluded. RE 360-61. FERC published the FEIS on January 8, 2010. *See* 75 Fed. Reg. 2540 (Jan. 15, 2010); 75 Fed. Reg. 3221 (Jan. 20, 2010). The Tribe provided comments on the FEIS and a "White Paper" prepared by Ruby Pipeline to FERC and BLM. In its comments, the Tribe again raised concerns about the project's social cultural and religious impacts on Tribal members and the Tribe's cultural resources. The Tribe also addressed the continued failure of the BLM and FERC to analyze alternatives and consult with the Tribe. RE 132-40. The Tribe provided additional oral and written comments in response to letters and documents, at meetings, and for the purposes of an ethnographic report. RE 158; RE 333; RE 334-35; RE 336-38; RE 339; RE 349; RE 350-51; RE 357; RE 358; RE 456-57.

III. THE DISPOSITION BELOW.

Based on the legally insufficient analysis in the FEIS, in addition to its own insufficient analysis BLM issued its ROD on July 12, 2010. RE 21-61. The Tribe challenges the ROD because the BLM failed to analyze the environmental, social, cultural and religious impacts on the Tribe, its members and their cultural resources as required by NEPA, FLPMA, NHPA, AIRFA, regulations and policy, numerous executive orders and the Federal Indian Trust Responsibility.

Similarly, the FWS issued its ROD on July 12, 2010, based on the analysis in the FEIS and its own independent analysis. RE 5-20. The Tribe challenges FWS's decision because it was made without considering the impact on the Tribe's cultural resources through consultation as required by the NHPA.

Finally, the ACOE issued its NWP on July 30, 2010. RE 1-4. The Tribe challenges the NWP because of the unanalyzed impacts the construction of the pipeline will have on water bodies and wetlands of social, cultural and religious interest to the Tribe and its members.

IV. THIS PETITION FOR REVIEW WAS FILED WITHIN 60 DAYS OF THE DATE OF THE ORDERS APPEALED FROM AND THIS APPEAL IS TIMELY.

Pursuant to Fed. R. App. P. 4(a)(1)(B) and 15 U.S.C. § 717r(b), BLM and FWS provided 60 days to seek judicial review of their respective July 12, 2010, RODs. The ACOE's July 30, 2010 NWP for the project is subject to review under

the same statutory scheme. The Fort Bidwell Tribe's Petition for Review is timely because it was filed on September 10, 2010, before the expiration of the 60-day time periods.

STATEMENT OF FACTS

I. THE FORT BIDWELL INDIAN TRIBE.

The Fort Bidwell Tribe is a federally recognized tribe of Northern Paiute Indians. Federally Recognized Indian Tribe List, 75 Fed. Reg. 60811 (Oct. 1, 2010). The Tribe's small reservation is situated in Modoc County near Fort Bidwell, California, approximately 12 miles south and east of the Oregon and Nevada borders. The Tribe's reservation is located within its ancestral territory, which includes lands in northeastern California, southeastern Oregon and northwestern Nevada.

II. THE FORT BIDWELL TRIBE'S CULTURAL LANDSCAPE.

A. The Barrel Springs Traditional Cultural Property.

The Barrel Springs Traditional Cultural Property ("TCP") includes visible geographic features, burials, rock stacks, subsurface historic and cultural features, springs and other fragile and irreplaceable properties within the Tribe's ancestral territory and near the Tribe's reservation. RE 631-37. Properties within the Barrel Springs TCP form the basis for the Tribe's identity. It is "the most important area for subsistence hunting and plant gathering by tribal members." AD 85-86 at ¶¶ 4-

5; RE 622 (providing that tribal members identified the greatest number of sites and resources of concern in the area known as the Barrel Springs TCP). The Barrel Springs TCP is the Tribe's tie to past generations and the knowledge and beliefs carried forward to today. RE 622. At properties in this area members pray, practice their religion, and teach children about their heritage, their Tribe, and their culture. These teachings include subsistence gathering and hunting for cultural, religious and subsistence purposes, and lessons on how properly to engage in these activities. AD 86-87 at ¶¶ 6-7; RE 632.

1. The Subsistence uses of the Barrel Springs TCP.

The Tribe's native name is the Gidutikad Band. Gidutikad means "groundhog eaters" and it relates to the distinctive subsistence resource located within their territory. In addition to the groundhog, animals of significance to the Tribe for subsistence purposes include mule deer, pronghorn, jackrabbit, sage grouse and trout. Plants of significance to the Tribe include yampah, wild plum, chokecherry, and willow. RE 621; AD 85 at ¶ 4. The Barrel Springs TCP is the "foremost center of subsistence hunting and plant gathering by tribal members." RE 622. The Tribe has relied upon resources in the area since time immemorial, with the reliance on the resources increasing over time as the Tribe's mobility became more restricted and other important resource areas were lost to competing interests. RE 622, 632. The TCP has been known to the Tribe as one of the very

"last good places to go hunt and dig roots" for more than a hundred years. RE 632. The TCP has sustained the Tribe by providing food security through very difficult historical times and continues to do so today. RE 632.

The Barrel Springs TCP is the principal area used by Tribal members for hunting groundhog, deer, antelope and rabbit. RE 631. This area is also used for gathering subsistence and ceremonial plant resources. The most important of these resources for subsistence both traditionally and contemporarily is the yampah root. RE 623. The gathering of plant materials and hunting involves visiting sites in sequence of priority until a favorable supply of resources is found. The top priority sites for digging yampah and for hunting deer and groundhog are in the Barrel Springs TCP. RE 623.

2. The Cultural, Spiritual and Religious Values of the Barrel Springs TCP.

The Barrel Springs TCP is considered sacred by the Tribe because of the abundance of ritual features found in the area and the importance of subsistence and other activities performed in the area. RE 631-33. The preservation of the TCP in its relatively undeveloped state is necessary to the continuity of cultural, spiritual, and ritual practices involved in hunting and gathering. RE 632. The TCP is important not only as a traditional hunting and gathering area for subsistence purposes, but also as a place where engaging in those activities, and the ritual and ceremony involved in preparing for them is used to teach the children the proper

way to hunt, gather, pray and engage in ceremony and ritual. RE 629; AD 106 at ¶ 6 . Hunting, gathering, engaging in ritual and ceremony, and instructing the youth are all religious exercises. AD 86-87 at ¶ 6-7. These exercises often take place at individual sites or areas of significance within the TCP. AD 106 at ¶ 4.

Such sites include the high number of rock stack features in the TCP. The rocks stacks are of great historical, cultural, spiritual and religious significance to the Tribe and its members. AD 87 at ¶ 9; RE 631. The rock stacks serve many purposes including: praying, making offerings, seeking power, and seeking protection. AD 87 at ¶ 9. These activities are often performed by single individuals but they are viewed as being for the benefit of the entire Tribe. The high volume of rock stacks occurring in the Barrel Springs TCP is attributable to the belief among Tribal members that it is a particularly powerful area. AD 87 at ¶ 9; RE 631.

Other sites of cultural, historical, spiritual, and religious significance in the Barrel Springs TCP and the surrounding area include archeological sites, springs, burials, and resource procurement areas. The TCP and the specific sites are visited for purposes of ritual, prayer, ceremony, and subsistence by many Tribal members. AD 105 at ¶ 3.

B. The Big Valley Traditional Cultural Property.

The Big Valley TCP possesses attributes similar to those at Barrel Springs. AD 88 at ¶ 10. The cultural properties include visible surface geographic features, gravesites, rock stacks, subsurface historic and cultural features, water courses and other fragile and irreplaceable artifacts and properties. AD 88 at ¶ 10; RE 554-55; RE 583-84. In addition to the subsistence resources that are available in the Barrel Springs TCP, Deep Creek within the Big Valley TCP and nearby Twentymile Creek provides opportunities for subsistence fishing of trout. AD 108 at ¶ 13; RE 554-55; RE 583-84.

III. THE RUBY PIPELINE PROJECT.

Ruby Pipeline's project is a 42 inch-diameter natural gas pipeline that will be buried in a trench that is between 6 feet wide and 6 feet deep. RE 189. The trench is sited within a 115 foot wide right-of-way that runs for 675 miles from Opal, Wyoming to Malin, Oregon. RE 43. After the pipeline is constructed, Ruby Pipeline will maintain a 50 foot permanent corridor over the pipeline including an access road that is 30 feet wide. RE 29. The permanent corridor will be subject to future disturbance for maintenance purposes. The pipeline will create a scar of depleted vegetation from Wyoming to Oregon through some of the last unfragmented sagebrush habitat in northern Nevada.

The pipeline will also directly impact the Barrel Springs TCP in Nevada, the Big Valley TCP in Oregon, and numerous other cultural resources of concern to the Fort Bidwell Tribe along the pipeline corridor in Nevada and Oregon. AD 107-08 ¶¶ 10-13, 22; RE 56. The Barrel Springs TCP was evaluated and found eligible for listing on the National Register of Historic Places. RE 56; 631-35. The Tribe believes that the Big Valley TCP is eligible but it has not been evaluated. AD 91 at ¶ 17; RE 349. The identification of cultural resources, analysis of adverse effects and mitigation measures to address the impacts was incomplete at the time the FEIS was published. This analysis remained incomplete at the time the BLM and FWS RODs were issued.[1]

BLM issued a ROD approving the project notwithstanding its determination that the Project "will have an 'adverse effect' on the Barrel Springs TCP, a property eligible for listing on the NRHP [National Register of Historic Places]." RE 56. These adverse effects "cannot be mitigated." RE 56. Nonetheless, BLM issued its ROD and ROW for the certificated route based on the environmental analysis of the pipeline in the FEIS despite the Department of Interior's understanding that the FEIS' consideration of alternatives was incomplete. RE 141-43.

[1] The BLM had previously stated that it would not issue its ROD until the Section 106 process was completed. RE 397-98, 424.

SUMMARY OF ARGUMENT

The FERC's FEIS failed to analyze the effects of the Ruby Pipeline on the human environment of the Fort Bidwell Tribe. In its approval of the pipeline, BLM adopted the deficient FERC FEIS, which failed to analyze the impacts of the pipeline on the Tribe's Barrel Springs TCP and other cultural sites, the Tribe's use of wildlife and botanical subsistence resources, and the sites that are considered sacred by the Tribe and at which the Tribe engages in religious ceremonies. The FEIS likewise failed to analyze the impacts in the context of the proposed alternatives.

NEPA requires that alternatives be analyzed in the same manner that the proposed project is analyzed. Only in this way can the proposed project and the available alternatives be compared, on the basis of similar information, and a reasoned decision made. This failure to analyze the impacts on the human environment of the Tribe and compare those impacts across available alternatives was adopted by BLM when it issued its ROD. Accordingly, BLM's action in approving the project is arbitrary and capricious and must be set aside.

Likewise, BLM's failure to analyze alternatives resulted in a violation of the FLPMA. The FLPMA requires the BLM to analyze project alternatives in order to prevent unnecessary or undue degradation of public lands.

In addition, the BLM ROD, the FWS ROD and the ACOE NWP violated the NHPA. The NHPA Section 106 regulations require agencies to consult with Indian tribes when a project will affect historic properties of religious or cultural significance to the tribes. This consultation must be provided on a government-to-government basis and in a manner that respects tribal sovereignty.

The agencies are likewise required to identify, evaluate and mitigate harm to historic properties before committing federal resources to the project. Here, a deferred approach to identification of historic properties was adopted, after alternatives were eliminated from consideration. Then construction was allowed to proceed in a manner that eliminated the broad range of alternatives for mitigation of harm to the sites in violation of the NHPA. By failing to consult and adopting the deferred approach to identification, BLM, FWS, and ACOE failed to take the procedural steps necessary to fulfill the requirements of the NHPA Section 106 regulations and their actions must be set aside.

ARGUMENT

I. THE FORT BIDWELL TRIBE HAS STANDING TO CHALLENGE THE FEDERAL APPROVALS AND PERMITS FOR THE PROJECT.

The Fort Bidwell Tribe adopts, and incorporates herein, the CBD and Defenders' argument on standing in their joint opening brief. Dkt. No. 54 in Case: 10-72356 at 9. The Tribe submits an affidavit and a declaration from Vice-Chairman Aaron Townsend and Dr. Deur's ethnographic reports to demonstrate

the standing of the Tribe. AD 84-104; AD 105-08; RE 501-27; RE 528-618; RE 619-37. These materials demonstrate that the Tribe and its members will suffer from the impacts of the project on their irreplaceable cultural resources, the short and long term impacts of the project on their environment, their subsistence resources, and from the burden imposed on their religious exercises.

II. PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT, THE AGENCY ACTIONS SUBJECT TO THIS PETITION MUST BE SET ASIDE IF THEY ARE ARBITRARY AND CAPRICIOUS.

The Tribe adopts, and incorporates herein, the CBD and Defenders' argument on the standard of review in their joint opening brief. Dkt. No. 54 in Case: 10-72356 at 9-11. This standard of review applies to all of the claims and issues presented in this opening brief. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (NEPA compliance is reviewed under arbitrary and capricious standard); *Webb v. Lujan*, 960 F.2d 89, 91 (9th Cir. 1992) (FLPMA compliance is reviewed under arbitrary and capricious standard); *Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 641 (9th Cir. 2010); *Quechan Tribe v. U.S. Dept. of Interior*, 2010 U.S. Dist. LEXIS 132482, *6 (S.D. Ca. Dec. 15, 2010)(failure to observe procedure required by law is subject to arbitrary and capricious standard of review).

III. THE ACOE VIOLATED THE CWA IN AUTHORIZING A NWP FOR THE PROJECT.

The Tribe adopts, and incorporates herein, the CBD and Defenders' arguments on the violations of the CWA attributable to the ACOE's issuance of a NWP for the project. Dkt. No. 54 in Case: 10-72356 at 34-51.

IV. BLM VIOLATED NEPA IN ADOPTING THE FEIS.

The Tribe adopts, and incorporates herein, the CBD and Defenders' arguments concerning BLM's violations of NEPA in its adoption of the FEIS to support its ROD and approve ROW for the pipeline project. Dkt. No. 54 in Case: 10-72356 at 51-70. In addition to the arguments made in the CBD and Defenders' joint opening brief, the Fort Bidwell Tribe provides the following:

A. BLM Violated NEPA by Failing to Analyze the Impact of the Pipeline Project on the Human Environment of the Fort Bidwell Tribe.

1. BLM's ROD is arbitrary and capricious because when issued, it was impossible for BLM adequately to compare alternatives.

NEPA requires that federal agencies analyze and describe the effects, both direct and indirect, of a proposed action and the alternatives on the quality of the human environment. 40 C.F.R. § 1508.8; *Lands Council v. Forester of Region One*, 395 F.3d 1019, 1026 (9th Cir. 2004). The primary means by which NEPA achieves these goals is through the requirement that "a federal agency 'to the fullest extent possible,' . . . prepare 'a detailed statement on the environmental

impact' of 'major Federal actions significantly affecting the quality of the human environment.'" *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 936 (9th Cir. 2010) (internal citations omitted); *Center for Biological Diversity v. U.S. Department of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (the EIS must provide a "full and fair discussion of significant environmental impacts" of the proposed action). 42 U.S.C. § 4332.

Full and meaningful consideration of all reasonable alternatives is the "heart" of an EIS. 42 U.S.C. § 4332(2)(C)(iii); *Or. Natural Desert Ass'n v. BLM*, 2010 U.S. App. LEXIS 18423 *19 (9th Cir. 2010) ("existence of a viable but unexamined alternative renders an environmental impact statement inadequate"). As this Court has confirmed:

> It is black-letter law under NEPA that such a comparison is required . . . . [T]he EIS "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decision maker and the public."

Ctr. for Biological Diversity v. U.S. DOI, 623 F.3d 633, 642, 38-39 (9th Cir. 2010) (citing 40 C.F.R. § 1502.14). It is imperative that this full and meaningful consideration be made ***before*** committing federal resources:

> an agency does not satisfy NEPA by ignoring the statute at the critical stage, committing resources to development, and eventually completing an EIS-however lengthy and exhaustive – that simply asserts that the fundamental decision to develop has already been made.

Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 786-87 (9th Cir. 2006). Although it is impossible for an agency to give "full and meaningful" consideration to alternatives before the information is available upon which a comparison can be based, that is precisely what BLM did here.

In regard to the preservation of cultural and historic resources, Section 101(b)(2) of NEPA provides that in order to carry out the policy of analyzing the impact of development on the human environment:

> it is the continuing policy of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . assure for all Americans safe, healthful, productive, and esthetically and ***culturally pleasing surroundings***.

42 U.S.C. § 4331(b)(2) (emphasis added).

Without the information to compare the impact of alternatives, (1) on the Tribe; (2) on the Tribe's cultural sites, (3) on religious exercises in the form of prayer, ritual and ceremony; (4) on the religious exercise of teaching ceremony, ritual, and prayer to the Tribe's children, (5) on the religious exercise of hunting and gathering for subsistence; (6) on the wildlife and botanical resources the Tribe relies upon for subsistence hunting and gathering resources at those sites; and (7) on the water resources upon which the Tribe relies for subsistence and other cultural practices, BLM issued its ROD, ROW and TUPs based entirely upon an

admittedly incomplete FEIS.[2] And it did so in spite of its own recognition that the approved route "will have an 'adverse effect' on the Barrel Springs TCP, a property eligible for listing on the NRHP." RE 56. BLM confirmed the adverse effects "cannot be mitigated." *Id.* BLM acted notwithstanding the fact that an alternate route is more environmentally sound – the Jungo-Tuscarora Route Alternative. This route was proposed by FWS, the Nevada Department of Wildlife, and BLM. RE 435-37; RE 463; RE 217-20. However, the alternative was rejected from further consideration in the FEIS on the basis of statements attributed by the FEIS to Ruby. Specifically, that the alternative would result in $271 million in additional costs, violations of Ruby's "binding precedent agreements," and the triggering of California environmental review, which could

[2] *See* RE 316 (FEIS at 4-260)(project reporting is incomplete, field studies are incomplete, treatment plans addressing mitigation must be completed, report reviews and tribal consultation are "ongoing," consequently FERC, BLM, FWS, USFS, COE, and Reclamation have not completed the process of complying with Section 106 of the NHPA); RE 294 (FEIS at 4-238)("[i]n its ongoing permitting process, the BLM states that it would recommend that Ruby continue to work with the BLM and the Fort Bidwell Tribe to develop additional alternatives that minimize impacts on the Barrel Springs TCP"); RE 319-21 (FEIS at 4-92)(Ruby, BLM, and FERC are consulting with tribes to identify wild harvesting areas and to develop proper avoidance or mitigation measures); RE 281 (FEIS at 4-209)(socioeconomic analysis does not include analysis of the impact from loss of subsistence resources for short or long term); RE 319-21 (FEIS at 4-307-09)(no cumulative effects analysis on socioeconomics or effects on cultural resources of the Tribe even though the project increases the likelihood of an additional utility following the same corridor and there are areas where other projects "may result in cumulative effects to cultural resources").

take an additional year of environmental analysis, and would prevent Ruby from meeting its in-service date. RE 219.

