United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
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SOUTHERN UTAH WILDERNESS ALLIANCE
THE NATURAL RESOURCES DEFENSE COUNCIL

IBLA 2002-334 Decided November 10, 2004

Appeal from a decision denying, in part, a protest to the inclusion of certain parcels in a competitive oil and gas lease sale.

Appeal dismissed as to parcels UT-079, UT-081, UT-082, UT-083, UT-084, UT-085 and UT-099; decision set aside and remanded as to parcels UT-006, UT-007, UT-008, UT-009, UT-010, UT-011, UT-012, UT-013, UT-014, UT–015, UT-066, UT-067, UT-068, UT-069, UT-077, UT-078, and UT-105.

1. Oil and Gas Leases: Oil and Gas Leases--Rules of Practice: Standing to Appeal

   Under 43 CFR 4.410(a), in order to have standing to appeal a BLM decision dismissing protests to the inclusion of various parcels in a notice of competitive oil and gas lease sale, the appellant must be a party to the case and be adversely affected by the dismissal action. Dismissal of the protest establishes that an appellant is a party to the case. Evidence that one or more members of an appellant organization uses each parcel to which the appeal relates establishes that the appellant is adversely affected by the decision being appealed as to that particular parcel.

2. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability

   Regulations implementing section 106 of the National Historic Preservation Act establish a three-step process: identification of historic properties; assessment of any adverse effect of the proposed undertaking on such properties; and creation of a plan to avoid, minimize, or mitigate those adverse effects. 36 CFR Part 800. The requirements of the Utah Protocol, an alternate

procedure, must be consistent with the section 106 regulations at 36 CFR Part 800. See 36 CFR 800.14(a).

3. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability

A BLM determination under the Utah Protocol that there is no potential for an oil and gas lease sale, an "undertaking" as defined at 43 CFR 800.16(y), to adversely affect historic properties, and therefore that BLM has no further obligations under section 106 of the National Historic Preservation Act, will be set aside when the record does not support the determination. BLM's interpretation and application of the Utah Protocol must be consistent with the 43 CFR Part 800 regulations; otherwise, BLM has undermined the fundamental purpose of section 106 of the National Historic Preservation Act, i.e., to take into account the effect of its undertaking on historic properties.

4. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Competitive Leases

BLM properly denies a protest of a competitive oil and gas lease sale on the basis that BLM violated the National Environmental Policy Act of 1969 when the environmental analyses demonstrate that BLM took a hard look at the potential significant environmental consequences, considering all relevant matters of environmental concern.

APPEARANCES: Stephen H.M. Bloch, Esq., Salt Lake City, Utah, for appellants; Emily Roosevelt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Southern Utah Wilderness Alliance and the Natural Resources Defense Council (appellants) have appealed an April 5, 2002, decision of the State Director, Utah State Office, Bureau of Land Management (BLM), granting in part appellants' protest

as to 13 parcels [1] and denying their protest as to the remaining 24 of 37 parcels included in the March 19, 2002, Utah Competitive Oil and Gas Lease Sale. [2]

Notwithstanding that the notice of appeal appears to pertain to all 24 parcels subject to BLM's protest denial, appellants' statement of reasons (SOR) states that it relates only to the following 17 parcels: UT-006, UT-007, UT-008, UT-009, UT-010, UT-011, UT-012, UT-013, UT-014, UT-015, UT-066, UT 067, UT-068, UT-069, UT-077, UT-078, and UT-105. (SOR at 1.) Since no SOR was filed with the notice of appeal, or thereafter filed, concerning the seven remaining parcels (UT-079, UT-081, UT-082, UT-083, UT-084, UT-085 and UT-099), we hereby dismiss appellants' appeal to the extent that it relates to those parcels, pursuant to 43 CFR 4.412.

Factual Background

In November and December 2001, Utah's BLM Field Offices reviewed 107 parcels that had been nominated for the March 19, 2002, lease sale to determine whether existing land use plans and documentation prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2) (2002), adequately addressed the issues and environmental consequences of leasing. See, inter alia, Admin. File, Vol. 2 ("Competitive Sale Book"). As a result, the Field Offices recommended that the Utah State Office, BLM, offer for sale 56 parcels, including the 17 at issue in this appeal, and that 51 be deleted from the offering. Id., "Final List" at 78. On January 17, 2002, the Utah State Office, BLM, decided to offer 71 parcels for lease sale, [3] concluding that leasing the parcels "would not result in significant impacts on the human environment other than [those] already analyzed in existing NEPA documents." Id., Decision Record/Finding of No Significant Impact, dated Jan. 17, 2002.

On January 18, 2002, the Utah State Office, BLM, issued a Notice of Competitive Lease Sale, indicating that the 71 parcels of land would be offered in a

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[1] UT-001, UT-002, UT-003, UT-004, UT-005, UT-017, UT-019, UT-023, UT-044, UT-062, UT-120, UT-121 and UT-122. BLM withdrew these parcels from the March 19, 2002, competitive oil and gas lease sale.

[2] The remaining 24 parcels include: UT-006, UT-007, UT-008, UT-009, UT-010, UT-011, UT-012, UT-013, UT-014, UT-015, UT-066, UT-067, UT-068, UT-069, UT-077, UT-078, UT-079, UT-081, UT-082, UT-083, UT-084, UT-085, UT-099, and UT-105.

[3] The 71 parcels included 12 that the U.S. Forest Service had separately recommended for the sale, and three within the Monticello Field Office that had previously been withdrawn from a lease sale, and were being reoffered in March 2002. (Admin. File, Vol. 2, "Final List" at 17-79.)

competitive lease sale on March 19, 2002, and providing a 45-day period to protest the lease sale, which ended on March 4, 2002. Id., "Final List." On March 4, 2002, appellants filed a protest to inclusion of 37 of the parcels, advancing numerous arguments, including, inter alia, that BLM disregarded section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f) (2000), as well as NEPA. On April 5, 2002, BLM issued its final decision granting the protest as to 13 parcels, and denying the protest as to 24 parcels. See, id., Admin. Record, Vol. 1, "Protest & Decision," at Decision and Appendices A-H. This appeal followed, with appellants challenging BLM's denial of their protest regarding the remaining 17 parcels as identified above, arguing that lease issuance violated the NHPA and NEPA.

[1] BLM has filed a motion to dismiss this appeal in part for lack of standing. BLM moves to dismiss the appeal as it relates to parcels UT-066, UT-067, UT-068, UT-069, UT-077, and UT-078 pursuant to 43 CFR 4.410, which provides that "[a]ny party to a case who is adversely affected" by a BLM decision may appeal to this Board. BLM does not dispute that appellants are parties to the case, since they filed a protest to the Notice of Competitive Lease Sale. However, BLM contends that appellants fail to meet the "adversely affected" prong of the standing requirement, in that they fail to "identify how the particular BLM action in question adversely affects [their] interest." (Motion for Partial Dismissal at 5, quoting Laser, Inc., 136 IBLA 271, 272(1996).) BLM argues that the appellants must "provid[e] evidence of use of each particular parcel to which the appeal relates." (Motion for Partial Dismissal at 5, quoting Wyoming Outdoor Council, 153 IBLA 379, 384 (2000).)

In their SOR, appellants state that their "members and staff use and enjoy the parcels that are the subject of this appeal for hiking, recreation, sight seeing, and solitude," and that their interests "have been injured and impaired by BLM's decision to sell and issue leases for the 17 parcels at issue in this appeal in violation of NEPA and the NHPA." (SOR at 4-5.) In support of their statement of standing, appellants submit declarations by Ray Bloxham and Liz Thomas, members of both SUWA and NRDC (Exhs. D and E to SOR, respectively). Both Bloxham and Thomas state that "SUWA and NRDC members and staff enjoy hiking, camping, birdwatching, study, contemplation, solitude, photography, and other activities in the lands that are the subject of this appeal * * *." In his declaration, Bloxham states that "[t]hese are the surface lands that will be disturbed by developments of the following oil and gas leases, sold competitively at the BLM's March 2002 oil and gas lease sale, as well as noncompetitively at the 'day after' sale: UT 006, UT 007, UT 008, UT 009, UT 010, UT 011, UT-012, UT-013, UT 014, UT 015, and UT 105."

