WHAT DOES IT MEAN TO COMPLY WITH NEPA?:
AN INVESTIGATION INTO WHETHER NEPA SHOULD HAVE
PROCEDURAL OR SUBSTANTIVE FORCE

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Since its enactment in 1970, the National Environmental Policy Act (NEPA) of 1969 has produced countless lawsuits by parties alleging some government agency failure to meet the procedural requirements mandated by NEPA’s statutory provisions and the Council of Environmental Quality’s (CEQ) corresponding regulations. Typical NEPA challenges involve either an agency’s failure to complete an adequate environmental impact statement (EIS) or an agency’s approval of a project in light of an EIS that demonstrates the negative impact the proposed action will have on the environment. This Note will examine a unique form of a NEPA challenge to an agency decision. First, the agency completes an EIS, finding that the “preferred alternative” is the approval of a proposed action, because the effects on the environment are minimal. Then, in its record of decision (ROD), the agency concludes the effects on the environment have not been adequately considered and decides not to approve the proposed action, a decision completely at odds with the findings of the EIS. This sequence of events is not a whimsical hypothetical. This NEPA situation was recently litigated in Skull Valley Band of Goshutes Indians v. Davis.¹ At the outset, it should be recognized how this NEPA challenge differs from others.

Like most NEPA challengers, the Skull Valley Band of Goshute Indian Tribe (Tribe) challenges the adequacy of the EIS with the hope of getting a court to require the agency to compile a supplement to the EIS, in an effort to get the project approved. The peculiarity of the situation arises from the agency pointing to oversights within the final EIS (FEIS) as the basis for not approving a project that could have significant impacts on the environment. These oversights are indentified in two RODs, one from the Bureau of Indian Affairs (BIA) and the other from the Bureau of Land Management (BLM). Environmental groups usually take this stance when seeking to halt an already approved project, alleging the agency’s failure to adequately assess these environmental impacts. The common reaction to the Department of Interior’s (DOI) assertion that the EIS was inadequate would be to require a supplement to the EIS to remedy its deficiencies; however, since the action has been tabled, the DOI asserted there was no need for a supplement because there was no longer a proposed major federal action that mandates NEPA compliance.

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The task will be to explore the parties’ claims to determine what constitutes NEPA compliance and which party’s approach to NEPA best preserves the integrity of the statute. To do so, the following questions will be asked: First, does NEPA have any substantive force or is it merely procedural? Depending on how one views NEPA, as procedural or substantive, will dictate whether the DOI violated NEPA. Interpreting NEPA as purely procedural implies the DOI failed to comply with NEPA by not supplementing the EIS. On the other hand, if NEPA has substantive force, then the DOI did not violate NEPA by taking an agency action that will not have a negative impact on the environment. This is because the agency decision harmonizes with NEPA’s purpose to conserve and protect the environment. Put another way, does an agency violate NEPA when its decision conserves or protects the environment, even though it may fall short of meeting NEPA’s procedural requirements? To aid in answering these questions, this Note is divided into six sections: (I) an overview of the Skull Valley EIS and litigation is provided to better frame this legal issue; (II) the legislative history of NEPA is analyzed to unearth the statutory goals of NEPA; (III) an analysis of case law that supports the contention that NEPA is merely procedural and case law supporting NEPA as having substantive force; (IV) the CEQ and DOI regulations and handbooks on NEPA are examined to understand the procedural duties imposed on the DOI; and (V) a discussion on why the DOI’s reliance on the inadequacy of the FEIS undercuts the purpose behind NEPA and DOI’s credibility as an agency; (VI) a brief analysis of Judge Ebel’s July 2010 decision on Skull Valley Band of Goshute Indians v. Davis.

I. SUMMARY OF PROPOSED PROJECT, THE FEIS, AND RECORD OF DECISION THAT LED TO SKULL VALLEY TRIBE V. CASON

A. The FEIS

The Skull Valley Tribe of Goshute Indians is a federally recognized tribe, located on a reservation approximately seventy miles west of Salt Lake City, Utah. In 1995, the Tribe began negotiations with Private Fuel Storage, LLC (PFS) to lease their tribal lands for nuclear storage. PFS is a “private consortium” of eight nuclear power plants from around the United States. Under the proposed lease, PFS would build an Independent Spent Fuel Storage Installation (ISFSI) to store spent nuclear fuel (SNF) rods. The Tribe sought, and received a conditional approval of the lease by the BIA Superintendent in 1997. This approval was

\[2\] Plaintiff’s Opening Brief on the Merits at 2, Skull Valley Band of Goshute Indians v. Cason, No. 2:07-cv- (D.UT filed June 1, 2009), ECF No. 78 [hereinafter Plaintiff’s Brief].

\[3\] Defendant’s Response Brief on the Merits at 1, Skull Valley Band of Goshute Indians v. Davis, No. 2:07-cv-00526 (D. Utah July 26, 2010) [hereinafter Defendant’s Brief].

\[4\] Id. at 1-2.

\[5\] Id. at 4.
conditioned on the completion of an EIS that would inform and satisfy the Secretary of Interior that the five statutory factors had been adequately considered under the Indian Long-Term Leasing Act. In order to approve the lease and construct the ISFSI, four federal agencies needed to approve the project: (1) the Nuclear Regulatory Commission (NRC); (2) the Surface Transportation Board (STB); (3) the BIA; and (4) the BLM.

A final EIS, completed in December of 2001, analyzed the ISFSI’s “potential environmental effects” pursuant to NEPA and CEQ regulations. The FEIS identified the NRC as the lead agency, while the BIA, BLM, and STB participated as cooperating agencies. The agencies identified the “Preferred Alternative” as the NRC issuing a license to PFS to operate the ISFSI, BIA approving the lease, and BLM approving a right of way for the rail spur. The FEIS identified the “Preferred Alternative” would be for the BIA to approve the lease. The FEIS also stated that approving the lease would have “no significant adverse impacts but would have significant economic benefits for the Skull Valley Band.” Moreover, the FEIS discusses the need for the ISFSI, because the ISFSI at Skull Valley would provide storage for SNF away from nuclear power plant sites where they are currently being stored. Still, the identified “Preferred Alternative” in the FEIS did not ensure the construction of the ISFSI on the Tribe’s land; each agency had to give the project its administrative blessing.

