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ELECTRONICALLY SUBMITTED (UT_Pr_Comments@blm.gov)
AND VIA FIRST-CLASS MAIL

Bureau of Land Management
Price Field Office
Attn: West Tavaputs Plateau Natural Gas Field Development Plan DEIS
125 South 600 West
Price, UT 84501

**Re: Comments on the West Tavaputs Plateau Natural Gas Field Development Plan Draft
Environmental Impact Statement**

To Whom It May Concern:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement (Draft EIS) for the West Tavaputs Plateau Natural Gas Field Development Plan (West Tavaputs Project). Over the past few years, natural gas development has become the principal use of public lands in the Nine Mile Canyon region. The adverse effect upon the region's internationally significant historic resources has been dramatic. Dust from industrial traffic has obscured prehistoric rock art sites in Nine Mile Canyon, and magnesium chloride, a chemical dust suppressant approved for use in conjunction with several natural gas projects by the Bureau of Land Management (BLM), has migrated from roadbeds to rock art sites and threatens further harm to these fragile and non-renewable resources.

The West Tavaputs Project, due to the scope and intensity of development proposed in the Draft EIS, would perpetuate and immensely exaggerate the adverse effects of natural gas development on Nine Mile Canyon. Industrial traffic under each of the Draft EIS action alternatives would increase by several hundred percent, and the limited mitigation measures proposed by BLM have been shown to be ineffective at best by the findings of the recent dust study.¹ Our biggest concern is that BLM has improperly dismissed several alternative access routes from detailed consideration—alternatives that could substantially reduce and even eliminate the adverse effects of industrial traffic on rock art sites in Nine Mile Canyon.

We do not question BLM's appreciation for the historic properties that will be affected by the West Tavaputs Project—numerous plans and project documents developed by BLM in the past describe the international significance of Nine Mile Canyon. However, we are deeply concerned by the failure of the Draft EIS to put forth concrete measures and alternatives that will protect historic properties in Nine Mile Canyon from the adverse effects of the project. For the reasons described below, we believe that the Draft EIS and the West Tavaputs Project as proposed in the Draft EIS violate the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470f, 470h-2, the National Environmental Policy Act (NEPA), 40 U.S.C. §§ 4332, and the Federal Land Policy and Management Act (FLPMA), 43 U.S.C §§ 1701–1784. We also believe that the specific deficiencies identified in this letter require the preparation of a Supplemental EIS.

¹ At the request of BLM and the project proponent, the Bill Barrett Corporation, Preservar, Inc. initiated the dust study in 2006. Draft EIS at App. G-2.

Interests of the National Trust

The National Trust for Historic Preservation has a long-standing interest in the protection of our nation's irreplaceable cultural and historic resources. In 1949, Congress chartered the National Trust as a private nonprofit organization to "facilitate public participation" in historic preservation, and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. Congress intended that the National Trust "mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S. Code Cong. & Ad. News 2285, 2288.

In addition, Congress has designated the Chairman of the National Trust as one of 23 members of the Advisory Council on Historic Preservation (ACHP), which is charged with assisting other agencies in complying with Section 106 of the NHPA. 16 U.S.C. § 470i(a)(8). With the support of more than 290,000 individual members nationwide, the National Trust has been involved as a consulting party in hundreds of Section 106 cases, helping federal, state and local agencies, as well as other consulting parties, effectively resolve issues affecting historic resources.

The National Trust has also participated as an advocate in BLM's decisionmaking process regarding natural gas exploration and development in the Nine Mile Canyon region for the past several years.² In addition, we have provided financial assistance to the Nine Mile Canyon Coalition to help privately fund preparation of the nomination of Nine Mile Canyon to the National Register of Historic Places—an important initiative that BLM has failed to take responsibility for, in violation of 16 U.S.C. § 470h-2(a)(2)(A). In 2004, the National Trust listed Nine Mile Canyon as one of *America's 11 Most Endangered Historic Places* in order to raise awareness about the area's cultural and historic significance and the threats to these resources from oil and gas development. In the years following the listing, the threats to the resources in Nine Mile Canyon have only increased.

I. BLM Has Failed to Comply With the National Historic Preservation Act.

The National Trust strongly objects to the manner in which BLM is administering the Section 106 process for the West Tavaputs Project. Since the NEPA analysis is supposed to inform BLM's decisionmaking during the Section 106 process, we have the following specific concerns about the Draft EIS.

A. BLM Has Failed to Identify Consulting Parties.

² For example, the National Trust has either commented and/or consulted with BLM on the following projects and plans related to natural gas development in the Nine Mile Canyon region: Seven Well Exploration Program (2003), Stone Cabin 3D Seismic Survey Project (2003), West Tavaputs Plateau Drilling Program (2004), Price Field Office Draft Resource Management Plan (2004), Vernal Field Office Draft Resource Management Plan (2005), West Tavaputs Plateau Natural Gas Field Development Plan (2005), Gasco Natural Gas Field Development Project (2006) and Rye Patch Exploratory Drilling Environmental Assessment (2007). In addition, the National Trust participated in a site visit to Nine Mile Canyon with members and staff of the Advisory Council on Historic Preservation in May 2006.

On more than one occasion in the past, the Price Field Office has denied the National Trust's request to participate as a consulting party based on an erroneous legal interpretation of the Section 106 regulations.³ Most recently, BLM rejected our consulting party request in connection with the West Tavaputs Project,⁴ stating that the NEPA process would provide the National Trust and others with a sufficient opportunity to raise concerns about the adequacy of BLM's assessment of adverse effects on historic properties. Letter from Patrick Gubbins, Field Manager, Price Field Office, BLM, to Elizabeth Merritt, Deputy General Counsel, National Trust 1 (Dec. 21, 2005) [hereinafter Consulting Party Letter]. However, as discussed below, we believe BLM's interpretation of the Section 106 regulations is wrong as a matter of law, and in any event, the agency's Draft EIS is not adequate to fulfill the requirements of Section 106.⁵

The Section 106 regulations clearly recognize two distinct types of participation in the Section 106 process—the role of consulting parties, 36 C.F.R. §§ 800.2(c)(1)-(5), 800.3(f), and the role of the public.⁶ Id. §§ 800.2(d), 800.3(e); see also Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520, 553 (8th Cir. 2003) (explaining that an agency has both a general duty to involve the public and a duty to identify consulting parties to be more formally involved). Federal agencies must seek to identify and include consulting parties in the Section 106 process, 36 C.F.R. § 800.3(f), and must “involve the consulting parties” in “findings and determinations made during the section 106 process.” Id. § 800.2(a)(4). Throughout the Section 106 process, consulting parties play an integral role, helping to identify potentially affected historic properties and helping to develop and evaluate alternatives and modifications to the project in order to avoid, mitigate and minimize adverse effects to historic properties. See id. § 800.4(a)(3), (4)(b). The regulations also provide consulting parties with an opportunity to formally review and raise objections to agency findings regarding the project's effects on historic properties. Id. §§ 800.4(d)(1), 800.5(c)(2)(i).

With respect to public involvement, the Section 106 regulations require BLM to:

³ BLM also rejected the consulting party requests of several other organizations, including the Colorado Plateau Archaeological Alliance, Nine Mile Canyon Coalition, and Southern Utah Wilderness Alliance.

