Garth Portillo

08/27/01 01:20 PM

To: Robert Lopez/UTSO/UT/BLM/DOI@BLM
cc: Shelley J Smith/UTSO/UT/BLM/DOI@BLM
Subject:: first read of SUWA protest of proposed O&G Lease Sale of September 6

My focus here is strictly Part 3 of the SUWA Protest (the second Part 3), beginning on page 12 of the document. First my general impression, the some specific discussion, and I will close with a conclusion/summary and then an attempt to draft a possible response.

IMPRESSIONS/ANALYSIS

SUWA learned quickly from our response to their last protest. They have identified what I see as the weakest point in our cultural resource compliance efforts for oil & gas leasing - - our deferral of tribal contacts until post-lease activities are proposed. As I mentioned the last time, and in the two meetings we held as we prepared our response a few months ago, that we could usually avoid or mitigate impacts to archaeological values. The problem is that while rare, any sacred, religious, or traditional use areas that may exist on a lease could be affected by oil & gas activity, and avoidance and mitigation may be impossible.

I am now convinced that we need to notify tribes about proposed leases, and offer them the opportunity to consult prior to the lease sale offering. Most tribes will not consult at this level, because the potential impacts are too vague and may never be proposed. However, we could build a record of good faith communications with tribes, and at the very least, develop an administrative record for defending against SUWA allegations in future.

SPECIFICS

A) It is the contention of the BLM Washington Office that the national Programmatic Agreement, to which the Protocol is tiered to, replaces the regulations at 36CFR800. It is the BLM position that if we meet the requirements of our internal guidance (BLM Manual and Handbooks), that the regulations do not apply. I am unwilling to use this as the sole defense for any BLM position on our compliance responsibility for a couple of reasons:

i) we have used language in the current regulations (36CFR800) to explain why we did not do more work prior to offering previous lease sales - - denying applicability of the regulations at this point would be arguing AGAINST the stance we took last time around;

ii) the Advisory Council on Historic Preservation, the key signatory in the Programmatic Agreement, and the agency responsible for the regulations at 36CFR800, has not been consistent in its interpretation of how the regulations may pertain to the BLM Programmatic Agreement - - they agree that the Programmatic Agreement predates the current regulations and is in effect *in lieu* of said regulations, but at the same time, they are telling agencies that the specifics of the current regulations may still apply to agencies operating under these agreements. In other words, we cannot count on their support if we take this issue to court.

We need to keep in mind that the Protocol and the national Programmatic Agreement significantly change our approach to cultural resources compliance, but I also feel we should address the regulatory issues brought forward by SUWA.

B) 36CFR800 does NOT place an "unconditional obligation on the BLM to seek information from native American tribes . . . " (SUWA Protest, p. 12, par. 2). Looking only at 36CFR800.4, this could be inferred. However, the sections leading to 800.4 clearly state that the Federal agency is obligated to make a good faith effort to determine whether or not the undertaking is likely to affect resources/places of concern to tribes, and if so, to invite them to participate. The language at 800.4 assumes that once you have identified tribes with potential interest, you will notify them and involve them throughout the Section 106 process, from SCOPING through to TREATMENT (mitigation) . . .

Our issue, for responding to this and other protests, will be to determine whether or not the DNAs and any supplementary analyses are an adequate expression of a good faith effort to determine whether or not the undertaking is likely to affect
. . . . . if we are confidant that the Field Offices made a good faith effort, and determined that there is little to no potential for impacts to resources/places of concern to tribes, then we are in good shape to proceed with the sale

I am concerned that most Field Offices to do not have sufficient interaction with the full range of potentially affected tribes to determine whether or not these lease sales will be seen by tribes as potentially damaging. Further, the nature of the DNAs has typically been to assess whether or not the existing land use plan continues to be an adequate tool (the conclusion of land use plan evaluations this past year has been that existing plans generally are NOT adequate to consider these sorts of tribal concerns). There is no room on the DNA forms to address the potential impacts to resources/places of concern to tribes other than TRUST Assets.

The responses from most Field Offices do not actively consider archaeological resources or potential impacts to tribes. Some of the DNAs submitted did not have an archaeologist on the interdisciplinary team. Moab included a stip for parcel UT062 that an EA be required for any APDs filed after leasing, in part to deal with cultural resources.

Vernal requested deletion of two parcels (UT077 and UT093) in part because archaeology or paleontology sites on the parcel constituted new data not considered in the RMP. These were deleted and are not subject to protest.

Monticello is the only office that specifically addressed tribal religious concerns, signing off that in their opinion, potential impacts were not anticipated.

{As a side issue, Monticello has at least some lands in parcel UT087 that also lie within the Alkali Ridge ACEC. The Field Office recommends avoidance of impacts to eligible sites in the ACEC, and adds that where avoidance is not possible, mitigative data recovery will be required. Alkali Ridge is a National Historic Landmark, not just a National Register District. Agency responsibilities to a National Historic Landmark are higher than to National Register listed or eligible properties (see 36CFR65.2(c)(2): Federal agencies MUST take actions to minimize harm to such a resource, in consultation with the Advisory Council. If we cannot assure avoidance of contributing resources within the boundaries of the Landmark, the property should be excluded from the lease parcel. Each year, NPS reports on the condition of Landmarks and the potential threats to them. Active leasing within a Landmark where data recovery might be required, would likely be construed as an increased threat.}

In summary of issue #B, with the exception of Mointicello there is no documented evidence that the Field Offices made a good faith effort to determine whether or not resources/places of concern to tribes might be affected. It should go without saying, that if BLM cannot in good faith make a determination that potential impacts to tribal values are not anticipated, then the notification/consultation process might be required. **BLM has always argued that these issues are best analyzed at the surface disturbance stage of lease operations. The unmitigable nature of impacts to religious, spiritual, and/or traditional values runs counter to this argument. See Weatherman Draw example in Montana.**

C) Tenth Circuit Court, Pueblo of Sandia v. United States, page 12, same paragraph as above. This case does establish an interesting precedent regarding the appropriate efforts to be made to establish good faith in terms of soliciting comments/information from tribes. However, if I recall, this case involved a USFS office that had reason to know that a particular proposed action might affect a place of concern to the Pueblo; the case revolves around the adequacy of the USFS efforts to contact the tribe. The court determined that the USFS had not done enough under the circumstances to identify and deal with tribal concerns. The citation seems tangential to our issue.

D) page 12. paragraph 3. SUWA claims that BLM cannot defer Section 106 compliance until the APD Phase, but must comply at the point of undertaking, which is the lease sale. SUWA is partly correct, and partly in error.

As indicated in our response to the previous protest, BLM does not deny that a lease sale is an undertaking. Rather, our position has been that a determination (under the regulations at 36CFR800 AND the Utah Protocol) that the undertaking is not likely to affect resources listed in or eligible for inclusion on the National Register, constitutes compliance with Section 106. The consideration of effects at a later exploration or APD phase, conducted as a lease operation, may be tiered to the lease in terms of NEPA, but gets a fresh look in terms of Section 106. In other words, the lease is an undertaking, and BLM determines that the act of leasing is unlikely to impact National Register properties. The APD is also an undertaking, which has a much more direct potential for causing impacts, and is scrutinized separately and in more detail.

E) page 13, paragraph 1. SUWA is correct, the protocol was negotiated between BLM and SHPO under auspices of the BLM national Programmatic Agreement. BLM did not consult with tribes specifically on the Protocol. However, during negotiation of the umbrella Programmatic Agreement, BLM did send copies to ALL sovereign tribes in the contiguous United States and Alaska, inviting comments, meetings, and an opportunity to consult. Nation wide, there were two phone calls placed by tribes to BLM seeking more information but not objecting.