As noted, BLM's Motion for Partial Dismissal of this appeal relates to the six parcels not mentioned in Bloxham's declaration. In their Response to Partial Motion to Dismiss, appellants provide a supplemental declaration by Thomas, which they claim "explains that she has a direct and substantial interest in the BLM's decision to

lease the 17 parcels at issue in this appeal." Concerning the six parcels of particular concern to BLM, Thomas states:

> 3. My friends and I use and enjoy the public lands and natural resources on BLM managed lands for many health, recreational, spiritual, educational, aesthetic, and other purposes and have used and enjoyed for these same purposes the public lands in the following lease parcels at issue in this appeal: parcel UT 066 (Trough Canyon); parcels UT 067, 068, and 069 (Butler Wash/Black Ridge); and parcels UT 077 and 078 (headwaters of Kane Springs Canyon/Black Ridge). I take great pleasure from my visits to these areas and intend to return as often as possible, and certainly within the next year. My health, recreational, spiritual, educational, aesthetic and other interests will be directly affected and irreparably harmed by the BLM's failure to evaluate, according to the terms of NEPA, the NHPA, and the BLM's own internal guidance, the impacts of oil and gas leasing to the current on-the-ground conditions and resources of these lands.

(Response to Partial Motion to Dismiss, Exh. V.)

This Board has held that "[a]n organization may establish that it is adversely affected within the meaning of 43 C.F.R. § 4.410 by showing that one or more of its members uses the public land in question." Wyoming Outdoor Council, 153 IBLA at 383. We conclude that appellants have established standing in this case as to the 17 parcels, and hereby deny BLM's motion to partially dismiss their appeal.

Compliance with the NHPA

The NHPA creates a National Register of Historic Places (National Register) to be established by the Secretary of the Interior. 16 U.S.C. § 470a(a)(1)(A) (2000). Section 106 of the NHPA provides that a Federal agency

> having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and * * * having authority to license any undertaking shall, * * * prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The * * * agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f (2000).

The Advisory Council for Historic Preservation (ACHP) promulgated rules at 36 CFR Part 800 for implementing section 106 of the NHPA, and for furthering the "section 106 process," which "seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the Agency Official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning." 36 CFR 800.1(a) (1999). [4/]

The following regulatory provisions, which relate to the "initiation of the section 106 review process," are at the crux of the instant case:

> (a) Establish Undertaking. The Agency Official shall determine whether the proposed Federal action is an undertaking as defined in §800.16(y) [5/] and, if so, whether it is a type of activity that has the potential to cause effects on historic properties. [6/]
>
> (1) No potential to cause effects. If the undertaking does not have the potential to cause effects on historic properties, the Agency Official has no further obligations under section 106 or this part.
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> (2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under §800.14 or a Programmatic Agreement in existence before the effective

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[4/] In 1999, the ACHP amended 36 CFR Part 800. 64 FR 27071 (May 18, 1999). This case arose under the 1999 regulations, and so we address it in the context of the 1999 rules, except as noted.

[5/] In turn, 36 CFR 800.16(y) defines an "undertaking" as:

"a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency."

[6/] An "effect" is defined as "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 CFR 800.16(i). The term "historic property" means "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior." 36 CFR 800.16(l).

> date of these regulations, the Agency Official shall follow the program alternative.

36 CFR 800.3(a).

In 1997, BLM, the President's ACHP, and the National Conference of State Historic Preservation Officers negotiated a National Programmatic Agreement (PA), which directs BLM State Offices to develop state-specific protocols to determine how BLM and the State Historic Preservation Officers (SHPOs) will interact, and to address BLM's responsibilities under the NHPA. (PA at 4.) Pursuant to that directive, in March 2001, the Utah State Office, BLM, and the Utah SHPO entered into a "State Protocol Agreement" ("Protocol" or "Utah Protocol," Exh. G to appellants' Statement of Reasons (SOR)) outlining BLM's obligation to identify and evaluate historic properties when an agency undertaking is at issue. BLM maintains that this Protocol governs the present appeal.

Section VI.A. of the Protocol states:

> BLM will make reasonable efforts to identify all historic properties and sacred sites on BLM-administered lands and private lands where a BLM undertaking will occur within Utah. BLM will ensure that project-specific surveys and other efforts to identify historic properties are conducted in accordance with appropriate professional standards, as defined in the Secretary's Standards, and BLM's 8100 Manual.

(Protocol at Section VI.A. (emphasis added).) Section VII. of the Protocol provides generally:

> BLM shall complete inventory evaluation and assessment of effects and the written documentation of these findings before proceeding with project implementation. Most of BLM's undertakings are routine in nature, and will normally be permitted to proceed and will not await submission of formal documentation to SHPO. For other undertakings, as described in Section VII.(A) below, BLM will consult with SHPO prior to implementation of the action. BLM will discuss the issue with SHPO in cases where there is any uncertainty.

For undertakings described in Section VII.A. of the Protocol, BLM must request the review of Utah's SHPO and the ACHP, when such undertakings directly and adversely "affect National Historic Landmarks or National Register eligible properties of

National significance." (Protocol at Section VII.A.B.(1).) Sections VII.B.(1) and (2) of the Protocol state:

> B. The BLM will request the review of the SHPO in the following situations:
>
> (1) undertakings affecting National Register eligible or listed properties.
> (2) land exchanges, land sales, Recreation and Public Purpose leases, and transfers.

The Protocol acknowledges that "BLM will make determinations of eligibility according to 36 [CFR] Part 60.4 and effects according to criteria set forth in 36 [CFR] 800.5." (Protocol at Section VII.B.)

The Protocol, at Section IV.C., reiterates that BLM is obligated to "seek and consider the views of the public and Indian Tribes when carrying out the actions under the terms of this Protocol," and that "[i]nterested parties shall be invited to consult in the review process [Section VII (B) below] if they have interests in a BLM undertaking or action on historic properties." Further, the Protocol requires BLM to "seek and consider the views of Indian tribes in accordance with the requirements of these and other statutes, regulations, and policy directives including Executive Orders, Manuals and memoranda." (Protocol at Section V.)

In its decision denying the protest as to appellants' NHPA claim that BLM should have sought SHPO review, and should have contacted Native American tribes and members of the interested public, BLM pointed to Section VII.C.(1) regarding "No Potential to Effect determinations," [7] stating:

> Section VII.A. of the Utah Protocol defines review thresholds. Please note that the Protocol, at VII.C. states that BLM will not request the review of the SHPO in certain situations which include No Potential to Effect determinations by qualified BLM staff. This section was brought forward into the Protocol from the regulations at 36 CFR 800.3(a)(1).
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> The regulations at 36 CFR 800, read in totality and in their proper context, do not place an unconditional requirement on the agency to

[7] The term "effect" is defined in the regulations at 36 CFR 800.16(I). See n.6 supra. When not appearing in quoted material, the verb "affect" means "to influence," the verb "effect" means "to bring about, to achieve," and the noun "effect" means "the result." Harbrace College Handbook § 19i (7th ed. 1972); see Webster's New Collegiate Dictionary 20, 362.

> consult with tribes. Following the regulations (36 CFR 800.3(a)), the first step to be taken by an agency is to determine if the action/activity is an undertaking. If it IS an undertaking, the second step is to determine if the action/activity has potential to effect. If there is No Potential to Effect, the agency documents this finding and may proceed; the Section 106 process is complete and no further efforts are required of the agency. Please keep in mind that the rationale for notification and consultation with tribes is to consider the effects of an undertaking. Where no potential to effect is found, there is no further obligation to consult. We agree that we have an affirmative obligation to consult where potential impacts are identified.

(BLM Decision at 8-9 (SOR, Exh. B).) BLM acknowledges that the Utah Protocol references "BLM obligations to work with tribes, and the public, and BLM obligations to meet requirements of other existing statutes." (BLM Decision at 9.) BLM emphasizes that "[t]he Protocol reminds the agency that the Protocol affects only the relationship between BLM and SHPO, and that any other obligations the agency has must still be met." Id. BLM states further:

> Regarding public participation, in accordance with the regulations, where we document that there is no potential to effect, our obligations under NHPA have been met and there is no requirement to involve the public. Our obligation to include the public has to do with considering the effects of an undertaking. Where there is no potential to effect, there are no effects to consider. Additionally, the RMP process is open to the public; opportunities to identify and forward concerns with cultural resources and potential conflicts with oil and gas leasing are documented through the planning process. At the leasing stage, the whole concept of the DNA is to verify and validate (or not, as the case may be) the conclusions of the RMP process.
>
> The DNAs for the Salt Lake, Moab, and Monticello Field Offices reflect that the Field Offices considered cultural resources and addressed Native American traditional and religious concerns. Each office made a determination that there is no potential to effect historical properties through this action. BLM has made every attempt to make a "good faith effort" in evaluating the parcels for Native American concerns and has determined that oil and gas leasing has no potential for impacts to resource/places of concern to Native American tribes at this time. See Appendices B, pg. 2(D-3), C, pg. 7(D-3), D, pg. 3(D-3).

Id. BLM determined "that, in accordance with 36 C.F.R. 800.3(a)(1), the proposed lease sale is an undertaking, but has no potential to cause effects on historic

properties." Id. Accordingly, BLM denied appellants' protest regarding all 24 parcels protested and offered them for lease sale.

Arguments of the Parties Regarding Section 106 Compliance

Appellants contend that BLM violated section 106, implementing regulations at 36 CFR Part 800, and the Protocol by failing to consult with the SHPO, and by failing to contact Native American tribes and other interested members of the public prior to entering into an undertaking that has the potential to cause effects on cultural resources, here the March 19, 2002, sale of the subject 17 oil and gas lease parcels. Appellants maintain that the point of undertaking is at the time of lease issuance, and that "the sale of an oil and gas lease, without adequate and legally enforceable restrictions or conditions to ensure long-term preservation, constitutes an adverse effect that triggers NHPA's consultation requirement, as well as the consultation requirement clearly defined in the Protocol agreement." (SOR at 10 (emphasis in original); see 36 CFR 800.5(a)(2)(vii); Protocol at Sections VII.A. and B.; and Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board (Atglen), 252 F.3d 246, 252 (3rd Cir. 2001).)

In their SOR, appellants observe that "[t]he NHPA is a procedural statute designed to ensure that, as part of the planning process for properties under the jurisdiction of a federal agency, the agency takes into account any adverse effects on historical places from actions concerning that property." (SOR at 5, quoting Atglen, 252 F.3d at 252 (citation omitted).) Courts, they note, have held that section 106 of the NHPA "applies to properties already listed on the National Register, as well as those properties that may be eligible for listing." (SOR at 5 (emphasis in original), citing Pueblo of Sandia v. United States, 50 F.3d 2d 856, 859 (10th Cir. 1995).) Appellants assert that BLM's "fast track" approach to oil and gas leasing and development, what appellants term as a "lease then look mandate," resulted in the disregard of section 106 of the NHPA, NEPA, and BLM's own Manual and policy, all of which "demand a precautionary approach to these types of 'irretrievable commitment of resources," and which require that the leasing of the 17 parcels be set aside and remanded for full compliance with the NHPA and NEPA. (SOR at 1-2.)

Noting that BLM does not dispute that the leasing of the subject parcels is an undertaking, appellants contend that the next question is "whether [such leasing] is a type of activity that has the potential to cause effects on historic properties." Id. at 6, quoting 36 CFR 800.3(a). Appellants add that, according to applicable regulations, "the '[t]ransfer, lease or sale of property out of federal ownership and control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance' results in an 'adverse effect' on historic properties." (SOR at 6, quoting 36 CFR 800.5(a)(2)(vii)(emphasis added by appellants).) Appellants contend that "[i]f an undertaking is of the type

that 'may affect' an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect." (SOR at 7, citing Pueblo of Sandia, 50 F.3d at 863 (holding that the Forest Service failed to make a reasonable and good faith effort to identify historic properties).)

In support of their claim that BLM's sale of the 17 leases constitutes an adverse effect, appellants refer the Board to Atglen, supra, and the preamble to the NHPA regulations, "confirm[ing] that the mere recordation and subsequent destruction of a potential site, constitutes an adverse effect." (SOR at 10; see 65 FR 77720 (Dec. 12, 2000).) Appellants reason that "[b]ecause BLM's sale of the 17 leases at issue in the appeal do not contain adequate leasing stipulations, the inescapable conclusion is that the sale constitutes an adverse effect that, under the NHPA and the protocol, required BLM to consult with SHPO, Native American Tribes and the interested public." (SOR at 10.) Appellants contend that "BLM failed to initiate consultation and thus its issuance of the leases for the 17 parcels must be set-aside and the decision remanded for full compliance with the NHPA and the Protocol." (SOR at 10-11.) Appellants charge that BLM's argument that "the sale of these 17 leases has 'no potential to effect' historic properties, is simply groundless and lacks any foundation in either the NHPA or its implementing guidelines." (SOR at 11.)

Appellants assert that BLM violated the NHPA and the Utah Protocol by deferring consultation with Native American tribes and the interested public. Appellants state that none of the BLM Utah field offices which approved the sale of the contested parcels "attempted to consult with any Native American tribe or other members of the interested public regarding the potential presence of cultural properties." (SOR at 11 (emphasis in original).) Appellants assert that BLM erroneously "argues that such consultation was unnecessary, relying on outdated, inadequate land use plans and early land use planning processes as an excuse for this failure." Id.

Appellants insist that BLM is "wrong" in its approach, maintaining that in an e-mail dated August 27, 2001, from Garth Portillo, Utah State Office, BLM, Archaeologist, to Robert Lopez, Chief, Branch of Minerals Adjudication (Portillo's e-mail), Portillo "expressly acknowledged as much in his review of BLM's same position on NHPA compliance, taken during [appellants'] protest of BLM's September 2001 competitive oil and gas lease sale":

> They [SUWA] 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. . . . The problem is that while rare, any sacred, religious, or traditional

> use areas that may exist on the lease could be affected by oil and 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 [the] future.

(SOR, Exh. J, Portillo's e-mail at unnumbered 1 (emphasis added by appellants).) Appellants note that "Mr. Portillo went on to state that if BLM cannot demonstrate a good faith attempt to consult with Native American tribes prior to leasing, and determine that Native American resources and values will not be affected by oil and gas leasing and development, that the agency should withdraw those particular lease parcels from sale." (SOR at 12; Portillo's e-mail at unnumbered 2.)

Appellants note that although Portillo "ultimately took the position that BLM had complied with the NHPA, he did so expressly on the ground that he believed the field office DNAs in the September 2001 lease sale had demonstrated a 'good-faith effort' to evaluate the lease parcels for potential effects to cultural resources." (SOR at 12; see Exh. J, Portillo's e-mail at unnumbered 2.) However, appellants stress that BLM failed to make a good-faith effort notwithstanding BLM's statement in its decision that the DNAs for the Salt Lake, Moab, and Monticello Field Offices "addressed Native American traditional and religious concerns." (SOR at 12, quoting Exh. B, BLM Decision at 9.) Appellants take exception to BLM's claim that the DNAs demonstrate that it "has made every attempt to make a 'good faith effort' in evaluating the parcels for Native American concerns." Id. Appellants point to Portillo's e-mail, in which he states: "I am concerned that most Field Offices 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." (SOR at 13; Exh. J, Portillo's e-mail at unnumbered 2.) Portillo continued: "[T]he nature of the DNAs typically has 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.") Id. (emphasis added). See also Pueblo of Sandia, 50 F.3d at 860-63 (discussing what constitutes reasonable and good-faith efforts).

Moreover, appellants contend that the Monticello Field Office DNA, approving the sale of parcels UT-067, UT-068, and UT-069, "is glaringly insufficient in its claim that the sale of these leases in one of the most truly rich areas of the United States,

let alone Utah, will not effect important cultural sites." (SOR at 13.) Appellants observe that the Monticello DNA "merely" states:

> Native American concerns were adequately considered during the preparation of the [San Juan] EIS [in the early 1980's] which included extensive public review including consultation with Native American tribes. No expressions of concern about the vicinities of these lease parcels came forward from Native American groups at that time. Therefore, there is no potential to affect historic properties through this action. [8/]

(SOR at 13-14; quoting Exh. L at unnumbered 6 (emphasis added in SOR).)

Appellants assert that BLM's statement is tantamount to stating that

> because Native American tribes failed to specifically identify the presence of important potential resources in lease parcels UT 067, UT 068 and UT 069 (totaling less than 1000 acres) in a 1980's BLM land planning process that covered 1.7 million acres of public land, BLM believed it could proceed with leasing these parcels and not run afoul of the NHPA's strict requirement for "good-faith" efforts to identify historic properties.

(SOR at 14.) Appellants state that "[t]his is simply not the case." Id. They charge that "the Monticello field office should have been aware that numerous important cultural sites had been previously identified within those very same lease parcels," as evidenced by "information already in BLM's own files," but ignored by BLM in an effort to offer these parcels at the March 2002 oil and gas lease sale. Id. (emphasis in SOR). Supporting this assertion, appellants quote from appellants' Exhibit M, entitled "The Results of a Class I Cultural Resources Site File Search at the BLM-Monticello Field Office and Utah Division of State History for the Southern Utah Wilderness Alliance in San Juan County, Utah," prepared by Alpine Archeological Consultants, Inc. (Alpine), for appellants:

> During a visit to the Bureau of Land Management's Monticello Field Office on June 12, 2002, cultural resource maps covering the eight land parcels described in Table 1 were examined. . . . The maps,

8/ Not quoted by appellants is that portion of BLM's finding that "there is also no potential to affect places or resources of religious or traditional concern to Indian tribes through this action." See Exh. 2 to SOR.