⁴ On April 14, 2008, the National Trust reiterated its continuing interest in having BLM recognize consulting parties under Section 106 by joining in a consulting party request letter with the Colorado Plateau Archaeological Alliance, Nine Mile Canyon Coalition, and Utah Rock Art Research Association. We have not yet received a response to this request.

⁵ The ACHP and the Utah State Historic Preservation Office both recommended that BLM approve the National Trust's consulting party request along with the requests of several other interested organizations. Letter from Reid Nelson, ACHP, to Kate Winthrop, BLM 1 (Oct. 11, 2006); E-mail from Matt Seddon, Deputy SHPO, Utah, Julie Howard & Blaine Phillips, Bureau of Land Management 1 (Apr. 20, 2006).

⁶ BLM's Utah State Protocol Agreement was signed in conformance with BLM's 1997 Nationwide Programmatic Agreement (PA) for compliance with the NHPA. However, BLM's Nationwide PA has been identified by the ACHP as one that needs to be amended because it is not consistent with the Section 106 regulations, in violation of 16 U.S.C. § 470h-2(a)(2)(E) and 36 C.F.R. § 800.14(a). Because the Utah State Protocol Agreement does not clearly spell out how the consultation process works, see State Protocol at IV-C and VII-B, the Section 106 regulations provide the needed additional guidance.

seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

36 C.F.R. § 800.2(d)(1).

In the rationale offered by the Price Field Office for denying the National Trust's consulting party request, BLM incorrectly assumed that the public involvement process used for NEPA compliance can satisfy the agency's responsibility under Section 106 to involve consulting parties. Consulting Party Letter at 1. The Section 106 regulations do allow federal agencies to use the NEPA process to satisfy the public involvement requirements of Section 106, 36 C.F.R. § 800.2(d)(3), and also allow agencies to use NEPA documentation for Section 106 purposes, but only if the agency provides advance notice to the State Historic Preservation Office (SHPO) and the ACHP of its intention to use the NEPA process, and the agency complies with specific standards, most of which have not been satisfied here. *Id.* § 800.8(c). The regulations include separate and distinct requirements for involving consulting parties. Compare 36 C.F.R. § 800.8(c)(1)(i), (iii), (v) ("Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties") with *id.* § 800.8(c)(1)(iv) ("Involve the public in accordance with the agency's published NEPA procedures. . .").

It is clear that the Section 106 regulations do not authorize agencies to use the public participation procedures of NEPA as a substitute for the involvement of consulting parties. Replacing the fundamental role of consultation with mere public participation under NEPA would not only render the delineation between consulting parties and the public meaningless, but would also eliminate significant aspects of the Section 106 "consultation" process that are simply not adequately provided by the NEPA process. The definition of "consultation" within the Section 106 regulations—"the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them"—helps to further highlight the significant role of consulting parties. *Id.* § 800.16(f). NEPA, by contrast, does not include any mechanism that resembles "consultation" under Section 106, and does not require that BLM attempt to "see[k] agreement" with interested parties. Accordingly, we view any attempt by BLM to substitute the NEPA public participation process in lieu of consultation with organizations that have a demonstrated concern with the undertaking's effects on historic properties as a direct violation of the requirements of Section 106.

Recommendation:

In consultation with the SHPO and ACHP, BLM should identify organizations with a demonstrated interest in the undertaking's effects on historic properties to participate in the Section 106 process as consulting parties. Organizations that have previously demonstrated an interest in the West Tavaputs Project by virtue of their active participation in public comments and advocacy concerning prior natural gas projects in the Nine Mile Canyon region include the Colorado Plateau Archaeological Alliance, National Trust, Nine Mile Canyon Coalition, Southern Utah Wilderness Alliance, and Utah Rock Art Research Association, as well as the Hopi and other Indian Tribes. After identifying consulting parties in

consultation with the SHPO and ACHP, BLM should convene a meeting with all parties, and learn to engage in consultation concerning the effects of the project on historic properties, in a manner consistent with 36 C.F.R. Part 800. We recognize that BLM has little practice or experience with true “consultation,” but we highly recommend using this project to provide the opportunity for training and experience with a genuine consultation process. We are confident that the ACHP and SHPO would be willing to provide substantial guidance and assistance to BLM in making such a demonstration successful.

B. BLM Has Failed to Involve and Adequately Inform the Public in the Section 106 Process.

The public’s role is “essential” to informed decisionmaking under Section 106. 36 C.F.R. § 800.2(d)(1). Accordingly, the Section 106 regulations require federal agencies to “provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” *Id.* § 800.2(d)(2). BLM may satisfy this requirement in one of two ways. First, it may use the agency’s procedures for public participation under NEPA “if they provide adequate opportunity for involvement consistent with” the Section 106 regulations. *Id.* § 800.2(d)(3). Second, it may develop a “plan for involving the public” in consultation with the SHPO, which must identify the “appropriate points for seeking public input” during the Section 106 process. *Id.* § 800.3(e). At a minimum, the plan must provide for public input in the resolution of adverse effects. *Id.* § 800.6(a)(4). If BLM were to propose a “no adverse effect” determination, then it must also provide the public with documentation of its decision consistent with the standards of 36 C.F.R. § 800.11(e). *Id.* In several respects, BLM has failed to comply with these requirements.

In the December 21, 2005 letter, BLM assured the National Trust that we and others would have the opportunity to participate in the Section 106 review through commenting on the EIS. Consulting Party Letter at 1. However, the Draft EIS has foreclosed this opportunity by omitting the information that would have been necessary to provide the public with a meaningful opportunity to comment on the effects of the project on historic properties, including information about the area of potential effects (APE), the identification of historic properties within the APE, and the adverse effects of the project on historic properties within the APE. *See* 36 C.F.R. §§ 800.4(a), 800.5(a).

he NEPA process to satisfy federal agencies’ compliance requirements under We were assured by BLM that the EIS process for this project would provide the National Trust along with other interested organizations an adequate opportunity to participate in the Section 106 process. However, the Draft EIS neither references 36 C.F.R. § 800.8, which authorizes the use of Section 106, nor does it comply with the specific criteria of 36 C.F.R. § 800.8. Thus, we are at a complete loss as to how and when BLM will involve the public in the Section 106 process for the West Tavaputs Project.

First, the Draft EIS suffers from a general failure to plan for public involvement in the Section 106 process. The Section 106 regulations require the development of a plan to involve the public. 36 C.F.R. § 800.3(e). However, the Draft EIS neither references nor describes such a plan, and there is no indication that one has been developed. Consequently, BLM must consult with the SHPO and ACHP as soon as possible concerning this requirement. Further, the plan must involve the public at each stage in the Section 106 process, an obligation assuming heightened importance for the West Tavaputs Project

because BLM has refused to consult with interested organizations concerning the effects of the project on historic properties.

Second, the Draft EIS fails to provide the public with a description of the project's APE. The Area of Potential Effects (APE) defines the geographic scope of analysis for the Section 106 review, and must be broad enough to include historic properties both directly and indirectly affected by the undertaking. Id. §§ 800.4(a)(1), 800.16(d). Complying with this requirement is particularly important for the West Tavaputs Project because the project may affect hundreds of significant historic properties located partially or entirely outside the area where drilling will occur, including significant portions of the Nine Mile Canyon Archaeological District (NMCAD), which will be threatened by dust and chemicals generated by truck traffic. See Jerry D. Spangler, National Register of Historic Places Registration Form: Nine Mile Canyon Archaeological District (Feb. 7, 2008) [hereinafter NMCAD Nomination] (describing the northern and southern boundaries of the NMCAD, which extend to one kilometer on either side of Nine Mile Creek); However, the Draft EIS provides no information concerning the APE and fails to state whether the “nearly 1,000 sites in the [West Tavaputs Project] region” include all of the sites potentially affected by the project. Draft EIS at 3-155.

Third, the Draft EIS fails to provide the public with the final results of the dust study, which contains information necessary for the public to fully evaluate the project's effects on historic properties. Under the Section 106 regulations, BLM must make available to the public “information about an undertaking and its effects on historic properties. . . .” 36 C.F.R. § 800.2(d)(2). After disseminating information concerning the undertaking to the public, BLM must then solicit public “comment and input.” Id. Although BLM included the interim report of the dust study in the Draft EIS, Draft EIS at App. G, it did not include the final report or the final laboratory results, which suggest that magnesium chloride may be affecting rock art sites in Nine Mile Canyon on a much broader scale than indicated by the interim results. EMSL Analytical, Inc., Laboratory Report: Material Analysis For Project: Nine-Mile Canyon, Utah 2 (Oct. 22, 2007) [hereinafter Final Lab Results]. Consequently, the Draft EIS lacks the information necessary for the public to fully evaluate the extent and nature of the project's effects on historic properties.

Fourth, the Draft EIS fails to provide the public with information concerning the effects of the project on the Nine Mile Canyon Archaeological District, which is eligible for listing in the National Register. See, e.g., Southern Utah Wilderness Alliance v. Norton, 326 F. Supp. 2d 102, 105 (D. Utah 2004) (finding Nine Mile Canyon to be eligible for listing in the National Register as an historic “district”); Bureau of Land Management, Finding of No Significant Impact and Record of Decision, Stone Cabin 3D Seismic Project 4 (2004) [hereinafter Stone Cabin ROD] (same); Draft EIS at 3-229 (same).⁷ In comparing the impacts of the alternatives in the Draft EIS, BLM discussed the direct, indirect, and cumulative impacts of the project on individual sites, but omitted a discussion of the impacts on the NMCAD. Draft EIS at 2-

⁷ The actual boundaries of the NMCAD appear to the source of some confusion. In the Draft EIS, BLM suggests that the boundaries of the NMCAD coincide with the boundaries of the existing and proposed Nine Mile Canyon ACECs, an area of some 125,798 acres. Draft EIS at 3-229. We do not mean to suggest that areas outside of the boundaries of the NMCAD are not eligible for the National Register, but do wish to clarify that the formal boundaries of the NMCAD, as delineated in the National Register nomination form, encompass only 47,559 acres on either side of Nine Mile Creek. NMCAD Nomination at Introduction.

141. Section 106 requires a broader assessment of the project's impacts than this—one that evaluates the effects of the project not only on individual sites but also on the range of historic properties located within the APE, including eligible historic districts. 36 C.F.R. § 800.5(a). BLM's failure to assess the effects of the project on the NMCAD—both direct and indirect—represents a clear violation of the Section 106 process.

Recommendation:

In consultation with the SHPO and ACHP, BLM should develop a plan to involve the public in the Section 106 process for the West Tavaputs Project. In light of the complex nature of the undertaking, significant effects it will have on historic properties, and the profound and long-standing public interest in the effects of natural gas development in the Nine Mile Canyon region, BLM should seek public input and comment at each step in the Section 106 process, including during the identification of historic properties, the assessment of adverse effects, and the resolution of adverse effects. Further, if BLM were to propose a “no adverse effect” determination for the West Tavaputs Project, it should provide the public with documentation of this decision in a manner consistent with 36 C.F.R. § 800.11(e).

C. The West Tavaputs Project Will Adversely Affect Historic Properties in Nine Mile Canyon.

Under the Section 106 regulations, BLM must evaluate the effects of an undertaking on historic properties in the APE and determine if they are adverse. 36 C.F.R. § 800.5(a). When performing this evaluation, BLM must “consider any views concerning such effects which have been provided by . . . the public.” *Id.* For the following reasons, the National Trust firmly believes that the West Tavaputs Project will adversely affect the internationally significant historic properties of Nine Mile Canyon. If BLM were to find otherwise—a decision to which we would strongly object and find wholly unsupported by the record—then BLM must provide the public with documentation of its decision in a manner consistent with 36 C.F.R. § 800.11(e). *Id.* § 800.6(a)(4). BLM has failed to comply with this requirement.

First, the West Tavaputs Project meets the criteria of adverse effect in the Section 106 regulations because it will directly and indirectly alter the characteristics of historic properties and will also “diminish the integrity of the propert[ies] location, design, setting, materials, workmanship, feeling, or association.” *Id.* § 800.5(a)(1). Under each of the action alternatives, industrial traffic in Nine Mile Canyon would increase dramatically over the current level—by more than 400 percent under the Agency's Preferred Alternative. Draft EIS at 2-41, 2-73, 2-87, 2-108, App. F-4. The Draft EIS acknowledges that this heavy volume of traffic will “pulverize[] the dirt roads of Nine Mile Canyon and release[] clouds of fine particulates into the air. If a rock art panel is nearby . . . dust will settle on the panel.” *Id.* at App. G-5. Dust accumulation will “create a very serious conservation problem for the rock art,” *id.* at App. G-5, and will also have “deleterious effects on the physical integrity and visual aesthetic of rock art.” *Id.* at 4-219. Further, the migration of magnesium chloride—a proposed dust suppressant in the Draft EIS—from project roads to rock art sites will have “deleterious” effects on the rock art sites. Constance S. Silver, *The Conservation of Mural Paintings 2* (2005); *see also* Final Lab Results at 2 (identifying magnesium chloride in a sample taken from the base of a rock art panel approximately 125 feet from the nearest road). These types of effects are clearly “adverse” under the Section 106 regulations. *See* 36 C.F.R. § 800.5(a)(2)(i), (iv), (v) (“[p]hysical destruction of or damage to all or part of the property;” “[c]hange of

the character of the property's use or of physical features within the property's setting that contribute to its historic significance;" and the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features"). Consequently, the use of the Nine Mile Canyon Road by high volumes of industrial truck traffic will adversely affect rock art sites eligible for listing in the National Register.

Second, the West Tavaputs Project will adversely affect the Nine Mile Canyon Archaeological District.

As discussed above, all trucks and other industrial vehicles connected with the project will use the Nine Mile Canyon Road to access the West Tavaputs Plateau. The Nine Mile Canyon Road runs directly through the heart of the NMCAD, and the "visual modifications [and] elevated noise levels" caused by project traffic will have "substantial" effects upon the integrity of the NMCAD. Draft EIS at 4-354, 4-363. Consequently, in addition to having adverse effects on the contributing components of the NMCAD, the West Tavaputs Project will also adversely affect the historic district as a whole.

