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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PIT RIVER TRIBE; NATIVE
COALITION FOR MEDICINE LAKE
HIGHLANDS; AND MOUNT SHASTA
BIOREGIONAL ECOLOGY CENTER,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT;
UNITED STATES DEPARTMENT OF THE
INTERIOR; U.S. FOREST SERVICE;
ADVISORY COUNCIL ON HISTORIC
PRESERVATION; AND CALPINE
CORPORATION,

Defendants.

CIV-S-02-1314 DFL/JFM

MEMORANDUM OF OPINION
AND ORDER

The Pit River Tribe, joined by two other groups, challenges the decision-making process followed by the Bureau of Land Management ("BLM") and the United States Forest Service in connection with a geothermal lease to Calpine Corporation on BLM lands near Medicine Lake, California. Calpine proposes to build a geothermal power plant on the lease lands, at a location known

1 as Fourmile Hill. Plaintiffs ask the court to set aside the
2 leases, thereby putting a stop to the proposed power plant. They
3 bring suit under the National Environmental Policy Act ("NEPA"),
4 the National Historic Preservation Act ("NHPA"), the Geothermal
5 Steam Act, the National Forest Management Act ("NFMA"), and the
6 Administrative Procedure Act ("APA"). Additionally, the Tribe
7 alleges violations of the federal government's trust obligations.
8 The parties have filed cross-motions for summary judgment.

9 I. Facts and Procedural History

10 A. The Medicine Lake Highlands and the Pit River Tribe

11 The lead plaintiff is the Pit River Tribe ("Tribe"), a
12 federally registered Indian tribe. The Tribe has lived in
13 Northern California and Southern Oregon for thousands of years.
14 (Pls.' Mot. for PSJ at 3.) The Medicine Lake Highlands
15 ("Highlands") is an area located in Klamath, Modoc, and Shasta-
16 Trinity National Forests, though its borders are not clearly
17 defined. (FEIS Fig. S-1.) The area is within the Tribe's
18 ancestral homeland; however, the Highlands are not tribal land,
19 and the Tribe exercises no external sovereignty over the area.
20 (Compl. Ex. A.) The Highlands are considered sacred by the Tribe
21 and contain a number of important spiritual and cultural sites
22 that are still used by members of the Tribe. (FEIS at 3-64.)

23 B. Geothermal Leases and the Fourmile Hill Project

24 The federal government has designated the general area of
25 the Highlands as the Glass Mountain Known Geothermal Resource
26 Area ("KGRA"). The Glass Mountain KGRA may be capable of

1 producing up to 500 megawatts of electricity. (Calpine's Reply
2 at 20-22.) Under authority of the Geothermal Steam Act, 30
3 U.S.C. § 1001 et seq., the BLM leased the two parcels at issue in
4 the Glass Mountain KGRA to the predecessor in interest of Calpine
5 in 1988 for an initial term of 10 years. (FEIS at 1-12; AR
6 21274.) Calpine was assigned the leases in 1996, although it had
7 obtained operating rights in 1994. (FEIS at 1-12.) The BLM
8 extended the leases for terms of five years in 1998. (AR 21274.)

9 In 1994, Calpine drilled a temperature core hole well at the
10 location of the proposed power plant, now in dispute, known as
11 the Fourmile Hill Development Project ("Fourmile Hill"). (FEIS
12 at 1-12.) The power plant would be built approximately three
13 miles northwest of Medicine Lake in the Klamath National Forest,
14 well within the area traditionally described as the Medicine Lake
15 Highlands. (FEIS at 1-1.) In 1995, Calpine proposed a plan of
16 operations that included drilling another exploration well at
17 Fourmile Hill. (FEIS at 1-14.) In 1996, Calpine submitted a
18 full development proposal for Fourmile Hill including a 50-
19 megawatt power plant with power transmission lines from the plant
20 to a main line 24 miles away. (FEIS at S-21, 22.) The clearance
21 necessary for the power lines would disturb significantly more
22 land (335 acres) than that needed for the plant itself (about 50
23 acres). (FEIS at 2-12.) The BLM considered several different
24 routes for the power transmission lines, settling on the one that
25 it determined would have the least adverse impact on the area.

26 In 2000, Calpine acquired CalEnergy, the other major

1 geothermal lessee in the Glass Mountain KGRA. (Calpine's Answer
2 ¶ 100.) CalEnergy was the owner and operator of a lease within
3 the Glass Mountain KGRA that contains a well capable of producing
4 geothermal steam in commercial quantities, known as a paying
5 well. (Calpine's SUF ¶ 24.) Under the BLM's Geothermal Steam
6 Act regulations, a paying well on one lease entitles that lessee
7 to 40-year extensions on its other leases. Because Calpine
8 acquired a paying well, the BLM granted a 40-year extension to
9 Calpine for its other leases in the Glass Mountain KGRA on May 2,
10 2002. (Id. ¶ 25.)

11 C. Various NEPA Compliance Documents

12 The leasing and development process has led to the creation
13 of a number of NEPA documents. To begin with, in 1973, the
14 Department of the Interior prepared a programmatic Environmental
15 Impact Statement ("EIS") for nationwide implementation of the
16 Geothermal Steam Act. (AR 17071-19558.) In 1981, when the
17 initial decision was made to issue leases in the Glass Mountain
18 KGRA, the BLM completed an environmental assessment ("EA"), which
19 addressed primarily the impacts of casual use exploration,
20 including geologic mapping, soil sampling, and aerial surveys.
21 (AR 19626, 19637.) A supplemental EA ("SEA") was completed in
22 September 1984. The SEA addressed the exploration, development,
23 and production phases. (Id.) Based on the SEA, the BLM made a
24 Finding of No Significant Impact ("FONSI"), such that an EIS was
25 deemed unnecessary before the initial letting of geothermal
26 leases at the Glass Mountain KGRA. (AR 19621.) When Calpine

1 submitted its exploration plan in 1995, the BLM completed an EA
2 and issued a FONSI before approving the exploration plan. (FEIS
3 at 1-14, 16.) No EA or EIS was completed when the leases were
4 extended for five-year terms in 1998 or for 40-year terms in
5 2002. After Calpine submitted its Fourmile Hill project proposal
6 in 1996, the federal defendants began work on an EIS. The
7 agencies completed the Fourmile Hill final EIS ("FEIS") in
8 September 1998.

9 The FEIS is organized into three main sections. The first
10 describes the alternatives, including the proposed action. (FEIS
11 at 2-1 to 2-80.) This section discusses the nature of the
12 Fourmile Hill project, including all the various components of
13 the power plant. It also lays out the proposed alternative
14 routes for the power lines carrying electricity from the plant to
15 the central transmission lines. The second significant section
16 of the FEIS describes the environment affected by the project.
17 (Id. at 3-1 to 3-216.) It discusses the natural environment, for
18 example, vegetation and wildlife, as well as the human
19 environment, for example, recreation and transportation. This
20 section includes a discussion of "traditional cultural values."
21 (Id. at 3-64 to 3-77.) Finally, the FEIS has a section devoted
22 to the environmental consequences of the project and the
23 mitigation measures adopted. (Id. at 4-1 to 4-340.) This
24 section analyzes the impacts on all the various aspects of the
25 natural and human environment discussed in the previous section.
26 This section includes the FEIS' discussion of the unavoidable

1 significant effects of the project, including those to
2 traditional cultural values. (Id. at 4-335.)

3 D. Tribal Consultations

4 The record is silent as to when consultation with the Pit
5 River Tribe or any other tribe began. The Tribe received a copy
6 of the 1995 EA concerning Calpine's proposed exploration plan.
7 (Fed. Defs.' Opp'n at 14.) The Tribe did not appeal the BLM's
8 FONSI. (Id.) The BLM and Forest Service consulted the Pit River
9 and Klamath Tribes on a number of occasions during the
10 preparation of the Fourmile Hill EIS. Between October 1995 and
11 April 1998, the Forest Service and the BLM had six meetings with
12 the Pit River Tribe and eight meetings with the Klamath Tribes.
13 (FEIS at 3-66.) In addition, Calpine hired an ethnographic
14 consultant to study the area's importance to local Indians. The
15 consultant interviewed 31 local residents, mostly from the Pit
16 River Tribe, and also made several site visits. (Id. at 3-66 to
17 3-68.) This study was incorporated into the FEIS.

18 E. Agency Actions: the Record of Decision, the Moratorium,
19 and the Forest Plan Amendment

20 After completion of the FEIS, the BLM and Forest Service
21 issued a joint project Record of Decision ("ROD") approving the
22 Fourmile Hill project on May 31, 2000.¹ (AR 19982-20008.)
23 However, the ROD contained a five-year moratorium on further
24

25 ¹ Shortly before the ROD was issued, the BLM, Forest
26 Service, State Historic Preservation Officer, and Advisory
Council on Historic Preservation completed a Memorandum of
Agreement regarding the project under the National Historic
Preservation Act. (AR 20051-20071.)

1 development in the Glass Mountain KGRA, pending analysis of the
2 actual impacts of the development of the Fourmile Hill project.
3 (AR 19983.) On June 15, 2001, the BLM decided to lift the
4 moratorium, citing: (a) the serious national energy shortage,
5 (b) a new executive order directing agencies to expedite projects
6 that increase energy production, and (c) the recommendations of
7 the President's National Energy Policy Development Group for more
8 geothermal power and for the streamlining of the geothermal
9 leasing process. (AR 15471-15472.) By lifting the moratorium,
10 the agency allowed potential further geothermal development on
11 additional leases within the Glass Mountain KGRA, whether by
12 Calpine or another lessee.

13 The ROD also announced a change in the Klamath Forest Plan
14 Standard 24-25. (AR 19984.) The old Standard provided: "Protect
15 traditional Native American rights and practices (Public Law (PL)
16 95-341) to insure the integrity of the site and to assure that
17 the use will continue to occur and will not be impaired." (FEIS
18 at 4-77.) The new Standard states: "Protect traditional American
19 Indian cultural and religious uses and practices consistent with
20 Public Law 95-341 (American Indian Religious Freedom Act of
21 1978)." (AR 19984.)

22 F. Procedural History

23 The Tribe filed an administrative appeal of the ROD with the
24 Forest Service and BLM. (AR 19559, 20086.) Both appeals were
25 denied, and this action followed. (Id.) The plaintiffs advance
26 ten claims: (1) the Fourmile Hill FEIS is inadequate under NEPA;

1 (2) the project approval violates the National Historic
2 Preservation Act; (3) the 1998 lease extension violates the
3 Geothermal Steam Act; (4) the 1998 lease extension violates NEPA;
4 (5) the 1998 lease extension violates NHPA; (6) lifting the five-
5 year moratorium violates the Administrative Procedure Act; (7)
6 the Klamath Forest Plan amendment violates the National Forest
7 Management Act; (8) the failure to comply with forest plan
8 standards violates the NFMA; (9) the development of the Highlands
9 without adequate consultation with the tribes violates the
10 federal government's trust obligation to American Indians; and
11 (10) the failure to timely implement all conditions in the Record
12 of Decision is willful agency inaction in violation of the APA.

13 The parties have filed cross-motions for summary judgment on
14 all claims.

15 II. Sufficiency of the Fourmile Hill
16 Environmental Impact Statement

17 The plaintiffs argue that the Fourmile Hill FEIS is
18 deficient in its scope and depth of analysis and thus violates
19 NEPA. At first blush this would seem rather unlikely. The FEIS
20 is approximately 700 pages long. NEPA's implementing regulations
21 state that an EIS of "unusual scope or complexity shall normally
22 be less than 300 pages," and a single 50-megawatt power plant is
23 not of "unusual scope or complexity." 40 C.F.R. § 1502.7. An
24 entire ethnographic study was made of the area's importance to
25 local American Indians and is incorporated into the FEIS.
26 Nevertheless, plaintiffs argue that the FEIS is insufficient.

1 The central thrust of plaintiffs' argument is that the FEIS
2 does not explicitly compare the significant adverse impacts that
3 any geothermal development in the Medicine Lake Highlands will
4 have on Indian spiritual life to the relatively small amount of
5 electricity that can be produced there. Moreover, plaintiffs
6 contend that this comparison should have been made in light of
7 other methods for producing an equivalent amount of electricity
8 in other locations.

9 Plaintiffs misconstrue the requirements of NEPA. NEPA does
10 not require an FEIS directed to a particular project to discuss,
11 much less to set, national energy priorities. Rather, NEPA
12 requires full disclosure of the adverse environmental impacts of
13 the proposed development, as compared with alternative ways of
14 accomplishing the same thing at the same site. Here, the various
15 agencies did not need to consider the virtually unlimited number
16 of methods and locations for generating 50 megawatts of
17 electricity, like windmills near Yreka, a coal-fired plant
18 outside of Redding, or a new hydro-electric project on some
19 western river. Congress has already made it national policy to
20 pursue geothermal power generation, in the limited number of
21 locations where it is feasible, through the Geothermal Steam Act.
22 The 1973 programmatic EIS that accompanied the Geothermal Steam
23 Act considered alternative sources of power; thereafter it was
24 unnecessary for every geothermal project to reinvent the wheel.
25 All of the alternative sources of electrical power that
26 plaintiffs might suggest fail to accomplish the central purpose

1 of the Fourmile Hill project - the development of a geothermal
2 power plant to exploit the clean, renewable energy source that
3 lies beneath the mountains of the Medicine Lake Highlands.
4 Moreover, as further discussed below, the FEIS fully identifies
5 the costs and benefits of the Fourmile Hill project. It does not
6 conceal the possible damage to tribal spiritual values and
7 observance, nor does it exaggerate the potential power generation
8 at the site. NEPA requires no more.

9 The court's decision to uphold the Fourmile Hill FEIS also
10 reflects the deferential standard of review under the
11 Administrative Procedure Act, which governs the review of agency
12 decisions within the NEPA framework. Selkirk Conservation
13 Alliance v. Forsgren, 336 F.3d 944, 953 (9th Cir. 2003). Under
14 the APA, an agency decision may be overturned only if it is
15 "arbitrary, capricious, an abuse of discretion, or otherwise not
16 in accordance with law." 5 U.S.C. § 706(2) (A). The Ninth
17 Circuit applies the "rule of reason" when reviewing the adequacy
18 of an EIS. Selkirk Conservation Alliance, 336 F.3d at 958. The
19 EIS must contain a "reasonably thorough" discussion of the
20 relevant issues. Id. However, the reviewing court must not "fly
21 speck" the document. See Churchill County v. Norton, 276 F.3d
22 1060, 1071 (9th Cir. 2001); Oregon Env'tl. Council v. Kunzman, 817
23 F.2d 484, 496 (9th Cir. 1987). The role of the court is to
24 ensure that the agency took a "hard look" at the environmental
25 consequences of the proposed action. Churchill County, 276 F.3d
26 at 1072. It is not the role of the court to decide whether the

1 agency made the correct choice among the various possible
2 options.

3 Plaintiffs argue that the FEIS is insufficient because: (1)
4 it does not adequately discuss the impact of geothermal
5 development on Indian spiritual life; (2) it contains an overly
6 narrow statement of purpose and an overly vague statement of
7 need; (3) it fails to consider appropriate alternatives; (4) it
8 has an insufficient cumulative impacts analysis; (5) there are
9 various technical deficiencies or omissions; and (6) a
10 supplemental EIS is necessary to address several issues. The
11 court now turns to these specific attacks on the FEIS.

12 A. Discussion of the Impact on Indian Spiritual Life

13 The plaintiffs' central complaint about the FEIS is that it
14 fails to address head-on "the wisdom of this stark tradeoff -
15 that is, sacrifice of the Highlands' environmental integrity, Pit
16 River Tribe cultural life, and ten thousand years of spiritual
17 practice in return for a minuscule amount of electricity."

18 (Pls.' Opp'n at 2.) They argue that there should have been an
19 explicit balancing of the harm to the spiritual significance of
20 the Highlands from the cumulative impacts of development against
21 the benefits of the geothermal power, as compared to alternative
22 ways to produce the same amount of power. (Pls.' Opp'n at 10.)
23 However, the plaintiffs recognize that the FEIS acknowledges that
24 the project "will have significant unavoidable adverse impacts on
25 traditional Native American cultural uses and religious
26 practices," and includes an in-depth study of the cultural and

1 spiritual significance of the Medicine Lake Highlands. (Pls.'
2 Opp'n at 4.)

3 Plaintiffs' complaint is either with the style and format of
4 the FEIS or with the defendants' ultimate decision to permit the
5 geothermal project despite its adverse effects. The FEIS does
6 disclose the very impacts the plaintiffs want discussed. For
7 example, the FEIS states that "elements of the project would be
8 visible and audible at sites in the Medicine Lake Highlands,"
9 which may lead local Indians "to not use sites in the project
10 region." (FEIS at 4-78.) The FEIS also clearly discloses the
11 energy capacity of the Fourmile Hill project. (FEIS at S-1.)
12 The "stark tradeoff" the plaintiffs complain of is not
13 highlighted because the FEIS undertakes to discuss all impacts of
14 the project: to wildlife, air quality, recreation, and others.
15 However, as long as the impacts are fully discussed, as they are
16 here, the FEIS cannot be legally deficient for not emphasizing
17 particular effects and then performing a separate cost-benefit
18 analysis effect by effect. The EIS must ensure that the reader
19 will "understand the very serious arguments advanced by the
20 plaintiff if he carefully reviews the entire environmental impact
21 statement." Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir.
22 2000). The Fourmile Hill FEIS adequately discloses the negative
23 effect of development on Indian spirituality in return for 50
24 megawatts of electrical power generation. In plaintiffs' view,
25 this trade-off cannot justify the decision to approve the
26 project. But that is not a procedural deficiency under the APA

1 and NEPA; rather, it is a disagreement on policy outside the
2 scope of appropriate judicial review.

3 B. Overly Narrow Statement of Purpose and Overly Vague
4 Statement of Need

5 The FEIS states that the project's purpose is "to develop
6 the geothermal resource on Calpine's Federal Geothermal Leases"
7 and further states that the need was previously demonstrated by a
8 number of federal energy laws, including the Geothermal Steam
9 Act. The FEIS also emphasizes the need for alternative energy
10 sources. (FEIS at 1-3.) The plaintiffs argue that the purpose
11 is stated too narrowly and specifically, while the need is stated
12 too vaguely.² According to the plaintiffs, the purpose should
13 have been phrased narrowly but generically - to produce
14 approximately 50 megawatts of electricity. Plaintiffs argue that
15 by narrowly defining the purpose as development of geothermal
16 resources on Calpine leases, the agencies "have essentially
17 preordained the outcome of the evaluation" because no other
18 alternative would satisfy that purpose. (Pls.' Opp'n at 9-13.)

19 The "purpose and need" section of an EIS is important
20

21 ² Plaintiffs criticize the statement of need in the FEIS as
22 overly vague. The FEIS relies upon other statutes and
23 directives, such as the Geothermal Steam Act, which suggest a
24 policy in favor of geothermal power development. Plaintiffs
25 argue that none of the documents cited expresses any need for
26 development in the Glass Mountain KGRA specifically. But
plaintiffs never suggest a more appropriate formulation of the
statement of need. According to the plaintiffs, a proposed power
development must do more than just identify a purported need for
energy. (Pls.' Opp'n at 13.) The formulation in the FEIS is
more specific than this by citing a need for geothermal
development specifically.

1 because it defines the scope of the alternatives analysis.
2 Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066
3 (9th Cir. 1998). Thus, when the purpose and need are stated
4 narrowly, few alternatives need be discussed because few
5 alternatives will achieve the same specific purpose and meet the
6 same need. The rule of reason applies to this section of the
7 EIS, such that the statement of purpose cannot be unreasonably
8 narrow. Id. at 1067. The Ninth Circuit has not held an EIS
9 deficient because of an improper statement of purpose or need and
10 has approved a number of site-specific, narrow statements. See
11 id. (purpose was to "meet market demand for timber in Southeast
12 Alaska"); City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123
13 F.3d 1142, 1155-57 (9th Cir. 1997) (purpose was to achieve a
14 particular flow of traffic on a stretch of highway). For
15 example, in City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th
16 Cir. 1986), the Ninth Circuit reversed the district court and
17 found that the EIS' stated purpose of providing a "safe,
18 effective means of transferring timber" from a particular tract
19 of land to market was not improperly narrow and rejected the
20 contention that the purpose should have been stated more broadly
21 as "commercial timber harvesting." Id. at 1021. The court held
22 that a site-specific proposal need not have a "broad social
23 interest" purpose and need. Id.

24 The stated purpose and need in the Fourmile Hill FEIS is
25 appropriate for a site-specific EIS. It is not unreasonable for
26 the FEIS to focus narrowly on this particular project and to

1 state its purpose in terms of the geothermal leases held by
2 Calpine. Earlier NEPA documents have considered the broader
3 actions. The programmatic EIS considered whether any geothermal
4 development was advisable. The 1984 SEA considered whether to
5 begin geothermal leasing at the Glass Mountain KGRA. In light of
6 these two more general documents, it is entirely appropriate for
7 the Fourmile Hill FEIS to state its purpose narrowly.

8 C. Consideration of Appropriate Alternatives

9 The alternatives analysis is the "heart" of the EIS. 40
10 C.F.R. § 1502.14; Friends of Southeast's Future, 153 F.3d at
11 1065. The range of alternatives is dictated by "the stated goal
12 of a project." Muckleshoot Indian Tribe v. U.S. Forest Serv.,
13 177 F.3d 800, 812 (9th Cir. 1999). As with the rest of the EIS,
14 the "rule of reason" applies to the agencies' choice of
15 alternatives. City of Angoon, 803 F.2d at 1020. Plaintiffs
16 argue that the FEIS fails to consider enough appropriate
17 alternatives. (Pls.' Opp'n at 13-16.) The FEIS considers a no-
18 action alternative and six alternatives that differ only in the
19 placement of the project's power lines. The plaintiffs argue
20 that the FEIS is inadequate because it fails to consider other
21 energy technology like solar energy or "amending the Klamath and
22 Modoc Forest Plans to protect the area from development." (Pls.'
23 Opp'n at 15.)

24 The alternatives considered in the Fourmile FEIS are narrow.
25 However, they are tailored to the statement of purpose and need,
26 and "it makes no sense to consider the alternative ways by which

1 another thing might be achieved.” Friends of Southeast’s Future,
2 153 F.3d at 1067. This is especially true when the sorts of
3 alternatives suggested by plaintiffs, other sources of power and
4 complete protection of the site, are the functional equivalent of
5 the no-action alternative. The sorts of alternatives suggested
6 by the plaintiffs are more appropriate to earlier NEPA documents,
7 and, indeed, the programmatic EIS for the Geothermal Steam Act
8 did consider alternative sources of electricity including coal,
9 oil, natural gas, nuclear, hydroelectric, and solar. (AR 17430-
10 17581.) The discussion of these alternatives is thorough, if not
11 exhaustive, stretching some 150 densely worded pages. The
12 different alternative sources of energy are discussed in turn,
13 each with its own advantages and disadvantages, merits and
14 demerits. The discussion includes not just the direct
15 environmental impacts of power generation, but also the impacts
16 of extraction and transportation of the fuel where that is
17 relevant, such as for coal, oil, and nuclear power. In light of
18 this extensive discussion of alternatives, the BLM decided to
19 issue regulations to put the Geothermal Steam Act into effect.
20 Thus, as a result of earlier environmental analyses, the BLM
21 already had settled on developing geothermal power, where
22 possible, despite the various other ways that the nation can meet
23 its electricity needs. The only task for the FEIS is to identify
24 the effects of developing geothermal power at the Fourmile Hill
25 site.

26 At a more specific level, plaintiffs downplay the importance

1 of the FEIS' consideration of several alternative routes for the
2 electrical transmission lines leading from the plant. These
3 transmission lines would have to travel the 24 miles from the
4 plant to the main Bonneville Power Authority transmission line.
5 Construction of the power plant itself would disturb only 50
6 acres of wilderness, but constructing the transmission lines
7 would require disturbing over six times that amount - 335 acres.
8 (FEIS at 2-12.) The FEIS considers six different routes for the
9 transmission lines, a serious exploration of the different
10 alternatives. (FEIS at 2-60.)

11 Additionally, the Ninth Circuit has held that the plaintiff
12 bears the burden of coming forward with a "specific, detailed
13 counterproposal" and must do so as early as possible in the NEPA
14 process. Morongo Band of Mission Indians v. FAA, 161 F.3d 569,
15 576 (9th Cir. 1998). The plaintiffs have failed to offer any
16 alternative proposals other than vague references to alternative
17 power sources and the no-action alternative restated differently.
18 The FEIS adequately discusses the alternatives that are
19 appropriate in light of the project's purpose and need.

20 D. Cumulative Effects Analysis

21 An EIS must analyze the cumulative impacts from reasonably
22 foreseeable future actions. 40 C.F.R. § 1508.7. Plaintiffs
23 contend that the Fourmile Hill FEIS fails to adequately analyze
24 the cumulative effects of future geothermal projects in the Glass
25 Mountain KGRA because it considers only one other proposed
26 geothermal project, a proposed power plant known as Telephone

1 Flat. They argue that there is a likelihood of continued
2 geothermal development in the area, leading to additional plants
3 beyond the proposed Fourmile Hill and Telephone Flat plants.³
4 (Pls.' Opp'n at 17.)

5 The BLM concluded that the impacts from further geothermal
6 development beyond the two proposed projects were too speculative
7 to be considered in the FEIS. The BLM found that additional
8 development in the Glass Mountain KGRA would "depend on the
9 success of the currently proposed projects and the market for
10 power." (FEIS at 4-333.) In other words, the economic
11 feasibility of geothermal power generation is currently unknown,
12 and Fourmile Hill and Telephone Flat are test cases. If they are
13 unsuccessful, then the BLM concluded that there would be no more
14 geothermal development in the area. (Id.) Even if these
15 projects prove successful, there is no way for the BLM to know
16 precisely where additional commercially viable geothermal
17 resources could be found because the necessary exploration has
18 not yet occurred.

20 ³ The plaintiffs' only specific objection to the inadequate
21 cumulative impacts analysis, however, is that the "vast
22 landscape-level impacts from such build-out [ten or more power
23 plants] would be devastating to the Tribes' spiritual interests
24 in and cultural uses of Medicine Lake and the surrounding
25 Highlands." (Pls.' Opp'n at 19.) But the FEIS' discussion of
26 cumulative impacts indicates that the activities considered would
"result in cumulatively significant visual impacts" and "in
cumulatively significant impacts on traditional cultural uses."
(FEIS at 4-317, 321.) These impacts are not quantifiable.
Therefore, even had other future projects been factored in, the
conclusion would have been the same - that the development would
"result in cumulatively significant impacts" on traditional
cultural uses and the natural visual aesthetic.

1 Given these uncertainties, the BLM concluded that it is "too
2 speculative to attempt to estimate the expected environmental
3 effects of future geothermal development projects." (Id.) The
4 Telephone Plant proposal is the only project that the record
5 suggests is being actively considered by the BLM or by any of the
6 geothermal lessees. The plaintiffs cite a number of pieces of
7 evidence which indicate that the parties are contemplating the
8 possibility of future development. (Pls.' Mot. at 17-18.) But
9 none of that evidence indicates that there are any projects
10 beyond the talking stage or that further development would be
11 commercially or practically viable. Because of all of the
12 obstacles to future development, and the general uncertainty
13 surrounding it, the BLM's determination that Telephone Flat is
14 the only reasonably foreseeable future development is reasonable.

15 E. Various Alleged Technical Deficiencies and Omissions

16 Plaintiffs advance a number of objections to the FEIS that
17 can be grouped under this heading. The objections all amount to
18 impermissible fly-specking of a complex, lengthy FEIS. See
19 Friends of Southeast's Future, 153 F.3d at 1063 (holding that
20 court must not "fly-speck the document and hold it insufficient
21 on the basis of inconsequential, technical deficiencies")
22 (internal quotation omitted).

23 1. Socioeconomic Impacts on Native Americans

24 The plaintiffs argue that "[t]he continuing erosion of
25 Native peoples' spiritual connection to the land - and the loss
26 of traditional religious sites for spiritual renewal - may well

1 increase or exacerbate social ills, such as substance abuse [and]
2 mental illness." (Pls.' Opp'n at 20.) The only support offered
3 for this assertion is a declaration by a member of the Tribe.
4 (Preston Decl. ¶¶ 7-8.) He offers no expert qualifications for
5 his opinion, nor does he cite any statistical study of Indian
6 substance abuse or mental illness that finds a reliable causal
7 connection to the loss of traditional religious sites. The FEIS
8 discusses at length the impact of the project on the Tribe's
9 cultural and spiritual use of the land. (FEIS at 4-59 to 4-81.)
10 It recognizes that the project would "disproportionately affect
11 the local American Indians because it could affect tribal use and
12 spiritual values." (FEIS at 4-296.) The FEIS' rather
13 comprehensive discussion of the impacts on local Indians is
14 adequate.

15 2. Nitrogen Emissions

16 Plaintiffs argue that the FEIS is based on flawed estimates
17 of nitrogen oxide emissions. Plaintiffs' argument reveals inter-
18 agency disagreement between the Siskiyou County Air Pollution
19 Control District, the California Air Resources Board, and the
20 EPA. (Pls.' Opp'n at 22-24.) However, NEPA does not require a
21 court "to resolve disagreements among various scientists."
22 Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359
23 (9th Cir. 1993). "An agency must have discretion to rely on the
24 reasonable opinions of its own qualified experts even if . . . a
25 court might find contrary views more persuasive." Id. (omission
26 in original) (quoting Marsh v. Or. Natural Res. Council, 490 U.S.

1 360, 378, 109 S. Ct. 1851 (1989). The FEIS apparently relies on
2 the data and opinion of the Siskiyou County Air Pollution Control
3 District. Where there are divergent views among various experts,
4 as here, the BLM is entitled to rely on the analysis and
5 conclusions of a local agency with expertise and experience in
6 the field like the Siskiyou County Air Pollution Control
7 District.

8 3. Hydrogen Sulfide Emissions

9 The plaintiffs also argue that the FEIS' discussion of
10 hydrogen sulfide emissions is inadequate. (Pls.' Opp'n at 24-
11 25.) There were differing expert estimates of hydrogen sulfide
12 emissions from a completed power plant at Fourmile Hill: one at
13 about 7 tons per year during operation, one at roughly 18 tons
14 per year. (FEIS at 4-230; AR 15391) This is a serious
15 difference. But even the plaintiffs attribute this to "a lack of
16 information about the chemical properties of the geothermal
17 resource." (Pls.' Opp'n at 25.) The FEIS is based on the
18 expectation that concentrations of hydrogen sulfide will be low.
19 (FEIS at 4-324.) In addition, many mitigation measures are
20 required, and the emission is governed by the Clean Air Act. The
21 FEIS contains substantial discussions of hydrogen sulfide
22 emissions. The FEIS' reliance on expert predictions and
23 mitigation by technological controls is not unreasonable.

24 4. Water Quality Analysis

25 Plaintiffs' argument that the FEIS' water quality analysis
26 is flawed comes down to two statements in the FEIS that

1 plaintiffs find contradictory. Plaintiffs point to one statement
2 asserting that the geothermal reservoir is replenished from deep
3 sources and to another asserting that recharge occurs from
4 surface waters.⁴ (Pls.' Opp'n at 26.) The document as a whole
5 seems to be based on the assumption that there is an impenetrable
6 layer between the surface/shallow ground water and the deeper
7 geothermal reservoir. (See FEIS at 3-42 to 3-50.) The
8 plaintiffs identify one sentence in a 700-page document that
9 could possibly be interpreted as suggesting that "some" of the
10 lost geothermal fluids "may" be replaced from groundwater
11 sources. (FEIS at 4-44.) No reliance appears to be placed on
12 this tentative statement. This is fly-specking; the FEIS'
13 discussion of water quality and hydrology is not unreasonable.

14 F. Failure to Prepare a Supplemental EIS

15 Plaintiffs argue that a number of flaws were found in the
16 FEIS and that the corrections were not circulated to the public.
17 (Pls.' Opp'n at 28-33.) They also argue that an SEIS should have
18 been prepared to incorporate these corrections. The corrections
19 relate to National Register eligibility, noise and visual
20 impacts, and seismic activity.

23 ⁴ The FEIS states that "[i]t is possible that some natural
24 recharge to the geothermal reservoir occurs via the caldera ring
25 fractures system." (FEIS at 4-44.) This seems to indicate
26 recharge from shallow groundwater or surface water. Earlier in
the document, the FEIS states that "[s]hallow groundwater within
the caldera is probably separated from the shallow groundwater
outside the caldera by shallow impermeability within the ring
fracture system The geothermal system may be recharged
from deep groundwater." (FEIS at 3-50.)

1 An agency must supplement an EIS when “[t]here are
2 significant new circumstances or information relevant to
3 environmental concerns and bearing on the proposed action or its
4 impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). In these circumstances,
5 an agency cannot “rest on the original document” but must
6 continue to take a “hard look at the environmental effects of its
7 action.” Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557
8 (9th Cir. 2000). None of the three items cited by the plaintiffs
9 is significant enough to require an SEIS. In 1999, after the
10 FEIS was completed, the Medicine Lake Highlands were determined
11 to be eligible for listing on the National Register of Historic
12 Places. However, the FEIS discusses at length the cultural and
13 archeological resources in the area; eligibility of the area for
14 listing on the National Register does not change these underlying
15 facts. (FEIS at 3-52 to 3-63.) Moreover, that the agencies and
16 Calpine conducted supplemental noise and visual impact studies
17 after the Register eligibility was announced shows that they
18 continued to take a hard look at the environmental consequences.
19 It would be perverse to create a disincentive to further
20 analysis.

21 The finding of one additional fault-line and a potential
22 increase in the likelihood of seismic activity also does not
23 warrant a supplemental EIS. The FEIS discusses the risks of
24 seismic activity and states that there is a risk of damage to
25 wells and pumps and damage to the transmission lines. The FEIS
26 concludes that the risks are low because the historic seismic

1 activity in the area has been low. (FEIS at 4-8.) The discovery
2 of an additional fault-line does not alter these risks - none of
3 which are very threatening - so significantly as to warrant an
4 SEIS. The agencies' decision not to prepare an SEIS will be
5 overturned only if arbitrary and capricious. Env'tl. Coalition of
6 Ojai v. Brown, 72 F.3d 1411, 1418 (9th Cir. 1995). None of the
7 facts cited by the plaintiffs show the agencies' decision to be
8 arbitrary and capricious.⁵

9 G. Conclusion

10 An EIS need only be sufficient to foster "both informed
11 decision making and informed public participation." Ass'n of
12 Pub. Agency Customers v. Bonneville Power Admin., 126 F.3d 1158,
13 1183 (9th Cir. 1997) (internal quotations omitted). The 700-page
14 Fourmile Hill FEIS comprehensively discusses all of the impacts
15 from the project, including a significant discussion of its
16 impact on the local Indians. None of the omissions or
17 deficiencies raised by the plaintiffs is unreasonable. NEPA
18 requires only informed agency decision making, not any particular
19 outcome. The role of the reviewing court is not to insure that
20 the agency made the best decision possible, or even a reasonable
21 one, but simply that the environmental impact statement prepared
22 by the agency contains "a reasonably thorough discussion of the
23

24 ⁵ The plaintiffs also separately argue that the FEIS is
25 deficient because the seismic data were not circulated for public
26 comment and review. They cite no cases for this proposition. If
the data do not necessitate an SEIS, then they cannot invalidate
the FEIS. To hold otherwise would be inconsistent with the
regulations and cases that govern when an SEIS is necessary.

1 significant aspects of the probable environmental consequences."
2 Churchill County, 276 F.3d at 1071. The Fourmile Hill FEIS
3 includes a more than reasonably thorough discussion of the
4 probable environmental consequences of the proposed development
5 at Fourmile Hill.

6 III. National Historic Preservation Act Challenge to
7 the Project Approval

8 Plaintiffs contend that the federal agencies violated the
9 National Historic Preservation Act by not properly identifying
10 historic properties on the Fourmile Hill site. The National
11 Historic Preservation Act requires the agency to take the
12 following actions prior to a federal undertaking: "make a
13 reasonable and good faith effort to identify historic properties;
14 determine whether identified properties are eligible for listing
15 on the National Register . . .; assess the effects of the
16 undertaking on any eligible properties found; determine whether
17 the effect will be adverse; and avoid or mitigate any adverse
18 effects." Muckleshoot Indian Tribe, 177 F.3d at 805 (citations
19 omitted). There are few cases that analyze NHPA's requirements.
20 The leading case analyzing the good faith identification
21 requirement is Pueblo of Sandia v. United States, 50 F.3d 856,
22 859-63 (10th Cir. 1995). In Sandia, the Forest Service's only
23 effort to identify important cultural properties was a request
24 for information from the tribes. Id. The court held that this
25 was not reasonable nor in good faith. Id. In Muckleshoot Indian
26 Tribe, the Ninth Circuit relied on Sandia to find that actions by

1 the Forest Service satisfied the statute. 177 F.3d at 806-07.
2 The Forest Service's actions in Muckleshoot Indian Tribe did not
3 include interviews and field surveys, and thus were less
4 extensive than those at Fourmile Hill. Id. The efforts at
5 Fourmile Hill went well beyond those in Sandia and Muckleshoot
6 and were not unreasonable or in bad faith.⁶

7 Plaintiffs specifically argue that the agencies' decision
8 not to attempt to identify the cultural resources along every
9 alternative power line route was unreasonable.⁷ However, a BLM
10 regulation provides that "[w]here the alternatives under
11 consideration consist of corridors or large land areas, . . . the
12 agency official may use a phased process to conduct
13 identification and evaluation efforts." 36 C.F.R. § 800.4(b)(2).
14 This regulation allows postponing the process of identifying
15 sites until the agency chooses between the alternatives. Id.
16 "The agency official may also defer final identification and

17
18 ⁶ The plaintiffs challenge the agencies' NHPA compliance
19 under the APA. The highly deferential standard of review under
20 the APA applies here as it does elsewhere. See San Carlos Apache
21 Tribe v. United States, 272 F.Supp.2d 860, 886 n.16 (D. Ariz.
22 2003). Plaintiffs make a separate argument that the defendants
23 failed to coordinate their NHPA and NEPA analyses. The
24 regulations do suggest coordination of NHPA review with review
25 under other statutes, including NEPA. 36 C.F.R. § 800.3(b)
("should coordinate"). This is an agency directive intended to
benefit the agency by preventing duplication of effort, so that
the agency can use "information developed for other reviews" to
satisfy NHPA. Id. Plaintiffs cite no authority for the
proposition that agency review under NEPA and NHPA must be
coordinated or that the analysis must somehow reflect this
coordination.

26 ⁷ NHPA regulations only require "a reasonable and good
faith effort to carry out appropriate identification efforts."
36 C.F.R. § 800.4(b)(1).

1 evaluation of historic properties if it is specifically provided
2 for in a memorandum of agreement." Id. There is a memorandum of
3 agreement on Fourmile Hill, signed by the BLM, the Forest
4 Service, the State Historic Preservation Officer, and the
5 Advisory Council on Historic Preservation,⁸ which provides for
6 additional studies on "places subject to the direct and indirect
7 effects by the proposed Project transmission line." (AR 20056.)
8 In the circumstances here, the defendants have met their
9 identification and evaluation obligations under NHPA and its
10 implementing regulations.

11 IV. Challenges to the 1998 Lease Extension

12 A. The NEPA and NHPA Claims

13 When the leases were extended for five years in 1998, the
14 BLM conducted no NEPA review. Neither an EA nor an EIS was
15 completed. The plaintiffs argue that the lease extensions
16 therefore violated NEPA. (Pls.' Mot. at 22.) Plaintiffs also
17 argue that the defendants' failure to prepare any report on the
18 1998 lease extension violated NHPA. (Id. at 26.) However, the
19 completion of the Fourmile Hill FEIS moots both of these claims.⁹
20

21 ⁸ The Pit River Tribe, and other tribes, were invited to
22 sign the MOA but apparently declined.

23 ⁹ Calpine also asserts a laches defense to these claims.
24 "[L]aches must be invoked only sparingly in environmental cases."
25 Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir.
26 1989). The plaintiffs only learned of the lease extensions
through a Freedom of Information Act request in 1999. Since
then, they have written letters to the EPA and Forest Service and
made comments during the EIS processes for both Fourmile Hill and
Telephone Flat. (Pls.' Reply in Support of PSJ at 26-27.) A
finding of laches is inappropriate in these circumstances.

1 NEPA and NHPA are procedural statutes. Apache Survival
2 Coalition v. United States, 21 F.3d 895, 906 (9th Cir. 1994).
3 The relief available is also only procedural. A plaintiff's
4 effort to compel agency compliance with the statutory procedures
5 is mooted when the agency later completes those very same
6 procedures because that is the only relief plaintiff to which is
7 entitled. Thus, the completion of an EIS moots a claim that NEPA
8 was violated when an agency failed to prepare an EA or EIS.
9 Aluminum Co. of Am. v. Bonneville Power Admin., 175 F.3d 1156,
10 1163 (9th Cir. 1999); City of Newport Beach v. Civil Aeronautics
11 Bd., 665 F.2d 1280, 1284 (D.C. Cir. 1981) (filing of an EIS
12 recommending agency action rendered claim moot); Blue Ocean Pres.
13 Soc'y v. Watkins, 767 F.Supp. 1518, 1523 (D.Haw. 1991) ("[A] suit
14 to compel an EIS is rendered moot when the EIS is completed and
15 filed."). Plaintiffs contend that the lease extensions gave
16 Calpine the right to develop geothermal plants on the leases and,
17 thus, a full EIS considering the impacts of development should
18 have been completed. (Pls.' Mot. at 23-25.) Even assuming that
19 the plaintiffs' contention is correct, their challenge to the
20 1998 lease extension under those statutes is nevertheless moot
21 because the completion of the FEIS satisfies NEPA, and the
22 completion of the FEIS and the Memorandum of Agreement satisfies
23 NHPA.¹⁰

24
25 ¹⁰ Even were the court to reach the merits, the plaintiffs'
26 claims would fail. Agency actions that do not change the
environmental status quo are not subject to NEPA. Nat'l Wildlife
Fed'n v. Espy, 45 F.3d 1337, 1343 (9th Cir. 1995). Where the
action "will result in one injury" that is simply extended in

1 B. The Geothermal Steam Act Claim

2 Under the Geothermal Steam Act regulations applicable when
3 the BLM extended Calpine's leases, a geothermal lessee must
4 include a report with its extension request showing bona fide
5 efforts to develop the geothermal resource through: (1)
6 exploration, (2) permit applications (including environmental
7 studies and other preliminary work), and (3) marketing or sales
8 activities. These three activities are analyzed in light of
9 current economic factors. 43 C.F.R. § 3203.1-4(c)(1)(i)-(iv)
10 (1997). Plaintiffs complain that the BLM violated the Geothermal
11 Steam Act when it extended the leases in 1998. They argue that
12 there is nothing in the record to demonstrate the bona fide
13 efforts necessary for the lease extension, such that the BLM's
14 1998 decision was arbitrary and capricious. (Pls.' Mot. at 29-
15 30.)

16 In requesting an extension on the Fourmile Hill leases,
17 Calpine submitted a brief statement of its activities. These
18 activities included preparation of an EA supporting Fourmile Hill
19

20 _____
21 time, for example, "continued degradation of the wetlands from
22 grazing," the environmental status quo is unchanged. Nat'l
23 Wildlife Fed'n, 45 F.3d at 1344. In this case, the lease
24 extension did not change the environmental status quo because the
25 extensions gave the lessees no additional environment-disturbing
26 rights. Therefore, the BLM's extension of the leases was exempt
from NEPA. The extensions were similarly exempt from NHPA.
"Because of the operational similarity between the two statutes,
courts generally treat "major federal actions" under the NEPA as
closely analogous to "federal undertakings" under the NHPA." Sac
and Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1263 (10th Cir.
2001).

1 exploration, sinking the Fourmile Hill test well, and preliminary
2 work on the Fourmile Hill development, mostly associated with the
3 preparation of an EIS. (AR 21282.) Calpine's expenses for these
4 activities totaled \$2.5 million. (Id.) The statute and
5 regulations provide explicitly that bona fide effort is judged
6 against the backdrop of the current market for geothermal
7 resources. 30 U.S.C. § 1005(h); 43 C.F.R. § 3203.1-4(c)(iv).
8 Calpine took serious steps toward development at Fourmile Hill;
9 the drilling of the test well alone cost nearly a half-million
10 dollars. (AR 21282.) The BLM's determination that these
11 activities were bona fide efforts was not arbitrary and
12 capricious.

13 V. Lifting the Five-Year Moratorium

14 Plaintiffs argue that the BLM's lifting of the five-year
15 moratorium on further development in the Highlands violated the
16 Administrative Procedure Act. (Pls.' Opp'n at 50-51.)
17 Plaintiffs do not specifically identify what procedures the APA
18 requires that were not followed in this case. The BLM rescinded
19 the moratorium in an agency decision. (AR 15471-72.) It based
20 the decision on the new, serious energy shortage, a new executive
21 order directing agencies to expedite projects that increase
22 energy production, and the recommendations of the President's
23 National Energy Policy Development Group for more geothermal
24 power and the streamlining of the geothermal leasing process.
25 (Id.) There is a rational connection between the energy shortage
26 and administrative policies favoring geothermal power and the

1 lifting of the development moratorium. This is all that is
2 required under the "arbitrary and capricious" standard of review
3 under the APA. Ariz. Cattle Growers' Ass'n v. U.S. Fish &
4 Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001) ("To
5 determine whether an agency violated the arbitrary and capricious
6 standard, this court must determine whether the agency
7 articulated a rational connection between the facts found and the
8 choice made."). The BLM's decision to lift the development
9 moratorium because of the nation's energy shortage was not
10 arbitrary and capricious.

11 VI. National Forest Management Act Claims

12 A. The Klamath Forest Plan Amendment

13 Plaintiffs argue that the amendment of the Klamath Forest
14 Plan Standard 24-25 violated the National Forest Management Act.
15 The Plan amendment was announced in the 2000 ROD and is governed
16 by the NFMA regulations in effect in 1999.¹¹ The applicable
17 regulation states that "the Forest Supervisor shall determine
18 whether a proposed amendment would result in a significant change
19 in the plan." 36 C.F.R. § 219.10(f) (1999). If the amendment is
20 significant, then the same procedures should be followed as for
21 development and approval of the plan itself. Id.

24 ¹¹ The current regulations require only that any amendment
25 be based on the identification and consideration of the relevant
26 issues, applicable information, and an analysis of the proposed
amendment's effects. 36 C.F.R. § 219.8. The previous
distinction between significant and non-significant amendments no
longer exists, and it appears that even significant plan
amendments no longer need to go through any particular procedure.

1 Plaintiffs contend that the amendment to Plan Standard 24-25
2 is significant. The old Standard provided: "Protect traditional
3 Native American rights and practices (Public Law (PL) 95-341) to
4 insure the integrity of the site and to assure that the use will
5 continue to occur and will not be impaired." (FEIS at 4-77.)
6 The new Standard states: "Protect traditional American Indian
7 cultural and religious uses and practices consistent with Public
8 Law 95-341 (American Indian Religious Freedom Act of 1978)." (AR
9 19984.) Plaintiffs argue that the new Standard significantly
10 reduces the protection afforded to traditional Indian land uses.
11 Defendants, on the other hand, argue that this was primarily a
12 stylistic change.

13 There is a fair amount of regulatory guidance as to what is
14 "significant," but none of it actually defines the term. The
15 Forest Service Handbook gives a non-exclusive list of factors to
16 be used to determine significance, which includes timing,
17 location and size of the affected area, relationship to the long-
18 term goals of the Plan, and application to future actions.
19 Forest Service Handbook § 1909.12.5.32(3). The Forest Service
20 Manual lists four categories of actions that are not significant
21 amendments. Forest Service Manual § 1922.51. But these
22 categories reuse the word "significant", or a synonym, in the
23 definitions, making these regulations tautological and therefore
24 unhelpful.¹²

25
26 ¹² For example, the Forest Service Manual lists four
categories of actions that do not significantly affect the
environment. The first three are: (1) "Actions that do not

1 Whatever the meaning of the term "significant," the Forest
2 Service's determination that a plan amendment is not significant
3 is reviewed under the deferential arbitrary and capricious
4 standard. Native Ecosystems Council v. Dombeck, 304 F.3d 886,
5 900 (9th Cir. 2002). Applying this standard, every published
6 opinion reviewing the Forest Service's determination that a plan
7 amendment is not significant has upheld that determination. See
8 id. at 900 (holding that amendment of Forest Plan to allow a
9 higher road density in a particular area was not significant);
10 Citizens Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d
11 1012, 1034-35 (10th Cir. 2002) (holding that amendment of Forest
12 Plan to allow construction of a building too tall under the old
13 standard was not significant); Wyo. Sawmills, Inc. v. U.S. Forest
14 Serv., 179 F.Supp.2d 1279, 1300-04 (D.Wyo. 2001) (holding that
15 amendment of Forest Plan that was more protective of traditional
16 Indian use of land, at the possible expense of logging interests,
17 was not significant).

18 Here, the Forest Service's determination that the amendment
19 of Standard 24-25 is not a significant change to the Forest Plan
20 is not arbitrary and capricious. The old and the new Standards
21 have similar language, and both reference the American Indian
22 Religious Freedom Act. Even assuming that the old Standard was

24 significantly alter the multiple-use goals and objectives . . .
25 ;" (2) "Adjustments of management area boundaries when the
26 adjustments do not cause significant changes in the multiple-use
goals and objectives . . . ;" (3) "Minor changes in standards and
guidelines." Forest Service Manual § 1922.51 (emphasis added).

1 enforceable and more protective of traditional Indian use of the
2 land, a debatable point, the change is not obviously
3 significant.¹³ The amendment must be viewed against the Plan's
4 "multiple-use goals and objectives." Insuring continued
5 traditional uses of the land is but one goal of many in the Plan,
6 including wildlife conservation, recreation, and logging. See
7 Native Ecosystems Council, 314 F.3d at 900 (holding that a Forest
8 Plan amendment was not significant because it did "not alter
9 multiple-use goals or objectives for long-term land and resource
10 management"). Under the regulations, the Forest Supervisor must
11 determine whether the amendment is a significant amendment of the
12 Plan, not just a significant amendment of any one of the Plan's
13 provisions. Given that the new Standard continues to protect
14 traditional Indian land uses, and that all of the myriad other
15 land use "goals and objectives" remain unchanged, the Forest
16 Service's determination that the amendment is not significant is

17
18 ¹³ The plaintiffs argue that the amendment is significant
19 because the Fourmile Hill project was inconsistent with the old
20 Standard and so could not have occurred without the amendment.
21 (Pls.' Opp'n at 44.) There is language in the FEIS that
22 indicates that the Forest Service believed that there was a
23 "potential inconsistency" between the new Standard and the
24 language, though not "the intent," of the old Standard. (FEIS at
25 4-78.) This potential inconsistency arose from the Forest
26 Service's interpretation of the phrase "assure that the use will
continue to occur and will not be impaired" to mean that the
Forest Service must insure that the Indian community will
continue the religious use of an area. (Id.) The Forest
Service's opinion was that this was an unenforceable policy
because the agency could not require American Indians to continue
to use an area in any particular way. The old Standard,
interpreted in this fashion, would be unenforceable. The Plan
amendment was intended to correct this supposed problem while
maintaining a level of protection consistent with the American
Indian Religious Freedom Act.

1 not arbitrary and capricious.

2 B. Project Approval

3 Plaintiffs allege that approval of the Fourmile Hill project
4 violated the NFMA because the project is inconsistent with the
5 Klamath and Modoc Forest Plans.¹⁴ (Compl. ¶ 124.) The
6 plaintiffs argue that Fourmile Hill is inconsistent with the
7 Modoc Plan Standard 2-5, which provides that the Plan will
8 “[p]rotect access and use of sites and locations important to
9 traditional Native American religious and cultural practices
10 consistent with” the American Indian Religious Freedom Act
11 (“AIRFA”). (Pls.’ Opp’n Ex. G.)

12 Whether the Fourmile Hill project is consistent with Modoc
13 Forest Plan Standard 2-5 depends on what that Standard means.
14 Unfortunately, the Standard is ambiguous. It states that access
15 and use will be protected consistent with AIRFA, so that AIRFA
16 determines the scope of the Plan’s protections. AIRFA states
17 that “it shall be the policy of the United States to protect and
18 preserve for American Indians their inherent right of freedom to
19 believe, express, and exercise the traditional religions of the
20

21 ¹⁴ Plaintiffs’ allegations and briefs concentrate on the
22 failure of the FEIS and ROD to “address” all the relevant
23 standards in the two Forest Plans. (Pls.’ Opp’n at 45-47.)
24 However, plaintiffs seem to be basing this claim on 16 U.S.C. §
25 1604(i), which requires that actions be consistent with Forest
26 Plans. See Friends of Southeast’s Future, 153 F.3d at 1070. A
violation of § 1604(i) is not a failure to discuss possible
inconsistency, but the inconsistency itself. Plaintiffs’
arguments about a failure to discuss consistency with certain
standards are irrelevant; the relevant question is whether the
Fourmile Hill project is consistent with the Modoc and Klamath
Forest Plans.

1 American Indian . . ., including but not limited to access to
2 sites, use and possession of sacred objects, and the freedom to
3 worship through ceremonials and traditional rites." 42 U.S.C. §
4 1996. None of the statutory language is directed to other land
5 uses that may detract from religious observance while not
6 preventing access to sites or preventing worship. Moreover, the
7 general language about a "policy" of the United States has led
8 courts to hold that AIRFA "requires federal agencies to consider,
9 but not necessarily defer to, Indian religious values. It does
10 not prohibit agencies from adopting all land uses that conflict
11 with traditional Indian religious beliefs." Wilson v. Block, 708
12 F.2d 735, 747 (D.C. Cir. 1983). The Ninth Circuit has held that
13 AIRFA "does no more than direct federal officials to familiarize
14 themselves with Native American religious values." Standing Deer
15 v. Carlson, 831 F.2d 1525, 1530 (9th Cir. 1987).

16 The Forest Service's determination that the Fourmile Hill
17 project is consistent with the Forest Plan provision cannot be
18 deemed arbitrary and capricious. The Forest Service had before
19 it a thorough evaluation of the tribes' spiritual interest in the
20 Highlands and the possible effects of the power plant on the
21 tribes' religious practices. Development at Fourmile Hill does
22 not prevent access to important religious and cultural sites
23 within the Highlands.¹⁵ (FEIS at 4-336.) It does not affect the
24

25 ¹⁵ After the amendment previously discussed, the Klamath
26 Forest Plan Standard 24-25 is almost identical to Standard 2-5 of
the Modoc Plan. All of the above arguments about the Modoc Plan
apply with equal force to the Klamath Plan.

1 local Indians' freedom of belief or prevent them from continuing
2 traditional religious practices if they so choose. The agencies
3 considered Indian religious values in their decision and the
4 Forest Plan does not clearly require more.

5 VII. Indian Trust Obligations

6
7 Plaintiffs assert a claim based on the federal defendants'
8 violation of their fiduciary obligations to the Tribe. They
9 argue that the claim arises out of the federal defendants'
10 issuance of the leases, extension of the leases, and approval of
11 the Fourmile Hill project. (Pls.' Mot. at 17-21; Pls.' Opp'n at
12 47-48.) The plaintiffs emphasize the spiritual importance of the
13 Highlands and the Tribe's assertion of jurisdiction over the
14 Highlands in its constitution. That the Tribe asserts
15 jurisdiction over the Highlands is an internal tribal matter and
16 does not turn the Highlands into tribal land. See Felix Cohen,
17 Handbook of Federal Indian Law 143 (1942 ed.) (noting that Indian
18 tribes can exercise jurisdiction over tribal property and any
19 individual property of tribe members even off tribal land). That
20 the land is spiritually important to the Tribe also does not
21 change the federal government's ownership of the land. See id.
22 at 289 (distinguishing between tribal land and federal public
23 land).

24 Though the Highlands are not Tribal land, plaintiffs argue
25 that the Tribe's constitution is akin to a treaty and creates
26 fiduciary duties for the federal government in its management of

1 the Highlands. (Pls.' Reply at 6.) The federal government does
2 owe a high fiduciary duty to a tribe when its actions involve
3 tribal property or treaty rights. See, e.g., Pyramid Lake Paiute
4 Tribe v. U.S. Dep't of the Navy, 898 F.2d 1410, 1420 (9th Cir.
5 1990) (holding the federal government has a fiduciary duty to
6 preserve and protect the Pyramid Lake fishery which is located on
7 the reservation). However, the Pit River Tribe's constitution is
8 not similar to a treaty - a binding obligation entered into
9 between two sovereigns. Its constitution is a document for the
10 Tribe's internal governance, and approval by the Secretary of the
11 Interior does not transform it into a treaty. Although there may
12 be a general fiduciary duty of the federal government owed to
13 Indians, "unless there is a specific duty that has been placed on
14 the government with respect to Indians, this responsibility is
15 discharged by the agency's compliance with general regulations
16 and statutes not specifically aimed at protecting Indians."
17 Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th
18 Cir. 1998).

19 The plaintiffs attempt to distinguish Morongo Band because
20 that case dealt with general reservation land and not an area
21 held sacred for centuries like the Highlands. (Pls.' Reply at
22 8.) Plaintiffs cite a host of federal statutes, regulations, and
23 executive orders demonstrating the federal government's
24 recognition of the importance of tribal religion and
25 spirituality, such as AIRFA, the Religious Freedom Restoration
26 Act, Executive Order 13007, and provisions of the BLM manual.

1 However, the existence of these provisions does not distinguish
2 this case from Morongo Band. If these statutes and executive
3 directives impose specific duties on the federal government
4 towards Indians, then the federal government must obey the
5 statutes and directives. But plaintiffs do not argue that these
6 statutes and directives were actually violated, only that they
7 demonstrate the importance of tribal spirituality. Under Morongo
8 Band, the government's recognition of the central place of tribal
9 religion and spirituality does not create new trust obligations
10 and duties.¹⁶

11 Because this case does not involve tribal property, the
12 federal agencies' duty to the Tribe is to follow all applicable
13 statutes. As discussed earlier, the agencies did not violate any
14 statutes during the approval process for Fourmile Hill;
15 therefore, the federal government satisfied its fiduciary duty to
16 the local tribes.¹⁷

18 ¹⁶ Plaintiffs also rely on the decision in Northern
19 Cheyenne Tribe v. Hodel, 804 F.Supp. 1281 (D.Mont. 1991).
20 However, Northern Cheyenne Tribe involved coal leases on federal
21 land near the tribe's reservation. N. Cheyenne Tribe, 804
22 F.Supp. at 1283. Northern Cheyenne Tribe is like the Ninth
23 Circuit's decisions recognizing that the federal government owes
24 the Paiute Tribe a fiduciary duty when making decisions about
25 upstream water use in Nevada that affect the size of Pyramid
26 Lake, a tribal lake. See, e.g., Pyramid Lake Paiute Tribe, 898
F.2d at 1420. The key fact in these cases is that the impacts
occur on the reservation, which the federal government has a
special duty to protect. However, the Fourmile Hill project does
not directly affect life on the Pit River reservation.

¹⁷ The plaintiffs argue that the failure to meet with the
local tribes prior to the development stage violated the
government's fiduciary obligations. However, the earlier
decisions only allowed casual use and light exploration, which

1 VIII. Failure to Timely Implement the Record of Decision

2 Plaintiffs assert that the federal defendants have violated
3 the Administrative Procedure Act by failing to implement the
4 Record of Decision in a timely fashion, namely by failing to
5 develop a Historic Properties Management Program for the
6 Highlands. (Compl. ¶ 129.) The Forest Service and the BLM
7 committed to develop a Historic Properties Management Program in
8 a Memorandum of Agreement, which was incorporated into the ROD
9 issued for the approval of the Fourmile Hill project. (AR 20006,
10 20051.) Plaintiffs allege that the agencies have failed "to
11 initiate and diligently pursue development of" the required
12 Historic Properties Management Program, which amounts to an abuse
13 of its discretion under the APA. (Compl. ¶ 130.)

14
15 The federal defendants argue that the court lacks
16 jurisdiction to hear this claim under the APA, because there has
17 been no final agency action. (Fed. Defs.' Opp'n at 50.) They
18 argue that jurisdiction is inappropriate under 5 U.S.C. § 706(1),
19 which grants jurisdiction to "compel agency action unlawfully
20 withheld or unreasonably delayed," because there is no "clear
21 statutory duty" to act. Mont. Wilderness Ass'n, Inc. v. U.S.
22 Forest Serv., 314 F.3d 1146, 1150 (9th Cir. 2003). Plaintiffs
23 argue that the agencies created a duty to act by adopting certain

24 _____
25 the government could reasonably conclude would have no
26 significant effect on the tribes. When the agencies considered
development, an action that might have significant effects on the
tribes, they engaged the local tribes in significant
consultations. See supra section I.D.

1 the agencies' decision. Therefore, defendants' motion for
2 summary judgment is GRANTED, and plaintiffs' motion is DENIED.

3
4 IT IS SO ORDERED.

5 Dated: _____.

6
7
8 _____
9 DAVID F. LEVI
United States District Judge