F) page 13, paragraph 1. SUWA's notes that there is no information presented in the DNAs to indicate that any BLM Field Office contacted tribes or any members of the public. At #B above, I point out this weakness in the DNAs; I have no answer to the SUWA claim. However, as I indicated at #B above, there is no specific requirement to notify or consult tribes. BLM is obligated to inform tribes or other potentially interested parties of actions which have potential to impact resources/places of concern to them. Where the BLM determination can be made in good faith that there is no potential to cause effects, there would be no obligation to notify. We are weak here, because of what the DNAs do not address. We do not have a clear record of such a determination being made.

SUWA footnote #5, at the bottom of this paragraph, draws attention to NAGPRA and other applicable statutes such as NHPA and internal policy. NAGPRA would not apply in this situation (Please let me know if you want this drawn out in discussion). Basically, NAGPRA consultation is required either when there has been an inadvertent discovery of human remains and/or objects covered by the statute, or when authorizing purposeful ground disturbing activities which has potential of unearthing human remains and objects covered by the statute. This situation does not apply to the lease sale, but might apply at the lease operations phase. This footnote does not cover new ground and is discussed adequately at #B above.

G) page 12, paragraph 2 -- I have no comment whatsoever on the award of attorney's fees. I thought this was a given, but appears to be intended as an additional threat.

H) BLM probably needs to respond to the protest in order to clear the way for an appeal to IBLA. However, once at IBLA, BLM should challenge SUWA's standing on the issue of Indian concerns and tribal involvement. SUWA cannot show that they are harmed by BLM actions or by a failure to consult with tribes. Only the tribal values, should any exist, are subject to harm.

CONCLUSION/SUMMARY

In the previous protest, SUWA emphasized compliance with Section 106 of the National Historic Preservation Act. Although tribal consultation was mentioned, it was not a major thrust of their claim. For this effort, SUWA has taken a different approach, and has identified a weakness in our administrative record. I pointed this weakness out last time, and informally recommended some changes in the way we document DNAs.

The DNA documents are much more consistent in format and content this time, but are still lacking in any direct consideration of Indian/tribal concerns for traditional/religious/sacred places and/or resources. Only one Field Office (Monticello) included a specific determination on this issue.

My recommendation is to play safe until we have found a way to document and track the way we determine if tribal contact is required, and to make those contacts where necessary pre-lease sale. We run two risks if we do not: First is continued protests and appeals from SUWA, and potentially from tribes (if we succeed in showing SUWA has no standing on this issue, they will attempt to enlist tribes in their protests and appeals). Bottom line, I recommend we withdraw all parcels from the lease sale except those in Monticello pending a better treatment of the Native American issues. For this and future sales, I once again suggest that we need to give specific instructions to Field Offices to make timely determinations about the need for tribal notification/consultation, and to make such contacts where appropriate. Where information is inadequate, the parcels should be dropped from consideration until the administrative record can be completed.

I would delete any portion of parcel #UT087 that lies within Alkali Ridge National Historic Landmark unless we can use stipulation or Notice to make clear to (and binding upon) the lessee that they may not adversely effect resources contributing to the Landmark (direct and indirect impacts must be avoided) even if it results in no surface occupancy.

DRAFT RESPONSE TO SUWA IF WE DO NOT WITHDRAW PARCELS:

"The regulations at 36CFR800, read in totality and not taken out of context, do not place an unconditional requirement on the agency to consult with tribes. The agency has discretion to make a good faith determination as to the potential of the undertaking to impact places/resources of concerns to tribes. Where no potential to effect is found, there is no inferred obligation to consult. We concur that we have an affirmative obligation to consult where such impacts are likely.

It is our determination that, in accordance with 36CFR800.3(a)(1), the proposed lease sale IS an undertaking but has no potential to cause effects on historic properties, assuming that such properties are present on lease parcels. Additionally, the "reasonably forseeable future" scenarios for the lease parcels is too vague to allow meaningful identification, evaluation, and treatment (mitigation) efforts in consultation with tribes , interested publics, and the State Historic Preservation Officer. In order to consider a potential for impacts, the proposed action must have sufficient foundation to identify a reasonable area of potential effect, to identify the nature of impacts, and to identify meaningful measures to avoid or mitigate from the impacts. Many, if not most of these lease parcels, will see no ground disturbing activity through lease operations during the life of the leases.