The NRC acted first, granting PFS a license to construct and operate the ISFSI on February 21, 2006. On September 7, 2006, the DOI issued two RODs. DOI’s Associate Deputy Secretary Cason withheld approval for the Tribe’s lease with PFS, and Acting Assistant Secretary Calvert denied PFS’s right-of-way applications. The four agencies completed the FEIS in December of 2001 and

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7 Cason, supra note 6, at 6–7.
9 Defendant’s Brief, supra note 3, at 4.
11 Id. at xxxii.
12 Defendant’s Brief, supra note 3, at 8.
13 Id.
14 Id.
released it to the public on January 18, 2002. The immediate question becomes: Why did it take the BIA and BLM four years, after completing the FEIS, to issue their opinions on the fate of this project?

Quite simply, Utahns opposed the project from the outset and employed every judicial, legislative, and administrative tactic available to halt an agency’s approval of the process. First, the state of Utah launched a challenge to the NRC’s authority to issue licenses for privately owned SNF storage facilities; this challenge was rejected by the NRC and the NRC’s decision was later affirmed by the D.C. Circuit. The state of Utah failed in a challenge to NRC’s licensing proceedings. The challenge questioned the adequacy of the conclusion reached in the FEIS that there would be no significant environmental effects from the construction and operation of the facility and any leakage during the transit of the SNF to the site was “highly unlikely.” Second, the Utah Legislature attempted to effectively make the project impossible through legislation, but the Tenth Circuit ultimately rejected these efforts, holding federal law preempted all of these statutes. After the failure of these efforts and the issuance of the NRC license, Utah did not abandon its quest to defeat the project; instead, the Utah Congressional delegation launched a full-borne lobbying effort towards the DOI to ensure that the DOI rejected approval of the lease and the right of way. Senator Orrin Hatch met with Secretary of the Interior, Dirk Kempthorne on June 29, 2006 and lobbied Kempthorne to cancel the leases while the State of Utah was litigating the NRC license in the D.C Court of Appeals. While these interactions may not amount to undue political influence of an agency official, these back-room interactions have the effect of seriously undermining the NEPA process. For the sake of argument, it

15 Plaintiff’s Brief, supra note 2, at 5.
16 In re Private Fuel Storage, LLC, 56 NRC 390, 392 (2004).
18 In re Private Fuel Storage, LLC, 60 NRC 125, 139 (2004).
19 Utah Code Ann. § 19-3-304(1)(a) (2001) (requiring SNF storage facilities to obtain a license from the Utah Department of Environmental Quality); Utah Code Ann. § 19-3-308(1)(a) (2001) (requiring a non-refundable application fee of $5,000,000); Utah Code Ann. § 19-3-318(2)(b) (2001) (nullify limited liability protections for equity shareholders of a limited liability company that engages in the transportation and storage of SNF in Utah).
22 Deborah Bulkeley & Suzanee Struglinski, Decision to Deny PFS Lease Shocks 2, DESERET MORNING NEWS, Sept. 9, 2006, at A01.
23 Based on the information available, there is no evidence that Senator Hatch or Bennett made any quid pro quo offers that would amount to undue political influence. See DC Fed’n of Civic Assn’s v. Volpe, 459 F.2d 1231, 1247-48 (D.C. Cir. 1972), cert. denied, 405 U.S. 1030 (1971) (holding undue political pressure occurs when: (1) the content of the pressure forces a decision based on factors not made relevant by Congress; and (2) decision must be affected by extraneous pressure, such as quid pro quo conversations).
is presumed that the Utah Congressional delegation successfully lobbied the DOI into changing their decision from an approval to a denial of the PFS permits. This presumption is reasonable based on the findings of an EIS that found the preferred alternative to be the issuance of a lease, and that no significant environmental impacts would result from the construction and operation of the SNF storage site.

There are several ways to view the DOI’s decision to deny the lease approval. First, the administrative process works effectively when lobbying efforts lead an agency to change its course by reaching the best-informed decision by exercising its discretionary powers as an agency. In other words, the Utah delegation used proper political influence and the DOI exercised proper discretion afforded by statute and reached the most informed decision possible. Contrarily, the Utah Congressional delegation exercised their political-clout to ensure that the DOI reached a decision that the delegation’s constituents would welcome, irrespective of the information contained in the FEIS. Moreover, the DOI, in their ongoing battles with Utah over DOI lands, may have seen this as an easy project to abandon which would let Utah—Senator Hatch in particular—herald the denial of the project as a victory over the federal government. Regardless of what view one takes, it is my position that the DOI’s decision does irreparable harm to the viability of NEPA and its procedures as a legal tool that ensures agencies make well-informed decisions on projects that have the potential to significantly affect the environment. Likewise, such decision-making imperils the legitimacy of all agencies, because these agencies retain vast discretionary powers, insulated by highly deferential standards of judicial review.24

This Note will next focus on the Cason ROD that denied approving the proposed lease. Particular attention will be paid to how the Cason ROD addresses the FEIS’s findings and shortcomings to justify its ultimate decision to deny approval for the project.

B. Cason ROD: Denying Lease Approval for ISFSI

The Cason ROD denies approving the lease on the grounds that granting the lease would violate the BIA’s duty under the trustee-beneficiary relationship to act as “prudent trustee” of tribal lands.25 Cason’s ROD concludes the FEIS gives inadequate consideration to statutory factors, required for the Secretary to approve a lease under the Indian Long Term Leasing Act.26 In particular, Cason identifies two subsequent events that occurred after completion of the FEIS. These two events make the FEIS an inadequate document to inform the agency’s decision on the lease, since the FEIS does not evaluate these events when determining the

24 See Administrative Procedures Act, 5 U.S.C. § 706(2)(a) (2001) (setting forth a judicial standard of review for agency decisions. Administrative actions and decisions are upheld unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).
25 Cason, supra note 6, at 19.
26 25 U.S.C. § 415(a) (1971); see also Cason, supra note 6, at 26.
environmental impact of the proposed action. The first event took place in 2004 when the Tribe leased land for the Tekoi landfill; the operation of which resulted in more traffic on the Skull Valley Road. The FEIS, completed in 2001, does not assess the environmental impact of the landfill or how the increased traffic might result in more environmental effects in conjunction with the construction and operation of the SNF facility. The second event was the creation of the Cedar Mountain Wilderness Area, which designated lands around the Goshute Reservation as protected wilderness. This wilderness designation nearly made it impossible for the BLM to issue a right-of-way permit, because the newly designated wilderness area encompasses the lands proposed for the road.