> however, are considerably out of date. Sites have not been plotted on them for at least five years, although my examination of them suggests that it may have been even longer in some cases. Furthermore, archeological project areas are not plotted on these maps. The dismal state of the cultural resources at the BLM-Monticello Field Office necessitated a file search at the Utah Division of State History in Salt Lake City. * * *
>
> The Division of State History file search, completed on June 14, 2002, revealed that a variety of past cultural resource inventories within and near the parcels have resulted in the discovery of numerous prehistoric and historic cultural resource sites. . . . Based on the results of previous inventories, the potential for additional cultural resource sites within uninventoried areas of the parcels, including many that would likely be evaluated as eligible to the [National Register of Historic Places], is high.

(SOR at 15; Exh. M at 5 (emphasis added in SOR).) Also, appellants point out that Exhibit M at 2 reports that parcel UT-069 had been "intensely inventoried and control site density has been documented at 27.3 sites per mile." (SOR at 15; Exh. M at 5.) [2/]

Likewise, appellants state that the Moab Field Office DNA "gave trivial attention" to cultural resource protection, stating that "[b]ased on available information," leasing of the listed parcels [including parcels UT 066, UT 077, and UT 078] would have no effect on Native American concerns. Also there is no potential to effect historic properties through this action and there is no potential to effect places or resources of religious or traditional concern to Indian tribes through this action." (SOR at 16, quoting Exh. H, Moab DNA at unnumbered page 2 (emphasis added in SOR).) In the "Critical Elements Checklist," BLM noted that "[p]revious consultation with Native American tribes has indicated that there are no known sites of this type with Native American concerns in the area of the proposed project." Id. Appellants support their argument with the following excerpt from

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[2/] According to appellants, the proposed and final San Juan Resource Management Plan (SJRMP) makes "no mention of consultation with Native American tribes," and does not evidence that "BLM consulted with Native American tribes whatsoever." Appellants further contend that "not a single tribe provided BLM with written comments on the draft and final San Juan environmental impact statements," both of which "do not mention consultation with Native American Tribes regarding cultural resources." (SOR at 15 (emphasis in original); Exh. K, Proposed SJRMP, Final EIS, Vol. 2 at vi-vii.)

Exhibit N, entitled "The Results of a Class I Cultural Resources Records Search for San Juan County, Utah, at the BLM Moab Field Office," prepared by Alpine for appellants:

> During a visit to the Bureau of Land Management's Moab Field Office, cultural resource maps covering the four land parcels described in Table 1 were examined. . . . The file search revealed that a variety of past cultural resource inventories within and near the parcels. . . . Based on the results of previous inventories, the potential for additional cultural resource sites within uninventoried areas of the parcels, including many that would likely be evaluated as eligible to the NRHP, is high.

(SOR at 16-17; Exh. N at 5 (emphasis added).)

Appellants add that review of the Grand Resource Area RMP (Grand RMP) planning document shows that cultural resources were not even considered a "planning issue" for BLM, and that "the agency contacted a single Native American tribe early in the land use planning process, the Ute Indian Tribe, located hundreds of miles north in Fort Duquesne, Utah." (SOR at 17; Exh. O (Draft Grand RMP at 5-1 to 5-5).) Appellants reason that "[l]ike the Monticello Field Office's half-hearted efforts, the Moab Field Office's lackluster efforts fall far short of the 'reasonable and good-faith effort' required by the NHPA," and therefore that BLM's leasing decision on parcels UT-066, UT-077, and UT-078 should be set aside. (SOR at 17.)

Responding to appellants' contentions, BLM maintains that it has complied with the NHPA, either through the regulations or as authorized by those regulations, through the alternative agreements that BLM has developed at both the state and national levels. Reviewing the regulatory scheme, BLM notes first that the regulations at 36 CFR 800.3 provide that, in reviewing a proposed action, BLM must determine "whether it is an undertaking, and if so, determine whether it is a type of activity that has the potential to cause effects on historic properties." (BLM's Motion for Partial Dismissal and Answer to Statement of Reasons (Answer) at 8.) BLM relies upon 36 CFR 800.3 in asserting that if "the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming that historic properties are present, the agency has no further obligations under section 106." (Answer at 8.)

BLM relates that the Protocol provides guidance as to when consultation with the SHPO is required before a proposed action is implemented. Specifically, section VII.B.(1) of the Protocol provides that BLM will request the review of the SHPO when there are "undertakings affecting National Register eligible or listed properties." BLM bases its entire argument that it has complied with section 106 of the NHPA upon

Section VII.A.C.(1) of the Protocol, which does not require BLM to request SHPO review when there is "No Potential to Effect determinations by qualified BLM staff." BLM argues that in this case "qualified BLM staff" determined that there was "No Potential to Effect," and accordingly at that point "the Section 106 process [was] complete and no further efforts [were] required" of BLM. (Answer at 8, quoting BLM Decision at 9.) On the other hand, BLM states that where it determines that the proposed undertakings may affect properties listed or eligible for listing on the National Register, it will request SHPO review, maintaining, however, that "there is no automatic requirement to consult with SHPO, tribes, or other interested parties prior to offering parcels for lease." (Answer at 8; see Protocol at VII.C.(1).)

BLM denies that Portillo's e-mail shows that BLM acted arbitrarily and capriciously. BLM relies upon Portillo's Declaration, offered subsequent to his e-mail, in which he states that his "comments [were made] after an initial review of the SUWA protest of the September 6, 2001 lease sale," and "reflected [his] assessment of the BLM review process that had been employed by the field offices for that particular sale." (Answer at 12; see SOR Exh. 2, Declaration at ¶ 5.) BLM emphasizes that Portillo's e-mail was "specific" to the September 6, 2001, lease sale and "has no bearing" on the March 19, 2002, lease sale. Id. at ¶¶ 6, 8. BLM explains that, based upon the concerns raised in Portillo's August 27, 2001, e-mail message, "BLM has worked to improve the Field Offices' review of cultural resources for lease sales and to ensure compliance with section 106 of the NHPA." Id. And indeed, BLM states that it "removed fourteen parcels from the March 19, 2002, lease sale because it was unable to determine that there was no potential to affect cultural resources for those parcels." Id. at ¶¶ 6, 7. [10/]

BLM asserts, moreover, that "[a] review of the record makes clear that Field Office efforts to determine whether there is a potential to affect were made in good faith and are not arbitrary and capricious." (Answer at 13.) BLM states that the Monticello DNA acknowledges (1) that "Native American concerns are a critical element of the human environment"; (2) that "Native American concerns were adequately considered during the preparation of the EIS [San Juan Resource Area

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[10/] In their reply, appellants argue that the key flaws identified in the leasing process in the Portillo e-mail had not been corrected by the March 2002 lease sale. Maintaining that Portillo was quite blunt in concluding that BLM's post-leasing consultation was contrary to the letter and spirit of the NHPA, and that nothing in Portillo's subsequent Declaration indicates what changes BLM has made to fix the identified problem, appellants contend that BLM has failed to work "to improve the Field Office's review of the cultural resources for lease sales and to ensure compliance with § 106 of the NHPA." (Reply at 6.) Appellants charge that "the damning statements in Mr. Portillo's e-mail are extremely pertinent because they demonstrate BLM's NHPA violations at the March 2002 lease sale." (Reply at 6.)

Management Plan (RMP)] which included extensive public review including consultation with Native American tribes"; and (3) that "Native American groups did not express concern at that time." (Answer at 13, citing Admin. File, Vol. 1, BLM Decision, App. C, Monticello DNA, as supplemented, at 7.) 11/

Similarly, BLM states that the Moab Field Office determined that "[b]ased on available information, leasing of the listed parcels would have no known effect on Native American concerns." (Answer at 14, citing BLM Decision, App. B, Moab DNA as supplemented, at unnumbered 2.) BLM urges that "[l]ike its counterparts in Monticello and Salt Lake, the Moab Field Office also found that there is 'no potential to [a]ffect historic properties . . . or places or resources of religious or traditional concern to Indian tribes through this action." (Answer at 14.) BLM states that the Moab Field Office appropriately consulted with the Ute Indian tribe in preparing the Grand RMP. BLM relates that historically the Ute Indians were the sole occupants of the involved land until the late 1800's. BLM notes that Fort Duquesne is not "hundreds of miles north," as contended by appellants, but "is actually contiguous to the lands managed by the Moab Field Office." (Answer at 14 n.13.)

BLM emphasizes that "[i]n making the determination of 'No Potential to [A]ffect' even assuming that historic properties exist, as contemplated by both the Protocol and 36 CFR 800.3(a)(1), the Field offices relied on the information that SUWA points out BLM already has.'" (Answer at 14, referring to SOR at 15-16; Exh. 2, Declaration at ¶¶ 10, 12.) However, contrary to appellants' claim, BLM maintains that it "does not have an obligation to identify known sites in its DNA, rather it must merely determine whether there is the potential to affect such sites." (Answer at 15.) BLM denies that it has "an obligation to further identify cultural resources or historic properties or consult with the public or tribes prior to leasing once BLM has found that there is no potential to affect under 36 CFR 800.3(a)(1)." (Answer at 15; see BLM Decision at 9.)