Finally, the adverse effects of the West Tavaputs Project cannot be avoided through commitments by the applicant to control dust from industrial traffic. The Price Field Office has a history of making "no adverse effect" determinations in an effort to avoid having to consult to develop agreements for resolving adverse effects under 36 C.F.R. § 800.6. See, e.g., BLM, FONSI and ROD, West Tavaputs Plateau Drilling Program, Carbon & Duchesne Counties, Utah 15 (2004) [hereinafter WTPDP ROD]. In the past, these determinations were based on the mistaken belief that the effects of dust generated by the project's industrial traffic could be mitigated and even eliminated through the application of chemical dust suppressants on the roads. Id. at 11. However, the interim report and final laboratory results of the dust study show that, in spite of dust suppression efforts in Nine Mile Canyon, dust laced with magnesium chloride is settling upon and damaging rock art sites. Draft EIS at App. G-5; Final Lab Results at 2. Consequently, BLM can no longer support "no adverse effect" determinations with discredited mitigation measures.

Recommendation:

In consultation with the SHPO and ACHP, BLM should apply the criteria of adverse effect in 36 C.F.R. § 800.5(a) to historic properties in Nine Mile Canyon. When performing this assessment, BLM should assess the direct, indirect, and cumulative effects of the West Tavaputs Project, including the effects of truck traffic, dust, chemical dust suppressants, visual modifications, and noise. If BLM were to propose a finding that the project will not adversely affect historic properties, then it should notify the public pursuant to 36 C.F.R. § 800.6(a)(4). In our view, such a finding simply could not be substantiated in this case.

D. Failure to Initiate Timely Section 106 Consultation May Foreclose Alternatives.

BLM cannot avoid, minimize, or mitigate the adverse effects of the project when it will be making decisions through the NEPA process that ultimately restrict its ability to consider a full range of alternatives. The Section 106 regulations require compliance with a process, the goal of which is to avoid the adverse effects of federal undertakings on historic properties. 36 C.F.R. § 800.6(a). Timing is critical to achieving this objective. An agency that fails to initiate or pursue each step in the Section 106 process in a timely fashion runs the risk of foreclosing alternatives to avoid, minimize or mitigate adverse effects

through the NEPA process. See *New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006) (requiring compliance with Section 106 prior to an “irrevocable commitment of resources”); 36 C.F.R. § 800.1(c) (requiring federal agencies to “ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.”). Of particular concern to the National Trust, the Draft EIS states that BLM will consider the final results of the dust study and develop a mitigation plan after issuing the record of decision (ROD) for the Final EIS. Draft EIS at 2-104. This is simply too late. Doing so will almost certainly limit BLM’s ability to consider the full range of measures to avoid, minimize, or mitigate the adverse effects of dust and magnesium chloride on historic properties in Nine Mile Canyon, including the Nine Mile Canyon Archaeological District (NMCAD) and the hundreds of rock art sites in Nine Mile Canyon that are eligible for the National Register.

E. BLM Must Consult with the Hopi and Other Interested Tribes Concerning the Adverse Effects of the Project on Properties of Religious and Cultural Significance to the Tribes.

BLM must consult with the Hopi Tribe and other interested tribes concerning the effects of the project on properties of religious and cultural significance to the tribes. In a June 18, 2007 letter to the Price Field Office, the Hopi Tribe notified BLM that Nine Mile Canyon contains properties of cultural significance, including properties that feature “rock markings.” Letter from Leigh J. Kuwanwisiwma, Director, Hopi Cultural Preservation Office, to Roger Bankert, Field Manager, Price Field Office, BLM 2 (June 18, 2007) [hereinafter Hopi Letter]. The Hopi have also identified an unspecified portion of Nine Mile Canyon as a traditional cultural property. Draft EIS at 4-222. Additionally, the Hopi have asserted that the dust generated by industrial traffic in Nine Mile Canyon adversely affects these resources. Hopi Letter at 2.

In response, the Draft EIS proposes to “preemptively mitigate Hopi Tribal concerns regarding the development of natural gas exploration in the [West Tavaputs] Project Area” through the preparation of an ethnographic study. Draft EIS at 4-221. While we support the preparation of such a study, it will not, as the Draft EIS admits, mitigate the “potential impacts to the rock art panels.” *Id.* at 4-221. When a tribe places a federal agency on notice that an undertaking may affect properties of religious or cultural importance, the agency must engage in consultation with the interested tribe, not only to ascertain the significance of the properties, but also to resolve tribal concerns about the project’s effects on the properties. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807–09 (9th Cir. 1999). Thus, prior to approving the West Tavaputs Project, BLM must engage in consultation with the Hopi and other interested tribes and seek to resolve their concerns about the adverse effects of project traffic.

Recommendation:

Prior to approving the West Tavaputs Project, BLM should consult with the Hopi and other interested tribes concerning the effects of project traffic on properties of religious and cultural significance in Nine Mile Canyon. As part of tribal consultation, BLM should provide the Hopi and other interested tribes with any information relevant to the tribe’s concern about industrial traffic in Nine Mile Canyon, including the final laboratory results and the final report of the dust study.

II. The Draft EIS Fails to Comply With the National Environmental Policy Act.

A. The Draft EIS Lacks an Adequate Range of Reasonable Alternatives.

The Draft EIS lacks an adequate range of reasonable alternatives because BLM has failed to evaluate alternative access routes for truck traffic to reach the West Tavaputs Plateau. Alternatives to the proposed actions are the “heart” of an EIS. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14(a). Whether an EIS contains an adequate range of alternatives is determined by applying a “rule of reason.” Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1031 (10th Cir. 2002). Here, the Draft EIS violates the rule of reason by failing to include a detailed evaluation of alternative access routes for trucks, and by failing to evaluate an alternative that would use a combination of different access routes. None of these alternatives would prevent BLM from fulfilling the purpose and need of the project. Draft EIS at ES-1.

First, the Draft EIS lacks a detailed analysis of alternative access routes to the project area, including the Bruin Point Route and a route through Trail Canyon, even though these alternative routes have the potential to substantially reduce the significant direct, indirect and cumulative impacts of project traffic on rock art sites in Nine Mile Canyon. Id. at 4-219, 5-36.⁸ In fact, in each of the four proposed action alternatives, the Nine Mile Canyon Road provides the principal means of access to the project area. Id. at 2-14. Over the past several years, natural gas companies have used the Nine Mile Canyon Road to access several project areas in the Nine Mile Canyon region. E.g., Bureau of Land Management, EA for the West Tavaputs Drilling Program, Carbon and Duchesne Counties, Utah 1-5 (2004). The effect upon Nine Mile Canyon’s rock art has been dramatic, and “many rock art panels immediately adjacent to the major roads are [now] obscured, or are becoming obscured, by the accumulation of dust.” Draft EIS at 4-219. Further, the final laboratory results of the dust study show that magnesium chloride—a chemical “notorious for its deleterious effects on cultural property,” Constance S. Silver, *The Conservation of Mural Paintings 2* (2005), and previously approved for use as a dust suppressant in Nine Mile Canyon by BLM—is migrating from the bed of the Nine Mile Canyon Road to nearby rock art sites. Final Lab Results at 2. Diverting project traffic away from Nine Mile Canyon through alternative access routes would minimize most if not all of the adverse effects on the rock art caused by dust and magnesium chloride. BLM’s failure to evaluate any alternative access routes in the Draft EIS violates NEPA.