The DOI justifies their position that there is no need to supplement the FEIS to cure these inadequacies on the basis that this wilderness designation moots any further inquiry. Additionally, Cason challenges the adequacy of the FEIS to inform his decision as a prudent trustee for the tribe, by citing the FEIS’s failure to consider the possibility and subsequent environmental impacts from terrorist attacks, environmental effects from removing the SNF at the end of the lease term, and the availability of a permanent repository to house the SNF. This conclusion by Cason is interesting and troubling. The BIA played an active role in scoping and responding to comments in the FEIS; yet, the BIA highlights the flaws in the document in order to justify a decision that runs contrary to its own conclusions reached in the FEIS. At the end of the ROD, Cason cites a CEQ regulation often cited when an agency approves a project after an EIS indicates approving the project would not be the environmentally preferable alternative:

Under 40 CFR §1505.2, an agency must identify in its ROD the alternative it considers to be the environmentally preferable alternative. All of the action alternatives analyzed in the FEIS have some environmental impacts from construction of the ISFSI. The BIA considers the environmentally preferable alternative to be the no action alternative. The potential environmental impacts of constructing and operating the ISFSI on the reservation would not occur under this alternative.

In its complaint, the Tribe identifies reasons why the Cason’s reliance on 40 C.F.R. § 1505.2 is misguided: “[u]nder Mr. Cason’s flawed reasoning, the no action alternative could always be justified as the preferred alternative, and there would be no point in preparing any environmental analysis. Bureaucratic inertia would be

27 Cason, supra note 6, at 20.
28 Id.
29 Id.
30 Plaintiff’s Brief, supra note 2, at 6.
31 Defendant’s Brief, supra note 3, at 35; the DOI’s argument that no supplemental EIS is necessary is further discussed infra Part C.
32 Id. at 22.
33 Plaintiff’s Brief, supra note 2, at 23; Cason, supra note 6, at 9.
rewarded, even encouraged.” Here, the Tribe makes a subtle point, but this point properly frames their NEPA claim.

From the tribe’s perspective, NEPA was designed as an “action forcing” statute requiring agencies to make informed decisions on “major federal actions” that have the potential to significantly affect the environment. In this case, the DOI actively participated in an FEIS through scoping meetings and responded to comments in order to reach an informed decision. But instead of using the FEIS to better inform their decision, the DOI cites the inadequacies of the FEIS to justify its final decisions. The logic used in the Cason ROD undermines NEPA by discounting the findings of the FEIS and the process used to compile such a document; consequently, it will also be explored how this abuse of NEPA diminishes the credibility of the administrative agencies as a whole. In juxtaposition with this view, the Cason ROD will be analyzed from the perspective that NEPA has substantive force and this decision is in harmony with NEPA’s over-arching purpose to protect the environment. Next, the purposes behind NEPA will be discussed to determine whether the Tribe or the DOI correctly interprets NEPA by examining the statute itself, its legislative history, and court decisions interpreting NEPA.

II. NEPA OVERVIEW: STATUTORY PROVISIONS, LEGISLATIVE HISTORY, AND COURT DECISIONS

The National Environmental Policy Act of 1969 went into effect January 1, 1970. The statutory goals of NEPA are broad:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. . . .  

34 Plaintiff’s Brief, supra note 2, at 23 (emphasis in original).
37 Id. § 4331.
These provisions are at the center of the controversy on whether NEPA is procedural or substantive. Those who take the view that NEPA has substantive force cite these policy goals, while the procedural proponents harp on the proceeding section of NEPA that requires all agencies to: “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on the environment.”38 This section also lists certain factors that must be considered; “the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action. . . .”39 Courts refer to these provisions as the “action-forcing” procedural requirements that are essential for NEPA compliance.40 By just looking at the statutory language, it seems unclear whether NEPA is substantive or procedural. In order to clarify what NEPA’s objectives are and what it means to comply with NEPA, a look into the legislative history into NEPA’s enactment will be undertaken.

Both proceduralists and substantivists cite to the legislative history to support their respective interpretations of NEPA. The senate report submitted by the Committee of Interior Insular Affairs states: “A primary purpose of the bill is to restore public confidence in the Federal Government’s capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment.”41 For the Committee of Interior Insular Affairs, restoring public confidence was critical to repair the public perception that “Federal policies and activities . . . contributed to environmental decay and degradation.”42 These concerns support the proceduralists’ argument that a reviewing court should rigorously analyze an agency’s compliance with NEPA procedures and any violation should be rectified. The premise behind this argument is that an agency decision must compile the most information possible to best inform its decision. And even when the agency decision appears to protect environmental quality by maintaining the status quo—for example, the DOI choosing the no action alternative—procedural errors must be corrected to preserve the integrity of the NEPA process. In this case, the Tribe adopts the procedural interpretation of NEPA, asserting that any procedural errors should be corrected before the document can be used for agency decision-making. One may assert the Tribe is being opportunistic in taking a proceduralist approach to NEPA in an effort to reverse an unfavorable decision. I, however, would like to suggest the pure proceduralist, irrespective of the decision reached, demands that any significant procedural error in a NEPA document be remedied in order to preserve

38 Id. § 4332 (2)(A).
39 Id. § 4322 (2)(C)(i)-(v).
40 Andrus, 442 U.S. at 349-51.
41 S. REP. NO. 296, 91st Cong., 1st Sess. 8 (1969) [hereinafter SENATE REPORT ON NEPA].
42 Id.
the integrity of NEPA. After all, NEPA is a tool to inform the public and agencies on the environmental effects of proposed projects. For the tribe—and by Cason’s own admission—the FEIS does not sufficiently inform the public or the agency on the environmental effects of the proposed action.