In issuing its ROD, BLM put the cart before the horse, improperly committing federal resources to large-scale excavation and construction before it could properly consider alternatives. As this Court has recognized:

> Proper timing is one of NEPA's central themes. An assessment must be "prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made."

Save the Yaak Comm. v. Block, 840 F.2d 714, 718 (9th Cir. 1988); *Pit River Tribe*, 469 F.3d at 782 (consideration of alternatives "would serve no purpose if at the time the EIS is finally prepared, the option is no longer available").

Yet BLM could not compare the proposed route with the alternatives because BLM simply does not have the necessary information to do so.[3] The FEIS primarily addressed alternatives only in Chapter 3. Though some but not all of the alternatives received a summary of effects in a table, the effects addressed in the tables are not consistent or of the same quantity and are compared only to the proposed route and not against other alternatives. The rest of the FEIS is dedicated

[3] *See supra* note 1; RE 202 (FEIS at 3-33)("Ruby has not completed on-the-ground surveys of natural and cultural resources along the Sheldon Route Alternative in the Sheldon NWR"); RE 207 (FEIS at 3-38)(stating fourteen percent of the construction corridor that would be needed for the Sheldon Route Alternative has been surveyed for cultural resources and 29 percent has been surveyed for the proposed route).

almost wholly to analysis of the proposed route, without comparable treatment of the alternatives. Indeed, as the CBD and Defenders illustrate in their joint opening brief, the BLM recognized that the alternatives were not studied to the same extent as the proposed route and that if the FEIS did not provide that analysis the BLM could not adopt it for its ROD. Dkt. No. 54 in Case: 10-72356 at 63-65.

2. BLM failed to consider the "no action" alternative.

One alternative to issuing the ROW and TUPs was not to do so. But BLM never considered this "no action" alternative. Instead, BLM committed federal resources without determining the NEPA impacts to the Fort Bidwell Tribe's human environment. For instance, the FEIS identified that the construction of the pipeline may have socioeconomic impacts on the Fort Bidwell Tribe as a result of displaced subsistence resources. RE 289. However, the FEIS did not study the impacts to those resources in the context of the proposed route or any other alternatives. Instead, the FEIS concludes without analysis that there is no impact on the Tribe and that mitigation to address wild harvesting would be part of ongoing consultation efforts. RE 289; RE 260.

This "after the fact" approach to NEPA in general, and to the no action alternative in particular, is improper. *Conner v. Burford*, 848 F.2d 1441, 1450-51 (9th Cir. 1988) ("Appellants' suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was

designed to avoid"); *Nat'l Parks & Cons. Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (proposal "to increase the risk of harm to the environment and then perform its studies . . . has the process exactly backwards"). As this Court has underscored:

> The "heart" of the EIS – the consideration of reasonable alternatives to the proposed action – requires federal agencies to consider seriously the "no action" alternative *before approving a project with significant environmental effects*. That analysis would serve no purpose if at the time the EIS is finally prepared, the option is no longer available.

Pit River Tribe, 469 F.3d at 782, *quoting Conner*, 848 F.2d at 1451 (emphasis added); *Accord Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (EIS "contained an inadequate discussion of the 'no action alternative'"). BLM's failure to give full and meaningful consideration to the "no action" alternative was arbitrary and capricious and requires remand for proper study and consideration of alternatives.

3. BLM violated NEPA when it adopted FERC's deficient FEIS.

NEPA allows agencies to use an existing EIS if it meets the standards for an adequate statement under the regulations. 40 C.F.R. § 1506.3(a). However, federal law imposes significant limitations on adopting existing environmental analysis. Those limitations were not met by BLM here.

FERC's FEIS is inadequate for many reasons, including incomplete: (1) project reporting; (2) consideration of alternatives; (3) field studies; (4) treatment plans

addressing mitigation; (5) report reviews; (6) tribal consultation; (7) agency compliance with Section 106 of the NHPA; and (8) BLM and FERC consultation with tribes to identify wild harvesting areas and proper avoidance or mitigation measures.[4] The FEIS is also inadequate because FERC failed to analyze socioeconomic impact from loss of subsistence resources. RE 260.

Moreover, cultural properties in the path of the proposed route were not properly evaluated under either NEPA or the NHPA, including historic properties in Big Valley, which had not been evaluated by BLM when it adopted the deficient FEIS. RE 583-84. Another example is the Barrel Springs TCP, which BLM identified as "eligible for listing on the NRHP." RE 56. Although no one evaluated the various resources within the Barrel Springs TCP consistent with NEPA standards, BLM relied on the inadequate FERC FEIS to grant ROW for construction of the pipeline.

4. BLM violated its own Native American Consultation policies when it adopted FERC's deficient FEIS.

BLM's own policies require that tribal officials and tribal religious leaders be consulted when "agency actions would abridge the tribe's religious freedom by . . . intruding upon or interfering with ceremonies." AD 81 (BLM Manual, H-8120-1, "Guidelines for Conducting Tribal Consultation," III-6 (Dec. 03, 2004)). This policy was adopted by BLM in response to the ongoing implementation

[4] *See supra* note 2.

requirements imposed by the American Indian Religious Freedom Act, 42 U.S.C. § 1966 ("AIRFA"). Accordingly, BLM's policy is "to avoid infringing on Native Americans' religious rights" and BLM is required to examine its actions or authorizations that would "interfere with free exercise" in consultation with Tribe's. BLM Manual, H-8120-1, III-6. AD 81.

In addition, the BLM Manual requires that tribal officials be consulted under Executive Order No. 13007 "Indian Sacred Sites" 61 Fed. Reg. 26771 (May 24, 1996). The purpose of this consultation is to "avoid adversely affecting the physical integrity" of Indian sacred sites that are used for ceremony, and to "seek alternatives that would resolve potential conflicts." BLM Manual, H-8120-1, III-9. AD 82.

The BLM contacted the Tribe by letter and informed them that consultation would occur as required by the H-8120-1 Guidelines. RE 439. Thereafter, the religious exercises of the Fort Bidwell Tribe were made known to BLM during the environmental review for the project.[5] These religious exercises were also made known through Tribal member participation in the ethnographic study done for the

[5] RE 290 (FEIS at 4-233)(ethnographic reports prepared for Fort Bidwell Tribe); RE 293-94 (FEIS at 4-237-4-238)(Fort Bidwell tribal members visit archeological sites and features within the Barrel Springs TCP for purposes of ritual, adverse effect to sensory experiences of individuals who visit the area for ceremonial purposes, and effects on the spiritual value of the place that cannot be mitigated); RE 314 (FEIS 4-258)(Aaron Townsend expressed concern over impacts on ceremonial sites, including springs, and on impacts to roots and animals that are used by the Tribe).

Fort Bidwell Tribe by Dr. Deur.[6] The religious exercises of the Tribe and many of its tribal members, which are practiced within the Barrel Springs TCP, include but are not limited to ritual preparation for hunting and gathering, ritual preparation for ceremony, engaging in ceremony, praying, making offerings, seeking power, seeking protection, hunting, gathering, and teaching all of these things to the children of the Tribe. These exercises often take place at specific sites within the TCP including the stacked rock features, petroglyphs, archeological sites, and other natural and cultural physical features of the TCP. RE 629, 632; AD 106 at ¶ 4.

The Tribe also made it known that the preservation of the TCP in its current, relatively undeveloped state is necessary to the continuity of cultural, spiritual, and

[6] RE 334-45 (AIRFA and EO 13007 both apply to the cultural resource issues in the Barrel Springs TCP); RE 628 (sacredness of certain locations and ceremonial uses of the Barrel Springs area); RE 630 (sacredness of rock art sites and other rock features used for ceremonial purposes; such features should not be disturbed; the view from such sites should not be impacted to maintain integrity of sites and of ceremony; increased noise from pipeline and effect on sites; physical and viewshed impact of pipeline on vegetation and groundwater that is important to sites and ceremony); RE 631 (high density of stacked rock features that are unique to Barrel Springs TCP relate to rituals used in hunting and gathering); RE 632 (archeological sites and features in Barrel Springs TCP are visited by tribal members for ritual and teaching tribal youth about traditional cultural practices and the sites; the area has been used for a very long time for rituals related to hunting and gathering; access to the area and integrity of the area is necessary to continuing these practices; the area is sacred to tribal members); RE 633 (rituals in Barrel Springs TCP related to subsistence; area encompassed in TCP is utilized regularly and intensively today); RE 634 (Barrel Springs TCP is the principle venue for intergenerational transmission of traditional subsistence knowledge and associated ritual protocols); RE 635 (evidence of history of ceremonial activity in Barrel Springs TCP); RE 636 (pipeline would have adverse effect on sensory experiences of individual who visit the area for ceremonial activity).

ritual practices involved in hunting and gathering. RE 632; AD 108 at ¶ 12. The TCP is important not only as a traditional hunting and gathering area for subsistence purposes, but also as a place where engaging in those activities, and the ritual and ceremony involved in preparing for them is used to teach the children the proper way to hunt, gather, pray and engage in ceremony and ritual. RE 629; AD 106 at ¶ 6. Hunting, gathering, engaging in ritual and ceremony, and instructing the youth are all religious exercises. AD 106 at ¶¶ 6-7. These exercises often take place at individual sites or areas of significance within the TCP. RE 566; AD 106 at ¶ 4.

The sites where religious exercises take place include archeological sites, springs, and resource procurement areas, as well as the high number of rock stack features in the TCP. The rocks stacks are of great historical, cultural, spiritual and religious significance to the Tribe and its members. AD 87-88 at ¶ 9; RE 631. The rock stacks serve many purposes including: praying, making offerings, seeking power, and seeking protection. AD 87-88 at ¶ 9; RE 630. The high volume of rock stacks occurring in the Barrel Springs TCP is attributable to the belief among Tribal members that it is a particularly powerful area. AD 87-88 at ¶ 9; RE 631. The power of the place is unique and only found in that place. AD 106-07 at ¶ 7.

The Tribe further made it known that its members believe that if the Barrel Springs TCP is disturbed by the construction of the pipeline, their religious

exercises will be interfered with. RE 630, 636. The religious exercises involved in hunting and gathering would also be substantially burdened by the potential long term impacts from the construction of the pipeline on resource procurement areas. AD 107-08 at ¶¶ 10, 11; RE 623.

Although the religious exercises of the Fort Bidwell Tribe that are dependent upon sacred sites in the Barrel Springs TCP and surrounding area were made known to BLM during the environmental review for the project, the BLM did not consult with the Tribe as required to solicit information that would assist the BLM in meeting its policy objective of not interfering with the Tribe's free exercise or of avoiding adverse effects on the physical integrity of the sites by seeking viable alternatives that would resolve the potential conflicts.

These policies must inform the analysis done by BLM for approval of the pipeline. However, it is clear from the FEIS and the ROD that BLM did not analyze the impact of the project on the Tribe. Indeed, the FEIS provides only that the impacts on these resources and sites will be the subject of future consultation. RE 281; RE 294; RE 319-21. The failure of the BLM to comply with its own policies and procedures in the environmental review for the project and to analyze the impact of each of the project's alternatives on the Tribe's religious exercises, sacred sites and ceremonial uses of the sites was arbitrary, capricious and not in conformance with required procedure and should be set aside.

5. BLM failed to follow procedure required by NEPA.

Because NEPA is a procedural statute, the Court "will set aside agency actions that are adopted 'without observance of procedure required by law.'" *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 810 n.27 (9th Cir. 2005). The procedure "required by law" mandates that "environmental information is available to public officials and citizens ***before*** decisions are made and ***before*** actions are taken." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 608 F.3d 592, 599 (9th Cir. 2010) (*citing and quoting* 40 C.F.R. § 1500.1(b)) (emphasis added). Instead of taking the required hard look at the environmental consequences of its decision, BLM improperly made an "irreversible and irretrievable commitment of resources" prior to completing its environmental review. *Pit River Tribe*, 469 F.3d at 786. Because BLM did not meet these procedural requirements, its approval of action that admittedly will destroy significant cultural properties, which cannot be mitigated, and that will impact the Tribe socioeconomically through un-analyzed impacts on subsistence resources along the proposed route corridor and within the Barrel Springs TCP in particular must be remanded for compliance with those procedural requirements.

V. BLM VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT.

A. BLM Failed to Provide the Meaningful Consultation Required by Section 106 of the NHPA.

The goal of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq*., is to protect the Nation's interests in the preservation of historic properties. *Te-Moak Tribe,* 608 F.3d at 609; *see San Carlos Apache Tribe v. U.S.*, 417 F.3d 1091, 1093-94 (9th Cir. 2005) (NHPA's goal is to "encourage preservation of sites and structures of historic, architectural, or cultural significance"). Section 106 of the NHPA has been described as a "stop, look, and listen" provision that requires a federal agency carefully consider the effects of its programs. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800,805 (9th Cir. 1999).

NHPA's Section 106 consultation requirements, and implementing regulations, provide agencies the guidance necessary to achieve this goal. 16 U.S.C. § 470f. Implementing regulations require agencies to consult with Tribes about the effects of federal action on historic properties of religious or cultural significance to the tribes. *See* 36 C.F.R. §§ 800.2(c)(2) & 800.4(c)(1). Agencies must recognize their trust responsibility to tribes and provide consultation on a government-to-government basis in a manner that is respectful of tribal sovereignty. 36 C.F.R. § 800.2(c)(2)(ii)(B) & (C); *See Quechan Tribe,* 2010 U.S. Dist. LEXIS 132482 at

*40 ("[G]overnment agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations").

1. Failure to Identify a Lead Official for Consultation leaves BLM independently responsible for Implementing Section 106.

When more than one agency is involved in project decision making, the agencies can appoint a lead agency responsible for all Section 106 obligations. In this regard, the regulations implementing Section 106 requirements provide:

> It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that ***an agency official with jurisdiction over an undertaking*** takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. ***The agency official has approval authority*** for the undertaking and ***can commit the Federal agency*** to take appropriate action for a specific undertaking as a result of section 106 compliance.
> ***
> If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, ***which shall identify the appropriate official to serve as the agency official who shall act on their behalf***, fulfilling their collective responsibilities under section 106.

36 C.F.R. § 800.2(a) & (a)(2) (emphasis added). Failure to do so leaves each agency independently liable for Section 106 compliance. 36 C.F.R. § 800.2(a)(2). Once a lead agency is appointed, it must identify the single official responsible for acting on behalf of all agencies. *Id.* But here, no individual agency official was ever identified. Instead, the Tribe was told that Ruby, Ruby's contractors and BLM would "be consulting with it." *E.g.*, RE 486; RE 438. This failure to

identify a lead agency official resulted in confusing, unfocused consultation with individuals that did not possess approval authority for the project, and does not comply with the express requirements of the regulations. Particularly here, where the Tribe has such limited resources, this haphazard approach prevented it from determining where to focus its efforts. Because no federal official with responsibility to carry out consultation on behalf of the federal agencies was identified for consultation, BLM remains independently responsible for its failure to comply with Section 106. 36 C.F.R. § 800.2(a)(2).

2. Delegating consultation authority to Ruby was improper.

Section 106 regulations allow an agency official to "use the services of applicants . . . ***to prepare information, analyses, and recommendations*** under this part." 36 C.F.R. § 800.2(a)(3) (emphasis added). Yet here, FERC improperly delegated to Ruby the responsibility to provide the Section 106 consultation. *See, e.g.*, RE 381; RE 303-06. This delegation was improper because only an "agency official" with "jurisdiction over an undertaking" can take on the legal and financial obligations imposed on an agency by Section 106. 36 C.F.R. § 800.2(a). The regulations also require that consultation recognize the government-to-government relationship between Tribes and the federal government, and mandate that the "agency official shall consult with representatives designated or identified by the tribal government." *Id*. at § 800.2(c)(2)(ii)(C). Ruby acknowledged this limitation

in its correspondence with the Tribe. RE 389. However, Ruby's activities were claimed to be "consultation" and were included as examples of Section 106 Consultation in Section 4.10.3 of the deficient FEIS. RE 298-306. Moreover, Ruby claimed to have "consulted" with Tribal members who were not designated by the Tribe and misrepresented the Tribe's positions. *E.g.*, RE 158. *See Quechan Tribe*, 2010 U.S. Dist. LEXIS 132482 at *38 (consultations with individual tribal members and meetings between the tribe and contracted investigators "are helpful and necessary part of the process" but "they don't amount to the type of "government-to-government" consultation contemplated by the regulations").

B. The BLM Failed to Mitigate the Harm to the Barrel Springs TCP and the Big Valley TCP.

The lack of meaningful consultation over historic properties of traditional religious and cultural significance to the Tribe is compounded by BLM's failure to analyze alternatives under NEPA. Section 106 requires that the BLM consult with the Tribe over the mitigation of adverse effects to properties that are eligible for listing on the NRHP. 36 C.F.R. §§ 800.2(c)(2)(ii)(A) & 800.6(a)(2).

In this case, the mitigation that was offered to the Tribe was a reroute of the pipeline through an area along the western boundary of the TCP that contains many of the same types of cultural resources as the proposed route. RE 56-58. For this reason, the Tribe submitted a Council Resolution requesting that the project use the Sheldon Route alternative. RE 333. As discussed above Section I.A. and

in the CBD and Defender's joint opening brief (Dkt. No 54 in Case 10-72356 at 51-67), the Tribe was limited in its ability to choose between alternatives to avoid the impacts to the Barrel Springs TCP because most of the alternatives had been withdrawn from consideration in the FEIS. The only alternatives analyzed in the FEIS were the Sheldon and Black Rock alternatives. RE 47-48. The Black Rock alternative bisects the Barrel Springs TCP along the same corridor as the proposed route. RE 46.

The Tribe was thus limited to choosing between a reroute along the so-called Western Route alternative (with the same type of impacts as the proposed route) or to pressing for the Sheldon Route alternative that would avoid the Barrel Springs TCP and the Big Valley TCP.

However, the BLM and FWS had both previously decided that the Sheldon Route alternative was not a feasible alternative because in their view it was not compatible with the Sheldon National Wildlife Refuge. RE 201-212; RE 452 (BLM letter to FWS thanking them for providing information that will "greatly assist us in putting the wooden stake through this alternative once and for all"). Through the consultation that was provided and the FEIS the Tribe became increasingly aware that the ultimate decision for the project was predetermined and the analysis of alternatives was manipulated in favor of the proposed route. *See* RE 132-40.

Despite the opposition of FERC, BLM and FWS, the Sheldon Route alternative was carried forward as a major route alternative in the FEIS, the analysis of the alternative was doubled, it was propped up as the lead alternative (receiving for more detailed consideration in the FEIS than other alternatives), and then ultimately dropped. RE 452; RE 45-50. This amply demonstrates that the alternatives analysis, and the Section 106 process were manipulated from the start. Indeed, the BLM used the Sheldon Route alternative as a means of suggesting that their hands were tied in making their decision to impact the Barrel Springs TCP in the ROD for the project. BLM stated that:

> the Sheldon Route is technically and economically feasible and may result in fewer environmental impacts on some resources as compared to the certificated route. In particular it . . . would avoid . . . all of the concerns of the Ft. Bidwell Tribe.