⁸ Many of the reasons offered by BLM in an attempt to justify not evaluating alternative access routes in detail apply with equal force to the existing access routes. For example, BLM dismissed the Bruin Point Route in part because it “does not meet standards and would require extensive engineering.” Draft EIS at 2-150. However, a “majority of the existing roads” in the project area do not meet BLM road standards, and several will require “extensive improvements” before project traffic may use them, including the Harmon Canyon Road and the dugway from Cottonwood Canyon to Flat Iron Mesa. Id. at App. F-13 to F-14. BLM also cited safety concerns in dismissing the Bruin Point Route. Yet many of the proposed access routes have serious safety issues associated with their use by industrial vehicles, including the Harmon Canyon Road, Prickly Pear Canyon Road and the Cottonwood Canyon dugway to Flat Iron Mesa. See id. at 3-218 to 3-219 (describing traffic “bottlenecks,” “excessive gradients,” and “corners with limited turning radius”). This double-standard contradicts BLM’s rationale for refusing to evaluate alternative access routes.

Second, the Draft EIS fails to evaluate an alternative involving a combination of access routes as a means of avoiding or mitigating the effects of truck traffic on rock art sites in Nine Mile Canyon. In dismissing various alternative access routes in the Draft EIS, BLM determined that none of the alternative access routes would independently satisfy the project's purpose and need. See Draft EIS at 2-149 to 2-50. In some cases, BLM found that a particular route would provide access to only a portion of the project area; in others, BLM determined that weather patterns and elevation may prevent the use of a particular route on a year-round basis. Id. at 2-150. However, BLM did not evaluate whether a combination of these or other alternative access routes could reduce the level of industrial traffic in Nine Mile Canyon and avoid or minimize the effects of truck traffic on rock art sites. As the federal court of appeals has ruled, an agency violates the "rule of reason" when it determines that alternative travel routes do not independently meet a project's purpose and need without also evaluating a "piecemeal option"—a combination of alternative travel routes the use of which would, in the aggregate, satisfy the purpose and need of the project. Davis v. Mineta, 302 F.3d 1104, 1120 (10th Cir. 2002). Because BLM failed to evaluate a "piecemeal option" of alternative access routes to the project, and this option would meet the project's purpose and need, the Draft EIS violates NEPA.

Recommendation:

In a Supplemental EIS, BLM should evaluate in detail the environmental impacts of alternative access routes to the project area, including the Bruin Point Route and a route through Trail Canyon. BLM should also evaluate in detail an alternative involving a combination of access routes. Further, BLM should provide the public with the opportunity to review and comment on the supplemental analysis of alternative access routes.

B. The Draft EIS Lacks Sufficient Baseline Information to Assess the Effects of the Project's Truck Traffic on Rock Art Sites in Nine Mile Canyon.

The Draft EIS does not contain sufficient baseline information to assess the effects of truck traffic generated by the project on rock art sites in Nine Mile Canyon. Courts have stated that, "without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). BLM has violated this requirement because the Draft EIS lacks baseline information concerning the following aspects of the affected environment: (1) the proximity of documented rock art sites to project roads; (2) the condition of documented rock art sites; and (3) the effectiveness (or not) of prior efforts to reduce the harm from industrial traffic to rock art sites in Nine Mile Canyon.⁹

⁹ BLM also failed to comply with the procedures for addressing incomplete or unavailable information during the preparation of an EIS. When information concerning a project's environmental impacts is "essential to a reasoned choice among alternatives," BLM must include the information in an EIS. 40 C.F.R. § 1502.22(a). However, if BLM is unable to obtain the information, then the EIS must: (1) state that the information is incomplete or unavailable; (2) describe the relevance of the missing information; (3) summarize the existing body of scientific research concerning the missing information; and (4) evaluate impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." Id. § 1502.22(b). BLM's failure to comply with these standards for the baseline information discussed above violates 40 C.F.R. § 1502.22(a).

The proximity and condition of documented rock art sites in Nine Mile Canyon is essential to evaluating the effects of truck traffic generated by the project. According to the interim report of the dust study, dust from heavy vehicle traffic on roads within Nine Mile Canyon is damaging and obscuring nearby rock art sites. Draft EIS at App. G-5, 30–31; see also id. at 4-219 (“The preliminary results of this study show that the accumulation of dust on rock art panels located in proximity to roads experiencing high levels of traffic does have deleterious effects on the physical integrity and visual aesthetic of the rock art.”). For instance, two rock art panels associated with the Hunt Scene near the confluence of Nine Mile and Cottonwood Canyons “have been visibly affected by a covering of light dust.” Id. at App. G-21. Further, the final laboratory results, which BLM omitted from the Draft EIS despite their availability in October 2007—over three months before BLM released the Draft EIS—identified the presence of magnesium chloride in a dust sample from the base of these panels. Final Lab Results at 2.

Despite the inverse correlation between the condition of a rock art site and its proximity to a project road, the Draft EIS provides no information concerning the proximity of the vast majority of documented sites to roads in the project area. This does not appear to be a situation where the necessary information was simply unavailable to BLM during preparation of the Draft EIS. On the contrary, the NMCAD National Register nomination form states that 583 rock art sites have been documented in Nine Mile Canyon, and that many of these sites are “accessible by road.” NMCAD Nomination at Sec. 7-1. This information—either in whole or in part—was available during preparation of the Draft EIS, both in the NMCAD nomination form and in the files of the Utah SHPO. Id. Additionally, with the exception of the five sites discussed in the interim report of the dust study (Appendix G), the Draft EIS lacks a description of the condition of documented rock art sites, particularly those located in close proximity to the roads that will be used by project-related truck traffic. This information is both relevant and necessary to determining the project’s effects, not only on individual sites, but also on the NMCAD, since each of the 538 identified rock art sites contributes to the district’s eligibility for the National Register. Id.

The final aspect of the affected environment missing from the Draft EIS concerns previous efforts by BLM and project operators to mitigate the effects of industrial traffic in Nine Mile Canyon. In particular, BLM failed to discuss the “deficiencies in the dust suppression methods employed following implementation of the West Tavaputs EA.” BLM, Bill Barrett Corp. 2007–2008 Prickly Pear Unit Winter Drilling EA, Carbon County, Utah 1-8–9 (2007) [hereinafter Prickly Pear EA]. These deficiencies suggest that the methods implemented pursuant to the West Tavaputs EA—the application of dust suppressants and selective road improvements, id., failed to mitigate the effects of dust on rock art sites, an inference supported by the interim report of the dust study. Draft EIS at App. G-5. However, the Draft EIS not only fails to describe the methods implemented pursuant to the West Tavaputs EA but also fails to discuss the deficiencies associated with them. Consequently, the public has no way of knowing that previously approved dust suppression methods—some of the very same methods proposed as mitigation in the Draft EIS—failed to mitigate the effects of industrial traffic on rock art sites in Nine Mile Canyon, and even exacerbated the harm.

Recommendation:

In a Supplemental EIS, BLM should provide the public with baseline information concerning the following aspects of the affected environment: (1) the proximity of rock art sites to roads that will be used

by truck traffic for the project; (2) the condition of documented rock art sites; and (3) the effectiveness (or not) of prior efforts to minimize or mitigate the effects of industrial traffic on rock art sites in Nine Mile Canyon.