The Cason ROD rationalizes the inadequacies of the FEIS by identifying how the decision will not impair the environment by preventing storage of SNF on the site.43 This decision fails to instill confidence in the public with regards to agency decision-making. The potential environmental harm posed by having SNF at reactor sites across the country still remains. The proceduralists’ argument is particularly strong here, because the FEIS identifies “the need for an alternative to at-reactor SNF storage that provides a consolidated, and for some reactor licensees, economical storage capacity for SNF from U.S. power generator reactors” as one of the reasons to approve the project.44 The Cason ROD rationalizes this flip-flop by citing the growing uncertainty that remains about whether a permanent repository will be constructed at Yucca Mountain.45 Cason’s reliance on this concern is troubling, because concerns on the uncertainty of Yucca Mountain were raised in comments contained in the FEIS.46 It would appear the Cason ROD joins forces with these comment-makers, but this alliance is more curious, since the FEIS plainly states “[t]he service[’s] agreement requirement to remove the SNF from the proposed PFSF is not dependent upon the availability of a permanent geological repository.”47 Cason suggests the uncertainty about the availability of a permanent repository has grown since completion of the FEIS, but the Tribe views the reversal on this agency position as occurring due to political pressures by Senators Hatch and Bennett.48 Even if these Senators’ interactions with agency officials did not amount to undue political influence, these interactions seriously cloud how NEPA should be viewed. Should NEPA be reviewed less rigorously when the agency action takes the environmentally preferred alternative by preserving the status quo, especially when backroom deals influence the decision?

43 Cason, supra note 6, at 9.
44 FEIS, supra note 10, at iv.
45 Cason, supra note 6, at 19.
48 Plaintiff’s Brief, supra note 2, 10, 47; Utah’s delegation is discussed supra Part I.
Again, this scenario exposes the peculiar nature of this NEPA challenge, because, typically, an agency’s interactions with political insiders are criticized when the agency chooses a course of action that poses significant harm to the environment. Still, the substantivist might argue a less rigorous review standard should be applied to the agency’s NEPA compliance, because democratically elected officials are expressing the views of their constituents. In this case, the views expressed by the Congressmen resulted in an environmentally preferable alternative, which paints these political contacts with an appearance of validity. Still, this political backdoor process runs counter to one of NEPA’s primary objectives to restore confidence in federal agencies by creating a transparent process between the agencies and the public.49

After considering the legislative history in conjunction with the contours of this NEPA process, the decision reached by the DOI strikes a discord with legislative goals and the motivating forces behind the creation of NEPA. The architects of NEPA designed the statute to restore public confidence in the government when its agencies make decisions that affect the environment; the restoration of public confidence occurs through the procedures laid out by the statute. Consequently, the administrative agency only achieves this statutory goal by strictly adhering to NEPA’s procedural requirements when compiling a NEPA document. While the legislative history strongly identifies NEPA as a procedure-based statute, one case offers a safe-harbor for the substantivist view that NEPA has substantive force when an agency adopts the environmentally preferred alternative.

III. CASE LAW: NEPA, SUBSTANTIVE OR PROCEDURAL?

The overwhelming majority of courts take the view that NEPA carries only procedural weight, whereby NEPA serves to inform agency decision-making50 and does not dictate that an agency choose the environmentally preferable action.51 A Ninth Circuit decision gives merit to the argument that NEPA has some substantive force, when an agency chooses the environmentally preferable alternative.

In *Kootenai Tribe of Idaho v. Veneman*, the court grafts a substantive gloss to NEPA: “While NEPA’s procedural safeguards may be used to benefit those who assert development interests, just as the safeguards may be used to benefit those who assert conservation interests, NEPA’s policy objectives must not be thwarted

49 *Senate Report on NEPA*, supra note 41, at 8.
50 *Tillamook Cnty. v. U.S. Army Corps of Eng’rs*, 288 F.3d. 1140, 1142 (9th Cir. 2002) (“NEPA is a procedural statute intended to ensure environmentally informed decision-making by federal agencies”).
51 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (holding NEPA does not dictate particular results, only that agencies take a “hard look at the environmental consequences of their actions”).
Here, the court alludes to the policy objectives that are found in Section 2 of NEPA and were discussed in *supra* Part II. The court further explains how meeting these policy objectives are more important than ensuring that NEPA procedural requirements are met by an agency. “The NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than harm it.” Broadly interpreting the court’s statements suggest when an agency chooses an action to “conserve and protect the natural environment,” it should be held to a less rigorous standard of review for its NEPA compliance, since the agency decision aligns with NEPA’s “policy objectives.” By ignoring a procedural lapse for a substantive result that Judge Gould deems congruent with the purpose of the statute, interpreting agency decisions that are environmentally friendly as being compliant with NEPA gives substantive weight to the statute. The question now becomes: Is the goal of NEPA to protect the environment through informed decisions, or can NEPA’s informational requirements be sacrificed when the result is a positive one for the environment? The *Kootenai* court marks a departure from how the Supreme Court and all other circuits that have interpreted NEPA to have only procedural force, offering plaintiffs remedies for procedural violations.

NEPA intends to “to insure a fully informed and well-considered decision.” While NEPA does not provide review for an agency’s substantive decisions, NEPA prohibits an agency from proceeding with an action until it has taken a “hard look at environmental consequences.” The principal manner by which an agency takes that hard look is through a series of environmental analyses. At step one, the agency must determine whether the proposed action, the approval of a lease for ISFSI, constitutes a “major Federal action[] significantly affecting the quality of the human environment.” Then, as a second step, the agency must compile a detailed report addressing the environmental impacts of the proposed action. In the Tribe’s case, four agencies concluded that construction of the ISFSI constituted a major Federal action triggering NEPA compliance. To meet compliance, the agencies cooperated in preparing a six hundred page FEIS, but, from the Tribe’s perspective, DOI failed to meet the hard look requirement before issuing its decision.