Ground disturbing activities conducted as part of future lease operations may or may not take place. Any proposed lease operations with potential to effect historic properties will also be addressed as undertakings, with a level of identification, evaluation, and treatment that is commensurate with the potential to cause effects. As appropriate, this will include tribal notification and consultation."
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Utah State Office Archaeologist

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09/05/01 12:59 PM

To: Robert Lopez/UTSO/UT/BLM/DOI@BLM
cc: Greg Thayn/UTSO/UT/BLM/DOI@BLM, Lauren Mermejo/UTSO/UT/BLM/DOI@BLM, Mary Higgins/UTSO/UT/BLM/DOI@BLM, Robert Henricks/UTSO/UT/BLM/DOI@BLM, Roger Zortman/UTSO/UT/BLM/DOI@BLM, Ron Bolander/UTSO/UT/BLM/DOI@BLM, Shelley J Smith/UTSO/UT/BLM/DOI@BLM
Subject: Re: Briefing SUWA Protest Oil and Gas Lease Sale: September 6, 2001

As I mentioned this morning, I cannot attend the meeting at 2:30 pm. However, I have reviewed the amended DNAs for Vernal, Salt Lake Field Office, Moab, Monticello and Price.

Vernal's amendment is very strong and addresses the tribal consultation issue very well.. The amendments by Price and Salt Lake Field Office address the Native American (American Indian) issue. Monticello had done an adequate job on the Native American/tribal consultation issue with their initial submission. In summary, Price, Monticello, Salt Lake and Vernal have directly addressed Native American religious/traditional concerns and indicated that impacts to properties of concern to tribe are not anticipated (and infer that notification/consultation is not needed). Vernal went so far as to notify the Ute Tribe and documents no response or comments from the tribe. This amended information, which I requested, should be adequate to show that we at least made a good faith effort to determine whether or not tribal consultation would be needed, in accordance with 36CFR800.3(f)(2). This will help considerably in defending an appeal if necessary.

The Moab response is more problematic, and may be incomplete. The document I was given for review is dated September 4, 2001 and is entitled **DNA Addendum**, and appears to address Wilderness concerns. Another Moab document dated 8/30/2001 addresses T&E species. The September 4 document mentions stipulations that Moab will require at the APD stage to assure protection of natural and cultural resources. Given the general thrust of the document (Wilderness) it is unclear whether or not this sentence (paragraph 4, line 7) is intended to cover all cultural issues or if it is somehow addressing cultural and natural resources as they contribute to Wilderness character. Moab has not included a statement addressing potential impacts to historic properties of concern to tribes, nor noted having contacted/consulted with potentially affected tribes. I cannot gauge the degree of risk, but the existing documentation and the amended documentation do not appear to address the "good faith effort" required by 36CFR800.(f)(2) head-on as Emily and I requested.

{Bob, Mary: For Parcel 87, I had SUGGESTED a change in language to indicate that archaeological sites within the Alkali Ridge ACEC (if also included in the Alkali Ridge National Historic Landmark) should be subject to full avoidance, because our obligation to protect sites within NHLs was more stringent than with normal National Register properties. Monticello did NOT change their language. The Unconditional NSO stip for portions of Sections 33, 34, and 35 (a total of about 150 acres) may be related to something else -- it is not clear from the amended DNA what it is related to. You may have to call Nick Sandberg.}

Summary: I am comfortable with all responses except Moab at this point in time. I am not sure of the risk involved and can offer no guarantees about defensibility. But clearly, we are in better shape and much more defensible on tribal issues for SLFO, Vernal, Price and Monticello. Conversely, we are less defensible in Moab.

I will be leaving office about 1:30 pm. I may get back before C.O.B., but will be in first thing Thursday so far as I know.

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Robert Lopez