C. The Draft EIS Lacks an Adequate Discussion of Mitigation Measures.

The Draft EIS lacks an adequate discussion of measures to minimize or mitigate the effects of truck traffic on rock art sites in Nine Mile Canyon. Under NEPA and its implementing regulations, an EIS must discuss measures to mitigate the environmental impacts of the proposed action. 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b)(3). NEPA requires the discussion to be “reasonably complete,” and expressed in great enough detail to allow both the agency and the public to “evaluate the severity of the adverse effects.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989); Colo. Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1173 (10th Cir. 1999). Additionally, a mere listing of mitigation measures is insufficient to satisfy NEPA because an EIS must also “explain[] how effective the measures would be.” Northwest Indian Cemetery Protective Ass’n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1985), rev’d on other grounds sub nom, Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439 (1988), accord, Colo. Envtl. Coalition, 185 F.3d at 1173. Here, the Draft EIS lacks a “reasonably complete” discussion of measures to mitigate the effects of project traffic on rock art sites. Further, BLM failed to evaluate the effectiveness of the mitigation measures listed in the Draft EIS.

1. The Draft EIS lacks a reasonably complete discussion of mitigation measures.

The Draft EIS fails to include an adequate discussion of mitigation measures that would reduce the impacts of truck traffic to rock art sites in Nine Mile Canyon. In the Draft EIS, BLM proposes to mitigate the effects of project traffic primarily through the use of dust suppressants—water and chemicals—and the improvement or “hardening” of certain road segments. Draft EIS at 2-26, 2-104-05, App. F-18. However, the Draft EIS provides virtually no detail concerning these proposed mitigation measures. For example, the Draft EIS does not identify which chemicals would be used to suppress dust in Nine Mile Canyon. Nor does it discuss which road segments would be treated with chemical dust suppressants or “hardened” with asphalt or chip-seal, or how BLM would monitor compliance with the proposed mitigation. Consequently, the public is left entirely in the dark concerning how and where BLM plans to implement proposed mitigation measures. This information is of particular relevance here because, in the past, the implementation of BLM-approved dust suppression and road hardening measures has failed to prevent the degradation of rock art sites in Nine Mile Canyon.

BLM has also impermissibly deferred the development of a mitigation plan based on the findings and recommendations of the dust study until after the issuance of the ROD for the Final EIS. Draft EIS at 4-219. Doing so circumvents BLM’s obligation under NEPA to discuss measures to mitigate the significant impacts of a project in an EIS. Further, deferring the development of a mitigation plan until after the EIS forecloses the public’s ability to review and comment on the mitigation proposals. Consequently, BLM must incorporate the findings and recommendations of the final dust study into the mitigation plan and circulate this document for public review and comment prior to issuing the ROD for the Final EIS.

2. BLM failed to evaluate the effectiveness of mitigation measures listed in the Draft EIS.

In recent years, BLM has sought to mitigate the effects of dust generated by industrial traffic in Nine Mile Canyon through two principal methods: (1) the application of water and chemical dust suppressants to project roads, including the Nine Mile Canyon Road; and (2) selective road improvements. For instance, in the ROD for the Stone Cabin 3D Seismic Project, BLM prescribed the use of “a dust suppressant material and/or water[] during mobilization and demobilization of equipment” on the Nine Mile Canyon Road and on roads in Harmon, Prickly Pear and Cottonwood Canyons. BLM, Bill Barrett Corp. Stone Cabin 3D Seismic Project Applicant-committed Environmental Protection Measures UTU -79559 3 (2004). BLM asserted that these mitigation measures would “minimize or eliminate dust for the duration of the project [and] . . . effectively reduce dust to levels below those that would be occurring with the No-Action Alternative.” *Id.* at 3 (emphasis added); Bureau of Land Management, Stone Cabin Seismic EA Content/Comment Analysis Responses 5 (2004) [hereinafter Stone Cabin Responses] (emphasis added).

A few months later, BLM approved the West Tavaputs Plateau Drilling Program and similarly concluded that “the use of water to suppress dust generated by traffic would mitigate possible effects” of the project on rock art sites in Nine Mile Canyon. WTPDP ROD at 13 (emphasis added). Unfortunately, this forecast proved to be overly optimistic. In October 2007, BLM acknowledged “deficiencies in the dust suppression methods” approved in the ROD for the West Tavaputs Drilling Program. Prickly Pear EA at 1-8-9; see also id. at 5-9 (describing dust suppression methods approved in the ROD for the West Tavaputs Plateau Drilling Program as “ineffective”). The interim report of the dust study provides additional support for this conclusion and suggests that previously approved dust suppression methods have neither “eliminated” nor “mitigated” the effects of dust on rock art sites. Draft EIS at App. G-5. Further, the final laboratory results from the dust study show that magnesium chloride—a chemical dust suppressant approved by BLM in the ROD for the West Tavaputs Plateau Drilling Program—is migrating from project roads to nearby rock art sites. Final Lab Results at 2. Thus, previously approved measures to mitigate the effects of industrial traffic have largely failed, and have actually exacerbated adverse impacts on rock art sites.

Yet, the Draft EIS proposes to mitigate the effects of dust primarily through the very methods already shown to be deficient—the application of chemical dust suppressants and selective road improvements. See, e.g., Draft EIS at 2-26, 2-56, 2-68, 2-104. Further, the Draft EIS does not explain how these methods would succeed in mitigating the effects of industrial traffic on rock art where similar efforts failed in the past. Consequently, the mitigation measures listed in the Draft EIS are unsupported by any evaluation or evidence of their likely effectiveness.

Recommendation:

In a Supplemental EIS, BLM should provide a detailed discussion of how and where it intends to implement dust suppression methods and selective road improvements. BLM should also develop a mitigation plan based on the findings and recommendations of the dust study and provide the public with the opportunity to review and comment on the plan. Finally, BLM should evaluate the effectiveness (or not) of the proposed dust suppression methods and selective road improvements, in light of the final dust study and any deficiencies in these previously identified mitigation measures. BLM should also provide the public with the opportunity to review and comment on this evaluation.

D. The West Tavaputs Project Would Impermissibly Restrict BLM's Ability to Consider a Reasonable Range of Alternatives for the Price RMP.

Approval of the West Tavaputs Project would limit alternatives for the Price RMP. When the following criteria are met, NEPA prohibits the approval of a proposed action: (1) a programmatic EIS is under preparation; (2) an action is proposed that is not covered by an existing programmatic EIS; (3) the proposed action requires the preparation of an EIS; and (4) the proposed action will "limit alternatives" in the programmatic EIS that is under preparation. 40 C.F.R. § 1506.1(c), (c)(3). Because these criteria are all currently applicable, NEPA prohibits BLM from approving the proposed project under each of the action alternatives.

In 2004, BLM published a notice of intent to prepare a Programmatic EIS for the Price RMP. BLM has yet to issue a record of decision for the EIS, and this NEPA process remains open. Second, an existing programmatic EIS does not cover the West Tavaputs Project because "its scale of development exceeds that considered in the programmatic oil and gas leasing EAs for the Price River MFP. . . ." Draft EIS at 1-6. Further, an environmental assessment cannot satisfy the "program statement" requirement of 40 C.F.R. § 1506.1(c). Third, the West Tavaputs Project is a major federal action significantly affecting the quality of the human environment; accordingly, BLM has prepared the Draft EIS.

Finally, the proposed project and each of the Draft EIS alternatives will limit the ability of BLM to designate the Nine Mile Canyon ACEC as proposed in Alternatives B, C and D of the Draft RMP for the Price Field Office. See BLM, Draft RMP and EIS, Price Field Office 2-124, Maps 2-44 to 2-46 (2004) [hereinafter Draft RMP]. According to the Draft RMP, the proposed ACEC contains "relevant and important" values, including internationally significant prehistoric resources, nationally significant historic resources, and regionally significant scenic resources. Id. at App. 26. Because these resources are subject to "adverse change" from oil and gas development, id., the Draft RMP proposes to manage the ACEC under visual resource management (VRM) classifications II and III. Id. at 2-124. Classification II aims to "retain the existing character of the landscape" by permitting "low" levels of change to the characteristic landscape, while classification III allows "moderate" levels of change in order to "partially retain the existing character of the landscape." Id. at Map 2-3.

Yet, each of the action alternatives in the Draft EIS for the West Tavaputs project would cause "substantial" impacts upon the "relevant and important" values of the proposed Nine Mile Canyon ACEC. Draft EIS at 4-354, 4-365, 4-368, 4-372. In fact, the project area encompasses approximately 47,263 acres of the proposed ACEC, including significant portions within the bottom of Nine Mile Canyon and

on the West Tavaputs Plateau. *Id.* at 3-229. Industrial development and vehicle traffic in these areas would cause “visual modifications, elevated noise levels, and [the] potential for conflict between industrial and recreational uses.” *Id.* at 4-363. Further, the nature and intensity of development projected for the proposed ACEC under the Draft EIS action alternatives may prevent BLM from designating all or portions of the proposed ACEC as VRM classification II or III as proposed in the Draft RMP. *See, e.g.*, Draft EIS at 4-363 (discussing “visual modifications” within the proposed ACEC). For each of these reasons, approval of the West Tavaputs Project under each of the action alternatives would restrict BLM’s ability to designate the proposed Nine Mile Canyon ACEC.

Recommendation:

BLM may not approve the proposed project under any of the action alternatives until the EIS process for the Price RMP is complete. If BLM intends to approve the project prior to completing the EIS process for the Price RMP, it should describe in detail and provide the public with the opportunity to review and comment on the steps it will take to ensure that alternatives for the proposed Nine Mile Canyon ACEC will not be restricted in the Final EIS for the Price RMP.

E. BLM Failed to Consider Significant New Circumstances and Information Concerning the Effects of Dust and Magnesium Chloride on Rock Art Sites in Nine Mile Canyon.

The omission of the final report and laboratory results from the dust study corrupts and undermines the credibility of the Draft EIS and requires the preparation of a supplemental environmental analysis. The obligation under NEPA to evaluate a project’s environmental impacts continues throughout the EIS process. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989); *Colo. Env’tl. Coalition*, 185 F.3d at 1177. Thus, when presented with new information showing that a proposed action “will affect the quality of the human environment in a significant manner or to a significant extent not already considered,” a supplemental environmental analysis is required and must be presented for public review and comment. *Marsh*, 490 U.S. at 374. Further, an agency that elects not to supplement an existing analysis after receiving new information must state the basis for its decision in the record. *Colo. Env’tl. Coalition*, 185 F.3d at 1178.

Here, BLM released the Draft EIS to the public knowing fully well that the dust study had not yet been completed. Why BLM did not wait until the dust study had been completed is not at all clear. Time is certainly not of the essence for this project. The record does not reflect that the natural gas resources of the West Tavaputs Plateau are being drained or otherwise depleted. Further, BLM has, in the past, acknowledged the need for a “definitive study” to evaluate the effects of dust and magnesium chloride on rock art sites in Nine Mile Canyon. Bureau of Land Management, FONSI and ROD, Stone Cabin 3D Seismic Project Response to Comments 3 (2004); Bureau of Land Management, FONSI and ROD, West Tavaputs Plateau Drilling Program Carbon and Duchesne Counties, Utah 13 (2004). It is puzzling why BLM would not allow this study to reach its natural end before proceeding with the development and publication of the Draft EIS. Without question, it will contain information relevant to the assessment of the project’s impacts on rock art sites in Nine Mile Canyon and the development of alternatives.

Further, in the Draft EIS, BLM provided the public with false information concerning the progress of the dust study, stating that “[a]lthough not yet available, the final results of this study will be used to create a management, mitigation, and protection plan against the effects of dust and other pollutants.” Draft EIS at 4-219 (emphasis added). In truth, the final laboratory results were available prior to the publication of the Draft EIS in February 2008 and as early as October 22, 2007. Final Lab Results at 1. These results show that magnesium chloride has migrated from project roadbeds to nearby rock art sites. Id. at 2. BLM’s assertion that this information was not available during the preparation of the Draft EIS is not only incorrect, it also suggests that BLM is willfully ignoring information that it is legally required to consider, evaluate and provide to the public.

Recommendation:

In a Supplemental EIS, BLM should evaluate the findings of the final laboratory results and the final dust study and provide this information to the public. Further, based on the findings and recommendations of the final dust study, BLM should revise the project alternatives, impacts analysis and mitigation measures.

F. The Draft EIS Fails to Take a “Hard Look” at the Project’s Direct, Indirect, and Cumulative Impacts on Historic Properties in Nine Mile Canyon.

Under NEPA, an EIS must disclose the environmental impacts of a proposed action, including any direct, indirect, and cumulative impacts. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.7, 1508.8. This requirement is satisfied by taking a “hard look” at the probable environmental consequences of the action in an EIS. Citizens’ Comm. to Save Our Canyons, 513 F.3d at 1178. In the Draft EIS, BLM points to the analysis contained in the interim report of the dust study as satisfying its NEPA obligation to assess the impacts of dust, chemical dust suppressants, and vehicle exhaust. Draft EIS at 4-219. The interim report fails in this regard for several reasons.

First, the interim report is only that—interim. See Draft EIS at 4-219 (“A current BBC-funded rock art study is in progress to assess the effects of dust, magnesium chloride, and vehicle exhaust.”). Consequently, the final report may refine, bolster, and/or potentially contradict the findings and conclusions of the interim report, and thus could present a wholly different outlook concerning the impacts of truck traffic on rock art sites. The final laboratory results in fact indicate a greater extent and degree of impact upon rock art sites than suggested by the interim report. While the interim report states that “it has been impossible to isolate and identify magnesium chloride” in samples taken from five rock art sites in Nine Mile Canyon, Draft EIS at App. G-6, the final laboratory results uncontrovertibly show the presence of magnesium chloride in the set of samples from four of the five sites. Final Lab Results at 2.

Second, the analysis in the interim report is limited to the effects of existing traffic on five rock art sites in Nine Mile Canyon. See Draft EIS at App. G-2 (“The second phase entailed field work in Nine Mile Canyon to record scientifically the genesis and impacts of dust on five selected rock art sites. . . .”) Although this information should inform the impacts analysis required by NEPA, it cannot replace altogether the analysis of the project’s direct, indirect, and cumulative impacts on historic resources throughout Nine Mile Canyon. Further, it is not immediately apparent that the author of the interim report had access to the Draft EIS while preparing the report because BLM issued the Draft EIS over three

months after completion of the interim report. See Draft EIS at App. G-title page (identifying the date of the final revision of the interim report as October 2007). Consequently, in developing the findings and recommendations in the interim report, it is not clear that the author considered and evaluated the exponential increase in the use of the Nine Mile Canyon Road by industrial traffic proposed in the Draft EIS.

