

INTERIOR BOARD OF LAND APPEALS

Timbisha Shoshone Tribe of Death Valley, et al.

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TIMBISHA SHOSHONE TRIBE OF DEATH VALLEY ET AL.

IBLA 95-620

Decided June 18, 1996

Appeals from a decision of the California Desert District, Bureau of Land Management, approving mining plan of operations. CA 92122070.

Affirmed.

1. Environmental Quality: Environmental Statements--Mineral Lands: Environment--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements--Rules of Practice: Standing to Appeal

A landless Indian tribe was properly given notice of and invited to participate as a party to a case involving environmental planning for a mining project on lands within an area subject to study to ascertain whether a reservation for the tribe ought to be created therein; while the tribe expressed disagreement with information appearing in an EIS and other documents prepared during planning for the project, no error was thereby shown in the BLM decision to approve the mining plan of operations.

APPEARANCES: Frederick Marr, Esq., Bishop, California, for appellants Pauline Esteves and Timbisha Shoshone Tribe of Death Valley; Luke Cole, Esq., San Francisco, California, for Timbisha Shoshone Tribe of Death Valley; Roger Flynn, Esq., Boulder, Colorado, for Desert Citizens Against Pollution; George S. Young, Esq., Golden, Colorado, and R. Timothy McCrum, Esq., Washington, D.C., for intervenor Canyon Resources Company; John R. Payne, Esq., Office of the Pacific Southwest Regional Solicitor, Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Timbisha Shoshone Tribe of Death Valley, Pauline Esteves, and Desert Citizens Against Pollution (hereafter collectively referred to as the Tribe, for reasons later explained) have appealed from a July 10, 1995, decision of the California Desert District, Bureau of Land Management (BLM)

approving a mining plan of operations submitted by Canyon Resources Company for the Briggs project located on unpatented mining claims in Inyo County, California. On August 29, 1995, pending receipt by this Board of the record in support of BLM's decision, a temporary stay of the BLM decision was ordered to allow counsel for BLM to respond to a stay request made by the Tribe. On October 23, 1995, an order denying the request to stay the BLM decision issued. That order provides, in relevant part:

In preparation for the proposed Briggs project, Canyon Resources, BLM, and Inyo County began a joint planning effort in 1992 that produced a joint environmental impact statement/environmental impact review (EIS) in May 1995 that considered environmental consequences of the project and provides part of the recorded planning support for the BLM decision here under review. The Briggs project is planned to be constructed as a conventional open pit mine; considerable exploration work has already been done and the area is readily identifiable as a mining operation by the presence of roads and other exploratory work done by Canyon Resources and predecessor miners at the site. Ore from the mine would be processed to extract gold using cyanide heap leach methods; the mine is projected to process 21 million tons of ore and produce 27 million tons of waste rock over a period of about six years. The life of the mine could be more or less than six years, depending upon development of reserves and fluctuation in gold prices and mining costs.

Approval of the mining plan was made subject by BLM to 16 general stipulations modifying the plan of operations, and to mitigation measures incorporated into the project design dealing with topography (6 measures), geology (6), soils (8), water resources (11), vegetation (13), wildlife (17), air quality (3), land use (2), visual resources (10), cultural resources (4), transportation (2), noise (2), socioeconomics (1), and environmental health and safety (4). Additional mitigation measures were also required by BLM acting in cooperation with Inyo County; as so modified, BLM found the proposed mining operation would not cause unnecessary or undue degradation of the public lands and approved the plan.

On appeal to this Board, the Tribe contends that the proposed Briggs project will destroy tribal cultural, religious, historic, and natural resources, and that BLM has not properly assessed the damage that will result because it failed to initiate a government-to-government consultative process with the Tribe as it was required by Federal law to do. The Tribe contends that, contrary to the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. § 4332(C)(v) (1988), BLM failed to properly consult with the Tribe when preparing the joint EIS used as a

foundation for the July BLM decision here under review. The Tribe also contends that provisions of other Federal statutes, including the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1988), and the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 (1988), as well as BLM's Manual and mining regulations sanctioning bonding were violated when BLM refused to deal in a proper manner with the Tribe. The other appellants join the Tribe in making these arguments.