RE 47, BLM ROD. BLM concluded that the alternative was rejected because FWS would not concur in it. However, the ROD is silent to the fact that BLM encouraged FWS to produce reasons why the alternative could be taken off the table very early in the process. RE 452-55. BLM's decision to encourage full consideration of an alternative it knew would be rejected and therefore infeasible was arbitrary and capricious and fulfilled neither the analysis of alternatives required by NEPA nor the meaningful government-to-government consultation required by the NHPA. *See Quechan Tribe*, 2010 U.S. Dist. LEXIS 132482 at *40 ("The Tribe was entitled to be provided with ***adequate information*** and time,

consistent with its status as a government that is entitled to be consulted")

(emphasis added).

C. Phased Identification of Historic Properties Was Improper.

1. The NHPA regulations require identification of historic properties when as here the Pipeline's location could be precisely ascertained.

In adopting the FEIS, BLM adopted FERC's so called "phased" approach under NHPA. RE 42-43, ROD at 1 ¶¶ 15-16. However, a phased or deferred approach is only appropriate in limited circumstances:

> Where ***alternatives*** under consideration consist of corridors . . . the agency official may use a phased process to conduct identification and evaluation efforts. . . . The process should establish the likely presence of historic properties within the area of potential effects ***for each alternative*** or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the ***number of alternatives*** under consideration, the magnitude of the undertaking and its likely effects . . . As specific aspects or locations of ***an alternative*** are refined . . . the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of [Section 800.4].

See 36 C.F.R. § 800.4(b)(2) (emphasis added). Here BLM knew with certainty the location of the project it was approving. Nevertheless, BLM approved ROW and allowed construction to proceed in multiple spreads at the same time in a manner that eliminates the availability of alternative routes, and alternatives for mitigation of adverse effects on historic properties not yet identified or evaluated, all in

violation of the NHPA. 16 U.S.C. § 470f (the effect of an undertaking on eligible historic properties shall be considered prior to the agency's approval).

2. The deferred identification of historic properties for the Pipeline was improper when the process to be used for identification and evaluation was not known at the time of the agency decisions.

Adopting a deferred approach to identification and evaluation of historic properties is only proper when there is a memorandum of agreement ("MOA"), a programmatic agreement, or the NEPA documents provides the process that will be used for phased identification. 36 C.F.R. § 800.4(b)(2). This was not the case here. At the time that the FEIS was published on January 20, 2010, the Certificate was issued on April 5, 2010, and the ROD was issued on July 12, 2010, there was no MOA, programmatic agreement or NEPA document that provided the process that would be employed. RE 42-43. Therefore, BLM did not undertake identification and evaluation of historic properties or condition the project in a manner to preserve the full range of "alternatives to ***avoid*** . . . the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c); *see Id.* § 800.4(b)(2).

VI. THE FWS AND ACOE FAILED TO CONSULT WITH THE FORT BIDWELL TRIBE OVER THE IMPACTS OF THEIR DECISIONS ON PROPERTIES OF TRADITIONAL RELIGIOUS AND CULTURAL IMPORTANCE TO THE TRIBE.

The FWS and ACOE failed to identify a lead agency and an agency official to act on their behalf to fulfill their collective responsibilities under Section 106 of

the NHPA. RE 5-20; RE 1-4. Thus, FWS and ACOE remain independently liable for compliance with Section 106. Neither of the two agencies consulted with the Tribe to identify properties or assess the effects of the project on historic properties of traditional religious and cultural importance to the Tribe.

VII. BLM VIOLATED THE FEDERAL LAND POLICY MANAGEMENT ACT BY CAUSING UNNECESSARY AND UNDUE DEGRADATION WITHOUT FIRST ENGAGING IN A RIGOUROUS EVALUATION OF ALTERNATIVES.

Congress confirmed in the FLPMA that it is our Country's policy that:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, . . . and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; . . . and that will provide for . . . human occupancy and use.

43 U.S.C. § 1701(a)(8). To achieve this policy, FLPMA requires that BLM "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). This includes preventing damage either: (1) unnecessary to a given project, or (2) that will cause undue degradation to cultural and other properties. 43 U.S.C. § 1732(b); 43 C.F.R. § 3809.5; *Mineral Policy Ctr. v. Norton*, 292 F. Supp.2d 30, 43 (D.D.C. 2003) ("Congress's intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive").

Construction along the proposed route in the Barrel Springs TCP will cause unnecessary destruction of significant cultural properties and of sagebrush habitat,

and undue and excessive degradation of BLM lands. The destruction is unnecessary because the analysis of alternatives in the FEIS and the ROD is flawed and alternatives improperly removed from consideration would avoid all of the harm to the Barrel Springs TCP and a significant amount of the harm to the sagebrush habitat.[7] RE 47. Moreover, and again as BLM itself confirmed, the Project "will have an 'adverse effect' on the Barrel Springs TCP,[8] and on the Big Valley TCP. This degradation, which cannot be mitigated, not only is unnecessary, it also is undue and excessive. *Cf. Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 757 (D.C. Cir. 2007) (affirming protection, under FLPMA, of "areas of traditional spiritual importance to Native Americans").

Finally, as this Court has confirmed:

> FLPMA's requirement that the Secretary prevent [undue or unnecessary degradation] supplements requirements imposed by other federal laws and by state law. ("You prevent unnecessary or undue degradation while conducting operations on public lands by . . . [c]omplying with § 3809.420, as applicable; the terms and conditions of your notice or approved plan of operations; *and* other Federal and State laws related to environmental protection and protection of cultural resources.")

Center for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633 (9th Cir. 2010) (citing 43 C.F.R. § 3809.5). Because BLM has not complied with Section

[7] *See* argument supra IV.A.1 at 16-21.

[8] RE 56-58.

3809.420 and other Federal laws "related to environmental protection and protection of cultural resources," its actions must be enjoined under FLPMA.[9]

CONCLUSION

The Fort Bidwell Tribe respectfully requests that the Court set aside the BLM ROD, the FWS ROD, and the ACOE NWP for the Ruby Pipeline Project because those agency actions are arbitrary and capricious.

ORAL ARGUMENT REQUESTED

Oral argument is requested due to the number of complex issues and the importance of the case. The Fort Bidwell Tribe believes that the decisional process will be significantly aided by oral argument.

[9] Indeed, BLM's actions run contrary to the goals identified in BLM's applicable Resource Management Plans. *See* AD 74-79 at pp. 74-78 (Lakeview RMP, November 2003) (setting goals to preserve and protect cultural resources in consultation with Native Americans, to take action to protect traditional religious sites, landforms, burial sites, resources and other areas of interest, to nominate areas that qualify as TCPs, to fulfill trust responsibilities with Tribal peoples and manage public land to maintain, restore, or enhance plant community health and cultural plants) found at: http://www.blm.gov/or/districts/lakeview/plans/files/Main_Text&Appendices.pdf (last visited Dec. 16, 2010); AD 71-73 at 2-6 – 2-8 (Surprise RMP, May 2007) (setting goals to protect and preserve cultural resources, protect burial sites and sacred items and consult with Native American tribal representatives to identify areas where special management or protection is needed - found at: http://www.blm.gov/ca/pdfs/surprise_pdfs/surpriseproposed-RMP-FEIS/ Web/SFO%20P RMP%20 Chapter%202.pdf (last visited Dec. 16, 2010).

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the following related cases challenging BLM's Ruby Pipeline ROD, Fish and Wildlife's ROD and Biological Opinion, and the Army Corps of Engineers' Nationwide Permit No. 12, are pending in this Court and were consolidated with that of the Fort Bidwell Tribe by order of the Court on November 23, 2010:

(1) Center for Biological Diversity v. BLM et al. (9th Cir. No. 10-72356);

(2) Defenders of Wildlife et al. v. BLM et al (9th Cir. No. 10-72775);

(3) Warner Barlese v. BLM (9th Cir. No. 10-72762); and

(4) Coalition of Local Governments v. BLM (9th Cir. No. 10-72552).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,560 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on Microsoft Office Word 2003 to obtain the word count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 and set in 14 point Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 20, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

United States Code Annotated
Title 15. Commerce and Trade
Chapter 15B. Natural Gas

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued

by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

CREDIT(S)

(June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459; Nov. 9, 1978, Pub.L. 95-617, Title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, Pub.L. 100-474, § 2, 102 Stat. 2302.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 15. Commerce and Trade
Chapter 15B. Natural Gas

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such

objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as “permit”) required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title , the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

CREDIT(S)

(June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947; Aug. 8, 2005, Pub.L. 109-58, Title III, § 313(b), 119 Stat. 689.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

Addendum 8

United States Code Annotated
Title 16. Conservation
Chapter 1A. Historic Sites, Buildings, Objects, and Antiquities
Subchapter II. National Historic Preservation
Part A. Programs

§ 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

CREDIT(S)

(Pub.L. 89-665, Title I, § 106, Oct. 15, 1966, 80 Stat. 917; Pub.L. 94-422, Title II, § 201(3), Sept. 28, 1976, 90 Stat. 1320.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 16. Conservation
Chapter 5A. Protection and Conservation of Wildlife
Subchapter III. Endangered Species of Fish and Wildlife

§ 668dd. National Wildlife Refuge System

(a) Designation; administration; continuance of resources-management-programs for refuge lands in Alaska; disposal of acquired lands; proceeds

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

(3) With respect to the System, it is the policy of the United States that--

(A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established;

(B) compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the System, directly related to the mission of the System and the purposes of many refuges, and which generally fosters refuge management and through which the American public can develop an appreciation for fish and wildlife;

(C) compatible wildlife-dependent recreational uses are the priority general public uses of the System and shall receive priority consideration in refuge planning and management; and

(D) when the Secretary determines that a proposed wildlife-dependent recreational use is a compatible use within a refuge, that activity should be facilitated, subject to such restrictions or regulations as may be necessary, reasonable, and appropriate.

(4) In administering the System, the Secretary shall--

(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System;

(B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;

(C) plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System, to contribute to the conservation of the ecosystems of the United States, to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats, and to increase support for the System and participation from conservation partners and the public;

(D) ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System;

(E) ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located;

(F) assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge;

(G) acquire, under State law, water rights that are needed for refuge purposes;

(H) recognize compatible wildlife-dependent recreational uses as the priority general public uses of the System through which the American public can develop an appreciation for fish and wildlife;

(I) ensure that opportunities are provided within the System for compatible wildlife-dependent recreational uses;

(J) ensure that priority general public uses of the System receive enhanced consideration over other general public uses in planning and management within the System;

(K) provide increased opportunities for families to experience compatible wildlife-dependent recreation, particularly opportunities for parents and their children to safely engage in traditional outdoor activities, such as fishing and hunting;

(L) continue, consistent with existing laws and interagency agreements, authorized or permitted uses of units of the System by other Federal agencies, including those necessary to facilitate military preparedness;

(M) ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges; and

(N) monitor the status and trends of fish, wildlife, and plants in each refuge.

(5) No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (except by exchange pursuant to subsection (b)(3) of this section) unless--

(A) the Secretary determines with the approval of the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established; and

(B) such lands are transferred or otherwise disposed of for an amount not less than--

(i) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or fair market value, whichever is greater; or

(ii) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the System which were donated to the System.

The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(6) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is--

(A) designated as an area within such System by law, Executive order, or secretarial order; or

(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of Congress, except that nothing in this paragraph shall be construed as precluding--

(i) the transfer or disposal of acquired lands within any such area pursuant to paragraph (5) of this subsection;

(ii) the exchange of lands within any such area pursuant to subsection (b)(3) of this section; or

(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph.

(b) Administration; public accommodations contracts; acceptance and use of funds; exchange of properties; cash equalization payments

In administering the System, the Secretary is authorized to take the following actions:

(1) Enter into contracts with any person or public or private agency through negotiation for the provision of public accommodations when, and in such locations, and to the extent that the Secretary determines will not be inconsistent with the primary purpose for which the affected area was established.

(2) Accept donations of funds and to use such funds to acquire or manage lands or interests therein.

(3) Acquire lands or interests therein by exchange (A) for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition, or (B) for the right to remove, in accordance with such terms and conditions as he may prescribe, products from the acquired or public lands within the System. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

(4) Subject to standards established by and the overall management oversight of the Director, and consistent with standards established by this Act, to enter into cooperative agreements with State fish and wildlife agencies for the management of programs on a refuge.

(5) Issue regulations to carry out this Act.

(c) Prohibited and permitted activities; application of mining and mineral leasing laws, hunting or fishing regulations, and State laws or regulations

No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; or enter, use, or otherwise occupy any such area for any purpose; unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof: *Provided,* That the United States mining and mineral leasing laws shall continue to apply to any lands within the System to the same extent they apply prior to October 15, 1966, unless subsequently withdrawn under other authority of law. With the exception of endangered species and threatened species listed by the Secretary pursuant to section 1533 of this title in States wherein a cooperative agreement does not exist pursuant to section 1535(c) of this title, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the

System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations.

(d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value

(1) The Secretary is authorized, under such regulations as he may prescribe, to--

> **(A)** permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established: *Provided*, That not to exceed 40 per centum at any one time of any area that has been, or hereafter may be acquired, reserved, or set apart as an inviolate sanctuary for migratory birds, under any law, proclamation, Executive order, or public land order may be administered by the Secretary as an area within which the taking of migratory game birds may be permitted under such regulations as he may prescribe unless the Secretary finds that the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species; and
>
> **(B)** permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that such uses are compatible with the purposes for which these areas are established.

(2) Notwithstanding any other provision of law, the Secretary may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the system in connection with any use permitted by him under paragraph (1)(B) of this subsection unless the grantee pays to the Secretary, at the option of the Secretary, either (A) in lump sum the fair market value (determined by the Secretary as of the date of conveyance to the grantee) of the right-of-way, easement, or reservation; or (B) annually in advance the fair market rental value (determined by the Secretary) of the right-of-way, easement, or reservation. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall otherwise compensate the Secretary by any other means agreeable to the Secretary, including, but not limited to, making other land available or the loan of equipment or personnel; except that (A) any such compensation shall relate to, and be consistent with, the objectives of the National Wildlife Refuge System,

and (B) the Secretary may waive such requirement for compensation if he finds such requirement impracticable or unnecessary. All sums received by the Secretary of the Interior pursuant to this paragraph shall, after payment of any necessary expenses incurred by him in administering this paragraph, be deposited into the Migratory Bird Conservation Fund and shall be available to carry out the provisions for land acquisition of the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.) and the Migratory Bird Hunting Stamp Act (16 U.S.C. 718 et seq.).

(3)(A)(i) Except as provided in clause (iv), the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety. The Secretary may make the determinations referred to in this paragraph for a refuge concurrently with development of a conservation plan under subsection (e) of this section.

(ii) On lands added to the System after March 25, 1996, the Secretary shall identify, prior to acquisition, withdrawal, transfer, reclassification, or donation of any such lands, existing compatible wildlife-dependent recreational uses that the Secretary determines shall be permitted to continue on an interim basis pending completion of the comprehensive conservation plan for the refuge.

(iii) Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and not inconsistent with public safety. Except for consideration of consistency with State laws and regulations as provided for in subsection (m) of this section, no other determinations or findings are required to be made by the refuge official under this Act or the Refuge Recreation Act for wildlife-dependent recreation to occur.

(iv) Compatibility determinations in existence on October 9, 1997, shall remain in effect until and unless modified.

(B) Not later than 24 months after October 9, 1997, the Secretary shall issue final regulations establishing the process for determining under subparagraph (A) whether a use of a refuge is a compatible use. These regulations shall--

(i) designate the refuge official responsible for making initial compatibility determinations;

(ii) require an estimate of the timeframe, location, manner, and purpose of each use;

(iii) identify the effects of each use on refuge resources and purposes of each refuge;

(iv) require that compatibility determinations be made in writing;

(v) provide for the expedited consideration of uses that will likely have no detrimental effect on the fulfillment of the purposes of a refuge or the mission of the System;

(vi) provide for the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use;

(vii) require, after an opportunity for public comment, reevaluation of each existing use, other than those uses specified in clause (viii), if conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use, but not less frequently than once every 10 years, to ensure that the use remains a compatible use, except that, in the case of any use authorized for a period longer than 10 years (such as an electric utility right-of-way), the reevaluation required by this clause shall examine compliance with the terms and conditions of the authorization, not examine the authorization itself;

(viii) require, after an opportunity for public comment, reevaluation of each compatible wildlife-dependent recreational use when conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use, but not less frequently than in conjunction with each preparation or revision of a conservation plan under subsection (e) of this section or at least every 15 years, whichever is earlier; and

(ix) provide an opportunity for public review and comment on each evaluation of a use, unless an opportunity for public review and comment on the evaluation of the use has already been provided during the development or revision of a conservation plan for the refuge under subsection (e) of this section or has otherwise been provided during routine, periodic determinations of compatibility for wildlife-dependent recreational uses.

(4) The provisions of this Act relating to determinations of the compatibility of a use shall not apply to--

(A) overflights above a refuge; and

(B) activities authorized, funded, or conducted by a Federal agency (other than the United States Fish and Wildlife Service) which has primary jurisdiction over a refuge or a portion of a refuge, if the management of those activities is in accordance with a memorandum of understanding between the Secretary or the Director and the head of the Federal agency with primary jurisdiction over the refuge governing the use of the refuge.

(e) Refuge conservation planning program for non-Alaskan refuge lands

(1)(A) Except with respect to refuge lands in Alaska (which shall be governed by the refuge planning provisions of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.)), the Secretary shall--

(i) propose a comprehensive conservation plan for each refuge or related complex of refuges (referred to in this subsection as a "planning unit") in the System;

(ii) publish a notice of opportunity for public comment in the Federal Register on each proposed conservation plan;

(iii) issue a final conservation plan for each planning unit consistent with the provisions of this Act and, to the extent practicable, consistent with fish and wildlife conservation plans of the State in which the refuge is located; and

(iv) not less frequently than 15 years after the date of issuance of a conservation plan under clause (iii) and every 15 years thereafter, revise the conservation plan as may be necessary.

(B) The Secretary shall prepare a comprehensive conservation plan under this subsection for each refuge within 15 years after October 9, 1997.

(C) The Secretary shall manage each refuge or planning unit under plans in effect on October 9, 1997, to the extent such plans are consistent with this Act, until such plans are revised or superseded by new comprehensive conservation plans issued under this subsection.

(D) Uses or activities consistent with this Act may occur on any refuge or planning unit before existing plans are revised or new comprehensive conservation plans are issued under this subsection.

(E) Upon completion of a comprehensive conservation plan under this subsection for a refuge or planning unit, the Secretary shall manage the refuge or planning unit in a manner consistent with the plan and shall revise the plan at any time if the Secretary determines that conditions that affect the refuge or planning unit have changed significantly.

(2) In developing each comprehensive conservation plan under this subsection for a planning unit, the Secretary, acting through the Director, shall identify and describe--

(A) the purposes of each refuge comprising the planning unit;

(B) the distribution, migration patterns, and abundance of fish, wildlife, and plant populations and related habitats within the planning unit;

(C) the archaeological and cultural values of the planning unit;

(D) such areas within the planning unit that are suitable for use as administrative sites or visitor facilities;

(E) significant problems that may adversely affect the populations and habitats of fish, wildlife, and plants within the planning unit and the actions necessary to correct or mitigate such problems; and

(F) opportunities for compatible wildlife-dependent recreational uses.

(3) In preparing each comprehensive conservation plan under this subsection, and any revision to such a plan, the Secretary, acting through the Director, shall, to the maximum extent practicable and consistent with this Act--

(A) consult with adjoining Federal, State, local, and private landowners and affected State conservation agencies; and

(B) coordinate the development of the conservation plan or revision with relevant State conservation plans for fish and wildlife and their habitats.

(4)(A) In accordance with subparagraph (B), the Secretary shall develop and implement a process to ensure an opportunity for active public involvement in the preparation and revision of comprehensive conservation plans under this subsection. At a minimum, the Secretary shall require that publication of any final plan shall

include a summary of the comments made by States, owners of adjacent or potentially affected land, local governments, and any other affected persons, and a statement of the disposition of concerns expressed in those comments.

(B) Prior to the adoption of each comprehensive conservation plan under this subsection, the Secretary shall issue public notice of the draft proposed plan, make copies of the plan available at the affected field and regional offices of the United States Fish and Wildlife Service, and provide opportunity for public comment.

(f) Penalties

(1) Knowing violations

Any person who knowingly violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under Title 18 or imprisoned for not more than 1 year, or both.

(2) Other violations

Any person who otherwise violates or fails to comply with any of the provisions of this Act (including a regulation issued under this Act) shall be fined under Title 18 or imprisoned not more than 180 days, or both.

(g) Enforcement provisions; arrests, searches, and seizures; custody of property; forfeiture; disposition

Any person authorized by the Secretary to enforce the provisions of this Act or any regulations issued thereunder, may, without a warrant, arrest any person violating this Act or regulations in his presence or view, and may execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of this Act or regulations, and may with a search warrant search for and seize any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof, taken or possessed in violation of this Act or the regulations issued thereunder. Any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or egg thereof seized with or without a search warrant shall be held by such person or by a United States marshal, and upon conviction, shall be forfeited to the United States and disposed of by the Secretary, in accordance with law. The Director of the United States Fish and Wildlife Service is authorized to utilize by agreement, with or without reimbursement, the personnel

and services of any other Federal or State agency for purposes of enhancing the enforcement of this Act.

(h) Regulations; continuation, modification, or rescission

Regulations applicable to areas of the System that are in effect on October 15, 1966, shall continue in effect until modified or rescinded.

(i) National conservation recreational area provisions; amendment, repeal, or modification

Nothing in this section shall be construed to amend, repeal, or otherwise modify the provision of the Act of September 28, 1962 (76 Stat. 653; 16 U.S.C. 460k to 460k-4) which authorizes the Secretary to administer the areas within the System for public recreation. The provisions of this section relating to recreation shall be administered in accordance with the provisions of said sections.

(j) Exemption from State water laws

Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(k) Emergency power

Notwithstanding any other provision of this Act, the Secretary may temporarily suspend, allow, or initiate any activity in a refuge in the System if the Secretary determines it is necessary to protect the health and safety of the public or any fish or wildlife population.

(l) Hunting and fishing on lands and waters not within System

Nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of fish and resident wildlife on lands or waters that are not within the System.

(m) State authority

Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations

permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.

(n) Water rights

(1) Nothing in this Act shall--

(A) create a reserved water right, express or implied, in the United States for any purpose;

(B) affect any water right in existence on October 9, 1997; or

(C) affect any Federal or State law in existence on October 9, 1997, regarding water quality or water quantity.

(2) Nothing in this Act shall diminish or affect the ability to join the United States in the adjudication of rights to the use of water pursuant to section 666 of Title 43.

(o) Coordination with State agencies

Coordination with State fish and wildlife agency personnel or with personnel of other affected State agencies pursuant to this Act shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

CREDIT(S)

(Pub.L. 89-669, § 4, Oct. 15, 1966, 80 Stat. 927; Pub.L. 90-404, § 1, July 18, 1968, 82 Stat. 359; Pub.L. 93-205, § 13(a), Dec. 28, 1973, 87 Stat. 902; Pub.L. 93-509, § 2, Dec. 3, 1974, 88 Stat. 1603; Pub.L. 94-215, § 5, Feb. 17, 1976, 90 Stat. 190; Pub.L. 94-223, Feb. 27, 1976, 90 Stat. 199; Pub.L. 95-616, §§ 3(f), 6, Nov. 8, 1978, 92 Stat. 3111, 3114; Pub.L. 100-226, § 4, Dec. 31, 1987, 101 Stat. 1551; Pub.L. 100-653, Title IX, § 904, Nov. 14, 1988, 102 Stat. 3834; Pub.L. 105-57, §§ 3(b) to 8, Oct. 9, 1997, 111 Stat. 1254; Pub.L. 105-312, Title II, § 206, Oct. 30, 1998, 112 Stat. 2958.)

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United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 3A. Leases and Prospecting Permits
Subchapter I. General Provisions

§ 185. Rights-of-way for pipelines through Federal lands

(a) Grant of authority

Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

(b) Definitions

(1) For the purposes of this section "Federal lands" means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf. A right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation.

(2) "Secretary" means the Secretary of the Interior.

(3) "Agency head" means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands.

(c) Inter-agency coordination

(1) Where the surface of all of the Federal lands involved in a proposed right-of-way or permit is under the jurisdiction of one Federal agency, the agency head, rather than the Secretary, is authorized to grant or renew the right-of-way or permit for the purposes set forth in this section.

(2) Where the surface of the Federal lands involved is administered by the Secretary or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved, to grant or renew rights-of-way or permits through the Federal lands involved. The Secretary may enter into interagency agreements with

all other Federal agencies having jurisdiction over Federal lands for the purpose of avoiding duplication, assigning responsibility, expediting review of rights-of-way or permit applications, issuing joint regulations, and assuring a decision based upon a comprehensive review of all factors involved in any right-of-way or permit application. Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction.

(d) Width limitations

The width of a right-of-way shall not exceed fifty feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities) unless the Secretary or agency head finds, and records the reasons for his finding, that in his judgment a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety. Related facilities include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips and campsites, and they need not necessarily be connected or contiguous to the pipe and may be the subjects of separate rights-of-way.

(e) Temporary permits

A right-of-way may be supplemented by such temporary permits for the use of Federal lands in the vicinity of the pipeline as the Secretary or agency head finds are necessary in connection with construction, operation, maintenance, or termination of the pipeline, or to protect the natural environment or public safety.

(f) Regulatory authority

Rights-of-way or permits granted or renewed pursuant to this section shall be subject to regulations promulgated in accord with the provisions of this section and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination.

(g) Pipeline safety

The Secretary or agency head shall impose requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline.

(h) Environmental protection

(1) Nothing in this section shall be construed to amend, repeal, modify, or change in any way the requirements of section 102(2)(C) [42 U.S.C.A. § 4332(2)(C)] or any other provision of the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.].

(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or permit granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section.

(i) Disclosure

If the applicant is a partnership, corporation, association, or other business entity, the Secretary or agency head shall require the applicant to disclose the identity of the participants in the entity. Such disclosure shall include where applicable (1) the name and address of each partner, (2) the name and address of each shareholder owning 3 per centum or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote, and (3) the name and address of each affiliate of the entity together with, in the case of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indirectly, by the affiliate.

(j) Technical and financial capability

The Secretary or agency head shall grant or renew a right-of-way or permit under this section only when he is satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way or permit is requested in accordance with the requirements of this section.

(k) Public hearings

The Secretary or agency head by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way applications filed after the date of enactment of this subsection.

(l) Reimbursement of costs

The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of a right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area and shall pay annually in advance the fair market rental value of the right-of-way or permit, as determined by the Secretary or agency head.

(m) Bonding

Where he deems it appropriate the Secretary or agency head may require a holder of a right-of-way or permit to furnish a bond, or other security, satisfactory to the Secretary or agency head to secure all or any of the obligations imposed by the terms and conditions of the right-of-way or permit or by any rule or regulation of the Secretary or agency head.

(n) Duration of grant

Each right-of-way or permit granted or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project, but in no event more than thirty years. In determining the duration of a right-of-way the Secretary or agency head shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The Secretary or

agency head shall renew any right-of-way, in accordance with the provisions of this section, so long as the project is in commercial operation and is operated and maintained in accordance with all of the provisions of this section.

(o) Suspension or termination of right-of-way

(1) Abandonment of a right-of-way or noncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if (A) after due notice to the holder of the right-of-way, (B) a reasonable opportunity to comply with this section, and (C) an appropriate administrative proceeding pursuant to section 554 of Title 5, the Secretary or agency head determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

(2) If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

(3) Deliberate failure of the holder to use the right-of-way for the purpose for which it was granted or renewed for any continuous two-year period shall constitute a rebuttable presumption of abandonment of the right-of-way: *Provided*, That where the failure to use the right-of-way is due to circumstances not within the holder's control the Secretary or agency head is not required to commence proceedings to suspend or terminate the right-of-way.

(p) Joint use of rights-of-way

In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary or agency head the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area granted pursuant to this section.

(q) Statutes

No rights-of-way for the purposes provided for in this section shall be granted or renewed across Federal lands except under and subject to the provisions, limitations,

and conditions of this section. Any application for a right-of-way filed under any other law prior to the effective date of this provision may, at the applicant's option, be considered as an application under this section. The Secretary or agency head may require the applicant to submit any additional information he deems necessary to comply with the requirements of this section.

(r) Common carriers

(1) Pipelines and related facilities authorized under this section shall be constructed, operated, and maintained as common carriers.

(2)(A) The owners or operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands.

(B) In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipeline, the Secretary may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported or purchased.

(3)(A) The common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act [15 U.S.C.A. § 717 et seq.] or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

(B) Where natural gas not subject to State regulatory or conservation laws governing its purchase by pipelines is offered for sale, each such pipeline shall purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline.

(4) The Government shall in express terms reserve and shall provide in every lease of oil lands under this chapter that the lessee, assignee, or beneficiary, if owner or operator of a controlling interest in any pipeline or of any company operating the pipeline which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipeline operating a lease or purchasing gas or oil under the provisions of this chapter.

(5) Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, he may request the Attorney General to prosecute an appropriate proceeding before the Secretary of Energy or Federal Energy Regulatory Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.

(6) The Secretary or agency head shall require, prior to granting or renewing a right-of-way, that the applicant submit and disclose all plans, contracts, agreements, or other information or material which he deems necessary to determine whether a right-of-way shall be granted or renewed and the terms and conditions which should be included in the right-of-way. Such information may include, but is not limited to: (A) conditions for, and agreements among owners or operators, regarding the addition of pumping facilities, looping, or otherwise increasing the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand; (B) conditions for adding or abandoning intake, offtake, or storage points or facilities; and (C) minimum shipment or purchase tenders.

(s) Exports of Alaskan North Slope oil

(1) Subject to paragraphs (2) through (6) of this subsection and notwithstanding any other provision of this chapter or any other provision of law (including any regulation) applicable to the export of oil transported by pipeline over right-of-way granted pursuant to section 1652 of Title 43), such oil may be exported unless the President finds that exportation of this oil is not in the national interest. The President shall make his national interest determination within five months of November 28, 1995. In evaluating whether exports of this oil are in the national interest, the President shall at a minimum consider--

(A) whether exports of this oil would diminish the total quantity or quality of petroleum available to the United States;

(B) the results of an appropriate environmental review, including consideration of appropriate measures to mitigate any potential adverse effects of exports of this oil on the environment, which shall be completed within four months of November 28, 1995; and

(C) whether exports of this oil are likely to cause sustained material oil supply shortages or sustained oil prices significantly above world market levels that would cause sustained material adverse employment effects in the United States or that would cause substantial harm to consumers, including noncontiguous States and Pacific territories.

If the President determines that exports of this oil are in the national interest, he may impose such terms and conditions (other than a volume limitation) as are necessary or appropriate to ensure that such exports are consistent with the national interest.

(2) Except in the case of oil exported to a country with which the United States entered into a bilateral international oil supply agreement before November 26, 1979, or to a country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency, any oil transported by pipeline over right-of-way granted pursuant to section 1652 of Title 43 shall, when exported, be transported by a vessel documented under the laws of the United States and owned by a citizen of the United States (as determined in accordance with sections 50501 and 50502 of Title 46).

(3) Nothing in this subsection shall restrict the authority of the President under the Constitution, the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), or Part B of title II of the Energy Policy and Conservation Act (42 U.S.C. 6271-76) to prohibit exports.

(4) The Secretary of Commerce shall issue any rules necessary for implementation of the President's national interest determination, including any licensing requirements and conditions, within 30 days of the date of such determination by the President. The Secretary of Commerce shall consult with the Secretary of Energy in administering the provisions of this subsection.

(5) If the Secretary of Commerce finds that exporting oil under authority of this subsection has caused sustained material oil supply shortages or sustained oil prices significantly above world market levels and further finds that these supply shortages or price increases have caused or are likely to cause sustained material adverse employment effects in the United States, the Secretary of Commerce, in consultation with the Secretary of Energy, shall recommend, and the President may take, appropriate action concerning exports of this oil, which may include modifying or revoking authority to export such oil.

(6) Administrative action under this subsection is not subject to sections 551 and 553 through 559 of Title 5.

(t) Existing rights-of-way

The Secretary or agency head may ratify and confirm any right-of-way or permit for an oil or gas pipeline or related facility that was granted under any provision of law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practical with the provisions of this section. Any action taken by the Secretary or agency head pursuant to this subsection shall not be considered a major Federal action requiring a detailed statement pursuant to section 102(2)(C) [42 U.S.C.A. § 4332(2)(C)] of the National Environmental Policy Act of 1970 (Public Law 90-190; 42 U.S.C. 4321).

(u) Limitations on export

Any domestically produced crude oil transported by pipeline over rights-of-way granted pursuant to this section, except such crude oil which is either exchanged in similar quantity for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or which is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign state and reenters the United States, shall be subject to all of the limitations and licensing requirements of the Export Administration Act of 1979 (50 U.S.C.App. 2401 and following) and, in addition, before any crude oil subject to this section may be exported under the limitations and licensing requirements and penalty and enforcement provisions of the Export Administration Act of 1979 the President must make and publish an express finding that such exports will not diminish the total quantity or quality of petroleum available to the United States, and are in the national interest and are in accord with the provisions of the Export Administration Act of 1979: *Provided,* That the President shall submit reports to the Congress containing findings made under this section, and after the date of receipt of such report Congress shall have a period of sixty calendar days, thirty days of which Congress must have been in session, to consider whether exports under the terms of this section are in the national interest. If the Congress within this time period passes a concurrent resolution of disapproval stating disagreement with the President's finding concerning the national interest, further exports made pursuant to the aforementioned Presidential findings shall cease.

(v) State standards

The Secretary or agency head shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance.

(w) Reports

(1) The Secretary and other appropriate agency heads shall report to the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate annually on the administration of this section and on the safety and environmental requirements imposed pursuant thereto.

(2) The Secretary or agency head shall promptly notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to the terms and conditions he proposes to impose, has been submitted to such committees.

(3) Periodically, but at least once a year, the Secretary of the Department of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential leaks or safety problems.

(x) Liability

(1) The Secretary or agency head shall promulgate regulations and may impose stipulations specifying the extent to which holders of rights-of-way and permits under this chapter shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit. Where the right-of-way or permit involves lands which are under the exclusive jurisdiction of the Federal Government, the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit.

(2) The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States.

(3) Regulations and stipulations pursuant to this subsection shall not impose strict liability for damage or injury resulting from (A) an act of war, or (B) negligence of the United States.

(4) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

(5) The regulations and stipulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liability, damage, or claims arising in connection with the right-of-way or permit.

(6) Any regulation or stipulation promulgated or imposed pursuant to this section shall provide that all owners of any interest in, and all affiliates or subsidiaries of any holder of, a right-of-way or permit shall be liable to the United States in the event that a claim for damage or injury cannot be collected from the holder.

(7) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(y) Antitrust laws

The grant of a right-of-way or permit pursuant to this section shall grant no immunity from the operation of the Federal antitrust laws.

CREDIT(S)

(Feb. 25, 1920, c. 85, § 28, 41 Stat. 449; Aug. 21, 1935, c. 599, § 1, 49 Stat. 678; Aug. 12, 1953, c. 408, 67 Stat. 557; Nov. 16, 1973, Pub.L. 93-153, Title I, § 101, 87 Stat. 576; Aug. 4, 1977, Pub.L. 95-91, Title III, §§ 301(b), 306, Title IV, § 402(a), (b), Title VII, §§ 703, 707, 91 Stat. 578, 581, 583, 584, 606, 607; July 12, 1985, Pub.L. 99-64, Title I, § 123(b), 99 Stat. 156; Oct. 30, 1990, Pub.L. 101-475, § 1, 104

Stat. 1102; Nov. 2, 1994, Pub.L. 103-437, § 11(a)(1), 108 Stat. 4589; Nov. 28, 1995, Pub.L. 104-58, Title II, § 201, 109 Stat. 560; Dec. 21, 1995, Pub.L. 104-66, Title I, § 1121(k), 109 Stat. 724.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights
Subchapter I. Generally

§ 1996. Protection and preservation of traditional religions of Native Americans

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

CREDIT(S)

1994 Main Volume
(Pub.L. 95-341, § 1, Aug. 11, 1978, 92 Stat. 469.)

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy
Subchapter I. Policies and Goals

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

CREDIT(S)

(Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy
Subchapter I. Policies and Goals

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [FN1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

[FN1] So in original. The period probably should be a semicolon.

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 43. Public Lands
Chapter 35. Federal Land Policy and Management
Subchapter I. General Provisions

§ 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that--

* * *

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

* * *

CREDIT(S)

(Pub.L. 94-579, Title I, § 102, Oct. 21, 1976, 90 Stat. 2744.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

United States Code Annotated
Title 43. Public Lands
Chapter 35. Federal Land Policy and Management
Subchapter III. Administration

§ 1732. Management of use, occupancy, and development of public lands

* * *

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: *Provided*, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 1767 of this title, withdrawals under section 1714 of this title, and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737(b) of this title: *Provided further*, That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining

Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

* * *

CREDIT(S)

(Pub.L. 94-579, Title III, § 302, Oct. 21, 1976, 90 Stat. 2762; Pub.L. 100-586, Nov. 3, 1988, 102 Stat. 2980.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart A. Purposes and Participants

§ 800.1 Purposes.

* * *

(c) Timing. The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

SOURCE: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 470s.

36 C. F. R. § 800.1, 36 CFR § 800.1

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart A. Purposes and Participants

§ 800.2 Participants in the Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

* * *

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

* * *

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization 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. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and

Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

* * *

SOURCE: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 470s.

36 C. F. R. § 800.2, 36 CFR § 800.2

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.4 Identification of historic properties.

* * *

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

* * *

(2) Phased identification and evaluation. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) Evaluate historic significance.

(1) Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and

cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

* * *

[69 FR 40553, July 6, 2004]

SOURCE: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 470s.

36 C. F. R. § 800.4, 36 CFR § 800.4

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.6 Resolution of adverse effects.

(a) Continue consultation. The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

* * *

(2) Involve consulting parties. In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

SOURCE: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 470s.

36 C. F. R. § 800.6, 36 CFR § 800.6

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1500. Purpose, Policy, and Mandate

§ 1500.1 Purpose.

* * *

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

* * *

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1500.1, 40 CFR § 1500.1

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1502.14, 40 CFR § 1502.14

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1506. Other Requirements of NEPA

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

* * *

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1506.3, 40 CFR § 1506.3

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

40 C. F. R. § 1508.8, 40 CFR § 1508.8

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 43. Public Lands: Interior
Subtitle B. Regulations Relating to Public Lands
Chapter II. Bureau of Land Management, Department of the Interior
Subchapter C. Minerals Management
Group 3800. Mining Claims Under the General Mining
Part 3800. Mining Claims Under the General Mining Laws
Subpart 3809. Surface Management
General Information

§ 3809.5 How does BLM define certain terms used in this subpart?

As used in this subpart, the term:

Casual use means activities ordinarily resulting in no or negligible disturbance of the public lands or resources. For example--

(1) Casual use generally includes the collection of geochemical, rock, soil, or mineral specimens using hand tools; hand panning; or non-motorized sluicing. It may include use of small portable suction dredges. It also generally includes use of metal detectors, gold spears and other battery-operated devices for sensing the presence of minerals, and hand and battery-operated drywashers. Operators may use motorized vehicles for casual use activities provided the use is consistent with the regulations governing such use (part 8340 of this title), off-road vehicle use designations contained in BLM land-use plans, and the terms of temporary closures ordered by BLM.

(2) Casual use does not include use of mechanized earth-moving equipment, truck-mounted drilling equipment, motorized vehicles in areas when designated as closed to “off-road vehicles” as defined in § 8340.0-5 of this title, chemicals, or explosives. It also does not include “occupancy” as defined in § 3715.0-5 of this title or operations in areas where the cumulative effects of the activities result in more than negligible disturbance.

Exploration means creating surface disturbance greater than casual use that includes sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present. Exploration does not include activities where material is extracted for commercial use or sale.

Minimize means to reduce the adverse impact of an operation to the lowest practical level. During review of operations, BLM may determine that it is practical to avoid or eliminate particular impacts.

Mining claim means any unpatented mining claim, millsite, or tunnel site located under the mining laws. The term also applies to those mining claims and millsites located in the California Desert Conservation Area that were patented after the enactment of the Federal Land Policy and Management Act of October 21, 1976. Mining "claimant" is defined in § 3833.0-5 of this title.

Mining laws means the Lode Law of July 26, 1866, as amended (14 Stat. 251); the Placer Law of July 9, 1870, as amended (16 Stat. 217); and the Mining Law of May 10, 1872, as amended (17 Stat. 91); as well as all laws supplementing and amending those laws, including the Building Stone Act of August 4, 1892, as amended (27 Stat. 348); the Saline Placer Act of January 31, 1901 (31 Stat. 745); the Surface Resources Act of 1955 (30 U.S.C. 611-614); and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

Mitigation, as defined in 40 CFR 1508.20, may include one or more of the following:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action;

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and

(5) Compensating for the impact by replacing, or providing substitute, resources or environments.

Operations means all functions, work, facilities, and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws; reclamation of disturbed areas; and all other reasonably incident uses,

whether on a mining claim or not, including the construction of roads, transmission lines, pipelines, and other means of access across public lands for support facilities.

Operator means a person conducting or proposing to conduct operations.

Person means any individual, firm, corporation, association, partnership, trust, consortium, joint venture, or any other entity conducting operations on public lands.

Project area means the area of land upon which the operator conducts operations, including the area required for construction or maintenance of roads, transmission lines, pipelines, or other means of access by the operator.

Public lands, as defined in 43 U.S.C. 1702, means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the BLM, without regard to how the United States acquired ownership, except--

(1) Lands located on the Outer Continental Shelf; and

(2) Lands held for the benefit of Indians, Aleuts, and Eskimos.

Reclamation means taking measures required by this subpart following disturbance of public lands caused by operations to meet applicable performance standards and achieve conditions required by BLM at the conclusion of operations. For a definition of “reclamation” applicable to operations conducted under the mining laws on Stock Raising Homestead Act lands, see part 3810, subpart 3814 of this title. Components of reclamation include, where applicable:

(1) Isolation, control, or removal of acid-forming, toxic, or deleterious substances;

(2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;

(3) Rehabilitation of fisheries or wildlife habitat;

(4) Placement of growth medium and establishment of self-sustaining revegetation;

(5) Removal or stabilization of buildings, structures, or other support facilities;

(6) Plugging of drill holes and closure of underground workings; and

(7) Providing for post-mining monitoring, maintenance, or treatment.

Riparian area is a form of wetland transition between permanently saturated wetlands and upland areas. These areas exhibit vegetation or physical characteristics reflective of permanent surface or subsurface water influence. Typical riparian areas include lands along, adjacent to, or contiguous with perennially and intermittently flowing rivers and streams, glacial potholes, and the shores of lakes and reservoirs with stable water levels. Excluded are areas such as ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil.

Tribe means, and Tribal refers to, a Federally recognized Indian tribe.

Unnecessary or undue degradation means conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;

(2) Are not “reasonably incident” to prospecting, mining, or processing operations as defined in § 3715.0-5 of this chapter; or

(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

[66 FR 54860, Oct. 30, 2001]

SOURCE: 45 FR 13974, March 3, 1980; 59 FR 44856, Aug. 30, 1994; 62 FR 9099, Feb. 28, 1997; 63 FR 52954, Oct. 1, 1998; 65 FR 70112, Nov. 21, 2000; 70 FR 58878, Oct. 7, 2005; 73 FR 73794, Dec. 4, 2008, unless otherwise noted.

AUTHORITY: 16 U.S.C. 3101 et seq.; 30 U.S.C. 22-42, 181 et seq., 301-306, 351-359, and 601 et seq.; 31 U.S.C. 9701; 40 U.S.C. 471 et seq.; 42 U.S.C. 6508; 43 U.S.C. 1701 et seq.; and Pub.L. No. 97-35, 95 Stat. 357.; 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782.

43 C. F. R. § 3809.5, 43 CFR § 3809.5

Current through December 9, 2010; 75 FR 76892

Code of Federal Regulations
Title 43. Public Lands: Interior
Subtitle B. Regulations Relating to Public Lands
Chapter II. Bureau of Land Management, Department of the Interior
Subchapter C. Minerals Management(3000)
Group 3800. Mining Claims Under the General Mining Laws
Part 3800. Mining Claims Under the General Mining Laws
Subpart 3809. Surface Management
Operations Conducted Under Plans of Operations

§ 3809.420 What performance standards apply to my notice or plan of operations?

The following performance standards apply to your notice or plan of operations:

(a) General performance standards--

(1) Technology and practices. You must use equipment, devices, and practices that will meet the performance standards of this subpart.

(2) Sequence of operations. You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.

(3) Land-use plans. Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.

(4) Mitigation. You must take mitigation measures specified by BLM to protect public lands.

(5) Concurrent reclamation. You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.

(6) Compliance with other laws. You must conduct all operations in a manner that complies with all pertinent Federal and state laws.

(b) Specific standards--

(1) Access routes. Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable to minimize cut and fill. When the construction of access routes involves slopes that require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations. An operator is entitled to access to his operations consistent with provisions of the mining laws. Where a notice or a plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and, if practicable, to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved and the use of an existing road is required, the authorized officer may require the operator to make appropriate arrangements for use and maintenance.

(2) Mining wastes. All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and state Laws.

(3) Reclamation.

(i) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands.

(ii) Reclamation shall include, but shall not be limited to:

(A) Saving of topsoil for final application after reshaping of disturbed areas have been completed;

(B) Measures to control erosion, landslides, and water runoff;

(C) Measures to isolate, remove, or control toxic materials;

(D) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and

(E) Rehabilitation of fisheries and wildlife habitat.

(iii) When reclamation of the disturbed area has been completed, except to the extent necessary to preserve evidence of mineralization, the authorized officer shall be notified so that an inspection of the area can be made.

(4) Air quality. All operators shall comply with applicable Federal and state air quality standards, including the Clean Air Act (42 U.S.C. 1857 et seq.).

(5) Water quality. All operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.).

(6) Solid wastes. All operators shall comply with applicable Federal and state standards for the disposal and treatment of solid wastes, including regulations issued pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.). All garbage, refuse or waste shall either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, its impact on the lands.

(7) Fisheries, wildlife and plant habitat. The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations.

(8) Cultural and paleontological resources.

(i) Operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building or object on Federal lands.

(ii) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.

(iii) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.

(9) Protection of survey monuments. To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated, or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees.

(10) Fire. The operator shall comply with all applicable Federal and state fire laws and regulations, and shall take all reasonable measures to prevent and suppress fires in the area of operations.

(11) Acid-forming, toxic, or other deleterious materials. You must incorporate identification, handling, and placement of potentially acid-forming, toxic or other deleterious materials into your operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:

(i) You must handle, place, or treat potentially acid-forming, toxic, or other deleterious materials in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);

(ii) If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate; and

(iii) You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control methods have been employed.

(12) Leaching operations and impoundments.

(i) You must design, construct, and operate all leach pads, tailings impoundments, ponds, and solution-holding facilities according to standard engineering practices to achieve and maintain stability and facilitate reclamation.

(ii) You must construct a low-permeability liner or containment system that will minimize the release of leaching solutions to the environment. You must monitor to detect potential releases of contaminants from heaps, process ponds, tailings impoundments, and other structures and remediate environmental impacts if leakage occurs.

(iii) You must design, construct, and operate cyanide or other leaching facilities and impoundments to contain precipitation from the local 100-year, 24-hour storm event in addition to the maximum process solution inventory. Your design must also include allowances for snowmelt events and draindown from heaps during power outages in the design.

(iv) You must construct a secondary containment system around vats, tanks, or recovery circuits adequate to prevent the release of toxic solutions to the environment in the event of primary containment failure.

(v) You must exclude access by the public, wildlife, or livestock to solution containment and transfer structures that contain lethal levels of cyanide or other solutions.

(vi) During closure and at final reclamation, you must detoxify leaching solutions and heaps and manage tailings or other process waste to minimize impacts to the environment from contact with toxic materials or leachate. Acceptable practices to detoxify solutions and materials include natural degradation, rinsing, chemical treatment, or equally successful alternative methods. Upon completion of reclamation, all materials and discharges must meet applicable standards.

(vii) In cases of temporary or seasonal closure, you must provide adequate maintenance, monitoring, security, and financial guarantee, and BLM may require you to detoxify process solutions.

(13) Maintenance and public safety. During all operations, the operator shall maintain his or her structures, equipment, and other facilities in a safe and orderly manner. Hazardous sites or conditions resulting from operations shall be marked

by signs, fenced, or otherwise identified to alert the public in accordance with applicable Federal and state laws and regulations.

[66 FR 54861, Oct. 30, 2001]

SOURCE: 45 FR 13974, March 3, 1980; 59 FR 44856, Aug. 30, 1994; 62 FR 9099, Feb. 28, 1997; 63 FR 52954, Oct. 1, 1998; 65 FR 70112, Nov. 21, 2000; 70 FR 58878, Oct. 7, 2005; 73 FR 73794, Dec. 4, 2008, unless otherwise noted.

AUTHORITY: 16 U.S.C. 3101 et seq.; 30 U.S.C. 22-42, 181 et seq., 301-306, 351-359, and 601 et seq.; 31 U.S.C. 9701; 40 U.S.C. 471 et seq.; 42 U.S.C. 6508; 43 U.S.C. 1701 et seq.; and Pub.L. No. 97-35, 95 Stat. 357.; 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782.

43 C. F. R. § 3809.420, 43 CFR § 3809.420

Current through December 9, 2010; 75 FR 76892

EXECUTIVE ORDER NO. 13007

<May 24,1996,61 F.R. 26771>

INDIAN SACRED SITES

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454 [Nov. 2, 1994], 108 Stat. 4791 [see Short Title note set out under section 479a of Title 25, Indians, and Tables for classification] and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate,

procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994 [59 F.R. 22951], "Government-to-Government Relations with Native American Tribal Governments [25 U.S.C.A. § 450 note]."

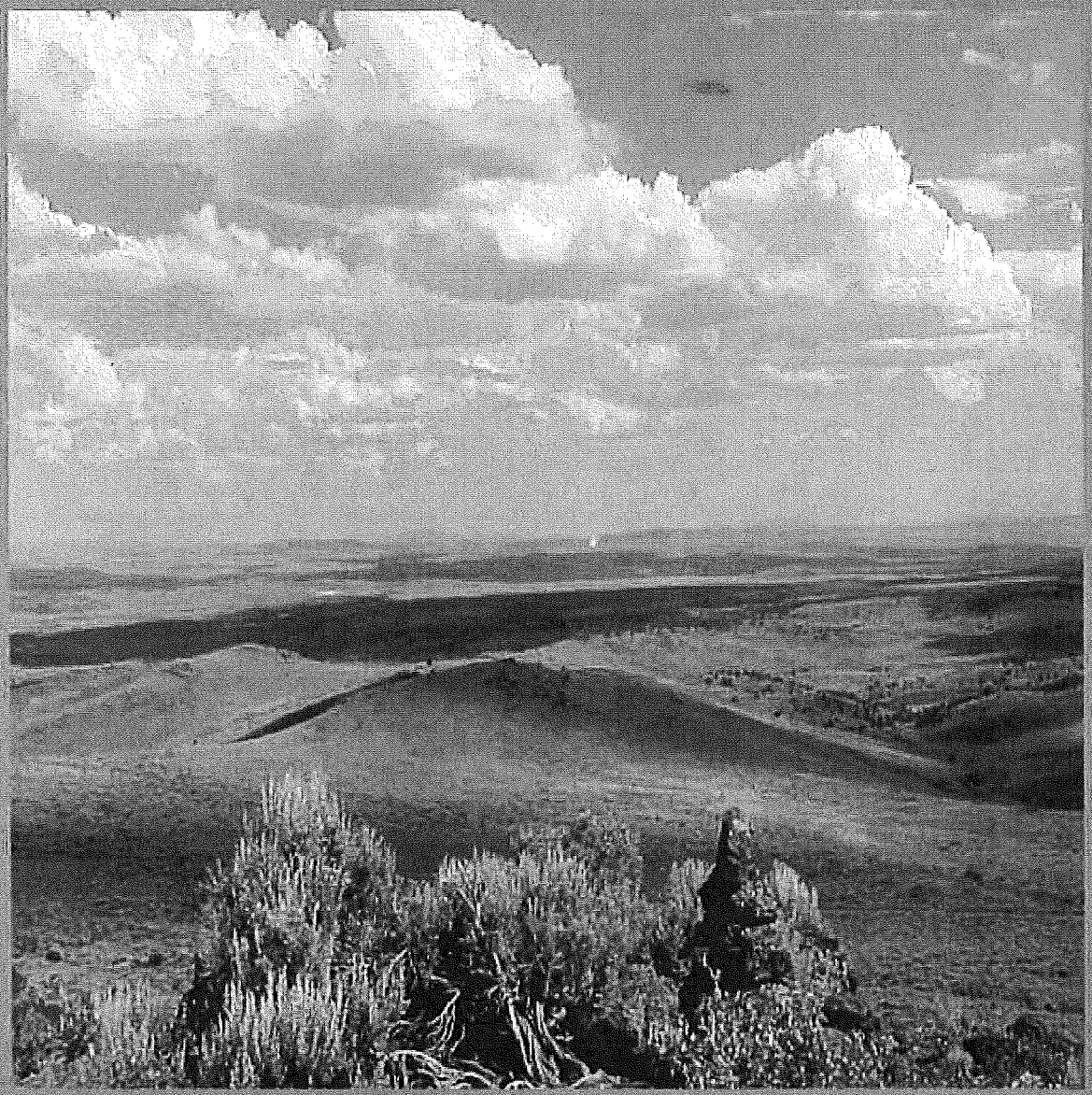
(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

WILLIAM J. CLINTON

Proposed Resource Management Plan and Final Environmental Impact Statement



Volume I

May 2007

BLM

Surprise Field Office

2.2 Cultural Resources and Paleontology

Current legal, regulatory, and policy direction concerning cultural and paleontological resources exists to protect and preserve these national heritage assets. It also supports development of literature, interpretive sites, and other forms of public education designed to increase knowledge, understanding, and enjoyment of these irreplaceable resources. Legal protection, physical preservation and restoration, documentation, and access by scientists and the general public, are regulated by federal and state law. Native American communities are also permitted to use public lands in a traditional manner. The electronic management and archiving of cultural and paleontological data is vital to the management of these resources. However, present land use plans are outdated and no longer reflect current legal direction and policy. The management actions presented here are a result of the need to update existing plans and incorporate current legislation and policy direction for the management of cultural and paleontological resources.

2.2.1 Desired Future Condition

NRHP-eligible and other significant cultural and paleontological resources, including Traditional Cultural Properties (TCPs) and areas of traditional Native American use, would be managed to maintain or enhance their scientific, interpretive, educational, or economic values.

2.2.2 Goal

Protect and preserve significant cultural resources. Ensure that these resources are available to present and future generations for appropriate uses. Manage legitimate activities in a manner that will ensure preservation and provide public benefits through education (including interpretation), research, public uses, and conservation for future generations.

Locate, evaluate, and classify paleontological resources and protect them where appropriate. Manage these resources for scientific, educational, and recreational values. Ensure that significant fossils are not inadvertently damaged, destroyed, or removed from public land as a result of multiple use activities.

2.2.3 Objectives

All cultural properties in the RMP area, whether already recorded or projected to occur on the basis of existing-data synthesis, including cultural landscapes, would be allocated to one of six uses as outlined in DOI IB No. 2002-101. The BLM Surprise Field Office would seek to reduce imminent threats to cultural resources and resolve potential conflicts, from natural or human-caused deterioration, or from other resource uses by identifying priority geographic areas for new field inventory, based upon a probability for unrecorded significant resources.

2.2.4 Legislative, Regulatory, and Policy Direction

- American Antiquities Act (1906)
- National Environmental Policy Act (1969)
- Historic Sites Act (1935)
- Reservoir Salvage Act (1960)
- Archaeological and Historic Preservation Act (1974), as amended
- National Historic Preservation Act (NHPA) (1966), as amended through 1992–particularly Sections 106 and 110
- The Federal Land Policy and Management Act (1976), as amended
- Archaeological Resources Protection Act (1979), as amended (1988)

- American Indian Religious Freedom Act (1978), as amended
- Native American Graves Protection and Repatriation Act (1990)
- Executive Order no. 11,593 – "Protection and Enhancement of the Cultural Environment" (1971)
- National Trails System Act (1968), as amended (1992)
- Executive Order no. 13,007 – "Indian Sacred Sites" (1996)
- Executive Order no. 13,175 – "Consultation and Coordination with Indian Tribal Governments" (2000)
- BLM Manual 8100 (Cultural Resource Management)
- BLM Manual 8270 (Paleontological Resource Management)
- Federal-Aid Highway Act (1956); Section 120, authorizing use of Federal-Aid Highway funds for archaeological and paleontological salvage
- BLM–California State Historic Preservation Office (SHPO) Protocol Agreement (1998) as amended
- BLM–Nevada State Historic Preservation Office (SHPO) Protocol Agreement (1999) as amended

2.2.5 Proposed Management Actions

Manage cultural resources in accordance with existing laws, regulations, executive orders, and Nevada and California State Historic Preservation Office (SHPO) protocol agreements (as amended). Management actions on public lands – and private land projects that are federally funded, permitted or assisted – must comply with Sections 106 and 110 of the National Historic Preservation Act, which includes consultation with Native American representatives and the State Historic Preservation Officer, when appropriate.

Evaluate and allocate cultural properties (including cultural landscapes) to one of six uses as outlined in USDI-IB No. 2002-101 "Cultural Resource Considerations in Resource Management Plans", and Table 2.2-1 below, regardless of whether their existence is known and recorded or inferred on the basis of current data synthesis.

Once sites have been examined and assigned a use category from "a" through "f," those that are noticeably deteriorated would be prioritized for NRHP (National Register of Historic Places) evaluation. Sites that are NRHP-eligible would then be protected through withdrawals, exclosures, stipulations on leases and permits, ROWs and/or other measures developed by a qualified interdisciplinary team. NRHP designation would then be sought for currently eligible sites. (Other eligible sites, identified and evaluated in future inventories, would eventually be sought for designation.)

Cultural resource management plans (CRMPs) would be developed for sensitive (i.e., vulnerable to natural or man-caused deterioration or destruction) cultural areas, unless included in other (integrated) activity plans. Plan development must include Native American and SHPO consultation, and compliance with other applicable regulations. Landmarks, sites, districts, and landscapes that are judged eligible, would be nominated for the NRHP.

CRMPs would incorporate the following measures:

- Development of a site monitoring system
- Identification of sites in need of stabilization and restoration
- Site protection (e.g., fencing or surveillance equipment)
- Development of research designs (for selected sites/areas)

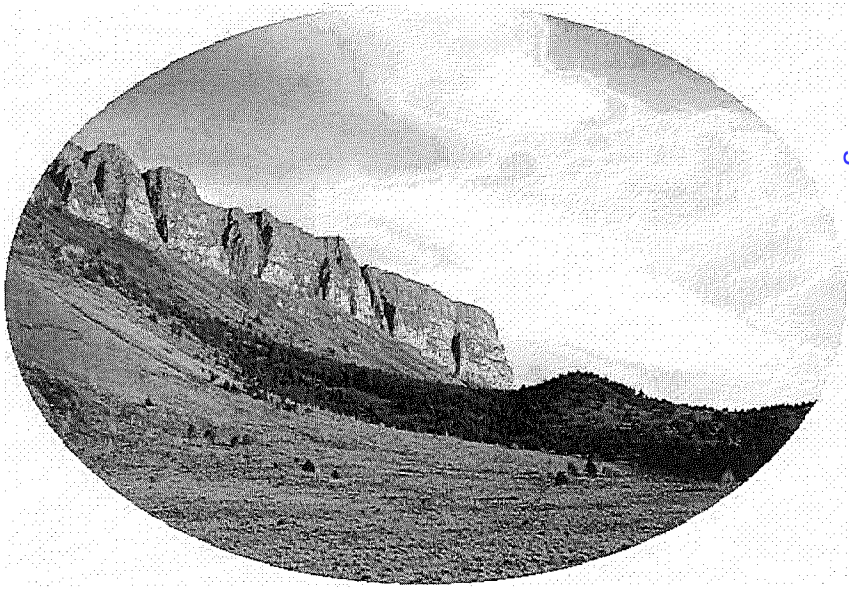
U.S. Department of the Interior
Bureau of Land Management

Lakeview Resource Area
Lakeview District Office
1301 South G Street
Lakeview, Oregon 97630

November 2003

Lakeview Resource Management Plan and Record of Decision

(Main Text and Appendices)



Addendum 74

Special Management Areas — Significant Caves

Rationale

The "Federal Cave Resources Protection Act" of 1988 declared that significant caves are an invaluable and irreplaceable part of the Nation's natural heritage, and directed Federal agencies to secure, protect, and preserve significant caves for the perpetual use, enjoyment, and benefit of all people. The Act also directed Federal agencies to prepare and maintain a list of significant caves and to establish criteria for the identification of significant caves on Federal lands. The resulting cave management regulations were published in the *Federal Register* (USDI-1993) in 1993. Until caves within the LRA are evaluated to determine significance, and management plans are prepared which provide specific management prescriptions, all caves are to be managed in accordance with "Oregon and Washington Interim Cave Management Policy" (USDI-BLM 1995i). This policy provides for specific protective management of all caves and cave resources until a specific management plan is prepared. Many of the known caves within the LRA are also located in WSA's, and these caves are afforded added protection under the wilderness IMP (USDI-BLM 1995b).

For a cave on public lands to be nominated, it must possess one or more of the following values: biota, cultural, geologic/mineralogic/paleontologic, hydrologic, recreational, or educational. The listing of significant caves involves two separate processes. During 1995, the initial listing process was coordinated by a national interagency effort in consultation with individuals and organizations interested in cave resources. This process had three steps: (1) nomination, (2) evaluation, and (3) listing.

Management Direction

There are presently seven known significant caves located within the LRA. As part of the evaluation process, interested individuals and organizations would be consulted as allowed within the parameters of the confidentiality provisions set in 43 CFR, Subpart B, Section 37.12. During the initial listing in 1995, nine caves were nominated by the Willamette Valley Grotto. Seven of these caves were found to be significant and are protected under interim management of the "Federal Cave Resources Protection Act." A subsequent listing of 62 caves was received in late 1995. Seventeen of these were eliminated from further review because they were duplicates of the first list, were on private land, or did not meet the definition of a "cave." Forty-five caves still need to be evaluated before a determination on listing can be made. Depending on funding and staffing levels, the inventory and evaluation process would be completed within 5 years after the completion of the RMP. After the inventory and evaluation process has been completed, a management plan for all new caves determined to be significant would be developed. This process would include public involvement.

Cultural and Paleontological Resources

Management Goal 1—*Preserve and protect cultural resources in accordance with existing laws, regulations, and Executive orders, in consultation with Native Americans.*

Rationale

The BLM is required by law, regulations, and Executive orders to manage cultural resources in such a fashion that they will be preserved and protected from destruction, and that the appropriate uses will be made of such resources. Law, regulations, and Executive orders further require that such management be coordinated with the appropriate Native American Tribes and individuals.

Management Direction

All management actions on public lands and private land projects that are federally funded, permitted, or assisted will require completion of section 106 of the "National Historic Preservation Act" regulations. This will consist of a literature review, a site survey on-the-ground to determine the presence or absence of sites, and site evaluation in consultation with Native Americans, as appropriate, and with the State Historic Preservation Officer, as appropriate. All sites which have currently been identified, as well as sites identified in the future will be evaluated for placement in one of four use categories, as specified in BLM Manual 8110 (USDI-BLM 1988c). These four uses are as follows:

1) Conservation for future use: This category places a site in protection from destruction with the intent to have it available at an unspecified date in the future for use in research or public interpretation.

2) Public use: Sites placed in this category will be used for recreation, public interpretation, education, etc.

3) Experimental use: Sites placed in this category will be used in scientific research. Such use may result in the complete consumption of the site in some cases. Site may be placed in public use as a result of the research which is conducted.

4) Discharged sites: These are sites which no longer exist or have been so damaged that they have no value of any kind. Sites may have been destroyed by erosion, consumption in research, or through destruction caused by humans.

To protect against illegal artifact or fossil collecting, site or fossil excavations, and site or fossil vandalism, the listed, eligible, or potential National Register of Historic Places known to contain large numbers of sites will be patrolled regularly. This includes the subbasins of Warner Valley, Abert Lake, Summer Lake, Christmas Valley, and Fort Rock. In addition, the surrounding uplands will also be patrolled.

The OHV closure at Fossil Lake will be enlarged to about 8,988 acres (Table 12) to protect existing fossils. Paleontological resource monitoring to determine damage to and collection of exposed fossils will be initiated.

Buildings and structures on the Shirk Ranch property located in Guano Valley will be stabilized.

A monitoring plan has been developed to evaluate cultural resource protection efforts and to provide a baseline for the present condition of sites and determine where stabilization and restoration is needed (Appendix R). Other uses will be limited as necessary to preserve and protect cultural resources.

A regular schedule of meetings with local and regional Native American Tribes for consultation on the preservation and protection of sites will be established.

Management Goal 2—*Increase the public's knowledge of, appreciation for, and sensitivity to cultural resources, Native American issues, and paleontological resources.*

Rationale

The BLM is required by law to preserve and protect cultural and paleontological resources. In order to do so, the public must be aware of their values and the impact which their activities have upon them. Cultural and paleontological resources are fragile and irreplaceable and can be damaged or destroyed by actions of the public. Through vandalism and natural erosion, these resources are disappearing. If the public understands the effects of their actions and feels it has equity in the Nation's cultural and natural history heritage, the resources will be appreciated and better protected from vandalism.

Management Direction

Public education programs, which will increase public awareness of the need to preserve and protect cultural resource sites, will be developed. All interpretation projects will be done in consultation with Native Americans, and implemented only if it will not impact the values at the site.

Cost-share programs with universities, museums, and researchers, and volunteers to inventory, analyze, and research the cultural resources within the resource area will be continued.

Regular consultation with Native American Tribes on all matters dealing with use, protection, and preservation of cultural resources within the resource area will continue.

Management Goal 3—*In consultation with local Native American Tribes, take actions, including designating areas of critical environmental concern (ACEC's), to protect traditional religious sites, landforms, burial sites, resources, and other areas of interest. Nominate areas that qualify as traditional cultural properties.*

Rationale

The BLM is required by laws, regulations, and Executive orders to consult and coordinate activities with Native American Tribes, so that their rights and interests are taken into account when land use decisions are made. In addition, American Indian traditions and traditional uses must be considered. Specifically, the agency must comply with the "National Historic Preservation Act," the "Native American Graves Protection and Repatriation Act," the "American Indian Religious Freedom Act," regulations 36 CFR 800, section 106 and 110, and Executive Order 13007 (Sacred Sites).

Table 12.—*Off-highway vehicle designations by area* [1, 2]

Area	Designation	Acres
Areas of critical environmental concern		
Devils Garden	D	28,241
Lake Abert (overlap with Abert Rim WSA)	E/D	43,007/7,110
Lost Forest/Sand Dunes/Fossil Lake		
Fossil Lake	C	8,988
Lost Forest RNA/ISA	D	8,883
Sand Dunes WSA	O	9,910
Remainder of ACEC	D/O	7,344/1,418
Warner Wetlands	D	53,087
Black Hills RNA	D	3,049
Connley Hills RNA	D	3,599
Fish Creek RNA	D	8,725
Foley Lake RNA	D	2,230
Guano Creek/Sink Lakes RNA	D	11,119
Hawksie-Walksie RNA	D	17,339
High Lakes	D	38,985
Juniper Mountain RNA	D	6,335
Lake Abert ACEC addition	D	18,049
Rahilly-Gravelly RNA	E	19,648
Red Knoll	D	11,127
Spanish Lake RNA	D	4,699
Table Rock	D	5,139
Wilderness study areas [3, 6]	E	343,778
Wilderness study areas	D	110,443
Proposed WSA additions (acquired lands)	D	1,194
Wild and scenic rivers		
Twelvemile Creek	D	1,311
Other areas		
Alkali Lake Dunes	E	6,813
Buck Creek	C	590
Cougar Mountain	D	0 [7]
Crane Mountain	C	1,030
Deer winter range [4]	D/E [5]	128,556
North Lake SRMA	E	550,392 [8]
Picture Rock Pass	E	491
South Green Mountain	C	14
West Side Cemetery	D	81
Remainder of LRA	O	1,756,799

[1] E = existing roads and trails; D = designated roads and trails; C = closed; and O = open.

[2] Acreage figures will not total correctly for the planning area (3,161,416 acres) due to overlap between areas (for example, Devils Garden ACEC equals the Devils Garden WSA, and acres appear in both designations.

[3] The acreage for the Sand Dunes WSA is found under ACEC's.

[4] Silver Lake and Fort Rock areas.

[5] Designated roads and trails from 12/1–3/31; existing roads and trails for the remainder of the year.

[6] OHV designations within WSA's are related to roads and ways; in the remainder of the LRA, they are referred to as roads and trails.

[7] Acreage is included in deer winter range.

[8] Total area within the special recreation management area (including non-BLM ownerships) is 1,117,007 acres. This acreage represents that portion of BLM lands in the special recreation management area not already included in some other area designation.

Management Direction

All consultation with Native American Tribes will be documented.

Ownership of the West Goose Lake Reinterment Site (approximately 80 acres) and the Adel Paiute Cemetery (approximately 100 acres) will be transferred to the local Tribes or to the Bureau of Indian Affairs to be managed in trust for tribal reinternment purposes.

The areas listed below will be designated as ACEC's to protect cultural resource values and traditional use areas (Map SMA-4). Eligibility of these areas as traditional cultural properties will be determined in the future. The specific management direction for each of these areas is described in the preceding Special Management Area section.

Red Knoll
Table Rock
Abert Rim Addition
High Lakes
Rahilly-Gravelly
Hawksie-Walksie
Connely Hills
Fish Creek

Management Goal 4—*In order to fulfill trust responsibilities with Tribal peoples, manage public land to maintain, restore, or enhance plant community health and cultural plants. Identify traditional ecological knowledge with humans as part of the ecosystem, and maintain habitat integrity with sustainable yields at a landscape level.*

Rationale

During the ICBEMP process, the concerns of American Indian peoples were analyzed—specifically their relationships with the natural environment and trends regarding agency relations with the project's affected Tribal peoples. The legal status of Tribal peoples, the sovereignty of Tribal governments, and the nature of reserved Tribes rights, merit separate attention from the general public's concerns over ecosystem management. The BLM management actions affect resources and areas of concern to Tribal peoples, and the Federal government holds certain trust responsibilities and obligations to Tribal groups based on various legal agreements described in BLM Manual 8100, Information Bulletin OR 2000-095, Executive Order 1307, the "American Indian Religious Freedom Act," the "Native American Graves Protection and Repatriation Act," 36 CFR 800 section 106, and the "National Historic Preservation Act." There are four recognized Tribes that have interest in the planning area: Burns Paiute, Fort Bidwell Paiute, Warm Springs Confederated Tribes, and the Klamath Tribes. The rights retained by these Tribes are viewed by them as an assurance by the U.S. Government to allow for the continuation of traditional land uses. Thus, what is reserved supports a way of life for Indian communities, not just resource uses.

The importance of native plants has received relatively little recognition compared to other native resources. Plants continue to be valued and their parts used for purification, ceremonial, subsistence, commercial, and medicinal purposes and for creating objects of personal use, trade, gift-giving, or sale. Cultural plant lists and plant community/habitats have been listed and given significance by Tribal peoples. Also, the aquatic/terrestrial world has cultural significance to Tribes beyond its value as a source of food, medicine, textiles and other material resources. Its cultural significance is much more complex, involving social values and meaning that intertwine traditional societal, political, religious, and economic areas of modern native cultures (USDI-BLM 1995g, 1996h). In order to more effectively protect Tribal interests, guidelines were developed under ICBEMP between the Tribal peoples and the Federal agencies concerning cultural plants and plant communities:

"Through treaties with the Federal government and regulatory acts signed over the past 30 years, Indian Nations have reserved rights and recognized interests to harvest a broad range of native plant and animal species. Therefore, sustainable harvest levels of the various species should be a management goal. Availability of these species is considered by Indian governments a trust responsibility of the Federal government. Inadequate quantities can lead to substantial effects on community well-being because numerous social activities center on the harvest, preparation, and consumption of the resources. This involves both the occurrence and access to the relevant resources. Occurrence of culturally important plant species may be measured through linkage with existing dominant overstory categories or associated soil types. Degree of access is determined by judging the potential effects that a number of anticipated impediments may be posed by differing management actions."

Plant communities that have cultural importance and value were identified in the process of consultation between the ICBEMP planners and Tribal peoples; these plant communities are labeled "cultural plant

ethno-habitats." These communities were rated for vulnerability and viability. In order that resources can be protected, the specific locations of these plants are not identified, except in broad areas where they are protected, such as in ACEC's and in ethno-habitats (habitats defined by Tribal people as having human importance). There is great concern by Tribal peoples, anthropologists, botanists, and some land managers of Federal lands to protect the habitats where cultural plants are located. One conclusion from ICBEMP analysis also has importance in the Lakeview area: "Tribal plants occurring in nonforested habitats are most at risk for decreases in habitat that may influence continued harvestability." Nonforested ethno-habitats of critical concern in the LRA include tall sagebrush, low sagebrush scablands, wet meadows, and riparian zones.

Cultural plants are defined as those plants important to Tribal groups, both past and present, for subsistence, economic, and ceremonial purposes. Various historical factors since European contact have affected the availability of these plants within the planning area. Noxious weeds; the exclusion of fire; and impacts from grazing, timber harvest, and road building, among other factors, have all contributed to declines and dislocations in many of the plant species important to Tribes in eastern Oregon (Hanes, R., personal communication).

Management Direction

Plant resources, especially western juniper woodlands, will be managed for desired range of conditions by using a mix of protection, restoration, and enhancement measures. These measures may include prescribed fire and special considerations for wildland fire management. Old growth western juniper will be maintained or enhanced (see Forest and Woodlands section). Tribal resource people will be encouraged to contribute their concerns for management of all cultural plants.

Monitoring

Management Goals 1 and 3. Develop procedures to track consultation and document all written, telephone, electronic, and in-person communications; and review yearly for adequacy related to cultural ACEC's or other important cultural sites. Develop on-the-ground monitoring of identified sites to determine condition, impacts, deterioration, and use of such sites.

The following ACEC's contain cultural resource values and will be visited periodically to determine whether any actions taking place in the area are causing detrimental changes to the cultural values. Any changes will be noted and recorded in the resource area cultural resources data base. Consultation with various Tribal groups with interests in the areas will be conducted periodically to determine if there are concerns from the Tribes or if they have observed changes to the condition of resource values in the area.

High Lakes: Visit monthly, April through October
Lake Abert: Visit quarterly
Rahilly-Gravelly: Visit quarterly
Red Knoll: Visit quarterly
Table Rock: Visit monthly, April through October

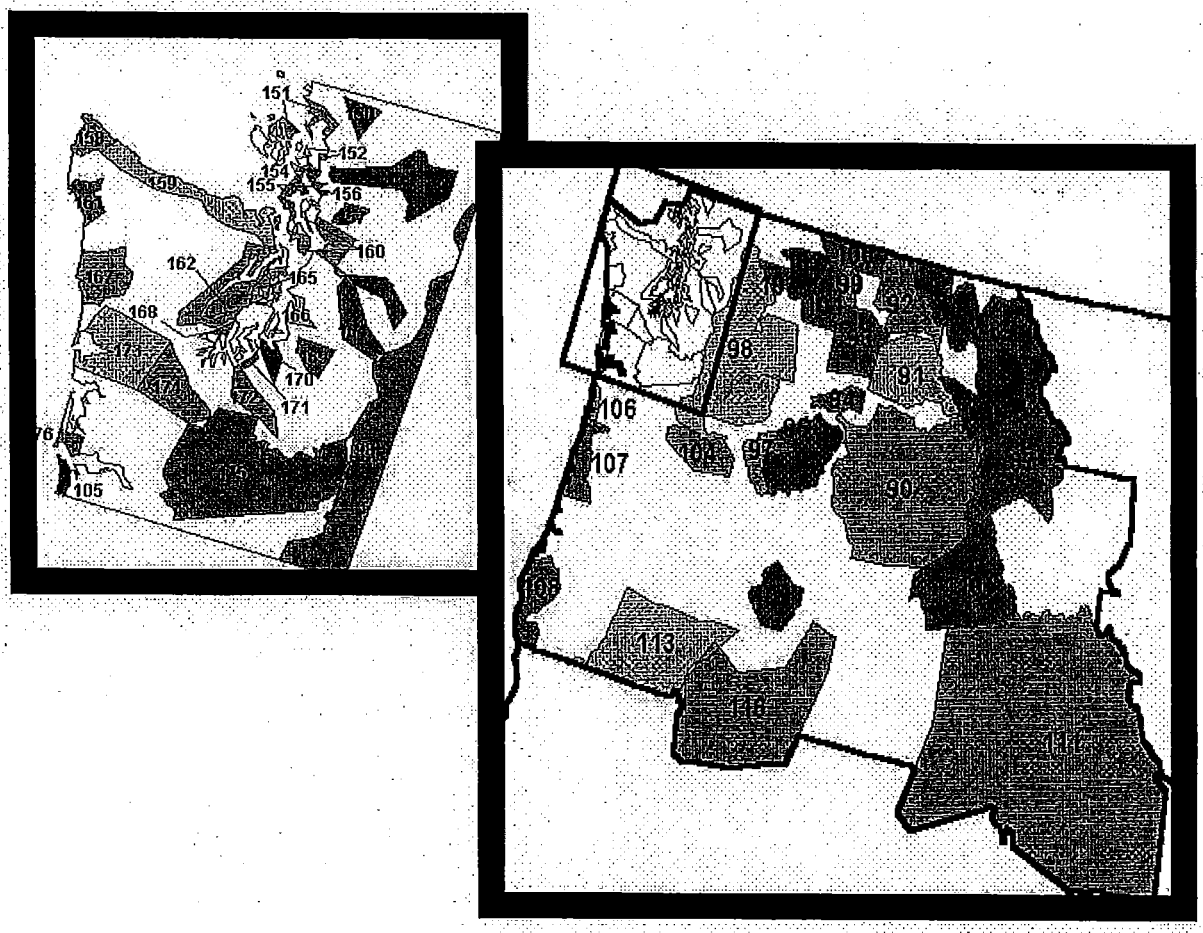
Visits to the ACEC's will be made by the cultural resource specialist or designated representative. During consultation meetings with Tribal staffs, questions, concerns, or observations from specific ACEC's will be recorded. All resulting information will be entered into the resource area cultural resource data base.

Periodic visitations to other cultural resource sites within all portions of the planning area will be made on a quarterly basis. A minimum of 200 sites per year will be visited. The purpose of the visits will be to monitor the condition of the site and document any disturbance or deterioration of the site. Visitation will be made by the cultural resource specialist or designated representative. The condition of the site and other data collected will be entered into the cultural data base. If the sites are listed on the NRHP or have been determined to be eligible for listing, consultation with the State Historic Preservation Officer will be made, when necessary, to determine the appropriate action to stop the deterioration of the site, provide mitigation, or, in the case of criminal removal of site materials, determine the appropriate legal action to be taken.

Management Goal 2. Monitor the effectiveness of presentations to the public, educational brochures, interpretative materials, informational materials, scientific research collections and materials, and informational displays for the public and scientific communities.

Management Goal 4. Cultural plants and their respective plant communities (ethno-habitats) will be considered prior to initiating any ground-disturbing projects through the NEPA and botanical clearance processes. Develop plans with Tribal peoples for the collection and protection of cultural plants and continue discussions with Tribal users/communities to determine long-term sustainability. Monitoring meth-

Guidelines for
Conducting
Tribal Consultation



BLM Manual Handbook H-8120-1

U.S. Department of the Interior
Bureau of Land Management

Addendum 80

C. American Indian Religious Freedom Act

The American Indian Religious Freedom Act (AIRFA) was a joint resolution of the two chambers of the Congress. The President adopted the resolution and signed it into law. Because it started out as a statement of the sense of the Congress, AIRFA is mainly a policy instrument. Section 1 reminds Federal agencies that Native Americans enjoy the same Constitutional guarantees under the First Amendment, as do all other people. Section 2 provides that the President will determine whether agency-specific laws and procedures conflict with the policy and need congressional action. The President's determination was made in a report to the Congress 1 year after AIRFA's 1978 enactment.

Case law has established that AIRFA has an ongoing implementation requirement, obligating agencies to consult with tribal officials and tribal religious leaders when agency actions would abridge the tribe's religious freedom by (a) denying access to sacred sites required in their religion; (b) prohibiting the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies; or (c) intruding upon or interfering with ceremonies.

American Indian Religious Freedom Act–

Resolves that it shall be the policy of the United States to protect and preserve for American Indians their **inherent right of freedom to believe, express, and exercise their traditional religions**, including–

- access to sacred sites, including cemeteries, required in their religion;
- use and possession of sacred objects necessary to the exercise of religious rites and ceremonies; and
- freedom to worship through ceremonials and traditional rites without government intrusion or interference.

FIG. 11. Provisions of the American Indian Religious Freedom Act.

The BLM's corresponding policy is to avoid infringing on Native Americans' religious rights. Land use allocations, proposed BLM actions and authorizations, and routine management practices that could substantially restrict access or interfere with free exercise must be examined in consultation with tribes.

Consultation for AIRFA purposes	
BLM consults with–	**Purpose of consultation is–**
Tribal representative(s) and/or native traditional religious leaders whom the tribal government has designated or identified for this purpose	• To identify the potential for land management procedures to conflict with Native Americans' religious observances • To seek alternatives that would resolve the potential conflicts

FIG. 12. Tribal consultation for purposes of Section 2 of the American Indian Religious Freedom Act.

Not strictly government-to-government. The provisions of AIRFA are not limited to federally recognized Indian tribes. The constitutionally guaranteed freedom to follow the religion of one's choice extends to all Native Americans – as to others – without qualification. The BLM manager's best starting point for consultation purposes, however, is through the government-to-government channels that structure most of BLM's official relations with Indian tribes.

D. Executive Order No. 13007, "Indian Sacred Sites"

Executive Order No. 13007, May 24, 1996, directs Federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and to avoid adversely affecting the physical integrity of such sacred sites, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.

The Order is very explicit about not creating new rights and not limiting duly authorized land uses. It is "not intended to, nor does it, create any right, benefit, trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person" (Sec. 4). Nothing in it is to be "construed to require a taking of vested property interests [nor] shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action" (Sec. 3).

Consultation for E.O. 13007 purposes	
BLM consults with–	**Purpose of consultation is–**
Tribal representative and/or appropriately authoritative representative of an Indian religion whom the tribal government has identified for this purpose	• To determine whether proposed land management actions would-- ❖ accommodate Indian religious practitioners' access to and ceremonial use of Indian sacred sites on Federal lands; and/or ❖ avoid adversely affecting the physical integrity of Indian sacred sites on Federal lands. • To seek alternatives that would resolve potential conflicts.

FIG. 14. Tribal consultation for purposes of E.O. No. 13007, "Indian Sacred Sites."

Identifying sacred sites. Only tribal representatives have the knowledge needed to identify a tribe's sacred sites. A tribe may name an appropriately authoritative representative of an Indian religion to provide this information. Federal officials cannot know to accommodate access to and ceremonial use of Indian sacred sites, and to avoid adversely affecting them, unless the tribe identifies them. Identification can only occur by consultation.

Overlap with "TCP's" and "religious or cultural sites." In some cases it may not be possible to differentiate among "sacred sites," "properties of traditional religious and cultural importance" (sometimes called "TCP's") that may be eligible for the National Register of Historic Places, and "sites of religious or cultural importance" subject to ARPA notification.

The similarity among these is that tribal identification is necessary as the beginning point for compliance with the intent of the law or executive order. A difference is that the BLM must apply the criteria in 36 CFR 60.4 to determine the eligibility of a traditional cultural property identified by a tribe. Identification itself does not make a property eligible for the National Register.

STATE OF CALIFORNIA)
) ss.
COUNTY OF MODOC)

AFFIDAVIT OF AARON TOWNSEND

The undersigned being duly sworn states as follows:

1. I am the Vice-Chairman of the Tribal Council of the Fort Bidwell Indian Community a federally recognized sovereign nation of Northern Paiutes, located on a reservation in Fort Bidwell, California. I have been appointed by the Tribal Council as the Tribe's official representative for the Ruby Pipeline project.

2. Since time immemorial the Gidutikad Band of Northern Paiute (now the Fort Bidwell Indian Community) had the right of respectfully utilizing the remote and isolated areas of southwestern Oregon, northeastern California and northwestern Nevada, including the Surprise Valley area, the area encompassing the Big Valley Traditional Cultural Property (TCP), and the area encompassing the Barrel Springs TCP for centuries as part of their aboriginal homeland. Our ancestors lived in and used this homeland for thousands of years. They hunted, fished, and gathered plants for food and medicines. They prayed and worshipped, buried their dead, and survived in the harsh environment. These places were shared with neighboring Northern

Paiute Bands. We are concerned about any impacts to places utilized for the traditional harvest of plants and wildlife that are used for subsistence, cultural, religious and spiritual purposes.

3. The Ruby Pipeline is near our reservation and will go through our ancient ancestral homeland, including our sacred sites and burial sites. The Fort Bidwell Tribe opposes the development of the Ruby Pipeline as currently planned, and specifically opposes the pipeline that is routed through the Barrel Springs TCP and the Big Valley TCP. The Fort Bidwell Indian Community passed Tribal Council Resolution # 09-12/603, "Ruby Pipeline Route Opposition," stating the Tribe's formal opposition to the pipeline route because of the impacts on the high concentration of archeological sites, cultural plant species, wildlife, and other cultural and natural resources of importance to the Tribe in and around the Barrel Springs TCP. A true and correct copy of the Resolution is attached as Exhibit A to this Affidavit.

4. The Tribe has used the Barrel Springs area since time immemorial. The Tribe continues to utilize the Barrel Springs TCP for subsistence hunting of mule deer, pronghorn, sage grouse, jackrabbit and groundhog and gathering of yampah root, willow, chokecherry, wild plum, mountain mahogany and other plants for food, ceremony, or other cultural

purposes. The Barrel Springs area was known for its high concentration of groundhogs that were a staple food source for our Tribe. The Northern Paiute Bands throughout Nevada, California and Oregon are named for the staple food in their area. Gidutikad is the band name for groundhog eaters. The Barrel Springs TCP is a place of great historical and contemporary significance to the Tribe and is an integral part of who we are as a people.

5. The Barrel Springs TCP continues to be the most important area for subsistence hunting and plant gathering by tribal members. The area of the Barrel Springs TCP is one of the last good places to hunt and dig roots. Subsistence resources form an essential part of tribal members' diets both culturally and because the per capita income of tribal members is low and there are few long-term employment opportunities near the reservation.

6. The Barrel Springs TCP is an area whose religious and cultural significance serves as one of the Tribe's last ties to our ancestors' beliefs. This area is one of the Tribe's last places we can freely visit and use because the area is on public lands of the BLM. Given this significance, this is an area where we teach our children about their ancestors. We also teach them what roots and plants are usable for cultural, religious and subsistence purposes, and how to hunt the game animals in culturally appropriate manner.

7. When visiting a cultural site, like the Barrel Springs TCP, to gather roots and hunt, the tribal members are required to religiously and traditionally prepare themselves. Hunting and gathering foods are religious exercises that link the Tribe and its members with the universal cosmos through obtaining and eating what the universe provides. It is the Tribe's and its members' religious right to hunt, gather, and pray within the Barrel Springs TCP.

8. There are burials in the Barrel Springs TCP and a high potential exists for burials to be encountered within the preferred route for the pipeline. The burials are an integral part of the sacredness of this area and are an important part of the cultural practices. The proposed route will directly impact the Tribe's traditional culture and the religious free exercise of its members.

9. The Barrel Springs region has prehistoric and historic pristine properties attached to the traditional practices of the Tribe, which include the Rock Stack Features. Exhibits B, C, and D to this Affidavit. The Tribe's Rock Stack Features have significant, important and valuable meaning relating to spirituality. Rock Stack Features are a part of our spiritual belief and reinforce traditional knowledge. These features were placed and used in this culturally sensitive area for various reasons and continue today to

provide the Tribe with spiritual connection to our Creator. The Rock Stack Features were placed as a monument for prayer, before and after hunting and gathering, to give thanks to the Creator for giving us this special place. This area possesses a power that is why this area was used in the past and today. This power together with the prayers of our ancestors shown by their rock stacks creates a strong associational sense of the sacred through connections of tribal members with their ancestors, the Creator, this site, the subsistence resources there, and the larger universe. In addition, these Rock Stack Features show a strong sense of cultural ties; they have been in existence for thousands of years. Some of the Rock Stack Features can provide a direction to a cultural landscape that provides super natural power, in turn providing strong prayers for an individual.

10. The Rock Stack Features, archaeological sites, burials, petroglyphs, and pictographs in the Barrel Springs and Big Valley TCPs are "sacred" and must be protected. These sites are unique and irreplaceable and must not be disturbed. These sites are "sacred" to the Tribe's members because they connect us to our ancestors and to our ancestor's cultural practices through ceremonial activities at the sites. Harm to these sites cannot be mitigated.

11. This cultural perspective on the importance of such features is a

major contributing factor in the Fort Bidwell Indian Community's formal opposition to the proposed pipeline route.

12. The BLM Surprise Field Office agreed that the Barrel Springs TCP is eligible for listing in the National Register of Historic Places. Based on the Tribe's beliefs and practices relating to the Barrel Springs area, the BLM determined that the TCP had a boundary enclosing approximately 30 square miles in area, including the Tribe's preferred lands for traditional hunting and root gathering activities.

13. Without any regard for that determination, or any consultation with the Tribe, the BLM granted the Ruby Pipeline a right-of-way directly down the center of the Barrel Springs TCP. The BLM cited as a reason for granting the right-of-way through this area the existence of the Pacific DC Intertie Transmission Line.

14. The Pacific DC Intertie Transmission Line was constructed in 1970, with no government-to-government consultation with the Tribe. The Tribe recovered from the impacts made by the line because the line had relatively few impacts on archaeological resources in the area. Exhibits B, C, D and E to this Affidavit (photographs show numerous Rock Stack Features that remain intact in close proximity to the transmission line). Each power line structure has a small footprint with only five points of contact

with the ground. Each point of contact is approximately 2 feet in diameter. Exhibits F and G to this Affidavit (photographs show base of a power pole structure and guy wire anchor with an 8 ½ by 11 inch paper tablet to demonstrate scale). Each structure is approximately 300 yards apart. Exhibits H and I to this Affidavit. The current road through this area caused minimal surface disturbance and is also rough making it difficult for people to gain access to the area. Exhibits J and K to this Affidavit.

15. The proposed underground pipeline will have a direct impact on important archaeological sites that serve as a link to ancestors and the basis for religious exercises that are an integral part of the Tribe's and member's religion. This impact will create a long lasting scar of depleted vegetation. During the construction of the current transmission line, construction was isolated and above ground. Therefore, few impacts happened to cultural resources linearly. The natural rock features were not displaced nor removed and there was minimal displacement and removal of cultural Rock Stack Features. See Exhibits B, D, L, M, and N to this Affidavit (photographs show Rock Stack Features and natural rock scab in the area to be cleared by the Ruby Pipeline). The proposed pipeline will have major adverse impacts to cultural resources due to the approximately 115-foot wide construction corridor and the six by six-foot trench for

burying the pipe. Exhibits O and P to this Affidavit (photographs show the 115 foot wide construction corridor and pipeline trench). In addition, the pipeline will include an improved road that will increase access to the area by looters and vandals.

16. The stretch of pipeline that is planned to pass through the Barrel Springs TCP will completely destroy hundreds of Rock Stack Features and numerous other cultural and archeological sites that tribal members use to this day. Whether it be to lay down prayers, forage items to use ceremoniously, or for subsistence we continue to use this area regularly.

17. None of the federal agencies has evaluated the Big Valley area for its eligibility as a TCP and it was not discussed in any ethnographic reports, the DEIS, the FEIS or the BLM ROD.

18. The Tribe has long held the opinion that the Sheldon route alternative was preferable because it would alleviate the Tribe's concerns over the Barrel Springs and Big Valley TCPs by avoiding those areas completely. The FERC, BLM and Fish and Wildlife did not consult with the Tribe about the reasons why the Sheldon route was rejected. Fish and Wildlife said that there could be as many cultural resources along the Sheldon route alternative but they did not consult with the Tribe about it.

19. The FERC never consulted with the Tribe over the impacts of

the project on the Tribe and its cultural or subsistence resources. The BLM insisted that it was providing only supplemental consultation and failed to consult with the Tribe on a meaningful government-to-government basis. The FEIS refers to a series of public meetings held at various locations in late 2008 and early 2009 as consultation. Cultural, religious, and spiritual concerns of Indian tribes are confidential, and protected under federal law. Multiple tribe meetings, public meetings and written comments on a project are not suited to meaningful consultation with the Tribe over such concerns.

20. Those meetings also involved multiple Indian tribes all in the same room at the same time. After Ruby, the BLM or FERC staff, would make there presentation on what they wanted to do, the meetings would break down into shouting by the tribal representatives present. There was no opportunity for effective dialogue.

21. Also, we often got documents just before the comments were due. For instance, we received an email June 29, 2010 from Charlene Vaughn of the Advisory Council on Historic Preservation requesting that we participate in a conference call on July 1, 2010, to discuss the Section 106 MOA's for the pipeline project. During the call, it was explained that the MOA's were to be sent out for execution the next day. We had not been provided copies of the MOA's prior to the conference call and were asked to

provide written comments by the following day.

22. We cannot put a price on our people's religious and cultural ties to the Barrel Springs and Big Valley TCPs. The pipeline will compromise the religious and cultural significance of the Barrel Springs and Big Valley TCPs. The unique geologic and cultural features in the Barrel Springs TCP area stretch linearly for approximately 10 miles along the proposed route. This entire length will be destroyed by the work area and trenching. It cannot be restored.

23. The Ruby Pipeline has also had impacts on our tribal government. The Fort Bidwell Tribe does not have a cultural resource department and is using current tribal staff to work on the project. In 2009, the Tribe had a fiscal operating budget of only $1,497,351.00 and has only 28 employees. Given the many demands placed upon the Tribe, no part of that budget could be programmed solely for cultural resources,

24. The Tribe does have an environmental manager but her grant-based program budget did not allow her to work on pipeline related issues. The time she did spend on the project was on a voluntary basis.

25. The hours that I spent working on the project were also mostly voluntary. The program hours put in on this project in 2009 were 126 hours. I put in a lot of time after hours because the Tribe did not have the funding

to deal with the issues. This time was not recorded because we did not have the program money to pay for it. Although the time and effort was put in after hours, it still required the use of the Tribe's phones, faxes, and computers. In 2009, I was also required to take 10 trips for a total mileage in excess of 1,000 miles using my personal automobile.

26. In 2010, the Tribal Council authorized me to work on the pipeline issues on program time. In this year, my program hours on the project to date are 300, with an additional 40 hours of my own personal time after hours. In 2010, I made nine trips with my personal vehicle, and one with a rental car, totaling in excess of 3,000 miles.

Dated this 15 day of October 2010.

FURTHER AFFIANT SAYETH NOT.

Aaron Townsend

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF MODOC)

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me by Aaron Townsend

____ this 15 day of October, 2010.

FRANCES E. HULLINGER
COMM. # 1824145
NOTARY PUBLIC - CALIFORNIA
MODOC COUNTY
MY COMM. EXP. DEC. 2, 2012

Frances E. Hullinger
NOTARY

My Commission Expires:

12-2-2012

FORT BIDWELL INDIAN COMMUNITY COUNCIL
P.O. BOX 129
FORT BIDWELL, CA 96112

PHONE 530-279-6310/2192
FAX 530-279-2233

FORT BIDWELL PAIUTE RESERVATION
GIDUTIKAD BAND

Established January 28, 1936 under the I.R.A. of June 18, 1934

RESOLUTION
FBIR No. 09-12/603

Subject: **Ruby Pipeline Route Opposition**

Whereas: The Fort Bidwell Indian Community, established under the Indian Reorganization Act of June, 1934, and approved January 18, 1936, established a legal community organization to govern in the best interest of the people, **and**

Whereas: The Fort Bidwell Indian Community Council, composed of nine (9) members, is the decision-making body of the Fort Bidwell Paiute Reservation, **and**

Whereas: The Fort Bidwell Indian Community Council has the authority to manage the tribal affairs and operations of the Fort Bidwell Paiute Reservation, **and**

Whereas: The Fort Bidwell Indian Community Council by unanimous decision opposes the Ruby Pipe Line current route, **and**

Therefore be it resolved that the Ruby Pipe Line completely avoid the tribes TCP in the Barrel Springs area and use the Sheldon Route, **now**

Be it further resolved that the Fort Bidwell Indian Community Council would also like the SV BLM as the lead agency to respect the Tribes decision and request Ruby Pipe Line use the Sheldon Route. The Fort Bidwell Indian Community Council believes this would significantly lower all cultural and environmental impacts in the Barrel Springs area.

CERTIFICATION

This is to certify that this resolution was adopted at a duly called Fort Bidwell Indian Community Council meeting, on **December 12, 2009**, with a quorum of 7 Council members present, by a vote of **6** for, **0** opposed, **0** abstentions.

ATTEST:

Secretary

Chairman

EXHIBIT
A

EXHIBIT B
To Aaron Townsend's Affidavit
Cultural Stacked Rock Feature with Heart Peak Alignment (Barrel Springs TCP)

EXHIBIT C
To Aaron Townsend's Affidavit
Cultural Stacked Rock Hunting Blind (Barrel Springs TCP)

EXHIBIT D
To Aaron Townsend's Affidavit
Rock Stack Feature in 115 foot wide construction corridor (Barrel Springs TCP)

EXHIBIT E
To Aaron Townsend's Affidavit
Power Line Tower near natural stone escarpment and Rock Stack Features
(Barrel Springs TCP)

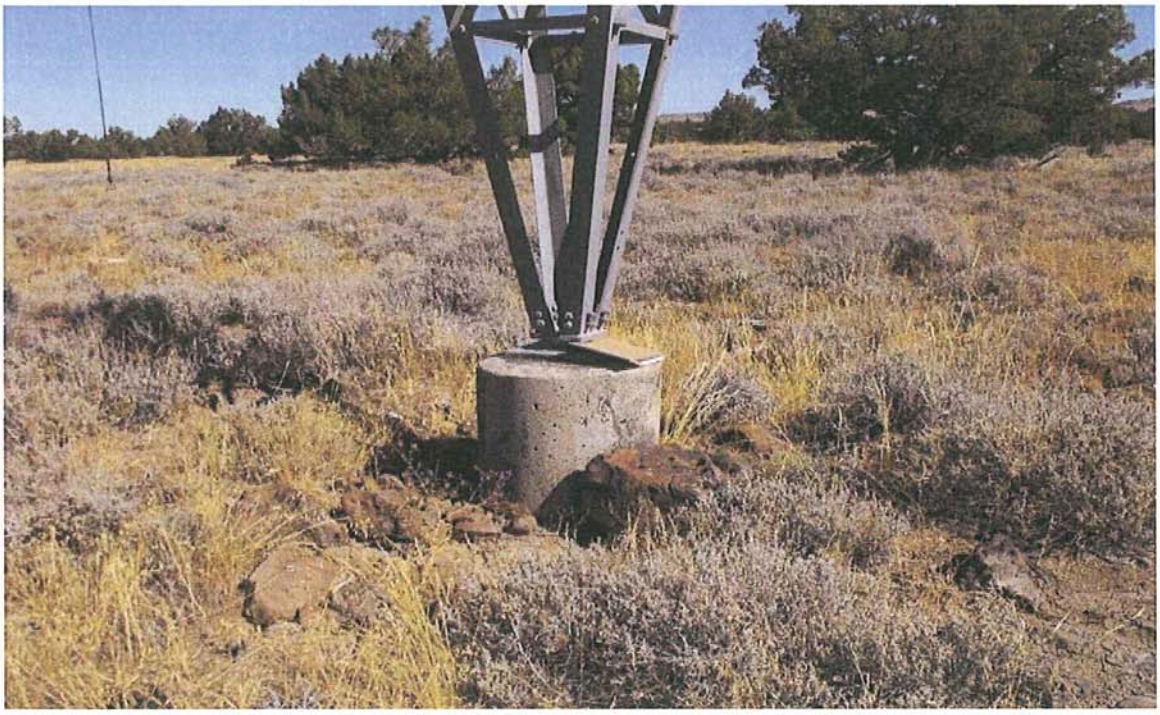


EXHIBIT F
To Aaron Townsend's Affidavit
Base of power line structure with 81/2" by 11" paper tablet
(Barrel Springs TCP)

EXHIBIT G
To Aaron Townsend's Affidavit
Power line structure guy wire anchor with 81/2" by 11" paper tablet (Barrel Springs TCP)

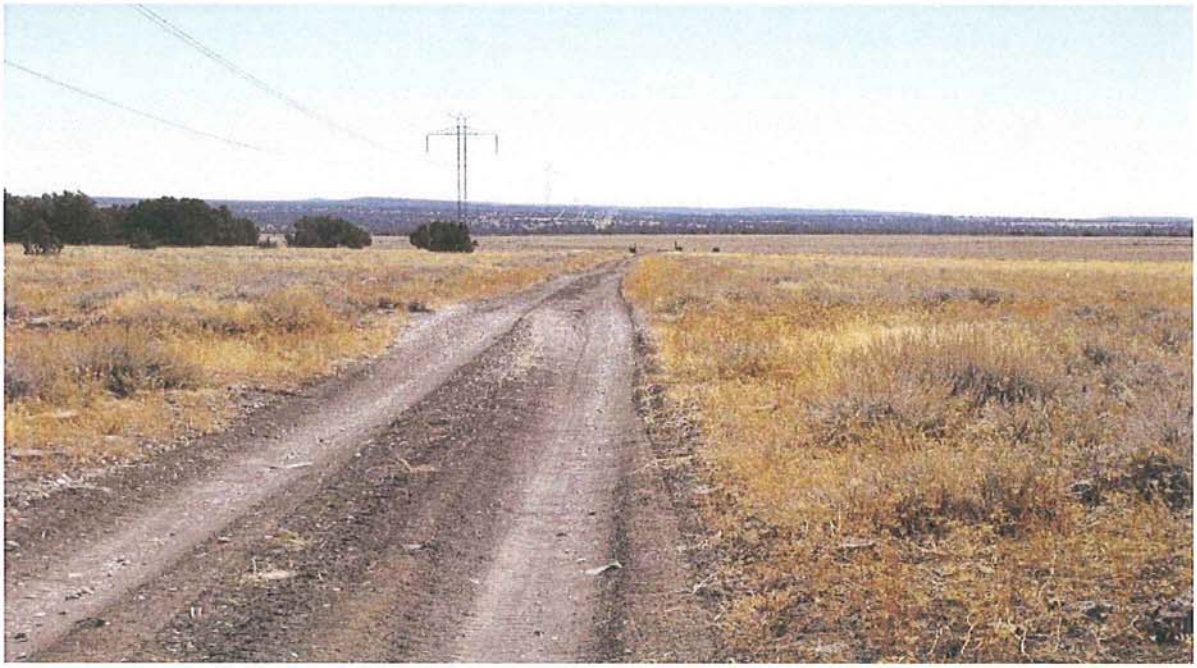


EXHIBIT H
To Aaron Townsend's Affidavit
View of power line structures demonstrating distance between structures
(Barrel Springs TCP)

EXHIBIT I
To Aaron Townsend's Affidavit
View of power line structures demonstrating distance between structures
(Barrel Springs TCP)

EXHIBIT J
To Aaron Townsend's Affidavit
Power line easement road in current unimproved condition
(Barrel Springs TCP)

EXHIBIT K
To Aaron Townsend's Affidavit
Power line easement road in current unimproved condition
(Barrel Springs TCP)

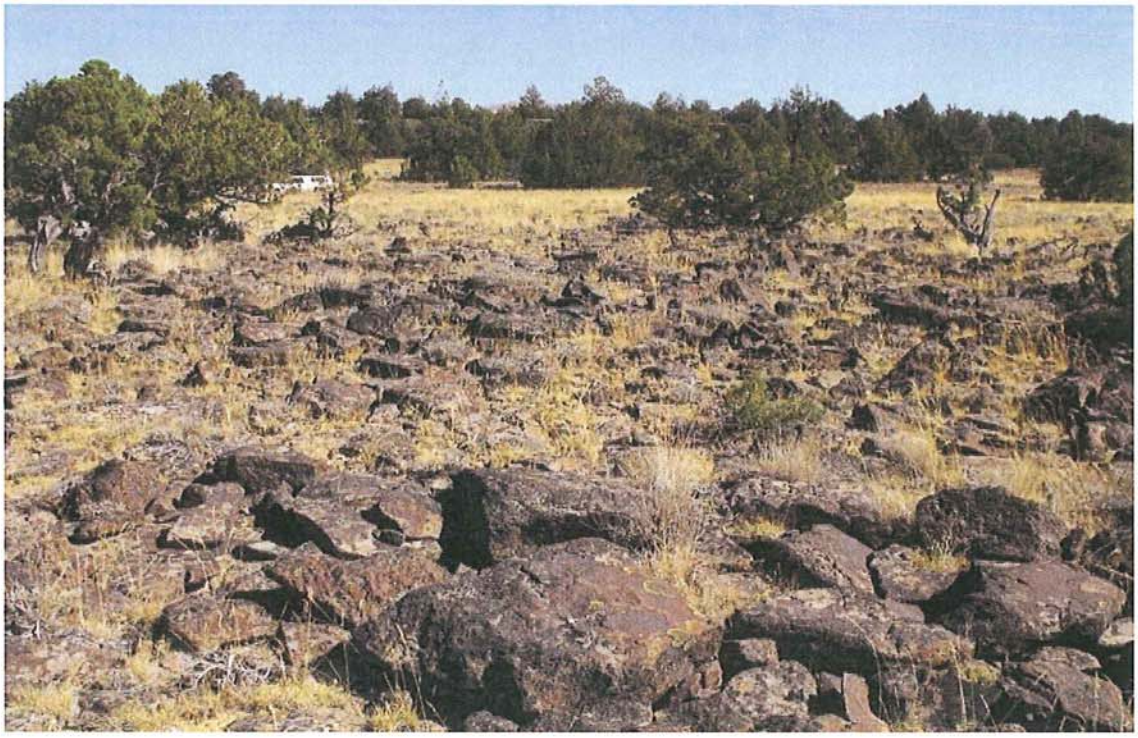


EXHIBIT L
To Aaron Townsend's Affidavit
Natural Rock Formation in 115 foot wide construction corridor (Barrel Springs TCP)

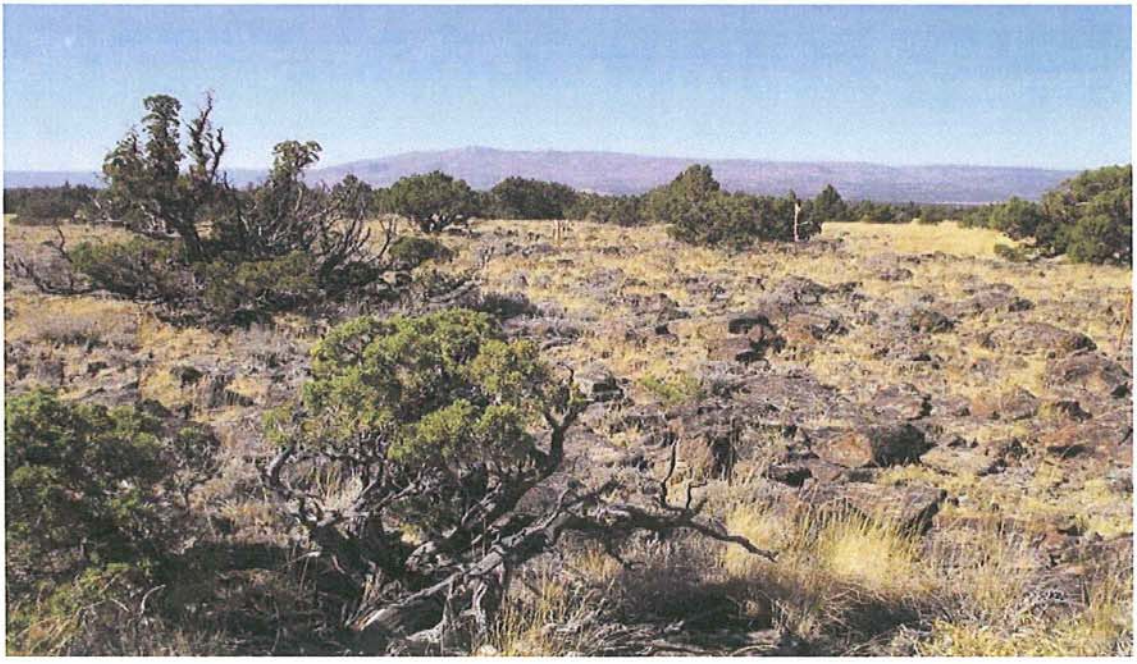


EXHIBIT M
To Aaron Townsend's Affidavit
Natural Rock Formation in 115 foot wide construction corridor (Barrel Springs TCP)

EXHIBIT N
To Aaron Townsend Affidavit
Natural Rock Formation in 115 foot wide construction corridor (Barrel Springs TCP)

EXHIBIT O
To Aaron Townsend's Affidavit
115 foot wide construction corridor along Ruby Pipeline Route

EXHIBIT P
To Aaron Townsend's Affidavit
115 foot wide construction corridor and trench for pipeline along Ruby Pipeline Route

DECLARATION OF AARON TOWNSEND

I, Aaron Townsend, declare as follows:

1. I am the Vice-Chairman of the Tribal Council of the Fort Bidwell Indian Community a federally recognized sovereign nation of Northern Paiutes, located on a reservation in Fort Bidwell, California. I have been appointed by the Tribal Council as the Tribe's official representative for the Ruby Pipeline project.

2. Since time immemorial the Fort Bidwell Tribe and its members have had the right of respectfully utilizing the remote and isolated areas of southwestern Oregon, northeastern California and northwestern Nevada, including the Barrel Springs Traditional Cultural Property (TCP) for centuries as part of their aboriginal homeland.

3. The ceremonies and rituals, prayers and subsistence activities that I and other Tribal members engage in at the Barrel Springs TCP have sustained my people spiritually and physically for many centuries and through many difficult times. This TCP serves as a link to our ancestors and the basis for religious exercises that are an integral part of the Tribe's and member's religion. The Barrel Springs TCP to us is like the Wailing Wall in Jerusalem.

4. Many of the Tribe's members use specific sites, features and areas within the Barrel Springs TCP to lay down prayers and make offerings. These sites include the stacked rock features, petroglyphs, archeological sites, and other natural and cultural physical features of the TCP. These prayers and offerings are made to seek power before hunting and gathering. These prayers and offerings are also made to express gratitude and thanks for the wildlife and plant resources taken while hunting and gathering. Prayers and offerings are also laid down to seek protection from certain influences or powers that may harm us. We view all of these prayer and offerings as being for the benefit to the whole Tribe.

5. The act of laying down prayers and offerings for some purposes can only be made at specific sites in the Barrel Springs TCP.

6. The Barrel Springs TCP is also the primary place where we teach our children how to be a Gidutikad or "groundhog eater." That is our traditional name because of an animal taken from this place. The act of teaching our children how to live off the land, use its power, and its plant an animal resources is a sacred and religious exercise for both the teacher and the taught. Many of the lessons learned through ceremony and ritual can only be performed at specific sites in the Barrel Springs TCP.

7. The Barrel Springs TCP has a power that is unique and found

only in this place. This power that is sought by Tribal members and as a Tribe through the act of laying down prayers and offerings and engaging in ceremony and rituals at this place has been past down from generation to generation.

8. In any culture, the acts of praying, making offerings, engaging in rituals and engaging in ceremony are religious exercises.

9. To the Tribe and its members, the acts of hunting, gathering and eating our subsistence resources are religious exercises, which can only happen at certain times of the years. Going through the process of praying, laying down offerings, hunting, gathering, giving thanks, preparing and eating the subsistence foods connects us to each other, the wild food sources, and the land. All together those acts make the Tribe spiritually whole.

10. The Ruby Pipeline project is near our reservation and will cut directly through the center of the Barrel Springs TCP. This pipeline will have a direct impact on the individual sites within the TCP and on the TCP as a whole due to the approximately 115-foot wide construction corridor and the approximately 5 to 15 foot wide and seven-foot deep trench for burying the pipe. The pipeline will create a long lasting scar of depleted vegetation and the vary animal from which we get our name.

11. The stretch of pipeline that is planned to pass through the Barrel

Springs TCP will destroy hundreds of Rock Stack Features and numerous other cultural and archeological sites that tribal members use to this day. Whether it be to lay down prayers and offerings, forage items to use ceremoniously, or for subsistence which some members rely on and continue to use regularly.

12. The pipeline will destroy the religious significance of the Barrel Springs TCP. The entire landscape of the TCP, over ten miles in length will be destroyed by the work area and trenching. It cannot be restored. If this happens, my belief in the power of the area, as it has been known to me, will be lost and my prayers will also be lost as a result.

13. The pipeline will also cause harm to creeks and wetlands in Oregon that are of cultural, religious and subsistence significance to some Tribal members. The harm the pipeline will cause to those creeks may interfere with Tribal members' ability to fish for trout in those creeks.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2010.

Aaron Townsend