



United States Department of Agriculture

Office of the Secretary
Washington, D. C. 20250

April 11, 2003

Deborah A. Sivas
EARTHJUSTICE
Owen House – 553 Salvatierra Walk
Stanford, California 94305-8620

Dear Ms. Sivas:

You have filed a notice of appeal on behalf of your clients; Pit River Tribe, Klamath Tribe, Native Coalition for Medicine Lake Highlands Defense and Mount Shasta Bioregional Ecology Center. The appeal was filed pursuant to 36 CFR 215, protesting the Chief of the Forest Service's Record of Decision (ROD) approving the Proposed Action as modified, of the Telephone Flat Geothermal Development Project Final Environmental Impact Statement (FEIS).

I have reviewed the administrative record, including the Appellants' written notice of appeal, the ROD, FEIS, and supporting documentation. I have weighed the recommendation from the Appeal Reviewing Officer and incorporated it into this decision. A copy of the Appeal Reviewing Officer's recommendation is attached. This letter constitutes my decision on the appeal and on the specific relief requested.

APPEAL DECISION SUMMARY

I affirm the Chief's decision to implement the Proposed Action as modified (proposed power plant site with the modification of selecting Alternative Transmission Line Route 2, segment D-2 and B-2 instead of Alternative Transmission Line Route 1). Implementation of the decision may proceed no sooner than April 16, 2003.

FOREST ACTION BEING APPEALED

In May 2000, the Bureau of Land Management (BLM) and the Forest Service (FS) signed a joint Record of Decision denying the Telephone Flat Geothermal Development Project. In October, the project proponent filed a lawsuit against the Bureau of Land Management and the Forest Service in the U.S. Court of Federal Claims for the denial of the project alleging breach of contract and takings claims. As part of a settlement agreement of this litigation, the Department of Justice agreed the two agencies would reconsider the decision by November 2002. On November 26, 2002 a new Record of Decision was issued by the Chief, USDA Forest Service and the Assistant Secretary, Lands and Minerals Management, U.S. Department of the Interior. The new decision was the culmination of that reconsideration process, replacing and superseding the

previous Record of Decision. Notice of this decision was published in the Modoc County Record on December 19, 2002.

The 2002 Record of Decision is also a joint U.S. Department of Interior and the U.S. Department of Agriculture document. However, each agency is making decisions that pertain to separate activities identified in the Plan of Operation. The part of the decision made by the Chief of the Forest Service is described in the attached Appeal Reviewing Officer's recommendation letter. In summary, the portion approved by the Forest Service includes a transmission line, a road easement, temporary water well use and waterline placement and maintenance. In addition, a forest order is approved prohibiting discharge of firearms within the vicinity of the power plant. Only the Forest Service's portion of the decision is subject to appeal in accordance with the regulations at 36 CFR 215. Approval of the project constitutes the final administrative action for the BLM.

APPEAL SUMMARY

The Department of Agriculture has no record of receiving an administrative appeal timely filed by the Earthjustice Environmental Law Clinic at Stanford on behalf of the Appellants. The Appellants are unable to demonstrate compliance with 36 C.F.R. 215.13(c) by producing physical evidence showing their appeal bore a U.S. Postal Service postmark dated on or before February 3, 2003. As a matter of discretion, I have agreed to review the Appellant's administrative appeal using the procedures set forth at 36 CFR Part 215, with six exceptions set forth in our agreement dated March 20, 2003.

The appellants request a decision granting their appeal and seek reversal of the Forest Service's approval of the Telephone Flat Geothermal Project. An informal resolution meeting by telephone was conducted on April 1, 2003 between the Forest Service, appellants and interested parties. No issues were resolved.

Interested party comments on your appeal were submitted by Robert Maynard, Attorney for CPN, Telephone Flat, Inc. and Calpine Corporation by letter dated March 28, 2003. Mr. Maynard's letter requested a final decision denying your appeal in its entirety in accordance with 36 CFR 215.17. Mr. Maynard concludes the subject appeal is untimely and therefore should be dismissed. Additionally, he concludes the allegations presented by the appellants have already been considered and rejected and that further delay of the project constitutes a breach and/or taking of CPN lease rights.

Another appeal of the Chief's 2002 decision was received from Stephan A. Volker on behalf of Save Medicine Lake Coalition, Medicine Lake Citizens for Quality Environment, Fall River Wild Trout Foundation, Klamath Forest Alliance, California Wilderness Coalition and Sierra Club. My decision on that appeal, which was timely, was signed and mailed to Mr. Volker on March 20, 2003.

ISSUES AND RESPONSES

ISSUE A. The new ROD violates the Administrative Procedure Act.

RESPONSE: The new ROD sets forth an adequate legal basis, consistent with the Administrative Procedure Act, for the decision to approve the Proposed Action as modified. The new decision acknowledges that traditional, cultural values associated with the Medicine Lake Highlands have remained the same since the original ROD

denied this project. However, the demand for electrical energy in the surrounding area has continued to accelerate with an increasing focus on California's requirement for renewable energy resources. Reconsideration of the 1999 decision on the Telephone Flat project included weighing the increasing demand for renewable energy with the need to protect traditional cultural values. These considerations and the issue of what is in the public interest are clearly and logically articulated in the 2002 ROD (section III Reasons for the Decision, A.4).

Alternative Transmission Line Route 2 was selected during the reconsideration in order to reduce certain cultural impacts. Route 2 will avoid impacts that Route 1 would have on the Mt. Hoffman Released Roadless Area and visual impacts in the area of the Glass Mountain glass flow (ROD, III.A.4). Impacts associated with Route 2 in the Managed Late Successional Area (MLSA) can be mitigated by adopting the management recommendations of the Amended Biological Assessment.

Direction in the Modoc National Forest Land and Resource Management Plan (LRMP) for the Medicine Lake Management Area does not preclude geothermal development. Project approval requirements for survey, avoidance and/or mitigation of cultural sites adequately address the Forest plan standard. Approval of the plan of operation is consistent with the LRMP (ROD, III.A.1).

ISSUE B. The leases on which the Telephone Flat Project will be operated are invalid.

RESPONSE: The BLM is the agency responsible for issuing geothermal leases on Federal land. The BLM also is responsible for ensuring that activities proposed on federal geothermal leases are consistent with the specific lease stipulations as provided for in the Geothermal Steam Act. When the land involves surface resources managed by the Forest Service, the BLM must obtain consent from that forest prior to the issuance of a lease.

The appellants are challenging BLM's decision from the 1980's to issue geothermal leases. In 1981 the FS issued an environmental assessment entitled, "Environmental Assessment for Geothermal Leasing". This document was prepared to address the potential issuance of geothermal leases in and around the Glass Mountain Known Geothermal Resource Area (KGRA) and provide a basis for Forest Service decisions on consenting to lease issuance and stipulations.

The appellants and other members of the public had notice of the intent to issue leases when the 1981 Environmental Assessment was completed and the decision notice signed. Notice was sent to members of the public who had expressed previous interest and the decision was published in several newspapers of the area. Any objections to consent to the issuance of the subject leases should have been directed to the FS within the time provided by the then applicable FS administrative appeal procedures. Objections to the issuance of the leases themselves should have subsequently been directed to the BLM, the agency who is ultimately responsible for geothermal lease issuance. However, no such appeal or objection was filed with the Forest Service or the BLM. The time for objecting to the issuance of the subject leases has passed.

In a related appeal of the Fourmile Hill geothermal project, Save Medicine Lake Coalition challenged BLM's decision to issue the underlying leases. In this matter the

Interior Board of Land Appeals found the appellants had notice of lease issuance and that the time for objecting was passed (156 IBLA 219, 227-228 [2002]). This decision also addresses the question of the propriety of BLM's subsequent extension of the leases and found the matter was also not timely raised. Additionally, once BLM determines the lessee has satisfied specific prerequisites for the extension of a geothermal lease, BLM's authority to approve such an extension is not discretionary.

The Forest Service and Department of Agriculture cannot provide relief for BLM actions such as those at issue here (i.e. BLM compliance with NEPA, NHPA or their fiduciary trust obligations in executing and renewing leases). Appeal of the Chief's decision on the Telephone Flat Project is not an appropriate forum for addressing these issues pertaining to BLM's authority and responsibility.

ISSUE C. The National Environmental Policy Act (NEPA) documentation for the Project is inadequate.

RESPONSE: In response to the lessee's submission of a proposed plan of operations, the BLM and the FS in cooperation and partnership with Bonneville Power Administration (BPA), and Siskiyou County Air Pollution Control District, completed the "Telephone Flat Geothermal Development Project Final Environmental Impact Statement/Final Environmental Impact Report" (FEIS/FEIR). The Preferred Alternative disclosed in the FEIS/FEIR was to approve the project.

In November 2002, a contracted, review report [Update Assessment for the Telephone Flat Geothermal Development Project Final Environmental Impact Statement/Environmental Impact Report, (FEIS/FEIR) hereby referred to as the "Update Assessment"] was completed. The purpose of the report was to evaluate the adequacy of the FEIS and determine whether or not the agencies needed to prepare and circulate a supplement to that NEPA document. The Update Assessment did not identify any new significant impacts resulting from the proposed action or project nor did it identify new mitigation measures or substantial increases in the anticipated severity of environmental impacts. In accordance with Forest Service NEPA Revised Policy and Procedures, the deciding officer's review documents that NEPA requirements had been fully met, the FEIS was sufficient and a supplement was not necessary (Worksheet, Documentation of NEPA Adequacy).

- Purpose and Need

Submission of the Project proposal triggered the Agencies' need to analyze the development of geothermal resources on the federal leases involved in the Telephone Flat project. The purpose of the proposal is to economically produce and deliver electrical energy from leases identified in the proposed plan of operations. The manner in which the purpose and need of the proposed action is described in the EIS given the lessee's proposal, to which the Agencies had a legal obligation to respond, is completely consonant with NEPA, the Council on Environmental Quality's (CEQ) regulations implementing that Act, and the predominant body of case law which has addressed this issue.

Legal authorities cited in the FEIS Purpose and Need discussion support the national policy regarding the development of alternative energy sources. This issue was additionally addressed in the 2002 ROD (III. B.1). The determination concerning

management of the area for geothermal energy development was made at the time the leases were issued.

- “Reasonable Range” of Alternatives

Section 102 (2) (C) of NEPA requires investigation and evaluation of reasonable alternatives to the proposed action that will accomplish the intended purpose. A range of reasonable alternatives was considered relative to the Purpose and Need of the proposal. The appeal cites 40 CFR 1502.14 that requires a Federal agency to explore and evaluate all reasonable alternatives. That provision does not require consideration of a “reasonable range” of alternatives.

In addition to the various transmission line alternative routes considered in detail, the FEIS also considered but eliminated from detailed consideration, additional routes (ES-16-19). Consideration was given to burying the line, however that alternative was found both to be excessively costly and to result in greater environmental impacts. Thus the alternative of burying the power line was dismissed from further detailed consideration.

The question at issue for the Forest Service and the BLM was whether to approve the plan of operations for the Telephone Flat Geothermal Development Project, not to determine the best way of providing energy in the area. Consideration of other increasing production in other geothermal areas and non-geothermal sources of energy are outside the scope of this analysis. The scope of the analysis was limited by the proposed plan of operations for the Telephone Flat Geothermal Development Project.

- Socioeconomic Impacts on Native Americans

Socioeconomic impacts on Native Americans are adequately considered in the FEIS (3.12). See also FEIS table 3.12 (ES-119) displaying impacts associated with the transmission line locations. The Update Assessment recognized no new mitigation measures or alternatives as a result of the consultation process. The Update Assessment further acknowledges that the identified, significant socioeconomic impacts cannot be mitigated to an acceptable level. Nonetheless, selection of an action alternative in these circumstances does not demonstrate that the environmental analysis was flawed.

- Cumulative Impacts of Several Projects

The FEIS considers the Fourmile Hill geothermal development project and the Reduced Glass Mountain exploration project to be reasonably foreseeable and evaluates them along with the Telephone Flat geothermal development project in the cumulative effects section (FEIS 4-1-28). The fact that the transmission line and other facilities authorized for the Telephone Flat Project can be utilized to facilitate future development does not, by itself, establish that such development is reasonably foreseeable, Headwaters, Inc. v. BLM, 914 F.2d 1174, 1181-82 (9th Cir. 1990). Absent additional information, there are no other projects or proposals that are appropriately considered as being reasonably foreseeable.

- Inadequate Environmental Analyses

The adequacy of the analysis is dependant upon consideration of relevant matters of environmental concern. Moreover,

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision

maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

County of Suffolk v. Secretary of the Interior. 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

Analyses of the affected environment and environmental consequences are detailed in Chapter 3 of the FEIS. Impacts and mitigation measures are identified and described. Exhibit 5 is the Medicine Lake Basin Comprehensive Hydrology Monitoring Plan. Analyses of impacts associated with water quality, seismic activity, air quality, visual quality and noise are contained in sections 3.2, 3.1, 3.4, 3.8 and 3.7 respectively. Included in the last pages of each section are descriptions of environmental consequences, impacts and mitigation specific to Alternative Transmission Line Route 2. The appellants have not demonstrated that impacts relevant to the proposed action were not adequately considered in the Final EIS and the Update Assessment.

Issues relating to the selection of mitigation measures for the environmental consequences associated with the cooling towers, turbine building, drill rigs, drill pads, well fields and other facilities not including the transmission line and temporary water line are outside of the scope of this appeal. Selection of such measures falls within the exclusive jurisdiction of the BLM whose decision is not subject to administrative appeal. Nonetheless, the Forest Service properly considered the environmental consequences associated with the facilities and road access, as part of the cumulative effects analysis in Chapter 4 of the FEIS. A summary of the significant cumulative effects is included in Table ES.8 (Executive Summary of the FEIS, page ES-123-125). Impacts associated with the transmission line alternative routes are addressed in the FEIS and mitigation is identified to reduce those adverse effects, where possible. Some impacts are recognized as cumulatively significant and unavoidable or immitigable. These impacts and mitigation measures are summarized in table ES 6 (ES-95-123).

Section 102(2) (C) of NEPA does not prohibit action where environmental degradation will result, it merely mandates full consideration of the environmental impact of the proposed action. The FEIS and Update Assessment adequately disclose the environmental consequences of the Proposed Action, as modified.

- Enhanced Geothermal System

As previously mentioned, authority for the approval and mitigation of impacts resulting from down-hole activities fall under the jurisdiction of the BLM. Consequently, such challenges to acidization or enhanced geothermal system activities are beyond the scope of this appeal.

Nonetheless, the potential for impacts from enhanced geothermal system activities is addressed in the Update Assessment (2.1-2, 3.1-2, 3.2). Recognize, however, that enhanced geothermal system activities are standard industry practices that are routinely employed. There is no historical precedent suggesting that those activities pose a threat of adverse impact to water quality when conducted in accordance with approved methods. Additional discussion concerning regulation of the underground injection control program is contained on pages 3.2-1 and 3.2-2 of the FEIS and in Exhibit 6, Injection Well Monitoring.

- Supplemental EIS or EA Required

In order to comply with the CEQ regulations implementing NEPA, the previously discussed Update Assessment was prepared as part of the ROD reconsideration process to determine if significant new circumstances or information relevant to the environmental concerns and bearing on the project were identified since the FEIS was released in 1999. It was determined through this analysis that there was no change in the condition of the environment and no significant change in the impacts associated with the project. Therefore, a supplemental EIS is not required in order to approve the Telephone Flat Project, as modified.

ISSUE D. Approval of the Project violates the National Forest Management Act and its implementing regulations.

RESPONSE: As the new ROD noted, the geothermal leases at issue are examples of existing contracts that are specifically not modified by the National Forest Management Act (NFMA) or the Modoc National Forest Land and Resource Management Plan (LRMP). Indeed, the direction in the LRMP for the Medicine Lake Management Area is that “other management activity should not preclude geothermal development.” The forest-wide standard and guideline which calls for the protection and conservation of cultural resources therefore cannot correctly be read as a basis for denying the Proposed Action as modified, although that action regrettably will have adverse effects on cultural resources which cannot be fully mitigated. For these reasons, the decision under appeal is definitely consistent with NFMA and the LRMP (ROD, III.A.1). For similar reasons, issuance of the special use authorizations necessary for the Proposed Action, as modified, is consistent with 36 CFR 251.56(a)(1)(i)(G).

Special use authorizations for the Proposed Action, as modified, issued subject to the condition that the permittee must comply with all applicable air and water quality standards established by or pursuant to applicable Federal or State law satisfy 36 CFR 251.56(a)(1)(i)(C). Complying with such standards is the responsibility of the permittee and enforcing such compliance is the role of the federal or state agency with authority to administer the air or water quality standards, not the Forest Service. No other provision of the special use authorization regulations is an impediment to approval of the Proposed Action, as modified.

ISSUE E. Approval of the Project is inconsistent with the National Historic Preservation Act.

RESPONSE: As part of the reconsideration of the Record of Decision denying the project, consultation under Section 106 of the National Historic Preservation Act (NHPA) was re-initiated. Additionally, the Advisory Council on Historic Preservation (ACHP or the Council) held a public meeting and solicited input on the reconsideration. A record of various tribal, agency and public contacts made during the reconsideration process is included in the 2002 ROD.

Documentation of consultation termination was duly provided to the ACHP. The Council acknowledged this to be in accordance with 36 CFR 800.7, the relevant regulation implementing Section 106 of the National Historic Preservation Act, 16 USC 470f, (ACHP letter of September 5, 2002). Consideration of the Advisory Council’s response is included in the 2002 ROD and formally documented in a November 26, 2002 letter from the deciding officials to the ACHP.

In accordance with NHPA, the agency made a reasonable effort in consultation with the ACHP, the State Historic Preservation Officer (SHPO) and the tribes to identify, evaluate and mitigate potential impacts to traditional/cultural resources. As a result, an alternate transmission line location was chosen and the project was also amended by incorporating additional Conditions of Approval and Agency Commitments to further reduce impacts to traditional values and uses (ROD, Sec. VIII). There is no requirement in law or regulation that the Forest Service obtains tribal concurrences prior to engaging in a Federal undertaking or manages federal lands to avoid all impacts on Native American uses and experience.

As discussed above, the decision under appeal is the Forest Service's approval of certain aspects of the Telephone Flat Geothermal Development Project, as modified. Issues concerning compliance with conditions of the Fourmile Hill Memorandum of Agreement (MOA) are beyond the scope of this appeal.

The appellants also argue that the 1980's decisions to issue geothermal leases did not comply with the NHPA. The appellants and other members of the public had notice of the intent to issue leases when the 1981 Environmental Assessment was completed and the decision notice signed. Notice was sent to members of the public who had expressed previous interest and the decision was published in several newspapers of the area. Any objections to consent to the issuance of the subject leases should have been directed to the FS within the time provided by the then applicable FS administrative appeal procedures. Objections to the issuance of the leases themselves should have subsequently been directed to the BLM, the agency who is ultimately responsible for geothermal lease issuance. However, no such appeal or objection was filed with the Forest Service or the BLM. The time for objecting to the issuance of the subject leases has passed. Objections to BLM's subsequent extension of the leases also are not timely raised.

ISSUE F. The agencies issuance and renewal of the Telephone Flat leases and reversal of the original Telephone Flat decision violated the federal government's fiduciary trust obligations to Indian tribes.

RESPONSE: The Forest Service does have a federal trust responsibility to Indian tribes that attaches to the federal government as a whole. However, given that no specific duty has been placed on the Forest Service with respect to Indians, the Forest Service satisfies its general trust responsibility to Indian tribes by complying with general laws and regulations. As discussed in the remainder of this decision, I have found nothing that indicated the Forest Service failed to comply with general laws and regulations in approving the previously specified aspects of the Proposed Action, as modified. Therefore, the Forest Service satisfied its trust responsibility to the Indian tribes in approving the new ROD.

Further, the Forest Service appears to have kept its trust responsibilities to the Tribes at the forefront throughout the tribal consultation process and in developing approaches to lessen or mitigate adverse effects of the Proposed Action.

ISSUE G. Approval of the Telephone Flat project without new source review violates the Clean Air Act.

RESPONSE: As discussed above, the aspects of the Proposed Action, as modified, which were approved by the Chief of the Forest Service, include a transmission line, a road easement, temporary water well use and waterline placement and maintenance. In addition, the Chief approved a forest order prohibiting discharge of firearms within the vicinity of the power plant. Only these portions of the decision are subject to appeal in accordance with the regulations at 36 CFR 215.

The FEIS recognizes the potential for the generation of fugitive dust generated by travel on unpaved roads, mobile combustion emissions from construction activities and dust lofted by earthmoving activities during construction, operation and decommissioning activities. For transmission line segment D2 the impact is considered less than significant and other measures are provided (FEIS 3.4-36) to reduce even those impacts. For line segment B2 impacts are considered to be less than significant with the exception of a short-term significant PM₁₀ impact possibly occurring in close proximity to construction activities (FEIS 3.4- 1, 37). To address those impacts, the project applicant will be required to design and implement measures to control the generation of dust during transmission line construction. Mitigation measures such as application of water or dust palliative, construction vehicle speed limitations and haul truck covers could be included.

However, you did not suggest that the impacts of any of these activities approved by the Chief would result in a violation of the Clean Air Act. Thus, there is no reason to reverse the Chief's decision on the basis of a violation of the Clean Air Act.

REVIEWING OFFICER'S FINDINGS

The Reviewing Officer found the EIS/EIR was well documented, referenced numerous applicable information sources, analyzed the project in depth and considered all significant public input. Additionally, it was noted that a review of the document to determine the need for a supplement had been completed and resulted in the appropriate determination. The Reviewing Officer recommended I affirm the Chief's decision and deny the relief requested.

DECISION

I have considered all the issues set forth in your appeal in making my decision. To the extent that those issues are germane to the Chief's decision that I agreed to review, I determined that those issues are adequately addressed in the FEIS, by the Chief in the ROD, or in the administrative record for the Chief's decision.

I affirm the Chief's decision to approve the previously specified aspects of the Proposed Action as modified.

My decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 215.18(c)].

Sincerely,

/s/Mark Rey
Under Secretary
Natural Resources and Environment



United States Department of Agriculture

Office of the Secretary
Washington, D. C. 20250

April 11, 2003

MEMORANDUM FOR THE APPEAL DECIDING OFFICER

Subject: Telephone Flat Geothermal Development Project Appeal

I am the designated Appeal Reviewing Officer (ARO) for this appeal. This is my recommendation on disposition of the appeal filed by Deborah A. Sivas of the Earthjustice Environmental Law Center at Stanford on behalf of the Pit River Tribe, Klamath Tribes, Native Coalition for Medicine Lake Highlands Defense, and Mount Shasta Bioregional Ecology Center.

BACKGROUND

In 1997, CalEnergy Corporation submitted a Plan of Operation and Special Use Application for the development of geothermal resources on and off Federal leases located within the Glass Mountain Known Geothermal Resource Area (KGRA). In February 1999, the Bureau of Land Management (BLM) and the Forest Service (FS), in cooperation and partnership with Bonneville Power Administration (BPA), and Siskiyou County Air Pollution Control District, released the "Telephone Flat Geothermal Development Project Final Environmental Impact Statement/Final Environmental Impact Report" (FEIS/FEIR). The Preferred Alternative disclosed in the FEIS/FEIR was to approve the project.

In May 2000, the BLM and FS signed a Record of Decision (ROD) denying the project. Subsequently, the project proponent filed a lawsuit in U.S. Court of Federal Claims against the two agencies alleging breach of contract and takings. Calpine Corporation acquired CalEnergy in November 2001. In April 2002, Calpine and the United States entered into an agreement to stay litigation and allow the agencies to reconsider the 2000 decision. On November 26, 2002, a new decision approving the proposal (as amended) was signed by the Chief of the Forest Service and the Assistant Secretary of the Department of Interior. Notification of the decision was published in the Modoc County Record on December 19, 2002.

Decision - The 2002 ROD is a joint BLM and FS document. However, each agency is making decisions that pertain to separate activities identified in the Plan of Operation. The Forest Service's decision includes:

- Permitting construction, operation and maintenance of a 230-kV, overhead transmission line,
- Issuance of a road use permit for access to the power plant,
- Permitting temporary water well use and water line placement and maintenance,
- Issuance of a Forest Order prohibiting firearm discharge within the vicinity of the Telephone Flat power plant.

Only the Forest Service's portion of the decision is subject to appeal in accordance with the regulations at 36 CFR 215. Approval of the project constitutes the final administrative action for the BLM.

The Chief of the Forest Service, U.S. Department of Agriculture and the Assistant Secretary, Land and Minerals Management, U.S. Department of the Interior jointly decided to reverse the earlier decision and select the Proposed Action (proposed power plant site) with the modification of selecting Alternative Transmission Line Route 2 (segment D-2 and B-2) instead of Alternative Transmission Line Route 1. This Proposed Action, as modified, is now the Telephone Flat Geothermal Development Project, as Amended (the Project). As part of the 2002 ROD for Telephone Flat, the Project is further amended by incorporation of additional conditions of approval and agency commitments based on the principles within the Memorandum of Agreement (MOA) for the approved Fourmile Hill Geothermal Development Project (which is located in the Medicine Lake Highlands, approximately six miles northwest of the Telephone Flat project area).

Scoping – Although there was no requirement for public involvement during the reconsideration (as part of the Settlement Agreement), in completing the Section 106 process under the National Historic Preservation Act, numerous meetings were held with various tribes, interested parties and the public. A summary table of these meetings is included in the Record of Decision.

APPEAL SUMMARY

The Department of Agriculture has no record of receiving an administrative appeal timely filed by the Earthjustice Environmental Law Clinic at Stanford on behalf of the Appellants. The Appellants are unable to demonstrate compliance with 36 C.F.R. 215.13(c) by producing physical evidence showing their appeal bore a U.S. Postal Service postmark dated on or before February 3, 2003. As a matter of discretion, you have agreed to a review of the Appellant's administrative appeal. I have completed this review at your direction.

The appellants request that the November 26, 2003 Record of Decision for the Telephone Flat Geothermal Development Project be reversed and withdrawn and that the use permits and other authorizations required for the Project be denied. They have not requested a stay of the Forest Service's implementation of the Telephone Flat Geothermal Project. An informal resolution meeting by telephone was conducted on April 1, 2003 between the Forest Service, appellants and interested parties. No issues were resolved.

Another appeal of the Chief's 2002 decision was received from Stephan A. Volker on behalf of Save Medicine Lake Coalition, Medicine Lake Citizens for Quality Environment, Fall River Wild Trout Foundation, Klamath Forest Alliance, California Wilderness Coalition and Sierra Club. This appeal was timely filed; and, on March 20, 2003, you signed the decision on their appeal and it was mailed to Mr. Volker.

Expressions of interested parties were received for both appeals. Robert Maynard, Attorney for CPN, Telephone Flat, Inc. and Calpine Corporation wrote letters, dated February 18, 2003 and March 28, 2003 in response to the two appeals. Both letters requested final decisions denying the appeals in their entirety in accordance with 36 CFR 215.17. Mr. Maynard concludes the subject appeal is untimely and therefore should be dismissed. Additionally, he concludes the allegations presented by the appellants have already been considered and rejected and that further delay of the project constitutes a breach and/or taking of CPN lease rights.

Issues – Allegations included: Failure to specify appropriate need and purpose of the Project, failure to consider a reasonable range of alternatives, environmental analyses are inadequate, inadequate consideration of cumulative effects, Project is inconsistent with the Modoc National Forest Land and Resource Management Plan, failure to adequately consider impacts to traditional/cultural sites and values, failure to consider input from the State Historic Preservation Officer and the Advisory Council on Historic Preservation, failure to provide a supplement to the Environmental Impact Statement, project leases are invalid, failure to identify changes in energy needs, failure to analyze socioeconomic impacts on native Americans, and violation of the federal government's fiduciary trust obligations to Indian tribes.

Purported Violations: Administrative Procedure Act, Geothermal Steam Act, National Historic Preservation Act, National Environmental Policy Act, National Forest Management Act, and Clean Air Act.

RECOMMENDATION

My review was conducted pursuant to and in accordance with 36 CFR 215.19 to ensure the analysis and decision is in compliance with applicable laws, regulations, policy and orders. I reviewed the appeal record including the Appellant's objections and recommended changes.

Based on my review of the Record, I recommend the Chief's decision be affirmed based on the following Forest Service decision activities:

- Permitting construction, operation and maintenance of a 230-kV, overhead transmission line,
- Issuance of a road use permit for access to the power plant,
- Permitting temporary water well use and water line placement and maintenance,
- Issuance of a Forest Order prohibiting firearm discharge within the vicinity of the Telephone Flat power plant.

I recommend the Appellant's requested relief be denied on all issues.

FINDINGS

Clarity of the Decision and Rationale - I found the Chief of the Forest Service has provided the necessary rationale and purpose for the decision in the ROD. The project was modified in response to concerns. Selection of the Alternate Transmission Line Route 2 and the incorporation of conditions and commitments of the Fourmile Hill MOA describe and constitute reasonable modifications of the original alternative and to Calpine Corporation's Plan of Operation. The responsible officials have gone into considerable detail to respond to the concerns expressed by the Appellants of this project.

Comprehension of the Benefits and Purpose of the Proposal – The purpose and need for this action is consistent with the Modoc National Forest Plan and direction. The “no action” alternative is carried throughout the analysis. Explanation included in the ROD, Section B, Renewable Energy Needs, contributes to a better understanding of the selected alternative.

Calpine Corporation obtained geothermal leases issued by the Bureau of Land Management within the Glass Mountain Known Geothermal Resource Area. The leases provide the leaseholder the right to explore, develop and utilize the geothermal resources located within the boundary of the leases. As per stipulations of the leases, Calpine Corporation submitted a Plan of Operation in compliance with the process for exercising their rights as leaseholders.

Consistency of the Decision with Policy, Direction, and Supporting Information – The proposed action, as developed and as amended by the ROD, is consistent with known ecosystem management principles. The proposal appears to be consistent with Agency policy and direction as far back as the 1981 Environmental Assessment for Geothermal Leasing, which allowed for geothermal resource exploration and utilization of lands within the Known Geothermal Resource Area.

The decision to select the Proposed Action as Amended is supported by rationale, information and analysis. A review of the EIS to determine the need for a supplement was completed and resulted in the appropriate determination. The decision is consistent with the Modoc National Forest Land Resource Management Plan. The analysis in both the EIS and the review of the EIS demonstrates compliance with existing management policy and direction. The ROD and EIS make appropriate findings required by law to affirm the project's compliance with the Administrative Procedure Act, Geothermal Steam Act, National Historic Preservation Act, National Environmental Policy Act, National Forest Management Act, and Clean Air Act. The analysis utilized detailed resource information related to the project.

Effectiveness of Public Participation Activities and Use of Comments – The public, various government agencies and tribal governments have provided considerable input that has been significant in the design of the alternatives and the selected action. Issues and concerns identified during public meetings, government-to-government consultation and site visits are evident throughout the environmental document, the reconsideration documents and the new Record of Decision. The decision does not appear to have been made without due consideration and appreciation of cultural and social impacts associated with the transmission line and other activities. There is evidence of active public participation and Forest Service responsiveness, including a meeting of the Chief

of the Forest Service with the Klamath and Pit River Tribes. Opportunity for public participation and tribal consultation was sufficient.

Requested Changes and Objections of the Appellants – The appeal, for the most part, reflects an understanding of the proposed action, location and information. There does appear, however, to be some confusion between the Fourmile Hill and the Telephone Flat geothermal projects. Issues concerning the approved Fourmile Hill project (not subject to appeal) are identified. Additionally it is not clear the Appellants understood which of the actions fall outside the jurisdiction of the Forest Service and therefore outside the scope of this appeal.

I recommend the requested relief be denied. The appeal file indicates the Forest Service took an interdisciplinary approach when developing alternatives as well as in the reconsideration process. Issues raised by the Appellants have been addressed in the environmental analysis.

CONCLUSION

I found the Telephone Flat Geothermal Development Project EIS was well documented and contained numerous references to applicable information. The project has been analyzed in depth and appropriate consideration and response have been given to significant public input. The project has been modified as a result of this input. The Proposed Action as Amended by the ROD appears to me to be the preferred alternative best serving the interests of the public.

Sincerely,

/s/David Tenny
Deputy Under Secretary
Natural Resources and Environment