BLM insists that appellants' "reliance on Exhibits M and N is misplaced," as "[t]he presence of recorded historic properties on these parcels does not constitute evidence that BLM ignored existing data." (Answer at 15.) BLM reiterates that it "made the no potential to affect findings assuming that cultural sites were present on the parcels." Id.; see, e.g., BLM Decision, App. B at ¶ D.3 (stating that that determination was made based on existing information (emphasis added)). BLM notes that "the cultural resources report has since been amended to reflect concerns

11/ BLM maintains that "[t]he Salt Lake Field office made essentially the same determinations that Monticello made, concluding that there is 'no potential to affect historic properties . . . or places or resources of religious or traditional concern to [I]ndian tribes through this action.'" (Answer at 13; citing BLM Decision, App. D, Salt Lake DNA, as supplemented, at 7.)

identified by the Monticello Field Office in a letter to [Alpine]." (Answer at 15.) BLM notes that by letter dated July 3, 2002, "Alpine modified the first and fifth pages of the report thereby removing the first paragraph quoted by appellants at 14 of their SOR." Id. at 15-16. BLM states: "The purpose of this amendment was to remove the implications that (1) BLM hid the fact that its records and cultural resources reports were out of date and in poor condition; and (2) 'the archeological staff in [the Monticello Field Office] relies on outdated information to formulate recommendations.'" Id. at 16; Exhs. 5 and 6 (Alpine Letters to BLM and Revised Reports). In its amendment, "Alpine recognized that the Monticello Field Office acquires and relies on more up-to-date data from the Utah SHPO (referred to as the Utah Division of State History in the report) and recommended that Alpine do the same." (Answer at 16.)

BLM reiterates that Portillo's August 27, 2001, e-mail does not establish that BLM erred in denying appellants' protest or in concluding in the DNA that there was no potential to affect historical properties. BLM again maintains that appellants' characterization of Portillo's e-mail is misleading, referring to appellants' SOR at 12-13. To the extent that appellants disagree with Portillo's explanation, BLM reiterates that this Board has long held that BLM is entitled to rely on its own experts. Legal and Safety Employer Research, Inc., 154 IBLA 167, 185 (2001); Great Basin Mine Watch, 148 IBLA 1, 6 (1999). BLM submits that its conclusion, based upon the findings of its experts, is entitled to deference, citing National Organization of River Sports, 138 IBLA 358, 363 (1977), and Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Furthermore, BLM responds that Portillo is merely speculating that BLM's internal process for reviewing sales has been modified and improved based upon his suggestions. BLM states that "[i]n the absence of controverting evidence, Mr. Portillo's declaration sworn under 28 U.S.C. § 1746 should be taken at face value." (BLM Reply at 6.)

The parties further sharply disagree as to the point at which BLM is required to meet the identification and consultation requirements under section 106 of the NHPA, i.e., at the leasing or at the APD stage. Appellants contend that BLM should have consulted with the Indian tribes, the SHPO, and members of the public "prior to entering into an undertaking with the potential to effect cultural resources," i.e., at the leasing stage. (SOR at 9.) They argue that "[i]n the oil and gas leasing context, the 'point of undertaking' is at the time of lease issuance, or in other words the point of irreversible commitment." (SOR at 9, citing BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); Wyoming Outdoor Council, 153 IBLA 379, 388-89 (2000); Opinion of BLM Director, MM 36928 (Nov. 24, 1980)(issuance of an oil and gas lease on the outer continental shelf constitutes an undertaking).) BLM acknowledges that "in accordance with 36 C.F.R. 800.3(a)(1), the proposed lease sale is an undertaking, but has no potential to cause effects on historic properties." (SOR Exh. B, BLM Decision at 8-9.)

Appellants again argue that "the sale of an oil and gas lease, without adequate and legally enforceable restrictions or conditions to ensure long-term preservation, constitutes an adverse effect that triggers the NHPA's consultation requirements, as well as the consultation requirements clearly defined in the Protocol agreement." (SOR at 10 (emphasis in SOR).) In this connection, appellants assert that the lease contains inadequate stipulations, pointing to the standard BLM Form 3100-11 (Oct. 1992), which states: "This lease is issued granting the exclusive right to drill for, mine, extract, remove and dispose of all oil and gas in the lands described." Additionally, they note that the Moab District DNA states that "a lessee's right to explore and drill for oil and gas at some location on Category 1 and 2 leases is implied by issuance of the lease." (SOR Exh. H (Moab DNA at unnumbered 1).) They refer to BLM's March 19, 2002, "Notice of Competitive Lease Sale -- Oil and Gas," which included "any special conditions or restrictions that will be made a part of the lease below each parcel." Our review of that Notice shows that none of the parcels include "any special conditions or restrictions" relating to the identification and consultation requirements under section 106 of the NHPA. Appellants assert that BLM regulations

> clarify just how limited the agency's choices are to require a lessee to move its operations at the APD phase: "[Mitigation] measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of a proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year. 43 CFR 3101.1-2 (Surface use rights)."

(SOR at 10 n.2.)

BLM disputes appellants' charge that issuing the leases is contrary to 36 CFR 800.5(a)(2)(vii) in placing the subject land out of "Federal ownership or control without adequate and legally enforceable restrictions or conditions." Rather, BLM contends that "adequate and legally enforceable restrictions or conditions exist which insure long-term protection of a property's historic significance." (Answer at 10.) In maintaining that enforceable restrictions or conditions exist, BLM urges that appellants misconstrue the nature of a lessee's right to drill, as well as the existing statutory and regulatory requirements concerning leasing and surface use. BLM states that "at the leasing stage, for example, BLM reviews data on cultural resources with the knowledge that the lessee has a right to develop that hinges on a well pad being placed somewhere on the parcel." Id., see Exh. 2, Portillo Declaration at ¶ 10. BLM, through Portillo, states that "even in areas of high archeological site density, it is usually possible to place a well pad in a location devoid of sites." (Answer at 10.)

BLM adds that appellants discount the fact that prior to conducting any surface use, a proposal is subject to additional NEPA analysis, a cultural resource assessment, and another round of section 106 consultation with the SHPO, tribes, and the interested public, as described in Portillo's Declaration at ¶¶ 10, 11. (Response at 11.) BLM states that appellants' claim that BLM can only require mitigation that does not exceed the 200 meter and sixty day "limits" set forth in 43 CFR 3101.1-2 is "incorrect." Id. BLM emphasizes that 43 CFR 3101.1-2 is not a mandatory directive, but that BLM retains flexibility to impose greater measures or restrictions on leases. BLM argues that the items identified in the regulation "provide a benchmark of what is consistent with lease rights." Id. BLM states that "[t]o the extent federal law requires mitigation measures greater than that contained in 3101.1-2, those measures will be reviewed to determine if they are inconsistent with lease rights." Id., citing Southern Utah Wilderness Alliance, 144 IBLA 70 (1998) (suggesting that limitations on a lessee's surface use greater than those in section 3101.1-2 may be imposed if reasonably justified).

Appellants charge that BLM's argument that the agency has the authority to protect cultural resources at the APD phase by precluding harmful surface development even without leasing stipulations is unsound for two reasons. First, appellants argue that BLM's position represents a 180-degree reversal from BLM's long-standing interpretation of its post-leasing authority, a position that has already been rejected by the Board in Wyoming Outdoor Council (On Reconsideration), 157 IBLA 259 (2002). Therein, appellants observe that the Board quoted BLM's own position regarding non-no surface occupancy ("non-NSO") leasing as it was stated in the January 2002 draft Powder River Basin EIS:

> The Department of the Interior's authority to implement a No-Action" alternative that precludes development * * * is limited. An oil and gas lease grants the lessee the "right and privilege to drill for, mine, extract, remove and dispose of all oil and gas deposits" in the lease lands, "subject to the terms and conditions incorporated in the lease." Form 3110-2.
>
> Because the Secretary of the Interior has the authority and responsibility to protect the environment within Federal oil and gas leases, restrictions are imposed on the lease terms.
>
> On lands leased without a [NSO] or similarly restrictive lease stipulation, the Department of the Interior cannot deny a permit to drill. Once the land is leased, the Department no longer has the authority to preclude surface disturbing activity, even if the environmental impacts of the activity is significant. The Department can only impose mitigation measures upon a lessee who pursues surface

> disturbing activities. By issuing a lease, the Department has made an irrevocable commitment to allow some surface disturbances (Tenth Circuit Court of Appeals in Sierra Club vs. Peterson [717 F.2d 1409, 1983]).

(Appellants' Reply at 4-5, quoting Wyoming Outdoor Council (On Reconsideration), 157 IBLA at 266.) Thus, appellants reason, "the agency lacks the authority to absolutely protect irreplaceable resources at the drilling phase." (Appellants' Reply at 5.)

Secondly, appellants argue that even if BLM's argument is not inconsistent with the agency's long-standing position, BLM's stated approach "has been so carefully qualified and circumscribed so as to render it meaningless." Id. at 5. They argue that BLM's "so-called 'flexibility' to require additional cultural resources protection must be 'reviewed to determine if it would be consistent with lease rights,' which, appellants state, "impl[ies] that if these protections were too restrictive of the lease rights granted by BLM they could not be imposed." Id., quoting Wyoming Outdoor Council (On Reconsideration) 157 IBLA at 266 (emphasis added by appellants). Appellants conclude that "[p]recisely because the issuance of an oil and gas lease is the point when the BLM engages in an irreversible commitment of resources (something the agency does not dispute), BLM must complete its NHPA Section 106 responsibilities before it completes the leasing transaction." (Appellants' Reply, citing Atglen, 252 F.3d at 252.)

Analysis

[2, 3] As noted, in its decision BLM states that under Section VII.C. of the Protocol "BLM will not request the review of the SHPO in certain situations which include No Potential to Effect determinations by qualified BLM staff." (BLM Decision at 8.) BLM states: "Following the regulations (36 CFR 800.3(a)), the first step to be taken by an agency is to determine if the action/activity is an undertaking. If it IS an undertaking, the second step is to determine if the action/activity has potential to effect. If there is No Potential to Effect, the agency documents this finding and may proceed; the Section 106 process is complete and no further efforts are required of the agency. * * * Where no potential to effect is found, there is no further obligation to consult." (Decision at 8-9.) Thus, according to BLM's decision, where BLM documents that there is no potential to effect, "there is no requirement to involve the public." Id. at 9. Nevertheless, BLM states that it "has made every attempt to make a 'good faith effort' in evaluating the parcels for Native American concerns and has determined that oil and gas leasing has no potential for impacts to resource/places of concern to Native American tribes at this time." Id.

The procedures embodied in the Protocol, assuming that "they are consistent" with the regulations at 36 CFR Part 800 (36 CFR 800.14(a)), are a "substitute" for those regulations for the purposes of compliance with section 106 (36 CFR 800.14(a)(4). We will assume that the Protocol procedures are consistent with the regulations, and proceed to address the critical question of whether BLM correctly determined that the March 2002 lease sale presented "No Potential to Effect" historic properties, so that it was relieved of a further obligation to consult.

A related issue in this case, as BLM recognizes, is whether BLM engaged in a "good faith effort" in evaluating the parcels for Native American concerns and identifying historic properties which may be affected by the undertaking. See, e.g., Pueblo of Sandia, 50 F.3d at 859 (BLM failed to "make a reasonable and good-faith effort to identify historic properties" under 36 CFR 800.4(b); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 807 (9th Cir. 1999)("[a]lthough the Forest Service could have been more sensitive to the needs of the tribe, we are unable to conclude that the Forest Service failed to make a reasonable and good-faith effort to identify historical properties."); Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569, 582 (9th Cir. 1998)(the undertaking, approval of a flight path over tribal land, would have no effect on historic properties, so failure to identify specific potential sites or properties was irrelevant). The NHPA provides that properties of traditional religious and cultural importance to an Indian tribe may be determined to be eligible for inclusion in the National Register. 16 U.S.C. § 470a(6)(A) (2000). Further, in meeting its duties under section 106 of the NHPA, a Federal agency is required to consult with any Indian tribe that attaches religious and cultural significance to properties that may be determined to be eligible for inclusion on the National Register. 16 U.S.C. § 470a(d)(6)(B) (2000).

In this case, BLM premises its argument that there is "No Potential to Effect" upon the fact that site-specific analysis considering whether historic properties will be adversely affected will take place at the APD stage, at which time appropriate stipulations will be imposed to ensure compliance with section 106 of the NHPA. (Answer at 10 n.10.) In the recently decided Montana Wilderness Association v. Fry (Montana Wilderness), 310 F.Supp.2d 1127 (D. Mont. 2004), BLM contended that an oil and gas lease sale is not an "undertaking," so that BLM was excused from proceeding with the section 106 process. In soundly rejecting BLM's position, the court observed that the section 106 process involves two steps under 36 CFR 800.3(a): "The agency official shall determine whether the proposed Federal action is an undertaking as defined in §§ 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties."

In the instant case, BLM concedes that the March 2002 lease sale is an undertaking under 36 CFR 800.16(y). The Montana Wilderness court states that the regulatory definition of "adverse effects" at 36 CFR 800.5(a)(1), and examples

provided therein, suggest that the sale of an oil and gas lease is an "undertaking." The instant case and Montana Wilderness both involve an "undertaking," i.e., an oil and gas lease sale. Whether this undertaking results in "adverse effects" then becomes the subject of inquiry. BLM simply says that "qualified BLM staff" have determined that there is "No Potential to Effect" resulting from the undertaking. (BLM Decision at 8-9.) As in Montana Wilderness, BLM bases this conclusion, for the most part, upon the fact that it will eventually address the question of whether there will be adverse effects on possible historic properties issues at the APD stage, and need not do so now. In Montana Wilderness, the court observed that BLM argues that it will avoid possible adverse effects of the lease sale through lease stipulations. Stating that BLM "cannot skip the first step and go directly to the second" to avoid those effects, the court said: "If the lease sales are an undertaking, BLM is required to initiate the NHPA process in accordance with the regulations." 310 F.Supp.2d at 1152.

While we recognize that the Utah Protocol governs the present case, we must still evaluate whether BLM followed the required NHPA process in reaching its determination that the March 2002 Utah lease sale resulted in "No Potential to Effect." For this Board to countenance BLM's determination, the record must support it. Our review of the record shows that it is devoid of any meaningful evaluation of whether the sale will result in "adverse effects." The appellants are correct that there is nothing in the record supporting BLM's allegation that it made a reasonable and good faith attempt to identify "historic properties" located on the subject parcels, and if there are, to indicate what steps it intends to take in compliance with the section 106 process to protect those properties. BLM simply declares that its qualified staff has determined that there is "No Potential to Effect," and therefore that nothing more is required under section 106 of the NHPA, thus skipping the consultation requirement. This approach renders meaningless the section 106 process, which, according to 36 CFR 800.1(a), "seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation * * * commencing at the early states of project planning." BLM's application of Section VII.A.C. of the Protocol eviscerates the "goal of consultation," which "is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 CFR 800.1(a).

The court in Montana Wilderness emphasized the importance of what it called step two of the section 106 process:

> BLM's contention that the sale of oil and gas leases is not an undertaking is not supported by the statute or the regulations. In fact, BLM's argument on this point mirrors its NEPA argument: By placing stipulations on leases, the agency can avoid affecting historic properties. But like NEPA, NHPA is a procedural statute. The process

> of identifying properties and consulting with affected tribes as well as members of the public is the goal sought by the statute. Lease stipulations do not accomplish the same goal, and cannot replace the BLM's duties under NHPA. Moreover, it is conceivable that different lease stipulations would evolve from a larger discussion of possible effects on historic tribal lands from oil and gas leasing. It seems to me that agency efforts to comply with the law are more productive than efforts that appear to be directed at circumventing the law.
>
> The plain language of NHPA requires consultation once an agency embarks on an undertaking. The sale of oil and gas leases is an undertaking. I am therefore granting Plaintiffs' motion for summary judgment that BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the leases herein.

310 F. Supp.2d at 1152-53. We find that the process of determining whether there is "No Potential to Effect" under the Utah Protocol should reflect the purposes of section 106 of the NHPA, as recognized in the regulations. BLM cannot avoid the consultation requirement by simply stating that it has determined that there is "No Potential to Effect," and therefore that nothing more is required.

As noted, the record does not show what steps it took to comply with section 106 of the NHPA in reaching its "No Potential to Effect" conclusion, merely stating that there is no such potential. In Southern Utah Wilderness Alliance v. Norton, 277 F. Supp.2d 1169 (D. Utah 2003), which involved an oil and gas exploration project in the Uintah Basin of Utah, the court considered whether BLM had complied with section 106 of the NHPA. The court summarized the procedures under section 106, as they relate to the instant case, as follows:

> Under Section 106 of the NHPA, a federal agency must first identify the area potentially affected by the undertaking. Then the agency must identify properties within the potentially affected area that may be eligible for inclusion in the National Register of Historic Places. The agency must then evaluate whether the project will have adverse effects on those potentially historic places. Where an agency concludes that the undertaking may have adverse impacts on historic properties, it must determine ways of avoiding, minimizing or mitigating those adverse impacts.

Id. at 1193 (citations omitted). The court then stated that "[i]f the agency determines that there will be no such effects, it may then propose a finding of no adverse effect to all consulting parties," which would include the states' SHPO, relevant Native American Tribes, and the ACHP. Id. at 1194.

In the instant case, the record does not show that BLM engaged in this process. The record merely shows BLM's conclusion that there is "No Potential to Effect." The steps BLM took in following the section 106 process in Southern Utah Wilderness Alliance contrast sharply with the lack of section 106 evaluation in the instant case. We quote the court's summary of BLM's evaluation in Southern Utah Wilderness Alliance to demonstrate and emphasize that BLM's application of Section VII.A.C. of the Utah Protocol is quite deficient under section 106 of the NHPA:

> Before determining whether the BLM complied with Section 106, it is necessary to determine what BLM actually did. The BLM determined the area of potential effects ("APE") for the Veritas Project, then conducted the file searches in the BLM Vernal Field Office and the Utah State Historical Society in Salt Lake City for further information. These searches located 121 prior surveys and 33 recorded historic sites in the Project area. Of those 33 sites, 11 were considered eligible for inclusion on the NRHP. Following the file searches, the BLM surveyed 12 of the 17 seismic lines proposed by the Veritas Project, conducting Class III cultural resource surveys on each of the 12 lines. All sites located by those searches were marked and their status determined. Those sites deemed historic were evaluated for eligibility on the NRHP. Those sites near proposed shotholes were moved to ensure that the sites would not be adversely affected by the Project. * * * [T]he BLM also imposed conditions to ensure that Section 106 review would be completed before seismic work began on the five lines not yet completed.

277 F. Supp.2d at 1194.

By contrast, there is scant evidence pertaining to the section 106 process leading to BLM's determination of "No Potential to Effect" in the present case. The major relevant evidence, Portillo's e-mail (SOR, Exh. J) and the Alpine reports (SOR, Exhs. M and N), is quite damaging to BLM's claim that it made "good faith efforts" to "determine whether there is a potential to affect." See Answer at 13. As noted, in his e-mail, Portillo states that "the weakest point in [BLM's] cultural resource compliance efforts for oil and gas leasing" is its "deferral of tribal contacts until post-lease activities are proposed." (SOR, Exh. J at unnumbered 1.) To repeat, Portillo states: "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." Id. Such an effort would "build a record of good faith communication with tribes, and at the very least, develop an administrative record for defending against SUWA allegations in the future." Id. Finally, in response to BLM's position that "these issues are best analyzed at the surface disturbance stage of lease operations," Portillo states that "[t]he unmitigable nature of impacts to religious, spiritual, and/or traditional values

runs counter to this argument." Id. In its answer, BLM offers a subsequent Declaration by Portillo, which, according to BLM, shows that Portillo did not quite mean what he said. Rather than address the point of Portillo's e-mail, i.e., that BLM should have consulted with relevant Native American tribes prior to offering the parcels for lease sale, BLM only says that the e-mail has "no bearing on the March 19, 2002 lease sale." (Answer at 12.)

Upon reviewing BLM's records in the Monticello and Moab Field Offices, Alpine concluded in both reports: "Based on the results of previous inventories, the potential for additional cultural resource sites within uninventoried areas of the parcels, including many that would likely be evaluated as eligible to the NRHP, is high." (SOR, Exhs. M and N, at unnumbered 5, respectively.) In its Answer, BLM appears more concerned with the efforts it took in correcting the impression that BLM's "records and cultural resources reports were out of date and in poor condition," and that BLM's "archaeological staff relies on outdated information to formulate recommendations," than with explaining how it complied with section 106 of the NHPA. See Answer at 12.

Whether the involvement of Utah's SHPO is necessary depends upon the outcome of a determination of "No Potential to Effect" historic properties conducted in accordance with the section 106 review process. Section VII.A.B.(1) of the Protocol, which provides that BLM will request the review of the SHPO when there are "undertakings affecting National Register eligible or listed properties," appears superfluous in the absence of a reasonable and good faith effort on BLM's part to identify historic properties as required under 36 CFR 800.4(b)(1). Obviously, in this case BLM seeks to obviate the need for making a reasonable good-faith effort to identity property eligible for inclusion in the National Register, maintaining that while it assumes historic properties exist, the sale of the separate parcels will have no effect on listed or eligible properties.

BLM's position appears inconsistent with the identification step of the section 106 process as tracked in the Protocol, which requires that "BLM will make reasonable efforts to identify all historic properties and sacred sites on BLM-administered lands and private lands where a BLM undertaking will occur within Utah." (SOR Exh. G, Protocol at Section VI.A.) Under the requirements of the Protocol, "an alternate procedure" must "be consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the Act," i.e., the 36 CFR 800 regulations. 36 CFR 800.14(a). See Attakai v. United States, 746 F. Supp. at 1407-08 (the Bureau of Indian Affairs (BIA) did not satisfy the requirements of 36 CFR 800.4(a)-(c), given that the procedures of BIA allow the Area Archaeologist to make a "unilateral determination" that the undertaking will not affect historic properties).

Implicit in BLM's finding of no effect is its assumption that under the Standard Lease Form and terms it possesses the authority to preclude surface disturbance where it affects cultural resources. That assumption, however, is unsubstantiated and is not borne out by the present regulatory scheme. It has been held on numerous occasions that issuance of a lease constitutes an irreversible, irretrievable commitment of resources. E.g., Wyoming Outdoor Council, 165 F.3d at 49; Colorado Environmental Coalition, 149 IBLA 154, 156 (1999); 43 CFR 3101.1-2; Part III, Drilling Operations, section E, Onshore Oil and Gas Order No. 1, "Approval of Operations," effective December 20, 1983 (48 FR 48916, Oct. 21, 1983), in effect when BLM issued the subject leases; see also Mack Energy Corp., 153 IBLA 277 (2000) (involving the unamended version of Onshore Order No. 1 (48 FR 48916 (Oct. 21, 1983)). The requirement that BLM conduct its section 106 evaluation prior to leasing is to determine, inter alia, whether it is appropriate for BLM to impose a cultural resource stipulation(s) in the leases to be issued.

We are not persuaded by BLM's argument that because development occurs in connection with approving an APD there is no effect associated with leasing. The NHPA is clear that BLM's obligations under section 106 are triggered by an "undertaking," and BLM does not dispute that leasing is an undertaking. We recognize the fact that section 106 is also triggered, perhaps more concretely, by the filing of an APD, and that Indian tribes and interested parties may be more likely to be actively engaged in that stage as opposed to the leasing stage, as BLM argues. In this case, Portillo concedes that little interest is likely to be generated because the potential impacts are too vague and may never be proposed. See SOR Exh. J, Portillo's e-mail at unnumbered 1. Because of the site-specific nature of an APD, BLM reasonably explains that this is the time and place for conducting a cultural resources survey and the time that tribal and interested parties are more likely to be actively engaged. Onshore Order No. 1 implements this reasoning as well. BLM in effect argues that owing to that which routinely occurs in connection with the filing of an APD, and the great unlikelihood, even assuming the presence of numerous cultural sites, that a well cannot be sited so as to protect those resources, its no effect conclusion is sustainable.

We have noted 36 CFR 800.4(b)(2), which provides for "phased identification and evaluation" in certain situations, such as those involving "corridors or large land areas, or where access to property is restricted." The agency may "also defer final identification and evaluation of historic properties if it is specifically provided for * * * pursuant to §800.14(b)." The conditions for application of 36 CFR 800.4(b)(2) do not appear to be present in the instant case. The court in Southern Utah Wilderness Alliance, 277 F. Supp.2d at 1195, found that "BLM may consider phased evaluation in appropriate circumstances." However, we have reviewed the considerable "good faith" efforts which BLM made in Southern Utah Wilderness Alliance to identify historic properties potentially affected by the oil and gas lease

sale at issue, and found them to stand in stark contrast to the lack of any such effort in this case. There is no "phased identification and evaluation" shown in BLM's application of the Utah Protocol. BLM would defer "final identification" to the APD stage, apparently the only stage contemplated in BLM's approach to the section 106 process, at least as effectuated herein. The term "final identification" itself would appear to presuppose that there was an "initial identification," or an effort of some kind to identify potentially affected historic properties prior to making a "No Potential to Effect" determination.