Finally, the Draft EIS grossly overstates the actual scope of the analysis contained in the interim report of the dust study. The interim report does not, as BLM claims in the Draft EIS at 4-219, evaluate or even acknowledge the impacts of vehicle exhaust on rock art sites in Nine Mile Canyon. Additionally, the interim report limited its analysis to the chemical dust suppressant magnesium chloride. Id. at App. G-32–33. By contrast, in the Draft EIS, BLM proposes to use a range of chemical dust suppressants on project roads, including lignins and synthetic polymers. Id. at App. F-20–21. Although the Draft EIS does evaluate the potential effectiveness of these chemicals as dust suppressants, neither the Draft EIS nor the interim report evaluate their effects on prehistoric rock art.

For the foregoing reasons, the interim report does not independently satisfy the NEPA obligation to take a “hard look” at the direct, indirect, and cumulative effects of dust, chemical dust suppressants, and vehicle exhaust on rock art sites in Nine Mile Canyon. Further, the Draft EIS does not comply with this requirement, either independently or in conjunction with the interim report.

Recommendation:

In a Supplemental EIS, BLM should take a “hard look” at the direct, indirect, and cumulative impacts of dust, chemical dust suppressants, and vehicle exhaust on rock art sites in Nine Mile Canyon. In doing so, BLM should consider the findings of the final report and laboratory results of the dust study and should also obtain the necessary scientific information to assess the effects of vehicle exhaust.

III. BLM Has Failed to Comply with the Federal Land Policy and Management Act

The Federal Land Policy and Management Act obligates BLM to “take any action necessary to prevent unnecessary or undue degradation” of public lands and resources. 43 U.S.C. § 1732(b); see also id. § 1702(c) (imposing a duty upon BLM to prevent the “permanent impairment” of public land and resources). The “unnecessary or undue degradation” standard requires BLM to make an affirmative finding before approving any projects or plans. Northwest Mining Ass’n v. Babbitt, 5 F. Supp. 2d 9, 11 (D.D.C. 1998); Soda Mountain Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1270 (E.D. Cal. 2006). Consequently, before issuing the ROD for the Final EIS, BLM must make a determination on the record of whether the West Tavaputs Project will cause: unnecessary or undue degradation to historic resources in Nine Mile Canyon. Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 43 (D.D.C. 1998). If this inquiry shows that the project will degrade historic resources, BLM is then required to “take any action necessary to prevent” degradation from occurring.

The Draft EIS unequivocally shows that the West Tavaputs Project will degrade significant historic resources in Nine Mile Canyon:

all of the [West Tavaputs Project] alternatives would incrementally and cumulatively add to the loss of important cultural resources. . . . Anticipated indirect impacts to cultural resources within the [West Tavaputs] Project Area include dust and associated impacts to rock art. . . . [H]eavy vehicular traffic on untreated roads will produce fine particulates that will settle on and damage nearby rock art.

Draft EIS at 5-36, 4-219, App.G-5. Consequently, FLPMA requires that BLM determine whether this degradation would be “unnecessary” or “undue.” Soda Mountain Wilderness Council, 424 F. Supp. 2d at 1270. Clearly, the unnecessary or undue degradation is met here.

Recommendation:

In a Supplemental EIS, BLM should comply with the “unnecessary or undue degradation” standard of FLPMA. First, BLM should acknowledge that the project will cause unnecessary or undue degradation to historic resources. BLM should also develop and discuss the actions it will take or require to ensure that the project avoids causing unnecessary or undue degradation on historic resources in Nine Mile Canyon.

Conclusion

The Draft EIS suffers from a number of serious deficiencies, most notably the failure to include a detailed evaluation of alternative access routes and the failure to evaluate the final results of the dust study. As a consequence, BLM has grossly under-represented the significant impacts of the West Tavaputs Project to the public. Further, BLM has failed to propose mitigation measures that would ensure the protection of rock art sites in Nine Mile Canyon from the adverse effects of industrial traffic. It is imperative that BLM correct these deficiencies through a Supplemental EIS, in addition to complying with Section 106 of the NHPA.

Thank you again for the opportunity to provide comments on the Draft EIS for the West Tavaputs Project. Should you have any questions or concerns related to these comments, please contact me at (202) 588-6341.

Sincerely,



Ti Hays
Public Lands Counsel

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Terry Morgart, Hopi Cultural Preservation Office

Barbara Pahl, Regional Director, National Trust for Historic Preservation
Matthew Seddon, Deputy State Historic Preservation Officer, Utah

Attachments

- A. Bureau of Land Management, Bill Barrett Corporation 2007–2008 Prickly Pear Unit Winter Drilling EA, Carbon County, Utah (2007).
- B. Bureau of Land Management, Bill Barrett Corporation Stone Cabin 3D Seismic Project Applicant-committed Environmental Protection Measures UTU -79559 (2004).
- C. Bureau of Land Management, Bill Barrett Corporation Stone Cabin 3D Seismic Survey Project, EA (2003).
- D. Bureau of Land Management, EA for the West Tavaputs Drilling Program, Carbon and Duchesne Counties, Utah (2004).
- E. Bureau of Land Management, Draft Resource Management Plan and Environmental Impact Statement, Price Field Office (2004).
- F. Bureau of Land Management, Finding of No Significant Impact and Record of Decision, Stone Cabin 3D Seismic Project (2004).
- G. Bureau of Land Management, Finding of No Significant Impact and Record of Decision, West Tavaputs Plateau Drilling Program, Carbon and Duchesne Counties, Utah (2004).
- H. Bureau of Land Management, Stone Cabin Seismic EA Content/Comment Analysis Responses (2004) (emphasis added).
- I. EMSL Analytical, Inc., Laboratory Report: Material Analysis For Project: Nine-Mile Canyon, Utah (Oct. 22, 2007).
- J. Gubbins, Patrick, Letter to Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation (Dec. 21, 2005).
- K. Kloor, Keith, *Dust Storm Rising Over Threat to Famed Rock Art in Utah*, Science, Jan. 25, 2008.
- L. Kuwanwisiwma, Leigh J., Letter to Roger Bankert, Field Manager, Price Field Office (June 18, 2007).
- M. Nelson, Reid, Letter to Kate Winthrop, Acting Chair, Preservation Board, Bureau of Land Management (Oct. 11, 2006).
- N. Reimer, Gary, Letter to Reid Nelson, Advisory Council on Historic Preservation (Aug. 17, 2006).

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- P. Silver, Constance S., *The Conservation of Mural Paintings* (2005).
- Q. Spangler, Jerry D., National Register of Historic Places Registration Form: Nine Mile Canyon Archaeological District (Feb. 7, 2008).
- R. Svoboda, Larry, Letter to Patrick Gubbins, Field Manager, Bureau of Land Management (Oct. 8, 2003).
- S. Winthrop, Kate, Letter to Reid Nelson, Advisory Council on Historic Preservation (undated).