The standing of appellants to maintain this appeal has been challenged; in making this attack, Canyon Resources questions whether the Tribe is actually an Indian tribe, observing that appellant Timbisha Shoshone Tribe of Death Valley has been identified by the Bureau of Indian Affairs as the "Timbisha Shoshone Band" in a reference published at 51 FR 25115 (July 10, 1986), and that the Tribe has furnished no documentary evidence to support the claim made on appeal that it is a federally recognized Indian Tribe. In addition, the record shows appearances were made before BLM in this proceeding involving the Briggs project by The Timbisha Shoshone Tribal Council and The Timbisha Shoshone-Death Valley Land Restoration Committee. Nonetheless, central to our inquiry in this appeal, sec. 705(b)(1) of the California Desert Protection Act of 1994 (1994 Act), P.L. 103-433, 108 Stat. 4498, refers to "the Timbisha Shoshone Tribe" in directing the Department to conduct a study to identify lands "suitable for a reservation for the Timbisha Shoshone Tribe." For the purposes of this order, all appellations referring to the tribal appellant will be considered to comprise various aspects of the group referred to by the 1994 Act as the Timbisha Shoshone Tribe.

Under Departmental regulation 43 CFR 4.410(a), in order to have standing to appeal to this Board from a BLM decision, one must be both a "party to a case" and be "adversely affected by a [BLM] decision." See Western Shoshone National Council, 130 IBLA 69, 70 (1994). It is correct that the SOR [statement of reasons] filed by appellants speaks only to interests of the Tribe said to be adversely affected by the Briggs project and that tribal participation in planning for the Briggs project appears to have been late in coming. It is also clear, however, that the Tribe participated in BLM planning before issuance of the July 10, 1995, decision here under review by participation at public planning meetings during preparation of the EIS and by submitting written comments on June 30, 1995, concerning the EIS upon which the BLM decision relies to great extent; by commenting before the BLM decision was issued, the Tribe became a party to the case. Sharon Long, 83 IBLA 304, 308 (1984).

Arguing that they are adversely affected by BLM's decision, the Tribe claims to have a prospective property right to lands within or directly affected by the Briggs project that are used by Tribal members in Tribal pursuits and claimed for inclusion in a Tribal reservation; the Tribe contends that tribal interests are put at risk by proposed mining on aboriginal tribal lands that might be selected for such a reservation. They argue the project will affect lands currently under consideration by the Department and the Tribe for their reservation pursuant to the study commissioned by Congress; on the face of the matter, therefore, the Tribe alleges a legally recognizable interest sufficient to enable us to consider their arguments on appeal. See Dorothy A. Towne, 115 IBLA 31, 33 (1990). Inasmuch as this appeal will be considered on the merits of the arguments raised by the Tribe as described above, and in the interest of administrative economy, it is unnecessary to consider whether the remaining appellants have standing, especially since neither of them has raised any arguments independent of those advanced by and on behalf of the Tribe. Id.

On August 29, 1995, a temporary stay was ordered while the record on appeal was being assembled; the general stay regulation at 43 CFR 4.21 does not control this appeal, because a specific regulation governing appeals from decisions approving mining plans of operations is provided by 43 CFR 3809.4. See Western Shoshone National Council at 130 IBLA 71. Under this rule, the decision here under review became effective when it was issued. Id. Nonetheless, having ordered a temporary stay in the case, standards published in the general rule at 43 CFR 4.21(b) will be applied in order to determine whether to continue the temporary stay now in effect. On the record as it is presently constituted, I find there is little likelihood the Tribe can succeed on the merits of this appeal; therefore the request for stay is denied and the temporary stay is revoked. See 43 CFR 4.21(b)(ii). The record establishes that BLM planning in preparation for the Briggs project was legally and factually adequate to support the decision approving the mining plan proposed by Canyon Resources, and that the Tribe was not impermissibly excluded from the planning process leading to the BLM decision.

Secs. 705(b)(1) and (2) of the 1994 Act provide that:

(1) The Secretary, in consultation with the Timbisha Shoshone Tribe and relevant Federal agencies, shall conduct a study, subject to the availability of appropriations, to identify lands suitable for a reservation for the Timbisha Shoshone Tribe that are located within the Tribe's aboriginal homeland area

within and outside the boundaries of the Death Valley National Monument and the Death Valley National Park.

(2) Not later than 1 year after the date of enactment of this title, the Secretary shall submit a report to the Committee on Energy and Natural Resources and the Committee on Indian Affairs of the United States Senate, and the Committee on Natural Resources of the United States House of Representatives on the results of this study conducted under paragraph (1).

The Tribe does not now have a reservation, but desires to establish one within an area described by the SOR as being on "aboriginal lands." This area lies along the California and Nevada border and is shown on a map furnished by the Tribe that is divided into 12 areas; as supplied by BLM in Exhibit IV to BLM's Answer, map area number 10 of Exhibit IV includes all the land where the Briggs project is proposed to be carried out. Prior to filing a reply to the answers filed by BLM and Canyon Resources, the Tribe had not claimed all of area 10 for the sought-after reservation, but argued that the Briggs operation would affect selected areas of interest to the Tribe within area 10. In a Reply filed on September 19, 1995, however, counsel for the Tribe shifted the Tribal position on appeal by asserting that all of area 10 is now claimed by the Tribe for inclusion in the reservation it seeks (see Declaration of Frederick I. Marr at 5, 10, and 15). The provision of NEPA relied upon by the Tribe in making the principal argument raised on this appeal concerning the degree of consultation required between BLM and the Tribe is 42 U.S.C. § 4332(C)(V) (1988); this statute requires that, "[p]rior to making any detailed statement [BLM] 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." The Tribe claims to possess special expertise concerning the area here under review, particularly as it relates to tribal claims of entitlement to continued use and enjoyment of the area for tribal purposes.

Since the Tribe is presently landless, however, it is not of a class entitled, as a matter of law, to be consulted by BLM before a final EIS can be prepared for a project affecting reservation lands. See 40 CFR 1503.1(a)(2)(ii), implementing NEPA, and requiring that comments shall be requested from an affected Indian tribe before preparation of a final EIS for a project affecting reservation lands. Nonetheless, although not specifically required by law to do so, the record establishes that BLM invited comment from the Tribe in writing during preparation of the EIS for the Briggs project on at least three occasions

in 1994 (see Exhibit V to BLM Answer, Tribe's Reply at 7). Nothing more was required; see e. g. General Procedural Guidance for Native American Consultation, BLM Manual Handbook H 8160-1 at III-15 (Nov. 3, 1994), observing that if "BLM has provided sufficient opportunity and has documented that this is the case, and the intended consultation partner refused or declines to consult, the BLM's requirement is met." No other entity or person consulted during the course of preparation of the EIS was treated differently than was the Tribe in this respect, nor has the Tribe alleged that they were treated differently than others similarly situated, nor is it claimed that they were prevented from participation in the planning by BLM's approach to consultation with them. The record shows instead that the Tribe chose to remain aloof from formal participation in the planning process until it was nearly complete; they cannot now complain about the course of action they chose to pursue. Cf. Committee for Idaho's High Desert, 133 IBLA 378, 379 (1995), (a group notified in advance of a proposed burn on Federal lands who reserved comment until after a decision to execute the project had been issued lacked standing to appeal).

On June 30, 1995, the Tribe commented in writing concerning the Briggs project. This comment received an initial response addressed to the Tribe from BLM on July 7, 1995 (Exhibit XI to BLM Answer). Denying the Tribe's assertion that it had not been contacted during planning for the Briggs project, BLM stated that tribal arguments challenging the sufficiency of the EIS would be considered in making the decision on the Briggs project mining plan. In the decision here under review, issued three days after the July 7 response, BLM concluded that the analysis of the effect on the environment of the Briggs project made by the EIS was adequate, and that implementation of operating restrictions placed by BLM upon Canyon Resources to mitigate significant impacts to resources, including cultural resources, would prevent "unnecessary or undue degradation of the public lands" (Decision at 2). The Tribe now argues that this finding is in error because "any development, including mineral development, within its aboriginal homelands" conflicts with tribal "traditional tribal beliefs and practices." Reply at 7.

Denying that they seek to use the reservation study commissioned by Congress to impose a "moratorium" on mining in the Panamint Valley where the Briggs project is located (see Reply at 7), the Tribe argues that they are entitled to "co-management" of lands designated by the Tribe as being within the area to be studied. Reply at 14, 15. The foundation for this conclusion is to be found in an interpretation of sec. 705 of the 1994 Act that construes the study as evidence of a "special relationship and focus upon this entire area, pursuant to the plenary power of Congress over Indian affairs." Id. Nothing in the 1994

Act or the legislative history thereof is cited in support of this position, which is inconsistent with existing regulations implementing NEPA: Under 40 CFR 1508.5, the term "cooperating agency," when used so as to include an Indian tribe, is limited to those cases "when the [environmental] effects are on a reservation." Since the Tribe has no reservation, it cannot become a "cooperating agency." Id.

Sec. 705(b) of the 1994 Act, quoted above, commissions a study, "subject to the availability of appropriations," to identify lands suitable for a reservation for the Tribe and requires the Secretary to report to Congress concerning the findings made by the study. The record before us indicates that this study is ongoing; counsel for the Tribe speculates, however, that the study may not result in a favorable report, but that other unspecified and unrelated actions may be required to achieve creation of a Tribal reservation (see Declaration of Frederick I. Marr at 7); indeed, such a conclusion is consistent with the plain meaning of sec. 705(b) of the 1994 Act. The 1994 Act clearly did not establish a reservation for the Tribe or promise that such a reservation would be created; moreover, no specific result is required of the study by the 1994 Act.

The legislative history of the 1994 Act is more specific concerning the Briggs project, and indicates a Congressional intent that the project should be allowed to proceed; as explained by Senator Feinstein, S.21, the bill that preceded the 1994 Act, reduced the size of some wilderness areas to promote the Briggs development:

The principal beneficiary of this reduction in wilderness designation is a proposed gold mine – the Briggs Mine – that is now in the final stages of permitting. * * * S. 21 removes the excluded lands from wilderness study status and thereby will allow the Briggs mine operators to mine the Briggs deposit more efficiently and to explore and possibly develop their larger claim block on the excluded lands. * * * Section 106 clearly contemplates that the Secretary will manage the excluded lands * * * so as to facilitate mineral exploration and development.

140 Cong. Rec. S5315 (May 5, 1994). It was clearly not the intention of Congress to allow the Tribe to use the study commissioned by sec. 705 of the 1994 Act to stop BLM from proceeding with the regular administration of the Briggs permit applications until the Tribe could become a cooperating agency for NEPA purposes, which would be the result of a decision to require waiting on a decision for the Briggs mining plan until the Tribe acquires

reservation lands. See 40 CFR 1508.5. The Tribe's contentions that BLM erred by excluding the Tribe from proper participation in environmental planning and by denying status as a cooperating agency to the Tribe for the Briggs project EIS must therefore be rejected as without foundation in law and fact. Related arguments that the Tribe is entitled to a remedy under AIRFA, 43 U.S.C. § 1996 (1988), and NHPA, 16 U.S.C. § 470 (1988), both of which exhort consideration of Indian concerns in agency actions affecting Indians, are also without merit; the record establishes that participation by the Tribe was solicited by BLM and that the Tribe did participate in the planning process. Similarly without foundation in the record are arguments that provisions of the BLM Manual require further consultations between the Tribe and BLM before approval of the mining plan can take place; BLM is not in a position to require cooperation by the Tribe (BLM Manual Handbook at III-15, supra).

It is also alleged by the Tribe that the EIS is inadequate to serve the purpose for which it is intended and should be sent back for further study and development of more information for a number of reasons. The Tribe complains that vat leaching was not considered as an alternative to heap leaching by the EIS; nonetheless Volume I of the EIS at page 5.2-64 deals with this potential alternative method of treatment, discussing advantages of the method. It is ultimately concluded, however, that it is not suited for the Briggs project (see EIS Volume II at 2-121). No error has been shown in this finding. Suggestions by the Tribe that the heap leach system should be constructed differently than proposed by the mining company, that a different lining system should be used, and that a better monitoring system for the extraction facilities could be devised, do not establish error in the project design or point to any defect in the system approved (see EIS Volume I at 6.2-49). It is also contended that tribal cultural resources are endangered by the Briggs project. Cultural resources are inventoried and analyzed in Volume II of the EIS at sec. 4.9, and a provision for fencing two such sites appears at page 4.9-5. Again, no error has been shown in this approach to preservation and identification of such values by the EIS; the Tribe has not identified any specific sites that were overlooked or wrongly characterized, but argues instead that identification of Indian gravesites would be "offensive to Tribal members" and "culturally impermissible." Reply at 14. The argument that BLM overlooked cultural matters critical to Tribal interests in the EIS must therefore also be rejected.

The Tribe also argues that the cumulative impacts analysis provided by the EIS is inadequate because it fails to reveal Canyon Resources plans to explore and develop other sites near the Briggs tract or within the 12 designated areas comprising the Tribe's aboriginal range. It is correct that BLM assumes

that either expansion or contraction of the project is possible, depending upon a myriad of unknown possibilities. Nonetheless, the scope of the EIS of the Briggs project is not required to be expanded to consider all possible future development within the area defined by Tribal interests; BLM properly considered the effects of the development planned by the Briggs project, and was not required to consider plans not yet developed or in existence; such "crystal ball inquiry" is not required by NEPA. See Howard B. Keck, 124 IBLA 44, 48-50 (1992), and authorities cited. Further, the Tribe questions information in the EIS dealing with groundwater levels and wildlife, particularly bighorn sheep. Groundwater levels and effects of mining on water are considered at section 3.3, EIS Volume II; the effects of the project on wildlife, and on bighorn sheep in particular, are considered in detail at pages 5.1-19 through -27, Volume I, EIS. In these instances also, the Tribe has not shown how the finding by the EIS concerning these matters is inadequate or in error, but has formulated opinion arguments questioning findings appearing in the EIS. Such argument is not sufficient to carry the burden of showing error or inadequacy in the EIS, and it is concluded that the analysis made by the EIS as to each of these matters is adequate. See San Juan Citizens Alliance, 129 IBLA 1, 14, (1994), and authorities cited therein.

Finally, the Tribe challenges the adequacy of the bonding arrangement approved by BLM for the Briggs project, which is based upon a reclamation surety calculation prepared by Canyon Resources indicating that a bond in the amount of \$2,924,462 will be adequate for this purpose (attachment to decision at 11; reclamation surety calculation at 2). Arguing that Canyon Resources has improperly discounted the cost of initial detoxification by including continued gold production as a credit, the Tribe reasons that because cyanide levels will be at their highest at the beginning of reclamation, a bond should be imposed without regard to anticipated incidental benefits of reclamation. It is contended that, by comparison to a cited Colorado mine using cyanide leaching methods, the reclamation plan proposed by Canyon Resources is inadequate, and that a bond amount in excess of \$2.9 million is required in light of the Colorado mining experience. The Tribe has not shown, however, that the Colorado mine cited as a model for the California operation is comparable to the Briggs project. Nor is it explained why consideration of the incidental benefits of reclamation is not proper in calculating the cost thereof. The burden to show error in such cases as this rests with the party challenging the agency finding. See e. g. Western Shoshone National Council at 130 IBLA 72. The Tribe has not met that burden on this issue.

Accordingly, the request for stay was denied.

The Tribe, while acknowledging they are now free to seek judicial review, have requested that the Board issue a final decision so as to "clarify remaining issues and facilitate judicial review." In view of the nature of the project involved and the present posture of this appeal, the request to expedite consideration, which is not opposed, is granted in order to dispel any doubt that this case is ripe for judicial review. See generally, Abbott Laboratories v. Gardner, 387 U.S. 136, 150 (1967), concerning when administrative action becomes ripe for judicial review.

Insofar as concerns arguments raised in the Tribe's original statement of reasons (SOR), they were considered and rejected by the order of October 23, 1995, quoted above, which we hereby adopt as the decision of the Board of Land Appeals. We will, however, now consider certain supplemental filings made by the parties which were not specifically mentioned in our order; objections to our consideration of those supplemental filings are denied.

Repeating arguments first advanced in their SOR, the Tribe argues in a reply brief filed September 19, 1995, that use by BLM of "outside sources of information" concerning Tribal lands led to an inadequate appraisal of Tribal interests in lands affected by the Briggs project and operated to deny direct consultation required by the BLM Manual (Reply Brief at 9-11). It is also alleged that it was not enough for BLM to have notified the Tribe of the mining planned for the Briggs project, but that BLM was required to "actively seek the Tribe's advice on proposed actions affecting the Tribe's aboriginal homeland area" and that BLM "must undertake a significantly higher level of consultation" with the Tribe than is accorded to other governmental agencies because of BLM Manual provisions (Reply Brief at 14, 15).

[1] The Tribe does not, however, explain what Tribal interest was injured by the manner of consultation between the Tribe and BLM in the planning for the Briggs project. As was found in the order issued on October 23, 1995, BLM repeatedly notified the Tribe that it could comment concerning the Briggs project and fully complied with applicable environmental regulations and BLM's internal operating manual by so doing. We find, therefore, that procedures used by BLM to obtain comments from the Tribe were reasonable, correct, and effective; the contention that the Tribe was not consulted in the manner required by law is rejected.

Allegations made by the Tribe that an environmental impact statement (EIS) prepared in the course of planning for the Briggs project was inadequate to support the mining plan ultimately approved by BLM were also considered and rejected by our order issued on October 23, 1995. The order correctly found that the EIS properly analyzed methods of ore treatment and inventoried cultural resources, analyzed the scope and effect of cumulative impacts of the project on the environment, and considered the effect of the project on groundwater and wildlife. Those findings are

adopted herein. The order also found that a reclamation bond proposed by the operator and approved by BLM was adequate; therein, it was concluded appellants had failed to show it was error to accept a bond in the amount of \$2,924,462 based in part on a reclamation surety calculation that considered it was probable that gold production would continue during initial reclamation operations.

The reply brief filed on September 19, 1995, elaborates on objections raised against the bond approved by BLM; the Tribe alleges that the bond fails to guarantee performance of reclamation, as it must do to comply with the BLM decision, which requires that "funding for reclamation activities will be guaranteed through the posting of financial assurance" (Reply Brief at 16 (emphasis in original)). The Tribe concludes that allowance of credit for continued production expected to be derived from gold remaining in the heap after mining was completed might not be realistic, because in the event there was a forfeiture by the operator other creditors would likely have prior claims on gold left at sites to be reclaimed (Reply Brief at 17). Arguing that this aspect of the reclamation provision makes the bond amount speculative, the Tribe argues that a bond provision that is contingent upon an uncertain future event, such as continuing availability of all mine equipment in working condition or continued solvency of the operator, will not provide an adequate guaranteed pool of money for reclamation, as it must do if there is to be an effective guarantee. Id. at 16.

The bond offered by the operator takes the form of an irrevocable letter of credit, made to the satisfaction of reclamation demands imposed by BLM, Inyo County, California, and the Regional Water Quality Control Board (cover letter, reclamation surety calculation). It is not the form of the bond to which the Tribe objects, but the amount thereof, which they consider to be understated as a result of calculations made by the operator. Nonetheless, while they speculate that recovery of gold during reclamation may not occur as planned, they have not shown that it is unreasonable to project, as the operator has done, that there will be some continuing production at the end of the mining operation. Although it may not be possible to project exactly the amount of reclamation costs involved in an operation of the size contemplated by the plan approved by BLM, it has not been shown on appeal that the calculation of bond amount made by the operator is unreasonable for the project described by the planning documents before us. The decision by BLM to require a project reclamation bond in the amount of \$2,924,462 is therefore affirmed.

We therefore find that BLM properly approved the Canyon Resources mining plan of operations for the Briggs project based upon information gathered in the EIS and other supporting documents prepared for evaluation of the project, and conclude that BLM correctly established an adequate reclamation bond and correctly determined that, as modified, the mining

plan proposed by Canyon Resources will not cause unnecessary or undue degradation of the public lands.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN THE RESULT:

The majority incorrectly states that "[i]nsofar as concerns arguments in the Tribe's original [statement of reasons], they were considered and rejected by the order of October 23, 1995, * * *." (Emphasis added.) Under 43 CFR 4.2(a), decisions of this Board must be "by a panel of any two Administrative Judges of the Board, * * *." (Emphasis added.) The October 23, 1995, order was issued under one signature. The arguments in the statement of reasons could not be considered or rejected in that order.

Notwithstanding my objection to the manner in which the majority casts their opinion, after review of the file and the arguments of the parties, I reach the same ultimate conclusion that the Bureau of Land Management's July 10, 1995, decision should be affirmed. Therefore, I concur in the result.

R. W. Mullen
Administrative Judge