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52 Kootenai Tribe of Idaho v. Veneman, 313 F. 3d 1094, 1122 (9th Cir. 2002); Judge Gould’s allusion to the policy objectives are found in Section 2 of NEPA and were discussed *supra* Part II.
53 *Id.* at 1120.
54 *Id.*
56 *Id.*
59 *Id.*
60 FEIS, *supra* note 10.
Specifically, the Cason decision failed to incorporate several developments such as the Tekoi landfill and the Cedar Mountain Wilderness Area designation into its decision-making. Instead of revisiting these issues, Cason offered these oversights as justification for his decision to deny approving the lease. Moreover, Cason found approving the lease would be in direct violation of the trustee duties owed to the tribe. Such procedural malaise would likely fall short of a court’s interpretation of an agency’s NEPA obligation to take a hard look at environmental impacts from a proposed action. As the Supreme Court suggests, NEPA does not dictate a particular result but guarantees procedures that act as a safeguard to ensure all the environmental consequences were adequately examined. Here, the Tribe believes the DOI sidestepped these procedural safeguards in favor of a particular result. In the Tribe’s eyes, the result has been clothed as the environmentally preferable alternative but, in actuality, it is the politically influenced alternative.

Assuming the Tribe’s allegations to be true, the DOI’s actions are detrimental to the credibility of their agency and administrative agencies as a whole. First, the law requires the BIA to act as a prudent trustee for the Tribe. The BIA has not acted as a prudent trustee when it chooses not to afford its beneficiary—the Tribe—all of the procedures available to reach the most informed decision. Second, the DOI does irreparable harm to its credibility by allowing political influence to hijack the NEPA process, because the agency—acting as trustee—no longer utilizes its expertise and the expert data compiled by scientists in the FEIS to evaluate environmental impacts. Instead, the agency mutates the NEPA process to dictate certain results—results that are not derived from informed decision-making but political prodding. NEPA also established the Council of Environmental Quality (CEQ). The CEQ has the task of implementing regulations to ensure Federal agencies follow certain procedures to achieve informed decision-making that better reflects environmental consequences as well as economic considerations. Next, the pertinent CEQ regulations will be analyzed to determine if DOI abided by these regulations to create an adequate document to serve as the basis for the Cason decision.

IV. CEQ Regulations at Play: 40 CFR §§ 1505.2, 1507.2, and 1502.9

A. 40 C.F.R. § 1505.2: Utilizing a FEIS in Agency Decision-Making

Pursuant to 40 C.F.R. 1505.2, the Cason decision identifies the DOI’s obligation to identify the “environmentally preferable alternative” as the no action alternative and decides the agency should take the no action alternative. The same provision also contains the following responsibility: “An agency shall
indentify all such factors including any essential considerations of national policy
which were balanced by the agency in making its decision and state how those
considerations entered into its decisions.\(^{65}\) This balancing clause serves as a
saving clause, whereby an agency can choose a course of action that is not the
environmentally preferable alternative identified in the EIS. The CEQ views this
provision as requiring the agency decision-maker to reconcile a “bulky EIS” with
the decision reached by the agency.\(^{66}\) The CEQ further states: “Other factors may,
on balance, lead the decision-maker to decide that other policies outweigh the
environmental ones, but at least the record of decision will have achieved the
original Congressional purpose of ensuring that environmental factors are
integrated into the agency’s decisionmaking.”\(^{67}\) This strongly implies that the
purpose of § 1505.2 is to establish a nexus connecting the NEPA procedures
followed with the final agency decision. Here, it is arguable whether NEPA served
its purpose to inform the agency in its decision-making process. In the Tribe’s
eyes, the gaps in the FEIS, based on new events—construction of the Tekoi landfill
and formation of the Cedar Mountain Wilderness area—do not allow Cason, or
any other agency decision-maker, to be in a position to make a final decision on
the project. Rather than reach a position from which an informed decision could be
made, the Cason ROD cabins its decision not to approve the lease based on the
inadequacies of the FEIS. In short, Cason uses § 1505.2 as a decoy to make the
DOI decision appear more valid, since it is more environmentally friendly, but he
has failed to meet the purpose behind this regulation, which is to integrate a bulky
EIS into his decision-making. From the Tribe’s perspective, calling the FEIS an
inadequate document does not amount to integrated decision-making required for
NEPA compliance under CEQ regulation § 1505.2. Meanwhile, by viewing the
issues not addressed in the FEIS as justifying their change in position not to
approve the lease, the DOI believes the Cason ROD to be consistent with § 1505.2.
Still, it is difficult to see how Cason’s cursory treatment of these issues can be
considered comparable to the in-depth treatment they would have received in a
NEPA document.

In pointing to the uncertainties left unresolved by the FEIS, the DOI balances
the “other factors” against their duty to act as a prudent trustee to justify not
approving the lease.\(^{68}\) The “other factors” are (1) the construction of the Tekoi
Balefill landfill; (2) the Cedar Mountain Wilderness area; (3) the possibility that
there may not be a permanent repository for the SNF at the end of the lease term.\(^{69}\)
This is a difficult stance for the DOI to be taking, because, in the same breath, the
DOI says the FEIS is inadequate but there is enough information before the agency
to make an informed decision. To conclude, the Tribe appears to have a stronger
argument, because it is difficult to see how the DOI has reconciled a “bulky EIS”

\(^{65}\) 40 C.F.R. § 1505.2 (b) (2010).
\(^{67}\) Id. at 55,985-86.
\(^{68}\) Id.
\(^{69}\) Cason, supra note 6, at 10, 19.
with its ROD.\textsuperscript{70} The DOI’s position would be strengthened by supplementing the EIS; at which time, the DOI would have a firm basis to have fulfilled their duty as a prudent trustee, justifying the no action alternative.

**B. 40 CFR 1507.2: The Adequacy of the FEIS**

As a part of the Tribe’s NEPA claim, the Tribe alleges the DOI failed to meet the CEQ duty to compose an adequate record; the Tribe evidences the inadequacy of the FEIS by Cason’s own admission that the document is inadequate.\textsuperscript{71} 40 CFR § 1507.2 states “. . . Agencies shall: . . . (c) Prepare adequate environmental impact statements pursuant to section 102(2)(C)[of NEPA]. . . .”\textsuperscript{72} Many environmental groups have challenged NEPA compliance by agencies on the grounds that the EIS is not adequate,\textsuperscript{73} but no case law exists where the agency is relying on the inadequacy of the EIS to justify its decision. The obvious remedy for an inadequate FEIS is for the agency to supplement the FEIS to address the shortcomings identified in the Cason ROD. The Tribe’s complaint against the DOI prays for such a relief,\textsuperscript{74} but this request brings an issue of first impression to the court. After completing an FEIS, is an agency required to supplement its EIS when the agency takes the no action alternative, eliminating the potential for a major federal action that initially triggered NEPA compliance? Put another way, by choosing the no action alternative does the DOI free itself from NEPA compliance? For the DOI, the adequacy of the EIS becomes an irrelevant question for a court to address because the DOI has chosen the no action alternative. In doing so, NEPA compliance is no longer mandated, because there is no longer a major federal action requiring the DOI to abide by NEPA and CEQ regulations.\textsuperscript{75} The following section will grapple with this issue.

*C. Supplementing an EIS: 40 CFR § 1502.9, DOI Handbook on Supplementing the EIS, and Case Law Interpreting the Need to Supplement the EIS*

This section will examine the following: (1) the CEQ regulation on supplementing the EIS; (2) DOI procedures on supplementing the EIS; and (3) the case law on when it is required to supplement the EIS. At the outset, it should be noted that the DOI takes the position that the BIA is not required to supplement the EIS, because, under the no action alternative, NEPA compliance has been alleviated, since there is no longer a major federal action being considered.\textsuperscript{76} On

\textsuperscript{70} National Environmental Policy Act, 43 Fed. Reg. 55,985 (Nov. 29, 1978).

\textsuperscript{71} Plaintiff’s Brief, supra note 2, at 22.

\textsuperscript{72} 40 C.F.R. 1507.2 (1978).

\textsuperscript{73} Starke County Farm Bureau Co-op. Ass’n v. I.C.C., 839 F. Supp. 1329 (N.D. Ind., 1993) (plaintiffs challenging the adequacy of an EIS for its failure to properly scope alternatives pursuant to 40 C.F.R. § 1501.7).

\textsuperscript{74} Plaintiff’s Brief, supra note 2, at 13.

\textsuperscript{75} Defendant’s Brief, supra note 3, at 36.

\textsuperscript{76} Id.
the other side of the aisle, the Tribe finds this reasoning to violate the basic purpose behind NEPA as an information-gathering tool and CEQ regulations (40 CFR § 1507.2—adequacy of the FEIS and § 1502.9—when supplementing is required). After evaluating the purpose behind the CEQ supplementing regulations and the DOI policies on supplementing the FEIS, it will be determined whether the DOI violated NEPA by failing to supplement the FEIS. Finally, it will be addressed whether case law suggests NEPA compliance was no longer warranted and consequently no subsequent supplement was required.

40 C.F.R. § 1502.9 requires an agency to prepare a supplement to the FEIS when: “There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or impacts.” BIA’s guidelines on NEPA compliance suggest supplementing a FEIS, when there are “[s]ignificant new circumstances or information relevant to environmental concerns.” The DOI regulations on NEPA compliance also suggest that Cason had an obligation to supplement the existing FEIS before making any decision. DOI regulation, 43 CFR § 46.120 permits the responsible official, Cason, to use NEPA documents when they are adequate to inform a proposed action that will have an effect on the environment. The BIA official has the latitude to supplement these NEPA documents when necessary. The purpose of this regulation is to avoid unnecessary work, but Cason is unable to rely on the existing NEPA document without supplementing it, due to the FEIS’s admitted inadequacy. As the Cason ROD notes, there were two significant developments, the construction of the Tekoi landfill and the enactment of the Cedar Mountain Wilderness Act. These events seem to provide prima facie evidence that a supplement to the EIS was warranted before any decision from the DOI. The DOI has not reached a point where it is doing unnecessary work; rather, Cason has failed to do the minimum required by the CEQ regulations. Another CEQ regulation brings into question whether DOI complied with NEPA. “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality.” The FEIS relied on by Cason fails to meet this “high quality” standard, because, as Cason states, the FEIS failed to adequately consider the environmental impact of the Tekoi landfill in conjunction with ISFSI’s construction and operation and the environmental impact the ISFSI would have on the newly designated wilderness area. It would appear that the DOI’s failure to issue a supplement to the FEIS is a NEPA violation in light of the CEQ and DOI regulations. But, the

77 40 C.F.R. 1502.9 (2010).
79 43 C.F.R. § 46.120 (a) (2010).
80 Id. at § 46.120 (d).
81 Cason, supra note 6, at 20.
82 Plaintiff’s Brief, supra note 2, at 22.
83 40 C.F.R. 1500.1 (b) (2010).
question remains: Does the no action alternative taken by the Cason decision alleviate the DOI from being required to supplement the FEIS?

The DOI argues, by selecting the no action alternative, the Cason ROD has transformed “the project’s status as a proposed major federal action” into a project that no longer requires NEPA compliance.84 Or, put another way, when an agency chooses not to approve a project, this denial does not constitute a major federal action. For the DOI, none of the CEQ regulations or NEPA compliance guidelines for the BIA or DOI are binding. This is because NEPA compliance is no longer mandated under the no action alternative since the chosen action preserves the “status quo.”85 In support of this conclusion, the DOI cites several cases where the courts found it unnecessary to prepare an EIS when a major federal action is not taken.86 These cases are distinguishable because these cases deal with the initial triggering of NEPA compliance, whereas NEPA compliance has already been triggered and an exhaustive FEIS has been compiled. The premise behind the DOI’s argument is that the Tribe “misinterprets NEPA and its implementing regulations.”87 In this vein, the DOI—relying on 40 C.F.R. § 1508.18(a)—believes NEPA compliance has been satisfied when there is no longer any major federal action. 40 C.F.R. § 1508.18(a) defines “major federal actions” as “new and continuing activities, including programs entirely or partly financed, assisted, regulated, or approved by federal agencies[.]”88 The DOI hones in on the language “approved” to suggest NEPA is no longer required. This is a difficult argument to make, because it denies the initial conclusion made by four cooperating agencies that the proposed action was a major federal action.

The logic employed by the DOI is seriously flawed and troubling. Applying this logic, the no action alternative card rests within the agency’s pocket to be played when the agency no longer wants to comply with NEPA, due to the weight of political pressures. Of course, an agency’s decision will still have to survive arbitrary and capricious review under the APA,89 but, for this discussion, the negative consequences of the DOI’s logic undermine the purposes behind NEPA, their credibility as an agency, and the greater community of administrative agencies.

84 Defendant’s Brief, supra note 3, at 36.
85 Id. at 34.
86 Sabine River Auth. v. U.S. Dep’t of the Interior, 951 F.2d 669, 679 (finding NEPA may require an EIS when a reservoir is built, but not necessarily when a reservoir is not built); N.W. Sea Farms v. U.S. Army Corps of Eng’rs, 931 F.Supp. 1515, 1523-24 (W.D. Wash. 1996) (finding there is no need to prepare an EIS when choosing the no action).
87 Defendant’s Brief, supra note 3, at 35.
88 40 C.F.R. § 1508.18 (a) (2010).
D. Conclusion: The DOI Violated CEQ Regulations by Issuing an Agency Decision in Light of an Admittedly Flawed FEIS

The DOI violated CEQ regulations and consequently was not in compliance with NEPA. The DOI violated § 1505.2 by failing to integrate the FEIS into their decision-making process and Cason’s reliance on this provision is misguided. However, NEPA was not intended to arrive at an environmentally minded decision without informed decision-making. NEPA and its implementing regulations intend to ensure a thoughtful analysis of the environmental effects of a proposed action and to reach a decision based on this analysis. The Cason decision also violates CEQ regulations (1500.1; 1502.9; 1507.2) because, as Cason admits, the FEIS is inadequate. The DOI should not be able to escape these violations of CEQ regulations by declaring there is no longer a major federal action at stake, and thus, no NEPA compliance is required. While the case law does not expressly speak on this issue it should not be interpreted to allow for such avoidance of NEPA compliance.

V. THE NEGATIVE CONSEQUENCES OF RELYING ON AN ADMITTEDLY FLAWED FEIS

While NEPA weaved its way through Congress, concerns were raised over the potential to abuse its procedural force:

The bill establishes a national policy for the environment. Unfortunately, policy standards can easily get lost in the bureaucratic maze. The bill authorizes studies and research on environmental problems. All too often, research has been used by the Federal Government as an excuse for action. The Federal Government has studied environmental problems to death. We know that our air and waters are polluted. It does us a great deal more good to establish programs to do away with this situation than to study the extent of it from every possible angle.90

Although Representative Farbstein’s concerns do not exactly foreshadow the present problem, he accurately identifies how bureaucracy can victimize the good intentions behind NEPA—to inform agency decision making by taking a hard look at potential environmental impacts from a proposed action. Of course, Farbstein’s apprehension has not been realized, because the FEIS is not being used to justify the federal action. Instead, the DOI justifies inaction based on their inability to adequately comprise an FEIS. The administrative maze has paralyzed the effectiveness of NEPA, but the question remains whether it really matters that the FEIS was inadequate.

The adequacy of this FEIS is just as critical as to the adequacy of an EIS where an agency chooses to go forward with a major federal action that will have a significant effect on the environment. NEPA serves to inform the public and the agency on the environmental effects of proposed federal actions. By not complying with NEPA, the DOI undermines this process, not just in the context of this decision, but for future agency decisions that involve NEPA compliance. Rather than instilling the public with confidence in agency decision-making through the NEPA process, the Cason ROD serves as an example where the agency appears to have flipped-flopped based on the influence of two prominent U.S. senators.

In this case, the presence of undue political influence carries particular significance. It should be noted that the Utah Congressional delegation openly took credit for halting the project. Senators Hatch and Bennett do not represent the sovereign interests of the Skull Valley Band of Goshute Indians. Rather, it is the BIA who must represent the Tribe’s interest; the BIA, acting as trustee, must keep a vigilant watch over the interactions between these two sovereigns, the U.S. and the Tribe. Therefore, the rationale that accountability to constituents ensures the integrity of congressional actions is inapplicable to this scenario.\(^\text{91}\) The best way to cleanse the taint of undue political influence would be to follow the CEQ regulations to supplement the FEIS when new information pertinent to the project proposal is introduced. Here, a strict procedural application of NEPA ensures that all the available information be considered through rigorous NEPA analysis, thereby instilling the public with the assurance that the agencies are making the most informed decisions possible in regards to projects that have the potential to significantly affect the environment. To preserve the viability of NEPA and its statutory goal of restoring public confidence in agency decisions that affect the environment, it is inadequate for the DOI to point to project opponents’ comments—either contained in the FEIS or the Utah Congressional delegation’s comments—as a basis for sustaining the decision. That is to say, NEPA procedural violations should be strictly vindicated, because in cases where the specter of undue political influence arises, the procedural safeguards—embodied in NEPA’s case law, statutory provisions, and regulations—preserve the integrity of agency decision-making. Without enforcement of the DOI’s alleged procedural violations, the administrative process returns to its pre-NEPA state, where agency decisions lack validity because there is no integrity to the process of reaching decisions that affect the environment.

There are reasonable arguments for NEPA having procedural and substantive force, but, in this case, a flawed process that invariably arrives at a flawed decision weakens the entire statute and its regime. Given the BIA’s duty to act as a prudent trustee for the tribe, the DOI has a heightened duty to comply with NEPA. A procedural interpretation of NEPA best assures that the statutory goals of NEPA are met, that is, by strictly adhering to procedures, agency decision-making is legitimized while these decisions simultaneously conserve the environment for

future generations. Taking a substantive view of NEPA is unwarranted in this case due to the heightened trustee-beneficiary relationship between the Tribe and DOI. Additionally, applying a substantive interpretation to lessen NEPA compliance runs the risk of creating a bureaucratic loophole through which an agency can effectively ignore the intent of NEPA and its required procedures.

VI. POSTSCRIPT: THE JULY 2010 DECISION

On July 26, 2010, the court issued its opinion on *Skull Valley v. Davis* vacating both the Cason and Davis decisions and remanding the decisions back for further review to the BIA and BLM, respectively. This section will analyze: (A) the court’s procedural approach to NEPA; (B) specifically how the FEIS is inadequate under NEPA; (C) why the BIA must supplement the FEIS; and (D) how the court’s decision preserves the integrity of NEPA.

A. The Court’s Procedural Approach to NEPA

The court takes a procedural approach to NEPA compliance; “NEPA imposes procedural, rather than substantive, requirements, however, it ‘does not mandate particular results.’” The court further states “[NEPA] prohibits uninformed—rather than unwise—agency action.” The court also discusses how NEPA imposes twin aims: to inform the public on the potential effect of agency decisions, and inform the agency in reaching its decision. While the court does not directly cite to CEQ regulations dictating an agency’s obligation to create an adequate EIS, the court cites the Tenth Circuit’s recognition of this duty. After laying out a proceduralist’s approach to NEPA compliance, the court puts forth the arbitrary and capricious standard of review that will be used to assess the agencies’ compliance with NEPA:

[a decision will be] arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Furthermore, [the reviewing court] must determine whether the disputed [agency] decision was based on

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93 Id. at 1292 (citing Lee v. U.S. Air Force, 354 F.3d 1229, 1237 (10th Cir. 2004)).
94 Id. at 1293 (citing Citizens’ Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1178 (10th Cir. 2008)).
95 Id. at 1292 (citing Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1021 (10th Cir. 2002)).
96 Id. at 1295 (“it was the DOI’s obligation under NEPA to prepare an adequate FEIS”) (citing *Krueger*, 513 F.3d at 1177-78).
consideration of the relevant factors and whether there has been a clear error of judgment. 97

The court held both RODs issued by the DOI were arbitrary and capricious, specifically highlighting how the agencies’ failure to comply with NEPA led to their unreasoned decisions.

B. Why the FEIS Was Inadequate Under NEPA

The court’s decision addresses the BLM’s failure to meet NEPA’s procedural requirements by analyzing the Calvert Decision 98 and then incorporates by reference the Calvert NEPA violations and demonstrates how the Cason Decision contains similar NEPA violations. 99 Consequently, this section will examine the court’s discussion on how the BLM violated NEPA in order to understand how the BIA similarly violated NEPA. The court finds both agencies violated NEPA by (1) relying on an admittedly inadequate EIS to reach its decision, and (2) failing to meet their respective duty to supplement the EIS in order to make the EIS adequate. 100

The court’s decision takes a strictly procedural approach to NEPA in requiring the agency to compile an adequate EIS to inform an agency decision. The court gives no credence to the DOI’s argument that NEPA compliance should be lessened when a decision preserves the status quo or that NEPA compliance is no longer required. The court indirectly refutes these positions taken by the DOI in its briefs, when he discusses how:

[NEPA does not] require agencies to elevate environmental concerns over other appropriate considerations; it requires only that the agency take a ‘hard look’ at the environmental consequences before taking a major action. In other words, it prohibits uninformed-rather than unwise-agency action. 101

In effect, the court is saying, ‘to comply with NEPA, the decision reached should not affect my analysis whether there has been NEPA compliance; instead, my calculus will judge whether the agency met its duty to be informed.’ Under the court’s calculus, the BIA failed in its duty to be informed, because the agency

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97 Id. at 1294 (citing Morris v. U.S. Nuclear Regulatory Comm’n, 598 F.3d 677, 690-91 (10th Cir. 2010)).
98 Id. at 1295-98.
99 Id. at 1303 (stating that “[f]or the same reasons discussed above in vacating the Calvert ROD . . . the Court also concludes that the DOI’s reliance in the Cason ROD on these grounds to disapprove Plaintiff’s lease was arbitrary and capricious, and an abuse of discretion”).
100 Id. at 1295 (finding “it was the DOI’s obligation under NEPA to prepare an adequate FEIS”); Id. at 1297.
101 Id. at 1293 (citing Kreuger, 513 F.3d at 1178).
failed to consider how increased traffic on Skull Valley Road from the Tekoi Bafflefill would affect the project as well as Congress’s designation of the Cedar Mountain Wilderness area.102 The court references these two oversights to demonstrate how the FEIS was an inadequate document to reach an informed agency decision, and then describes how NEPA requires the agency to supplement its EIS in order to remedy these deficiencies.103

C. NEPA Requires Supplementing the EIS

Again, the court refutes the DOI’s assertion that no supplemental EIS was required because there was no longer a major federal action on the table. Specifically, the court found the decision not to supplement as a violation of NEPA when “the DOI . . . has readily available mechanisms which it could have invoked to obtain the information that it found lacking in the FEIS.”104 To support this obligation to supplement, the court cites 43 C.F.R. § 1502.9(c)(1)(iii), which requires supplementation when “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”105 The court also cites two cases, one where the agency supplemented its EIS after determining the EIS to be inadequate and the other recognizing that “NEPA ensures [that an] agency will not act on incomplete information.”106 The court further critiques the failure to supplement, because this unanswered information was easily accessible.107

D. The Court’s Decision as Preserving the Integrity of NEPA

The court’s decision preserves the integrity of the statute by taking a strict proceduralist’s approach to NEPA. In so doing, the court ensures the statutory goals of NEPA are met, that is, the public is instilled with confidence that government agencies are making informed decisions after evaluating the necessary information. Even though, Utahns are upset with this decision as it effectively restarts a ten-year saga, the public should find some solace that government agencies are adhering to their legal responsibilities. It should also be noted that the court’s decision does not, in any way, guarantee the approval of the project; rather, the decision only gives the agencies a chance to comply with NEPA. Upon remand, the agencies may supplement the EIS to give full and adequate

102 Id. at 1303.
103 Id. at 1297.
104 Id.
105 Id.
106 Id. (citing Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1189 (10th Cir. 2006); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989)).
107 Id., at 1298 (stating that “[i]f the incomplete information relevant to reasonably foreseeable significant impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information” (citing 40 C.F.R. § 1502.22(a))).
consideration to the oversights identified in this Note and by the July 2010 court decision. After doing so, the agencies may still deny the Tribe’s lease application. Achieving NEPA compliance will hopefully bring some legitimacy to whatever decision either agency reaches. However, the bureaucratic shenanigans surrounding this FEIS and ROD may prove too difficult to overcome, preventing the public from being assured that the agency has reached an informed decision on the lease. With any luck, the events discussed in this Note will never be repeated, because such events run roughshod over the NEPA process and its ability to be an effective tool for decisions that significantly affect the environment.