BLM's analysis overlooks the fact that because it is required to evaluate an APD under section 106 does not mean that it is excused evaluating the undertaking, albeit with a broader focus and less detail, at the leasing stage. Compliance with section 106 at the leasing stage is intended to ascertain whether the presence of historic properties, including unidentified but identifiable eligible properties. This requires BLM to include stipulations in the lease to protect or mitigate potential impacts which might affect cultural resources should a conflict arise involving siting of a well(s) and surface facilities. Such identification at the leasing stage, based on current records, regardless of whether those records are found with SHPO or BLM, and notification to Indian tribes and other interested parties seeking to identify potentially eligible properties, is likely sufficient where BLM reasonably requires more site-specific data, including a cultural resource survey, at the APD stage.

Based upon the record, and the previous discussion, we deem it appropriate to set aside BLM's decision on the section 106 compliance question, and remand the matter for BLM to take the steps necessary for applying Section VII of the Utah Protocol consistent with the purposes of section 106 of the NHPA as articulated in the regulations, and compilation of a record sufficient to support the conclusion reached as a result of that process.

Compliance with NEPA

While BLM's evaluation of the subject parcels under section 106 of the NHPA was deficient at the pre-lease stage, notwithstanding the fact that further section 106 review will be required at the APD stage, we do not reach a similar conclusion with regard to BLM's NEPA compliance. We reject appellants' argument that BLM's NEPA analysis supporting the March 2002 competitive lease sale as it relates to the subject parcels was inadequate. It is well established that the appropriate time for considering the potential environmental impacts of oil and gas exploration and development under NEPA is when BLM proposes to lease public lands for oil and gas purposes, because leasing, at least without NSO stipulations, constitutes an irreversible and irretrievable commitment of resources by permitting surface disturbing activities in some form and to some extent. Colorado Environmental

Coalition, 149 IBLA at 156, and cases cited; see also Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983).

The question raised by appellants in this case is whether existing applicable NEPA documentation, including the Grand Resource Area RMP (SOR, Exh. O), the San Juan RMP (SOR, Exh. K), and the Proposed Pony Express RMP/EIS (SOR, Exh. P), adequately analyzed the impacts of the proposed leasing for NEPA purposes. The adequacy of these documents under NEPA depends upon whether they constitute a detailed statement which takes a "hard look" at the environmental consequences of the proposed action, considering all relevant matters of environmental concern. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Colorado Environmental Coalition, 149 IBLA at 156; Colorado Environmental Coalition, 142 IBLA at 49, 52 (1997), and cases cited. The documentation must fulfill the primary purpose of NEPA, which is to ensure that a Federal agency, in exercising its discretion to approve or disapprove a project, is fully informed of the environmental consequences of such action. Id.

Arguments of the Parties

Appellants devote somewhat limited attention to this issue, arguing simply, based upon Conner v. Burford, 848 F.2d 1441, 1448-51 (9th Cir. 1988), that "NEPA requires an EIS for non-NSO proposed oil and gas leases as they represent a full and irretrievable commitment of resources." (SOR at 19.) They observe that all 17 of the leases at issue in this appeal "are referred to as 'non-NSO' leases, meaning, in simple terms, that they are leases that do not prohibit occupancy of the surface by the lease purchaser." Id.; see Exh. I (Mar. 2002 Utah BLM Notice of Competitive Lease Sale – Oil and Gas).) They derive support from Wyoming Outdoor Council, 153 IBLA 379 (2000), in which the Board, quoting BLM's Handbook on Planning for Fluid Mineral Resources (H-1624-1), stated:

> The BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities. By law, these impacts must be analyzed before the agency makes an irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance.

Id. at 388-89 (emphasis added by appellants); see also Wyoming Outdoor Council, 156 IBLA at 357. They further point to BLM's Information Bulletin No. 92-198 (Jan. 12, 1992), which states that "[t]he simple rule coming out of the Conner v. Burford case is that we will comply with NEPA * * * prior to leasing" (SOR, Exh. Q.), as discrediting BLM's reliance upon Park County Resource Council v. U.S. Department

of Agriculture, 817 F.2d 609, 623-24 (10th Cir. 1987), for the proposition that BLM can wait until the APD stage to conduct the environmental analysis required under NEPA. (SOR at 20.)

Our review of the record shows that appellants fail to demonstrate that the environmental analyses in this case were inadequate under NEPA. Appellants' critique of the NEPA analysis in this case amounts to an observation that "the DNAs prepared by BLM to sanction oil and gas leasing do not engage in any site-specific analysis," and that "they merely parrot the broad, programmatic language used in the field office-wide RMPs." (SOR at 23.) [12/] Thus, they assert that "BLM must be directed to rescind the leases and required to prepare a pre-leasing EIS before re-offering them for sale." Id. at 24.

In its answer, BLM incorporates by reference its answer to appellants in Southern Utah Wilderness Alliance, IBLA 2001-310 (currently pending before the Board), in which, according to BLM, appellants raise and BLM responds to the same arguments regarding its May and September 2001 lease sales. (Answer, Exh. 6.) BLM's primary contention in IBLA 2001-310 and in the present case is that appellants must show "by objective proof that an agency failed to satisfy the requirements of NEPA," and that such objective proof must show that BLM's environmental analysis "failed to consider a substantial environmental question of material significance." (Answer at 18, citing Wildlife Damage Review, 150 IBLA 362, 377 (1999).) BLM contends that in the applicable RMPs, EISs, and EAs, it "identified lands potentially available for oil and gas drilling and developed and analyzed reasonably foreseeable drilling scenarios for those lands." (Answer at 18.) BLM states that appellants offer no objective proof that its NEPA evaluation was deficient.

Analysis

[4] Upon review of the record before us, we conclude that BLM has taken a hard look at the environmental consequences of the March 2001 lease sale, and that appellants have failed to address whether the NEPA documents cited by BLM constitute a detailed statement which takes a "hard look" at the environmental

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[12/] A DNA does not constitute a NEPA analysis that can be tiered. See 40 CFR 1508.28. The DNA is used to identify the relevant analyses prepared in accordance with NEPA's provisions and to indicate BLM's conclusions regarding whether they remain adequate for the Federal action at issue and conform to land use planning decisions. Colorado Environmental Coalition, 162 IBLA 293, 296 n.4 (2004); see also Southern Utah Wilderness Alliance, 163 IBLA 14, 21 (2004); Wyoming Outdoor Council, 160 IBLA 387, 388-89 n.3 (2004); Wyoming Outdoor Council (On Reconsideration), 157 IBLA at 276.

consequences of the proposed lease sale. We agree with BLM that Sierra Club v. Peterson, 717 F.2d at 1414, does not require it to prepare an EIS prior to its decision to conduct the sale. As BLM argues, NEPA does not require BLM to always prepare a site-specific EIS prior to issuance of oil and gas leases that do not contain NSO stipulations, particularly as in this case, where, as documented in the relevant DNAs, there is no significant new information or substantial changes in circumstances warranting additional NEPA review. (Answer at 20; see 40 CFR 1502.9(c)(1)(ii).) A review of the record supports BLM's assertion that the DNAs are often site-specific in addressing questions concerning environmental issues relating to the subject parcels. (Answer at 20; see, e.g., SOR, Exh. L (Monticello DNA).) [13/] We agree with BLM that it "will have [the further] opportunity to analyze impacts of the site-specific proposal at the APD stage and mitigate those impacts consistent with the lease rights granted by the lease." Id. at 25.

Conclusion

Consequently, for the reasons detailed herein, we set aside and remand BLM's decision for an evaluation of the subject parcels under section 106 of the NHPA, as discussed herein. BLM must make a reasonable and good faith effort to identity historic properties, meaning properties eligible and listed, which are potentially adversely affected by the subject undertaking, i.e., the March 2002 lease sale, consulting as appropriate and necessary under 43 CFR 800.1 in order to "identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." We find that Section VII of the Utah Protocol must be interpreted and applied consistently with the regulations at 43 CFR Part 800. Because the record fails to disclose that this occurred, we set aside and remand the BLM decision as it relates to parcels UT-006, UT-007, UT-008, UT-009, UT-010, UT-011, UT-012, UT-013, UT-014, UT-015, UT-066, UT-067, UT-068, UT-069, UT-077, UT-078, and UT-105.

To the extent not expressly addressed herein, this Board has considered and rejected any other arguments advanced by the parties.

[13/] BLM states that appellants' claim that Conner v. Burford dictates otherwise "is simply preposterous and unsupported by the law or the facts," and that while its decision to lease subject parcels "constitutes an irretrievable commitment of some resources, it is not a full irretrievable commitment of all resources." (Answer at 24.)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM partial motion to dismiss is granted as to parcels UT-079, UT-081, UT-082, UT-083, UT-084, UT-085 and UT-099 and the decision appealed from is set aside and remanded as to the remaining parcels, identified in the foregoing paragraph, consistent with this decision.

James F. Roberts
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge