Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 18
Issue 3 *Fall 2011*

Article 4

2011

Secular vs. Sacred: NEPA Again Proves to be an Ineffective Tool to Protect Sacred Land. Pit River Tribe, et al. v. United States Forest Service, et al.

Joshua K. Friel

Secular vs. Sacred: NEPA Again Proves to be an Ineffective Tool to Protect Sacred Land

Pit River Tribe, et al. v. United States Forest Service, et al.[1]

I. INTRODUCTION

Geothermal energy has been described as the "sleeping giant" of the United States' energy reserves.[2] The steam from geothermal sources can be used to turn turbines, creating electricity with little pollution; the technology holds the promise of reducing reliance on fossil fuels such as coal or natural gas.[3] Large reserves of geothermal energy lay beneath public lands in the western United States.[4] One such area of accessible geothermal energy is located around Medicine Lake Volcano in Northern California.[5]

While the Medicine Lake Volcano is classified as dormant,[6] the area remains a "hotspot" of geothermal activity[7] and has recently become a hotspot of conflict over the development of geothermal energy. The federal government has encouraged the development of geothermal energy on federally owned land at places like Medicine Lake. However, this secular development which began decades ago, threatens the sacred use of the land by the Pit River Tribe ("Tribe") which has cultural, historical, and

---

[1] 615 F.3d 1069 (9th Cir. 2010) ("Pit River").

[2] Alan Bible, *The Geothermal Steam Act of 1970*. 8 IDAHO L. REV. 86, 92 (1971). Senator Bible of Nevada was one of the sponsors of the Geothermal Steam Act.

[3] *Id.* at 86. Geothermal steam can also be used indirectly to heat homes or in industrial applications. *Id.*

[4] *Id.*

[5] Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 772 (9th Cir. 2006) ("Pit River I").

[6] *The Geology of Lava Beds* National Park Service, *available at* http://www.nps.gov/labe/planyourvisit/upload/GEOLOGY.pdf (last visited October 20, 2011).

[7] Julie M. Donnelly-Nolan, et al., *Volcano Hazards Assessment for Medicine Lake Volcano, Northern California*, United States Geological Survey Scientific Investigations Report 2007-5174-A-26, 8 (2007), http://pubs.usgs.gov/sir/2007/5174/a/sir2007-5174a_text.pdf.

spiritual connections to the area.[8] This conflict led the Tribe to sue the developer which holds a lease and the federal agencies which hold title to the land in an attempt to stop the development.[9]

The Medicine Lake region appears to be exactly the type of land that Congress envisioned[10] for geothermal development when it passed the Geothermal Steam Act of 1970 ("the Act").[11] The geothermal hotspot is located on federally owned land and is not protected as a national park. While the Act does not expressly authorize the leasing of geothermal rights on Indian land, the land at issue is not part of the Pit River Tribe's reservation.[12] Despite the fact that the legal discussion in the case focuses on lease terms and civil procedure, the heart of the dispute concerns the beneficial, secular use of sacred lands, which are held by the public.

Following an analysis of Pit River, two conclusions will follow. First, laws that ensure federal agencies follow proper procedure, such as the National Environmental Policy Act of 1969 ("NEPA")[13] and the National Historic Preservation Act ("Preservation Act"),[14] do not protect a site merely because it is sacred to an Indian tribe. At best, the current laws only serve to delay development, not stop it. Second, if sacred Indian sites are to be adequately protected, a moderate substantive law must be passed. This note will propose a measure modeled off of the Preservation Act that will allow Indian tribes to request a site be added to a registry of sacred sites, thus affording the site some substantive protection.

II. FACTS AND HOLDING

The Pit River Tribe ("Tribe") is a federally recognized sovereign Indian tribe[15] with around 1,800 people enrolled.[16] The Tribe's

---

[8] *Id.*; *see also* Opening Brief for Appellant at 8, Pit River Tribe v. U. S. Forest Serv., 615 F.3d 1069 (9th Cir. 2009) (No. 09-15385), 2009 WL 3651827.
[9] *See Pit River I*, 469 F.3d 768, 772 (9th Cir. 2006).
[10] Bible, *supra* note 2, at 88.
[11] *Pit River I*, 469 F.3d at 772–73.
[12] *Id.*
[13] *See* 42 U.S.C. §§ 4321–4347 (2006).
[14] *See* 16 U.S.C. § 470 (2006).
[15] Opening Brief for Appellant, *supra* note 8, at 2.

reservation is located in northeastern California; however, its ancestral lands occupy a much larger area.[17] The land around Medicine Lake, California has been used for spiritual and cultural purposes for thousands of years, although it lies out of the currently recognized reservation.[18]

In 1988, the predecessor to defendant Calpine Corporation[19] ("Calpine") entered into two exclusive lease agreements with the Bureau of Land Management ("BLM") to develop geothermal energy in the Medicine Lake region of California[20] under the Geothermal Steam Act.[21] After exploring the region, Calpine submitted a plan for the development of the leasehold to the BLM in 1995. Three years later in May 1998, the BLM extended Calpine's lease for five years.[22] While the BLM provided Environmental Impact Statements ("EIS") as required by NEPA for the initial lease, they failed to prepare EISs for the 1998 and subsequent lease extensions.[23] Lease extensions became mandatory under the amended statute and regulations so long as the lessee met minimum requirements.[24] The federal agencies[25] charged with overseeing the project did issue an

---

[16] *California Indians and Their Reservations*, San Diego State Univ. Library, http://library.sdsu.edu/guides/sub2.php?id=195&pg=195 (last visited October 10, 2011).
[17] *Id.*
[18] Opening Brief for Appellant, *supra* note 8, at 8.
[19] The initial lease was granted to Freeport-McMoran Resource Partners Limited Partnership. *Pit River I*, 469 F.3d 768, 775 n.2 (9th Cir. 2006). The partnership entered into a cooperative agreement with Calpine in 1994 and fully assigned its leases to Calpine in 1996. *Id.*
[20] *Pit River*, 616 F.3d at 1073. The Medicine Lake Volcano sits in northern California and is the largest volcano in the Cascade Mountains. *Medicine Lake Vicinity*, United Stated Geological Survey, *available at* http://vulcan.wr.usgs.gov/Volcanoes/Medicine Lake/description_medicine_lake.html (last visited January 1, 2012).
[21] 30 U.S.C. §§ 1001–1027 (2006).
[22] *Pit River*, 615 F.3d at 1073.
[23] *Id.*
[24] 30 U.S.C. § 1005 (2006); *see also infra* note 81 and accompanying text.
[25] The Bureau of Land Management was the agency that managed the leasing process. The United States Forest Service and the Advisory Council on Historic Preservation also had input into the granting of geothermal leases at issue here. *Pit River*, 615 F.3d at 1073.

EIS for Fourmile Hill Plant, the proposed geothermal facility.[26] In 2002, the BLM again extended Calpine's lease, this time for forty years.[27]

Following the Calpine's forty-year extension, the Tribe sued,[28] alleging violations of NEPA[29] and the Preservation Act.[30] [31] The United States District Court for the Eastern District of California granted summary judgment in favor of the defendant federal agencies and Calpine, and to which the Tribe subsequently appealed.[32] On appeal, the Ninth Circuit found the federal agencies violated NEPA by failing to prepare an EIS before each lease extension was granted.[33] The court found the lease extensions to be invalid and remanded the case to the district court with an order to grant summary judgment to the Tribe.[34]

Again at the district court, the parties could not agree on the proper remedy for the NEPA violations.[35] The Tribe contended that since Calpine possessed invalid geothermal leases, then the whole development process would have to start from scratch, including reopening the competitive bidding process for the leases.[36] Unpersuaded, the court vacated the lease extensions but remanded the issue to the BLM, ordering the agency to complete the necessary EISs before deciding whether the lease extensions would be appropriate.[37] The Tribe appealed the remand order, giving rise to the instant case.

On review, the circuit court found that although the district court's remand order did not constitute a final decision for purposes of § 1291,[38] it

---

[26] *Id.*
[27] *Id.*
[28] Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929 (E.D. Cal. 2004) *rev'd sub nom.* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006).
[29] *See* 42 U.S.C. §§ 4321–4347 (2006).
[30] *See* 16 U.S.C. § 470 (2006).
[31] *Pit River*, 615 F.3d. at 1073.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 1073–74.
[35] *Id.* at 1074.
[36] *Id.*
[37] *Pit River*, 615 F.3d at 1074.
[38] 28 U.S.C.A. § 1291 (1982).

had appellate jurisdiction under the All Writs Act [39] and ruled accordingly.[40] The circuit court ultimately upheld the district court's ruling that federal agencies had appropriate authority to review and renew the leases.[41]

III. LEGAL BACKGROUND

While on the surface, the case concerns land that has served an important role in "Native American cultural and religious ceremonies for countless generations," the legal issues involve procedural law rather than substantive law.[42] At the heart of this case is whether leases granted to Calpine under the Geothermal Steam Act followed the parallel procedural requirements of NEPA and the Preservation Act. The court settled many of the issues concerning compliance with NEPA and the Preservation Act in *Pit River I*; however in the instant case, the issue concerned whether the lower court's actions complied with the Ninth Circuit's remand order from the first case.

This section examines the jurisdictional background the court relied upon to establish jurisdiction and the substantive and procedural laws it interpreted in its final ruling.

A. *Jurisdiction*

Although both parties made little effort to establish the circuit court's jurisdiction to hear the appeal, the court focused on several issues concerning jurisdiction. Eventually, the court found and exercised jurisdiction under the All Writs Act.

---

[39] *Pit River*, 615 F.3d at 1077–78; *see also* 28 USC §1651(a) (1949).
[40] *Pit River*, 615 F.3d at 1079–80.
[41] *Id.* at 1085.
[42] Response Brief of Federal Appellees at 1–2, Pit River Tribe v. Bureau of Land Mgmt., 469 F.3d 768 (9th Cir. 2010) (No. 04-15746), 2004 WL 3020940.

1. 28 USC §1291: The Final Judgment Rule

In *Pit River*, both the Tribe and Calpine asserted the court had jurisdiction under the final judgment rule.[43] The final judgment rule grants circuit courts appellate jurisdiction over the final decisions of district courts,[44] however, uncertainty can exist as to what constitutes a final decision. Generally, when a court remands a decision to a federal agency, that order is not considered "final" for purposes of the final judgment rule.[45] Following *Pit River I*, the district court issued such a remand to the BLM, which had issued the geothermal lease to Calpine.[46]

The "administrative remand rule" states that remand orders to federal agencies are not final since an agency could grant the relief that a party would request in an appeal.[47] Nonetheless, there are circumstances in which a remand to an agency might be considered a final decision. Those circumstances include when all of the following criteria are satisfied: "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable."[48] The general exception to the rule is when the agency itself appeals the remand order.[49]

---

[43] *Pit River*, 615 F.3d at 1074.

[44] 28 U.S.C. § 1291 (1982) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.").

[45] *Pit River*, 614 F.3d at 1075 (citing Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 (9th Cir. 1990)).

[46] *Id.* at 1073.

[47] *Id.* at 1975–76.

[48] *Id.* at 1075 (citing Alsea Valley Alliance v. Dep't of Commerce, 358 F.3d 1181, 1184 (9th Cir. 2004)).

[49] Alsea Valley Alliance v. Dep't of Commerce, 358 F.3d 1181, 1184 (9th Cir. 2004) (stating that because an administrative remand effectively forces an agency to go back

Since agencies' rulemaking and decision processes are governed by procedures which allow for public-input rules and regulations, parties may be able to get the relief they seek by working through the agency's rules. Another Ninth Circuit case demonstrates why administrative remands do not constitute a final judgment.

In *Alsea Valley Alliance v. Dep't of Commerce*,[50] the plaintiff challenged the classification of Coho salmon as a "threatened" species.[51] A district court invalidated the classification and remanded the case to the National Marine Fisheries Service ("NMFS").[52] The NMFS agreed to comply with the order, and announced it would begin a public rules creation process.[53] Unsatisfied that the NFMS failed to appeal the ruling, the Oregon Natural Resource Council intervened in the case and appealed to the court of appeals.[54] The court of appeals found the district court's remand ruling met the first two criteria for an agency decision to be considered a final decision.[55] However, the court ruled that the third criterion had not been satisfied, and thus the court had no jurisdiction because the decision was not a final decision.[56] In examining the third criterion, the court noted the only instances in which it had found a remand order to constitute a final decision occurred when an agency itself had appealed a ruling.[57] The court reasoned that "only agencies compelled to refashion their own rules face the prospect of being deprived of review altogether."[58] However, the court did not close the door to the possibility that a non-agency litigant may be able to appeal an agency remand.[59] In *Alsea*, the court found there was the possibility the appellant could receive

---

and reconsider an action or decision, a remand order is final in its perspective); *see also infra* note 51 and accompanying text.

[50] 358 F.3d 1181 (9th Cir. 2004).

[51] *Alsea Valley Alliance*, 358 F.3d at 1183.

[52] *Id.*

[53] *Pit River*, 614 F.3d at 1075.

[54] *Id.*

[55] *Id.*

[56] *Alsea Valley Alliance*, 358 F.3d at 1184.

[57] *Id.*

[58] *Id.*

[59] *Id.*

the relief desired through the rulemaking process, thus the decision was not final.[60]

2. 28 USC §1292: An Exception to the Final Judgment Rule

Calpine contended the Ninth Circuit had jurisdiction under an exception[61] to the final judgment rule, which allows the appeal of some interlocutory orders.[62] The exception is to be construed narrowly.[63] The court noted a line of cases have found jurisdiction appropriately exercised when an order has the "practical effect of granting, denying, or modifying injunctive relief."[64] Specifically, the Ninth Circuit has found that exercising jurisdiction under the statue's exception to the final judgment rule is appropriate when a ruling "(1) ha[s] the practical effect of entering an injunction, (2) ha[s] serious, perhaps irreparable, consequences, and (3) [is] such that an immediate appeal is the only effective way to challenge it."[65]

In *Alsea*, the court held it was "far too tenuous" to find that a judgment, which invalidated an agency rule, amounted to an injunction. The court reasoned that finding such an injunction would violate the principles of §1292, a statute intended to only create a narrow exception.[66]

3. 28 USC §1651(a): The All Writs Act

Both Calpine and the Tribe further contended the court has jurisdiction under the All Writs Act,[67] providing a broad grant of jurisdiction giving courts the power to issue writs "necessary or appropriate in aid of their respective jurisdictions."[68] Exercising

---

[60] *Id.* at 1185.
[61] 28 U.S.C. § 1292(a)(1) (2006).
[62] *Id. Pit River*, 615 F.3d at 1077.
[63] *Alsea Valley Alliance*, 358 F.3d at 1186.
[64] *Id.* (citing Plata v. Davis, 329 F.3d 1101, 1106 (9th Cir. 2003)).
[65] *Pit River,* 614 F.3d at 1077 (quoting Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 137 F.3d 1420, 1422 n.2 (9th Cir. 1998)).
[66] *Id.* at 1078.
[67] 28 U.S.C. § 1651(a) (2006).
[68] 28 U.S.C. § 1651 (2006).

jurisdiction under this provision would be appropriate if a lower court did not follow a remand order from a higher court.[69] Writs of mandamus have been used by appellate courts to limit the actions of a lower court or to compel a lower court to act when it has a duty to do so.[70] Mandamus is an appropriate remedy "when a lower court obstructs the mandate of an appellate court."[71] Although the Ninth Circuit has developed factors to consider in mandamus review,[72] it is ultimately within the court's discretion whether to issue a writ of mandamus.[73]

B. *Geothermal Steam Act*

The leases at the heart of the *Pit River* conflict were issued under the authority granted by the Geothermal Steam Act ("Steam Act").[74] The Steam Act passed with the dual goal of providing a managed development of geothermal resources on federal land[75] and protecting "significant thermal features within units of the National Park system" from such

---

[69] *Pit River*, 615 F.3d at 1079.

[70] Will v. United States, 389 U.S. 90, 95 (1967) (citing Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943)).

[71] *Pit River*, 615 F.3d at 1078 (citing Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash., 173 F.3d 713 718–19 (9th Cir. 1999)).

[72] The factors are: "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654–55 (9th Cir. 1977).

[73] *See* Cole v. U.S. Dist. Ct., 366 F.3d 813, 816–17 (9th Cir. 2004).

[74] 30 U.S.C. §§ 1001–1027 (2006).

[75] Geo-Energy Partners-1983 Ltd. v. Salazar, 613 F.3d 946, 960 n.7 (9th Cir. 2010) (citing Cong. Rec. H732-02 (daily ed. Sept. 9, 1988) (statement of Rep. Rahall) ("[T]he purpose of S. 1889 as amended is to provide for the orderly development of Federal geothermal resources, and to ensure the protection of significant thermal features within units of the National Park System from potential geothermal development activities.")).

development.[76] In addition, development is not authorized on lands held by Indian trusts and those within Indian reservations.[77]

The Steam Act provides for both new leases for the purpose of developing geothermal energy and for the conversion of existing mining rights to geothermal leases.[78] In the original act, an initial geothermal lease was set for a period of ten years, with the BLM having the option of granting five-year extensions thereafter.[79] Amendments to the Steam Act made the lease extensions mandatory if certain requirements were met; such guidelines included timely payment and minimum work requirements.[80] Since the procedural requirements of NEPA only have a bearing on discretionary decisions, this amendment had the effect of making extensions to leases granted after the August 8, 2005, effective date not subject to NEPA regulations.[81] However, there remained a question as to whether lease extensions granted pre-2005 also fell under the mandatory language of the regulations, thus evading the requirements of NEPA.[82] The BLM promulgated rules giving those with leases under the previous version of the act an option to have the new language apply to future extensions.[83]

C. *National Environmental Protection Act*

Heralded as landmark legislation, NEPA directed the federal government to study and consider the potential environmental impact of its major decisions.[84] NEPA has been called "our basic national charter

---

[76] 30 U.S.C. § 1001(f) (2006); *see also* 30 U.S.C. §1026 (2006) (providing a more extensive list of units which are not subject to lease); 30 U.S.C. § 1027 (2006) (including a list from a section on mining rights of excluded federal lands).
[77] 30 U.S.C. § 1014(c)(4) (2006).
[78] 30 U.S.C. § 1003 (2006).
[79] 30 U.S.C. § 1005 (2006).
[80] *See id.* (a)(2), (a)(3), and (b); *see also Pit River I*, 469 F.3d 768, 780–81 (9th Cir. 2006).
[81] *Pit River I*, 469 F.3d at 780 (noting that NEPA's requirements only apply to discretionary decisions—mandatory actions are exempted).
[82] *Id.*
[83] 43 C.F.R. § 3200.7(a)(2) (2007).
[84] *Pit River I*, 469 F.3d at 781.

for protection of the environment."[85] NEPA's purpose is not to direct action towards a specific result, but rather to ensure procedural safeguards are followed and those making decisions are informed of environmental consequences of an agency's action.[86] Since NEPA is designed to force the federal government to consider the environmental impacts of discretionary decisions, if an agency is obligated to act or to refrain from action, there is no purpose for fulfilling the procedural requirements of NEPA.[87]

Prior to the 2005 amendments, the decision to grant a geothermal lease under the Steam Act was both discretionary[88] and had the potential to impact the environment, thus triggering NEPA.[89] NEPA, *inter alia*, requires all federal agencies to prepare an "environmental impact statement" ("EIS") prior to "(1) every recommendation or report on proposals for legislation and (2) other major federal action significantly affecting the quality of the human environment."[90]

Federal actions which have been ruled to trigger NEPA's requirement for an EIS include "direct" environmental actions such as permits to dredge national waterways or to work in navigable waterways.[91] It has also been found to include "indirect" environmental impacts caused by actions of federal agencies overseas.[92]

Judicial review of an agency's compliance with NEPA is authorized by the Administrative Procedure Act ("APA").[93] The APA requires a plaintiff challenging a finding of no significant impact to show the agency acted in an "arbitrary and capricious" manner in issuing the

---

[85] Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 ALI-ABA 757, 759 (2010) (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998)).
[86] *See* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989).
[87] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 769 (2004) (citing 40 C.F.R. § 1500.1).
[88] *Pit River I*, 469 F.3d at 780.
[89] 42 U.S.C. § 4332(2)(C) (2006).
[90] *Id.*
[91] *Marsh*, 490 U.S. 360, 385 (1989).
[92] Chertok, *supra* note 85, at 762 (noting decision by federal agencies to incinerate food waste at Antarctica camps was covered by NEPA, and in two cases, Department of Defense installations abroad were exempt).
[93] 5 U.S.C. § 702 (2006).

finding.[94] In determining whether the agency conducting the review acted in an arbitrary or capricious manner, a court will look at whether the agency took a "hard look" at the environmental impact of its proposed action.[95] To evaluate whether the agency took a "hard look," a court should:

> consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The final inquiry is whether the Secretary's action followed the necessary procedural requirements.[96]

The APA specifically authorizes two remedies: (1) compelling the agency to act[97] and (2) "set[ting] aside" the offending decision, actions, or findings.[98] In the context of a NEPA case, if a court finds an agency violated NEPA procedures, then the agency action will typically be vacated.[99]

---

[94] 5 U.S.C. § 706(2)(A) (2006). This standard of review has been used by the Supreme Court and followed by a variety of circuits including the Ninth. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356–57 (1989); Sierra Club v. U.S. Army Corps of Eng'rs, 295 F.3d 1209, 1221 (11th Cir. 2002); Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 763 (9th Cir. 1996); Hanly v. Kleindienst, 471 F.2d 823, 827–29 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

[95] "The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look at environmental consequences . . . .'" *Robertson*, 490 U.S. at 350.

[96] Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. 2d 1129, 1139–40 (N.D. Cal. 2003) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)).

[97] The APA's emphasis on deference to the administrative agency allows an order to act only if the court finds action has been unlawfully withheld or delayed. 5 U.S.C. § 706(1) (2006).

[98] 5 U.S.C. § 706(2) (2006).

[99] Chertok, *supra* note 85, at 760.

D. *National Historic Preservation Act*[100]

When actions may impact property of historical or cultural significance to an Indian tribe, the tribe should have an opportunity to participate in the consideration process.[101] The Preservation Act requires the head of any federal agency to take into account the effect of its action on property that is included, or is eligible for inclusion, in the National Register of Historic Places.[102] The Preservation Act also requires giving the Advisory Council on Historic Preservation time to comment on the effects of action.[103] The Preservation Act's purpose and procedural requirements are similar to NEPA, with the Preservation Act focusing on federal impacts to historic property as opposed to environmental impacts.[104] Like NEPA, the Preservation Act does not advocate a particular outcome, but requires a "hard look" at the consequences of a proposed action.[105] As with NEPA, courts review decisions under the Preservation Act to ensure decisions are neither arbitrary nor capricious.[106]

IV. INSTANT DECISION

In *Pit River*, the Ninth Circuit upheld a district court's ruling to remand the case to the federal agencies. The decision focused on several matters regarding the court's appellate jurisdiction, specifically whether the district court's remand order constituted a final decision. Ultimately, the Ninth Circuit found it possessed jurisdiction to hear the case under the

---

[100] 16 U.S.C. § 470 (2006).
[101] 36 C.F.R. § 800.2(c)(2)(ii) (2000).
[102] 36 C.F.R. § 801.1 (1981).
[103] *Id.* at § 801.1(c).
[104] United States v. 0.95 Acres of Land, 994 F.2d 696, 698 (9th Cir. 1993).
[105] United States v. 162.20 Acres of Land, 639 F.2d 299, 302 (5th Cir. 1981); *but see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, n.1 (1978) (which indicates however that, like NEPA, the Preservation Act has an implicit goal of preserving sites of "architectural, or cultural significance").
[106] Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 573 (9th Cir. 1998) (citing Communities, Inc. v. Busey, 956 F.2d 619, 623–24 (6th Cir. 1992)).

All Writs Act,[107] and upon examination of the merits of the appeal, found the district court had ruled properly.[108]

A. *Jurisdiction*

The Ninth Circuit concluded it did not have jurisdiction under either the final judgment rule or the exception for interlocutory appeals. The court first noted the appeal stemmed from a district court's administrative remand order.[109] Since the Tribe might have been given its desired result at the agency level, for example if the BLM had restarted the leasing process, the court found the district court's remand order did not constitute a "final decision."[110]

Calpine argued the decision was a final judgment and thus appealable due to the manner in which the district court handled the remand order.[111] In remanding the case to the federal agencies, the district court dismissed the action and ruled that any further judicial action would commence with a new federal district court case.[112] Despite this, the Ninth Circuit found that because the Tribe had an opportunity to participate in the agency processes which could potentially yield a favorable outcome, the remand order did not constitute a final decision, Calpine could not appeal the remand.[113]

The Ninth Circuit next considered whether it had jurisdiction based on the interlocutory order exception to the final judgment rule, which may grant jurisdiction over some interlocutory orders, such as the denial of an injunction.[114] While no injunction was asked for and thus none denied in the district court's decision,[115] the court noted how certain actions can

---

[107] 28 U.S.C. § 1651(a) (2006).
[108] *Pit River*, 615 F.3d 1069, 1085 (9th Cir. 2010).
[109] *Id.* at 1074.
[110] *Id.* at 1075–76 (citing Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 (9th Cir. 1990)).
[111] *Id.* at 1076.
[112] *Id.*
[113] *Id.*
[114] *Pit River*, 615 F.3d 1069, 1077 (9th Cir. 2010).
[115] *Id.*

have the "practical effect" of an injunction.[116] However, the court rejected the contention that the district court's order had the effect of an injunction.[117] Thus, the court found it did not have jurisdiction under the final judgment rule or its primary exception.

The court's final attempt to find jurisdiction to rule on the issues relied on the All Writs Act.[118] The act provides authority for all congressionally created courts to issue orders to confine a lower court to actions within its jurisdiction, and to compel a lower court to act when it has a duty.[119] The court found that although the Tribe did not technically title its appeal as a writ of mandamus, it had the substance of such a writ because the appeal essentially asked the Ninth Circuit to order the district court to comply with an earlier ruling.[120] Thus, the court found jurisdiction to hear the case under the All Writs Act and proceeded to the merits of the argument.[121]

B. *The Merits*

The primary issue on appeal before the Ninth Circuit concerned whether the federal agencies had the power to extend the leases, which the Tribe argued had expired in 1998 when a proper EIS was not completed.[122] In *Pit River I*, the court of appeals ordered that the geothermal leases be "undone,"[123] but granted the agencies authority to decide whether to renew the leases in the future.[124] The Tribe argued that because these renewed leases must be "undone" back to 1998, it would not

---

[116] *Id.* (citing Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 137 F.3d 1420, 1422 n.2 (9th Cir. 1998)).

[117] Calpine argued that Pit River had asked the district court to cancel the past geothermal leases, but in reality, Pit River argued that the leases had expired according to the terms of the lease. *Id.* at 1077–78.

[118] *Id.* at 1078.

[119] 28 U.S.C. §1651(a) (2006).

[120] *Pit River,* 615 F.3d at 1079.

[121] *Id.* at 1079–80.

[122] *Id.* at 1080.

[123] *Pit River I,* 469 F.3d 768, 788 (9th Cir. 2006).

[124] *Pit River*, 615 F.3d at 1080.

be possible to merely "extend" the leases.[125] Instead, the Tribe contended the entire lease process, including competitive bidding for the leases, must be begin anew.[126] The circuit court handily rejected this argument.[127]

The court considered the policy implications if a party were allowed to challenge a lease extension and have the effect of questioning the underlying lease agreement. It noted that such a ruling would allow any party to effectively undo an entire lease relationship simply by challenging the technical aspects of a single extension.[128] The court reasoned that this would create a loophole for statute of limitations claims concerning leases, since any party limited from bringing a proceeding against an original lease could instead attempt to undo the lease by challenging its more recent extensions.[129]

For legal support, the court looked to general principles concerning remedies for NEPA violations. First, the court found any relief a court grants for NEPA violations is subject to principles of equity.[130] The court examined several cases where principles of equity were applied to temper the potential remedy for a NEPA violation. In one such case, *Sierra Club v. Bosworth*, the court found that although an injunction was necessary for the public good, the need should be balanced against the hardships posed to those who had relied upon the improper agency action in the case.[131] Based on similar principles of equity, the district court had attempted to put the parties in the position they would have been in 1998, a decision the Ninth Circuit found appropriate.[132]

The second point of appeal concerned the procedures used by the district court in ordering the agency's reconsideration of the leases.[133] The Tribe criticized the procedures as ad hoc.[134] However, the Ninth Circuit

---

[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Pit River*, 615 F.3d 1069, 1080 (9th Cir. 2010).
[130] *Id.* at 1080–81.
[131] *Id.* at 1018 (citing Sierra Club v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007)).
[132] *Id.* at 1081–82.
[133] *Id.* at 1084.
[134] *Id.*

found principles of equity provide district courts with broad discretion to grant relief for NEPA violations.[135] The court found these procedures were a proper exercise of discretion by the district court.[136]

With no substantive law specifically protecting Medicine Lake from development, the Tribe was forced to rely upon a patchwork of laws requiring agencies follow proper procedure. However, procedure did not provide enough protection as the Ninth Circuit found the district court's remand was proper.

V. COMMENT

A. *The Failure of NEPA to Protect Sacred Places*

Pit River represents the latest in a line of cases in which Indian tribes have attempted to halt unfavorable federal agency action through use of NEPA's procedural requirements. Outside of designated Indian reservations, sacred Indian sites are not protected by any substantive law.[137] Consequently, when their sacred places are threatened, Indian tribes have resorted primarily to the procedural requirements of NEPA and the Preservation Act in an attempt to protect the land from development.[138] However because NEPA and the Preservation Act essentially only require a hard look at the consequences of agency action, coupled with the fact that agency decisions are reviewed on an arbitrary and capricious standard,[139] makes blocking actions by federal agencies difficult.[140]

Morongo Band of Mission Indians v. Federal Aviation Administration illustrates another attempt to use the procedural

---

[135] *Pit River*, 615 F.3d 1069, 1084 (9th Cir. 2010).
[136] *Id.* at 1085 (approving the District Court's decision but remanding the case with directions to fix a typo that lead to an inconsistency in the decision).
[137] *Id.* at 1080–81.
[138] Wetlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 865 (9th Cir. 2004) (noting that in reviewing a NEPA claim, courts must avoid substituting their judgment for that of the agency and only ensure the agency took a hard look at the consequences of their actions).
[139] 39A C.J.S. *Health & Env't* § 147 (2011).
[140] *Id.*

requirements of NEPA and Preservation Act to protect sacred land.[141] The Morongo Band of Mission Indians operates a $250-million casino–resort on its reservation in the high desert of Southern California.[142] When the Federal Aviation Administration ("FAA") began the process of creating an air corridor over the Indian reservation land, the tribe attempted to block the corridor.[143] The FAA considered the tribe's objections to the proposed change in flight path, and even entertained a proposal which would move the new air path north of the tribe's land. However, the FAA eventually rejected the tribe's proposal.[144] Unlike *Pit River I*, which found that the BLM neglected several procedural requirements of NEPA and the Preservation Act, the court in this case found that FAA had followed all of the procedural requirements.[145]

A cynical observer might characterize the dispute in Morongo not as sacred versus secular, but rather as the age-old NIMBY[146] problem. Morongo illustrates the conundrum that could potentially arise if sacred sites are given more protection under either environmental or historical preservation laws: how do you separate the sacred from the secular? Was the Morongo tribe concerned with their sacred and spiritual land, or were they more concerned about the detrimental impact on the casino and resort also operated on their reservation?

One reason lawmakers may seem hesitant to put any substantive requirements into the Preservation Act or include consideration for sacred sites in NEPA is evidenced in a case arising from a dispute north of Medicine Lake.[147] In an administrative hearing before the Interior Board of Land Appeals ("IBLA"), Klamath Tribes challenged geothermal

---

[141] 161 F.3d 569 (9th Cir. 1998). Even though the land at issue in the *Morongo* case was a part of the Morongo Tribe's reservation, the attempt to use NEPA in an unattended manner is illustrative of the potential for abuse.

[142] *About Morongo: The Morongo Band of Mission Indians*, MORONGO (Nov. 2011), http://www.morongocasinoresort.com/about-morongo-casino ("The present $250 million destination which opened in late 2004, the Morongo Casino, Resort & Spa, is one of the largest tribal gaming facilities in the nation.").

[143] *Morongo,* 161 F.3d at 572.

[144] *Id.* at 572–73.

[145] *Id.* at 583.

[146] NIMBY stands for "not in my backyard."

[147] *See Pit River*, 469 F.3d at 768.

exploration in the Deschutes National Forest in Oregon.[148] The Klamath Tribes asserted the entire region was sacred land and must not be developed.[149] The IBLA rejected the idea that an entire region could be held sacred.[150] The IBLA noted the developer agreed to move the proposed drilling sites of the exploratory wells due to expressed concerns regarding the sensitivity of a particular site.[151] The administrative court also observed that access to the region would still be relatively open, and any religious or cultural ceremonies should not be directly affected by the drilling.[152]

The IBLA seemed satisfied that the developer's voluntary adjustments to the well locations constituted a sufficient compromise between the wishes of the tribe and the needs of the developer. If substantive protections had been available, and were overly broad, then an entire geothermal project could have been halted due to the feelings of a tribe. However, as the instant case highlights, compromises cannot always be reached, and currently the law favors geothermal development.

B. *A New Approach to the Protection of Sacred Indian Sites*

NEPA and the Preservation Act provide no substantive protection for sacred Indian sites that lay outside of a reservation. An Indian tribe seeking to halt development of such a site can only hope the federal agency taking action "slips up" and fails to follow one of the requirements of NEPA or the Preservation Act. However, as illustrated in *Pit River*, agencies receive great deference in how they choose to cure the problem. NEPA litigation often only delays agency action rather than blocking it. After over five years of litigation concerning the geothermal leases at Medicine Lake, the agency's decision has ultimately been upheld. The agency was forced to go back and give its decision to grant a lease extension a "hard look" and nothing else.

---

[148] *See* Oregon Chapter Sierra Club, et al. The Klamath Tribes, 176 IBLA 336, 2009 WL 1138071 (IBLA 2009).
[149] *Id.* at 356.
[150] *Id.*
[151] *Id.* at 354–55.
[152] *Id.* at 356.

While the Tribe's concern for damage done to a site considered sacred seems sincere, the *Morongo* and *Klamath* cases show the potential for abuse if existing protections were given more substance. Too much substantive protection over "sacred" sites could be abused by tribes merely looking to preserve their commercial interests. The best approach to giving any substantive protections "teeth" would be by amending the Preservation Act to account for places of cultural and spiritual significance in addition to those with historical significance. Along with its procedural requirements, the Preservation Act also provides for a registry of historical sites. However, the narrow definition of such places often prevents protection for sacred Indian sites. An amendment extending protection to sacred sites could provide tribes with the necessary security while still allowing the use of federal lands for geothermal development. However, any such protection would have to be mindful of the potential for overbreadth or ulterior motives on behalf of the tribes seeking conservation of a particular site.

VI. CONCLUSION

The Pit River Tribe failed in their attempt to use federal procedural laws to protect land they consider sacred from geothermal development. NEPA only delayed the inevitable approval of geothermal development in a region the Tribe claims as sacred. Furthermore, the Preservation Act, which would seem designed to avoid this type of harm, also provides little shelter against agency action in this situation. However, the conflict between the secular or sacred use of federal lands need not be decided in total favor of one use. Amending the Preservation Act to afford some protection to sacred Indian sites would give tribes like the Pit River Tribe substantive protection over the important spiritual and cultural sites that lay outside their reservation, while allowing continued development of federal land for the evolution of geothermal energy. For those seeking to protect sacred sites on land owned by the federal government, it looks like the struggle will need to be taken to congress instead of the courts.

JOSHUA K. FRIEL