

FILED

MAR 27 2014

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TE-MOAK TRIBE OF WESTERN
SHOSHONE INDIANS OF NEVADA;
TIMBISHA SHOSHONE TRIBE;
WESTERN SHOSHONE DEFENSE
PROJECT; GREAT BASIN RESOURCE
WATCH,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF THE
INTERIOR; BUREAU OF LAND
MANAGEMENT; GERALD M. SMITH,
District Manager, Battle Mountain Field
Office,

Defendants - Appellees,

BARRICK CORTEZ, INC.,

Defendant-intervenor -
Appellee.

No. 12-15412

D.C. No. 3:08-cv-00616-LRH-
WGC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Argued and Submitted September 19, 2013
San Francisco, California

Before: SCHROEDER, TASHIMA, and BERZON, Circuit Judges.

Plaintiffs-Appellants Te-Moak Tribe of Western Shoshone Indians of Nevada, Timbisha Shoshone Tribe, Western Shoshone Defense Project, and Great Basin Resource Watch (“the Tribes”) appeal the district court’s order granting summary judgment in favor of Defendants-Appellees the Bureau of Land Management (“BLM”) and Barrick Cortez, Inc. (“Cortez”). The Tribes contend that BLM’s approval of the Cortez Mine Expansion Project (“the Project”) violated both the Federal Land Policy and Management Act (“FLPMA”) and the National Environmental Policy Act (“NEPA”). We affirm.

A. FLPMA Claim Regarding Sacred Sites.

The Tribes first argue that BLM violated FLPMA by failing to accommodate religious uses of the Project area. FLPMA requires BLM to administer public lands in accordance with “principles of multiple use and sustained yield,” while enforcing environmental laws relating to the use of public lands. 43 U.S.C. § 1732(a), (b); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1220 (9th Cir. 2011). As part of its duties under FLPMA, BLM must take “any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C.

§ 1732(b).

For purposes of this case, “unnecessary or undue degradation” is “any harmful activity that is either not ‘reasonably incident’ to an approved mining operation or that violates a state or federal law relating to environmental or cultural resource protection.” *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718, 723–24 (9th Cir. 2009); *see also* 43 C.F.R. § 3809.5.

In our prior opinion, we rejected the Tribes’ claim that the whole of Mount Tenabo was a sacred site for purposes of Executive Order 13007 (“E.O. 13007”). *S. Fork Band Council*, 588 F.3d at 724. In this appeal, the Tribes argue that the pediment area of piñon-juniper groves at the base of Mount Tenabo is a sacred site within the meaning of E.O. 13007, and that the Project will interfere with religious uses of that area.

E.O. 13007 provides that BLM “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.” 61 Fed. Reg. 26771 (May 24, 1996). Although E.O. 13007 has no force and effect on its own, *see id.*, its requirements are incorporated into FLPMA by virtue of

FLPMA's prohibition on unnecessary or undue degradation of the lands, *see* 43 U.S.C. § 1732(b); 43 C.F.R. § 3809.5.

BLM studied the Project's effects for over two years, consulting with fourteen tribes and tribal organizations and reviewing several surveys of religious practices in the Mount Tenabo region. *S. Fork Band Council*, 588 F.3d at 724. The surveys described the cultural significance of the pediment area, including its importance for pine nut harvesting, but could not identify particular locations that were of greater cultural significance than others. The surveys also described the religious significance of the pediment region due to its proximity to Mount Tenabo. The surveys did not, however, indicate that the area that will be disturbed by the Project is an area used for religious ceremonies.

BLM's study of the Project resulted in over seventy pages of the Environmental Impact Statement ("EIS") devoted to consideration of the impacts on the Tribes' religious practices. *Id.* BLM reduced the original scope of the Project in response to the Tribes' concerns and agreed to continue consulting with the Tribes regarding the Project's impacts. *Id.* To mitigate the Project's impacts, BLM required that mining facilities avoid the most religiously and culturally significant areas, including the top of Mount Tenabo, the White Cliffs, the Cortez town site, and Shoshone Wells.

A sacred site is any “specific, discrete, narrowly delineated location” of “established religious significance” or “ceremonial use.” 61 Fed. Reg. 26771. The Tribes point to comments from members of the Tribes and Tribal organizations regarding religious uses of the Project area. The Tribes’ references, however, are personal in their description of practices and general in terms of location. They do not describe established practices. Moreover, E.O. 13007 requires only that sacred sites be accommodated “to the extent practicable.” *Id.* BLM determined that further accommodation was not practicable given the lack of specificity as to location and as to the number of Tribal members who use any particular site on the pediment for religious activities. We see no arbitrary or capricious agency action in relation to BLM’s obligation under E.O. 13007 to accommodate the use of sacred sites.

B. FLPMA and NEPA Claims Regarding Dewatering.

The Tribes next contend that BLM violated FLPMA and NEPA by failing to adequately analyze the Project’s impacts on water resources. FLPMA requires that BLM avoid unnecessary or undue degradation of public lands, 43 U.S.C. § 1732(b), and NEPA requires that BLM consider measures that may mitigate the adverse impacts of a proposed project, 40 C.F.R. §§ 1502.14(f), 1502.16(h). The Tribes argue that BLM failed to address mitigation measures specific to ground

water in situ, failed to propose new mitigation measures relating to surface water resources, and failed to consider the religious use and significance of water in the Mount Tenabo region.

Because the Tribes did not raise the issue of mitigation measures specific to ground water in situ during the initial or supplemental EIS public comment periods, they have waived this challenge. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). As for mitigation measures relating to surface water resources, BLM proposed a detailed water resources mitigation plan and analyzed the effectiveness of that plan in accordance with our prior opinion. *See S. Fork Band Council*, 588 F.3d at 727. Finally, BLM did in fact consider the religious significance of water in the Mount Tenabo region, but the Tribes did not identify religious uses of any particular springs or seeps within the Project area. BLM's analysis of the Project's impacts on water resources was not arbitrary or capricious.

AFFIRMED.

Judge Berzon's dissent.

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15412

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I dissent as to whether the Bureau of Land Management (“BLM”) violated the Federal Land Policy and Management Act (“FLPMA”). The FLPMA, as the majority states, incorporates the requirements of Executive Order 13007 (“E.O. 13007”) with regard to the accommodation of Indian use of sacred sites.

The BLM’s analysis of why E.O. 13007 did not apply was faulty for three reasons: the analysis failed to recognize that comments regarding the proposal did point to the area where the mine is being built as an area in which worship occurs; it demanded quantification of that use as a condition of Executive Order coverage, when no such quantification is necessary; and it required greater specificity of location than comports with Shoshone religious practices. As to the last point, to require greater specificity would interfere with Shoshone religious practices, as those practices appear to regard certain recognized natural areas, rather than specific set locations, as places for worship.

I therefore would hold the BLM’s conclusions arbitrary and capricious and remand for further proceedings.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
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Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk