

THE MANDAN, HIDATSA, AND ARIKARA NATION

IBLA 2005-47

Decided February 9, 2005

Appeal from a decision of the State Director, Montana State Office, Bureau of Land Management, dismissing a protest of the September 28, 2004, competitive oil and gas lease sale. MTM-93710.

Decision affirmed; petition for stay denied as moot; motions to dismiss denied as moot.

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

The National Historic Preservation Act is essentially a procedural statute designed to ensure that an agency identifies and considers significant cultural resources in its decision-making process. Section 106 of that act requires that the head of any Federal agency having authority to license any undertaking take into account the effect of the undertaking on any property eligible for inclusion on the National Register of Historic Places. 16 U.S.C. § 470f (2000). Section 101(d)(6)(A) provides that properties of traditional religious and cultural importance to an Indian tribe may be determined to be eligible for inclusion on the National Register. 16 U.S.C. § 470a(6)(A) (2000).

2. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability--Oil and Gas Leases: Generally

In considering a proposed action, a Federal agency must first determine whether such action is an “undertaking,” within the meaning of section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f (2000).

An “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including * * * those requiring a Federal permit, license, or approval * * *.” 36 CFR 800.16(y). Issuance of a Federal oil and gas lease is an “undertaking.”

3. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability--Oil and Gas Leases: Generally

In issuing Federal oil and gas leases, BLM may adopt a phased approach to compliance with section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f (2000), when no surface-disturbing activity is to occur until the section 106 process is completed.

APPEARANCES: Dean B. Suagee, Esq., and Elliott A. Milhollin, Esq., Washington, D.C., for appellant; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management; Ezekiel J. Williams, Esq., Denver, Colorado, for Michael F. Hartman and Zier & Associates, Ltd.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Mandan, Hidatsa and Arikara Nation (also known as the Three Affiliated Tribes of the Fort Berthold Reservation, hereinafter the Nation) has appealed from and petitioned for a stay of the effect of an October 18, 2004, decision of the State Director, Montana State Office, Bureau of Land Management (BLM), dismissing its September 27, 2004, protest of BLM’s September 28, 2004, competitive oil and gas lease sale, to the extent it encompassed 150 parcels of Federal land in Montana and North Dakota, under the jurisdiction of BLM (Lewistown, Malta, Glasgow, Miles City, and Billings Field Offices, Montana, and North Dakota Field Office, North Dakota) and the Forest Service, U.S. Department of Agriculture (Little Missouri National Grassland, North Dakota, part of the Custer National Forest).^{1/}

^{1/} Each parcel in the sale bore a designation of 09-04 followed by a sequential two or three-digit number. Any reference to the parcels herein will be by the two or three-digit parcel number. At least two parcels in the sale contained lands the surface of which is administered by other agencies, the United States Bureau of

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The Nation, which claims “aboriginal ties to lands throughout the lease sale area,” contends that BLM’s October 2004 decision violates sections 101(d)(6)(B) and 106 of the National Historic Preservation Act (NHPA), as amended, 16 U.S.C. §§ 470a(d)(6)(B) and 470f (2000), and its implementing regulations (36 CFR Part 800), because BLM decided to go forward with the September 2004 competitive lease sale without first complying with the statute. (Statement of Reasons for Appeal (SOR) at 1.) It argues that, since the lease sale constitutes a Federal “undertaking” within the meaning of section 106 of the NHPA, BLM was required to take into account the effect of the sale on historic properties of religious and cultural significance to the Nation, which are eligible for listing on the National Register of Historic Places. 16 U.S.C. § 470f (2000). The Nation asserts that BLM was required, in consultation with the Nation, to survey the sale lands for such properties, assess potential impacts of the lease sale to such properties, and resolve any adverse effects to such properties, all prior to the lease sale. (SOR at 12-16, citing Montana Wilderness Association v. Fry, 310 F. Supp.2d 1127 (D. Mont. 2004).) The Nation concludes that, since BLM failed to fulfill any of its obligations under sections 101(d)(6)(B) and 106 of the NHPA, it violated that statute.

The Nation states that the Montana State Historic Preservation Office (SHPO) has conducted a preliminary review, which has confirmed the Nation’s knowledge that the lease sale area contains “hundreds of documented historic tribal sites.” (SOR at 4.)

According to Dr. Stan Wilmoth of the Montana [SHPO], even a preliminary review of the area confirms that there are scores and scores if not hundreds of identified sites in the townships in which the lease sale parcels are located. Yellow Bird Decl. at ¶ 3. [^{2/}] Moreover,

^{1/} (...continued)

Reclamation (101) and the United States Fish and Wildlife Service (113). An additional six parcels in South Dakota were included in the September 2004 sale, but were not included in the Nation’s protest. Of the 150 parcels in Montana and North Dakota, 109 parcels were leased, competitively or noncompetitively, following the September 2004 lease sale.

^{2/} Pemina Yellow Bird is a member of the Nation, and a “cultural resources consultant” for the Nation, who provided a Nov. 20, 2004, declaration (attached to the SOR) in support of the Nation’s appeal. (Yellow Bird Declaration at ¶ 1.) In that declaration, she offered information obtained from a Nov. 11, 2004, conversation
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Dr. Wilmoth's findings indicate that there could be many more as yet unidentified sites in the lease sale parcels as well. *Id.* The sites recorded in Dr. Wilmoth's database include tipi rings, rock cairns, lithic scatters, bison kill and processing sites and rock alignments. *Id.* However, those are just the sites that have been recorded in Dr. Wilmoth's database. *Id.* The lease sale areas have not been intensively inventoried, and the Nation's history indicates there are likely many additional sites in those areas that are sacred to its people but have not been recorded in a database. *Id.* [Emphasis added.]

(SOR at 4-5.)

The Nation asserts that BLM failed to comply with sections 101(d)(6)(B) and 106 of the NHPA, and, therefore, the Board should reverse BLM's October 2004 decision, and remand the case to BLM with instructions to rescind the September 2004 lease sale and conduct a pre-leasing analysis, in accordance with the statute, prior to deciding whether to go forward with the sale. (SOR at 9, 29.)

^{2/} (...continued)

with Wilmoth. She also attached a Nov. 19, 2004, letter from Wilmoth to counsel for the Nation, in which Wilmoth stated at page 1 that "our records indicate the significant likelihood of pre-contact tribal sites in the areas of concern." Wilmoth explained that he obtained fax copies of "BLM Lease Parcel Maps" for May, August, and September 2004 lease sales and that due to time constraints, workload, and generalized information on the maps, performed "only an expedient search." *Id.* He stated: "First I extrapolated the township/range (T/R) information from the faxed maps." *Id.* He added that "[d]ue to the scale and lack of T/R and section numbers on the maps I queried our database at the T/R level only--I did not attempt to control for sections. Neither did I attempt to identify portions of sections (or 'parcels' offered for lease)." *Id.* He reported that "[o]ut of about 25 of the T/Rs containing the BLM lease sale parcels, only 5 did not contain records of recorded pre[-]contact [tribal] sites." *Id.* All the other T/Rs "indicated between one and perhaps 25 sites of the types described above (tipi rings, bison kill and processing sites, rock alignments, cairns etc.)." *Id.* Michael F. Hartman, one of the successful bidders at the September 2004 sale, correctly notes that the 25-township area covered by Wilmoth's database search encompasses an area of close to 576,000 acres, which contains "more than four times more acreage than that offered in the [September 2004] Lease Sale [i.e., close to 139,555 acres]." (Response in Opposition to Petition for Stay and Answer at 10.) In addition, Wilmoth stated at page 1 of his letter that "[o]ur records do not include tribal affiliation.

Incorporated in the Nation's SOR is a petition to stay the effect of the State Director's October 2004 decision during the pendency of its appeal. The Nation's stay petition is opposed by BLM and two of the successful bidders who acquired leases to parcels of land in the sale, Michael F. Hartman and Zier & Associates, Ltd. (Zier).^{3/}

Based on our review of the record and the pleadings filed by the parties, we conclude that the Nation has failed to establish any error in the State Director's decision. Thus, for the reasons set forth below, we affirm BLM's decision. The Nation's petition for a stay and motions to dismiss for lack of standing filed by BLM, Hartman, and Zier are denied as moot.

[1] The NHPA is essentially a procedural statute designed to ensure that an agency identifies and considers significant cultural resources in its decision-making process. See Southern Utah Wilderness Alliance v. Norton, 277 F.Supp. 2d 1169, 1193 (D. Utah 2003);^{4/} United States v. Jones, 106 IBLA 230, 251, 95 I.D. 314, 325

^{3/} BLM also asserts that the Board lacks any jurisdiction to address the "Forest Service's compliance with NHPA," because we may not "review Forest Service decisions." (Response to Petition for Stay (Response) at 2 n.1, citing Colorado Environmental Coalition, 125 IBLA 210, 218 (1993).) While it is true that we have no jurisdiction to review "Forest Service decisions," no Forest Service decision is before us. Thus, the Forest Service's decision to consent to the leasing of the parcels in the Little Missouri National Grassland is not at issue. Rather, we are concerned with BLM's ultimate decision to lease those parcels. See Colorado Environmental Coalition, 125 IBLA at 215-16. That decision was based on BLM's assessment of the adequacy of the Forest Service's NHPA compliance, and is, therefore, comparable to a BLM decision to lease National Forest lands based on BLM's assessment of the adequacy of the Forest Service's National Environmental Policy Act (NEPA) compliance. Such an assessment is subject to review by the Board. See, e.g., id. at 220.

^{4/} In Southern Utah Wilderness Alliance v. Norton, the plaintiffs sought to set aside BLM's decision approving a notice of intent to conduct geophysical exploration. In its order and judgment, dated Aug. 22, 2003, the district court denied plaintiffs' request, holding that BLM's action was proper. Plaintiffs challenged that ruling in the U.S. Court of Appeals for the Tenth Circuit (No. 03-4244). In an order and judgment dated Nov. 1, 2004, the circuit court dismissed the appeal as moot because the notice of intent had expired by its own terms on Oct. 4, 2004. It remanded the case to the district court with directions that it vacate its order and judgment of Aug. 22, 2003, and dismiss the complaint. On Nov. 30, 2004, the district court complied with those
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(1998). Section 106 requires that the head of any Federal agency having authority to license any undertaking take into account the effect of the undertaking on any property eligible for inclusion on the National Register of Historic Places. 16 U.S.C. § 470f (2000). Section 101(d)(6)(A) of the Act provides that “[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.” 16 U.S.C. § 470a(6)(A) (2000). Further, in carrying out its responsibilities under section 106, a Federal agency is required to consult with any Indian tribe that attaches religious and cultural significance to such properties. 16 U.S.C. § 470a(6)(B) (2000).

[2] The Advisory Council for Historic Preservation promulgated rules at 36 CFR Part 800 for implementing section 106 of the NHPA. In considering a proposed action, a Federal agency must first determine whether such action is an “undertaking,” within the meaning of section 106. 36 CFR 800.3(a). An “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including * * * those requiring a Federal permit, license, or approval * * *.” 36 CFR 800.16(y).

The Nation argues that BLM “appears * * * to be taking the position that issuing the oil and gas leases was not an ‘undertaking,’ and just in case it was an undertaking, its ‘phased approach’ to compliance is sufficient.” (SOR at 12.) The Nation is mistaken regarding BLM’s position on whether leasing constitutes an “undertaking” within the meaning of section 106 of the NHPA. BLM clearly considers the issuance of oil and gas leases in this case to be an “undertaking.” See BLM Response at 8 (“Nor does BLM take the position that issuing oil and gas leases is not an ‘undertaking’”). But the Nation does accurately describe BLM’s position on phased compliance. BLM believes that compliance with section 106 of the NHPA may be achieved for the lease parcels at issue here through a phased approach.

In its October 2004 decision, BLM described that process for “BLM Administered Parcels” and “Forest Service (FS) Administered Parcels.” (Decision at 1, 2.) For the BLM parcels, it stated that the first phase consisted of the “land use planning process,” during which it considered the “distribution and significance of cultural resources” in the planning area.^{5/} Id. at 1. BLM noted that, during that

^{4/} (...continued)
directions.

^{5/} Numerous Environmental Impact Statements (EIS), which were prepared in
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process, it relied on BLM and SHPO records, as well as “cultural resource inventories, archeological and historic literature, ethnographic studies, information from the public, and in some cases Tribal consultation.” (Decision at 1.) BLM stated that, having analyzed this information, it then determined to authorize oil and gas leasing in the planning area, providing, in appropriate instances, for protecting cultural resources in the event of oil and gas development, by requiring leases to include certain stipulations precluding surface occupancy or otherwise limiting such development.

BLM stated that the second phase consisted of the lease sale approval process, during which it analyzed whether to include individual parcels in the pending sale, including having a cultural resource specialist “review[] existing data to determine whether any sensitive cultural resources were within the proposed lease sale areas which had not previously been addressed in the land use planning process.” (Response at 6.) It describes the lease sale approval process as follows:

The cultural resource specialist reviews cultural resource records to determine whether cultural resources are present in the proposed lease area and also reviews previous information from consultation with the Tribes, existing ethnographic data, and the archaeological and historic literature specific to the area under review. [^{6/}] This information is

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connection with land use planning, addressed the potential impacts of oil and gas leasing and development in the lease sale areas at issue: May 1983 Draft and November 1983 Final EIS for the Headwaters Resource Management Plan (RMP); November 1983 Final EIS for the Billings RMP; December 1986 Draft and July 1987 Final EIS for the North Dakota RMP; October 1992 Final EIS for the Judith-Valley-Phillips RMP; December 1992 Final EIS for the Oil and Gas Amendment for the Billings-Powder River-South Dakota RMP's; February 1995 Final EIS for the Big Dry RMP; May 2001 Final EIS for the Northern Great Plains Management Plan Revision; and January 2003 Final Statewide Oil and Gas EIS. The process of promulgating each of the BLM and Forest Service land use plans involved preparing a draft and final EIS, with opportunities for public comment, pursuant to the environmental review requirements of section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (2000).

^{6/} BLM states that the data reviewed in the present case “included ‘An Ethnographic Overview of Southeast Montana’ (May 2002), the American Indian Religious Freedom Act (AIRFA) Background Data, and the ‘Ethnographic Gazetter of the
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then analyzed comprehensively to determine if sensitive cultural resources may be present. If the specialist determines that the analysis requires more information, the BLM may conduct sample based cultural resource surveys and/or Tribal consultation to augment existing data.

(Decision at 2.) BLM stated that its review of the proposed lease parcels “did not indicate that sensitive cultural resources were within any of the proposed lease sale areas,” and the Nation’s protest failed to identify specific resources “either associated [with] or located on” the lease parcels. Id.

BLM noted that the third phase consists of the APD approval process, during which it analyzes the potential impacts of drilling and related activity for specific well sites: “It is at that point where the BLM will require site-specific cultural resource inventories, gather additional Tribal information through consultation, and implement mitigation measures where necessary.” (Decision at 2.)

BLM stated that the Forest Service undertakes a similar approach to deciding, through land use planning, whether to consent to oil and gas leasing in its planning area, and then deciding whether to consent to the leasing of specific parcels and eventually the drilling of specific wells on the leased lands. BLM noted that, prior to issuing its land use planning and lease authorization decisions, the Forest Service “consult[ed] with the Tribes” in the course of analyzing the potential impacts to cultural resources and deciding whether to require no surface occupancy or other protection for such resources. (Decision at 2.) BLM pointed out that, once an APD is submitted, the Forest Service will usually engage in a site-specific cultural resource inventory. BLM noted that the Forest Service “sends quarterly updates on proposed wells to the Three Affiliated Tribes and is available for further consultation if requested.” Id.

BLM concluded that the phased approach to section 106 compliance is “appropriate and contemplated” by the statute and its implementing regulations. (Decision at 3.) Such an approach is justified, BLM asserted, because the potential site-specific impacts of a lease sale on such properties cannot reasonably be known

^{6/} (...continued)

Northern Great Plains.” (Response at 6.) While the Ethnographic Overview relates to sacred sites and traditional cultural properties located in Montana, and the AIRFA document identifies sacred sites and property types in the three-state area (Montana, North Dakota, and South Dakota) that might be sacred to Native Americans, “[t]he Ethnographic Gazetteer identifies sacred sites important to the Three Affiliated Tribes.” Id.

until an APD is submitted and the situs of proposed drilling and related activity is identified.

It is logical that this is the point at which we require targeted cultural resource investigations including site[-]specific inventories, determinations of eligibility, and the development of mitigation measures where appropriate. It is also the point where we more specifically consider Native American cultural and religious values which may be associated with the proposed drilling location.

Id. at 4.

The Nation argues that BLM's position that "NHPA compliance is not required until an application for a permit to drill has been received" was "specifically rejected" by the court in Montana Wilderness.²⁷ (SOR at 25.) It points to language in the court's opinion rejecting BLM's contention that it could evade its section 106 obligations, prior to the lease sale, to assess the effects of the sale on historic properties, in consultation with the affected Indian tribes, by placing stipulations on prospective leases which would avoid any impact to such properties:

** * * 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*

²⁷ In Montana Wilderness, the Montana Wilderness Alliance and a Native American tribal member challenged the 1999 sale by BLM of three Federal oil and gas leases on public lands in Montana. Those lands were subsequently designated as part of the Upper Missouri River Breaks National Monument by President William J. Clinton in Presidential Proclamation 7398, dated Jan. 17, 2001. Plaintiffs alleged therein, inter alia, that BLM violated the NHPA by failing to engage in the section 106 consultation process prior to conducting the lease sale. BLM argued that the lease sale was not an undertaking and, therefore, it had no obligation under the NHPA to conduct site inventories or consult with any tribes. The court rejected BLM's argument concluding that "[t]he sale of oil and gas leases is an undertaking" and that BLM violated the NHPA by failing to follow the NHPA process prior to selling the leases. 310 F.Supp. 2d at 1153.

more productive than efforts that appear to be directed at circumventing the law.

(SOR at 15-16, quoting 310 F. Supp.2d at 1152-53.) Thus, the Nation concludes that, since BLM was required to assess the effects of the lease sale on historic properties at the time of the sale, it could not defer doing so until the submission of an APD, without violating section 106 of the NHPA. Indeed, it argues that deferring compliance until an APD is submitted means that BLM has little or none of the discretion that it would have had at the leasing stage to deny or modify the APD “even if that would be the only way to avoid adverse impacts to historic properties that hold [traditional] religious and cultural importance for the Nation.” (SOR at 16.) The Nation asserts that BLM’s ability to place reasonable restrictions on drilling and related activity at the APD stage “does not substitute for compliance with the Act prior to the sale.” Id. at 17.

The Nation further argues that BLM did not, in fact, adopt a phased approach to section 106 compliance because it did not provide for incorporation of a stipulation in the applicable leases, which would allow BLM to deny or modify, to the extent necessary, any APD which is likely to adversely affect historic properties of religious and cultural significance to the Nation, which are eligible for listing on the National Register: “According to BLM’s decision dismissing the Nation’s protest, none of the BLM parcels include such stipulations, and it is not clear whether any of the Forest Service parcels include them.” (SOR at 22.)

[3] In a similar case, The Mandan, Hidatsa and Arikara Nation, IBLA 2004-303, involving the Nation’s appeal and petition for stay of the effect of a July 15, 2004, decision of the Montana State Office, which dismissed the Nation’s protest of BLM’s May 25, 2004, competitive oil and gas lease sale, we addressed similar arguments in a September 29, 2004, order denying the petition for stay. We concluded that nothing in the court’s Montana Wilderness decision specifically precludes BLM from engaging in a phased approach to section 106 compliance. We distinguished Montana Wilderness on the basis that in that case there was no evidence that BLM engaged in a phased approach to compliance with the NHPA. The land use planning documents in Montana Wilderness either did not address the environmental impacts of oil and gas leasing, or, if they did, did not discuss the impacts on cultural resources. See 310 F.Supp. 2d at 1136-37. We contrasted that situation to the actions taken in IBLA 2004-303, which are similar to those described by BLM in its October 18, 2004, decision in this case, in which cultural resources are considered during each phase of the oil and gas leasing and development decision-making process.

We noted in our order that “[u]nder 36 CFR 800.14(a), a Federal agency may develop procedures to implement section 106 of the NHPA and substitute them for 36 CFR Part 800, Subpart B. This may be done through the negotiation of programmatic agreements. 36 CFR 800.14(b).” (IBLA 2004-303 Order at 5.) We found that, in 1997, BLM, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers had entered into a National Programmatic Agreement in order to document and describe BLM’s procedures to comply with its obligations under the NHPA and that that agreement stated that the 36 CFR Part 800 regulations and any State Programmatic Agreements would continue to apply to BLM undertakings pending the satisfaction of three conditions: the updating and revision of national BLM policies and procedures, the development of State-specific BLM/SHPO operating protocols, and the training of all field managers and their cultural heritage staffs in the operation of the policies, procedures and protocols.

In 1998, the Montana State Office, BLM, and the Montana SHPO entered into a State Protocol Agreement which clarifies and sets forth the manner in which the Montana BLM will comply with the requirements of the NHPA. (EOG Resources Motion to Dismiss, Ex. 7.) EOG Resources, Zier, and Hartman assert that those documents effectively control the NHPA process for the parcels for which they were high bidders. The State Protocol Agreement states at page 3 that “the Native American community will be encouraged to raise issues, express concerns, provide information and identify resources and places they would like BLM to consider in decision making.” It also states that “BLM will solicit such input through the public participation opportunities afforded by BLM’s land use planning and environmental review processes.” Diamond Resources asserts that a similar alternative procedure was developed by the Forest Service and the North Dakota SHPO in 1997. See Diamond Resources Motion to Dismiss at 16, Ex. 6, “North Dakota Programmatic Agreement for Cultural Resource Management on the Custer National Forest: Site Identification Strategy.” [Footnote omitted.]

(IBLA 2004-303 Order at 6.)

Whether BLM’s alternative procedures or the 36 CFR Part 800 regulations are applicable to BLM undertakings, however, appears to be dependent on satisfaction of the National Programmatic Agreement conditions, and execution of a state protocol agreement was merely one of those. It was not clear in IBLA 2004-303 whether the alternative procedures developed by BLM were applicable. Nor is it clear in this case.

Nevertheless, a phased approach to section 106 compliance, in accordance with 36 CFR 800.4(b)(2) and 36 CFR 800.5(a)(3),^{8/} has been endorsed by the courts in circumstances where no surface-disturbing activity is to occur until the section 106 process is completed. Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 553-54 (8th Cir. 2003); National Indian Youth Council v. Andrus, 501 F. Supp. 649, 674-78 (D. N.M. 1980), aff'd, 664 F.2d 220 (10th Cir. 1981).^{9/} And, there is no evidence that the BLM alternative procedures, if applicable, impose any limitation on such an approach.^{10/}

^{8/} Under 36 CFR 800.4(b)(2), “[w]here alternatives under consideration consist of * * * large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts.” Further, 36 CFR 800.5(a)(3) provides that in the same situation “the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to [36 CFR] § 800.4(b)(2).”

^{9/} In Southern Utah Wilderness Alliance, 277 F.Supp. 2d at 1195, the court stated:

[T]he statute does not require a cramped interpretation of agency powers. The BLM may consider phased evaluation in appropriate circumstances. The Section 106 standard that the BLM must follow in this regard is one of “a reasonable and good faith effort . . . to identify properties” and that “the level of effort [] in the identification process depends on numerous factors including, among others listed, the nature of the undertaking and its corresponding potential effects on historic properties.” Here, there are numerous factors for the BLM to consider, including the size of the Project involved, the nature of the potential historical sites at risk (particularly those that might be at risk because Section 106 analysis has not been performed), and the opportunity to complete Section 106 analysis before work begins. [Footnote omitted.]

^{10/} In Save Medicine Lake Coalition, 156 IBLA 219, 263-65 (2002), aff'd sub nom., Pit River Tribe v. BLM, 306 F. Supp.2d 929 (E.D. Cal. 2004), a case involving a challenge to BLM’s approval of a geothermal development project, the Board rejected an argument that BLM was required to comply fully with section 106 of the NHPA prior to project approval. The Board found, based on 36 CFR 800.4(b), that a sample survey of cultural resources in the various alternative transmission line corridors satisfied section 106, when the decision required an intensive survey of the selected alternative prior to approval of any construction or other surface-disturbing activity.

The Nation argues that the result in this case should be governed by our recent decision in Southern Utah Wilderness Alliance, 164 IBLA 1 (2004), in which we set aside a decision denying a protest to a competitive Federal oil and gas lease sale in Utah based on BLM's failure to comply with section 106 of the NHPA. That case, however, is distinguishable on its facts. Therein, BLM determined that, although oil and gas leasing constitutes an undertaking, no potential effect to cultural resources would result therefrom. In criticizing that determination, the Board stated at page 23:

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 * * *.

In the present case, the record is not "devoid of any meaningful evaluation." As BLM detailed in its decision at page 2, when individual lease parcels are reviewed prior to lease sale, the cultural resource specialist examines

cultural resource records to determine whether cultural resources are present in the proposed lease area and also reviews previous information from consultation with the Tribes, existing ethnographic data, and the archaeological and historic literature specific to the area under review. This information is then analyzed comprehensively to determine if sensitive cultural resources may be present. If the specialist determines that the analysis requires more information, the BLM may conduct sample based cultural resource surveys and/or Tribal consultation to augment existing data.

The record shows that such an evaluation was undertaken in this case, and, as a result, numerous parcels were offered with NHPA protective stipulations. This contrasts with the situation in Southern Utah Wilderness Alliance, in which the Board found at 164 IBLA 19 that "none of the parcels include 'any special conditions or restrictions' relating to the identification and consultation requirements under section 106 of the NHPA."

The case record contains a copy of the “Notice of Competitive Lease Sale Oil and Gas September 28, 2004” (Sale Notice), which includes the parcel numbers, legal descriptions, and corresponding stipulations. That Sale Notice shows at page 63 that 101 parcels (01 through 98, 114, 146, and 150, which includes all the parcels leased to Hartman and Zier) were to be offered with standard stipulations/notices, including a notice for “Cultural and Paleontological Resources.”^{11/} That notice informs the lessee or operator that “[p]rior to undertaking any surface-disturbing activities on the lands covered by this lease,” it is required to “[c]ontact the SMA [Surface Management Agency] to determine if a site-specific cultural resource inventory is required” and, if it is, “[e]ngage the services of a cultural resource specialist acceptable to the SMA to conduct a cultural resource inventory of the area of proposed surface disturbance.” In addition, the lessee or operator must “[i]mplement mitigation measures required by the SMA,” and, most importantly, “[w]here impacts to cultural resources cannot be mitigated to the satisfaction of the SMA, surface occupancy on that area must be prohibited.” Thus, BLM notified bidders that, for the majority of the parcels offered at the sale, surface occupancy could be precluded, when impacts to cultural resources, including historic properties eligible for listing on the National Register, would suffer adverse impacts that could not be mitigated to the satisfaction of the agency.^{12/} Also the Sale Notice stated that a Forest Service stipulation would be placed in the applicable leases for 29 other parcels providing for a site-specific cultural resource inventory acceptable to the agency and the mitigation of any adverse effects, prior to any surface-disturbing activity.^{13/} See Sale Notice at 64-67.

The record shows that BLM and the Forest Service undertook various environmental reviews related to the lands involved in the September 2004 lease sale. See note 5, supra. In doing so, they considered the potential impacts of oil and gas leasing and development to cultural resources, including historic properties of religious and cultural significance to the Nation, which might be eligible for listing on the National Register, in consultation with the Nation and other members of the

^{11/} Hartman and Zier also each provide a copy of that sale notice. However, the copies they include (Attachment 1 to each of their pleadings) contains slightly different pagination. Thus, the cultural and paleontological resources notice appears on page 66 thereof. The wording is identical.

^{12/} The Nation is mistaken that “BLM has issued the leases at issue without including stipulations that preserve the option of denying a permit to drill * * *.” (SOR at 19; see also id. at 22.)

^{13/} Those parcels were 116 through 118, 120 through 123, 125 through 130, 133 through 148.

public. It is well accepted that section 106 compliance may occur in conjunction with NEPA compliance. 36 CFR 800.3(b), 800.4(b)(2), and 800.8;^{14/} Mid States Coalition for Progress v. Surface Transportation Board, 345 F.2d at 553 (“[Section 106 compliance] may be conducted * * * in conjunction with an environmental review under NEPA”). In addition, BLM prepared a Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) for each parcel in order to assess the adequacy of its existing environmental documentation for oil and gas leasing. Before consenting to lease, the Forest Service engaged in a similar process.

While the Nation admits that “the [NHPA] regulations do allow for the use of NEPA documents for NHPA section 106 compliance” (SOR at 20), it asserts that certain regulatory standards must be met. Among those, it argues, is the requirement of 36 CFR 800.3(f)(2) to make a “reasonable and good faith effort” to identify and solicit information from Indian tribes that might attach religious and cultural significance to historic properties in the lease sale areas. (SOR at 20.) Although the Nation asserts that BLM and the Forest Service failed to do so, the record does not support such a claim. The Nation was afforded an opportunity, through the public comment periods associated with environmental reviews, to provide input. In addition, BLM described the process undertaken to identify properties prior to conducting the sale.^{15/} See Decision at 2; note 6, supra.

The Nation’s refusal to recognize the validity of a phased approach to compliance with section 106 of the NHPA undermines its conclusion that BLM violated the NHPA in proceeding with the lease sale. There is no evidence that BLM and the Forest Service have deferred section 106 compliance entirely to the APD approval stage. At every stage, as outlined in BLM’s decision, BLM and the Forest Service identify cultural resources, including historic properties of religious and cultural significance to the Nation, which are eligible for listing on the National Register, and evaluate the effects of taking the particular action at issue on such

^{14/} Regulation 36 CFR 800.8(c)(1) provides standards to be utilized by agency officials in developing environmental documents to comply with section 106. Those standards at 36 CFR 800.8(c)(1)(ii) allow the scope and timing of the identification of historic properties and the assessment of effects of the undertaking to “be phased to reflect the agency official’s consideration of project alternatives in the NEPA process[.]” [Emphasis added.]

^{15/} We note that there is no evidence that the Nation sought, prior to the submission of its Sept. 27, 2004, protest, one day before the September 2004 sale, to be actively involved in the process. See SOR at 12 (“The Nation requested in writing to be a consulting party * * * in its protest of the September 28, 2004 lease sale”).

properties. In doing so, the agencies continually narrow their focus, from the large land areas potentially subject to oil and leasing to the particular lands to be leased, and, finally, to the exact sites proposed for surface-disturbing activities. Such an approach allows for identification, consideration, and mitigation of adverse effects on cultural resources at each phase of the oil and gas decision-making process.

Further, the Nation has failed to identify any historic properties of religious and cultural significance to the Nation that might be eligible for listing on the National Register, which should have been identified by BLM and the Forest Service prior to leasing. The November 19, 2004, letter from the SHPO, which is the only evidence offered on appeal by the Nation regarding the presence of cultural resources in the lease sale areas, fails to relate any of those resources directly to any of the lease parcels at issue here. Moreover, the SHPO records did not include tribal affiliation for any of the identified cultural resources. Therefore, none of these resources has been shown to be of religious and cultural significance to the Nation, a necessity under 16 U.S.C. § 470a(6)(B) (2000) to trigger the specific obligation to consult with the Nation.^{16/} Finally, there is nothing in the record to suggest that any cultural resources which might be identified during the APD approval process could not be adequately protected under the stipulations incorporated in the leases, or by modifying the siting or design of drilling and other facilities or the timing of operations, or by undertaking other “reasonable measures,” pursuant to 43 CFR 3101.1-2.^{17/}

^{16/} According to 36 CFR 800.2(c)(2)(ii)(A), what is required of the agency in a consultation under section 101(d)(6)(B) of the NHPA is that it provide “the Indian tribe * * * a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” (Emphasis added.)

^{17/} Under 43 CFR 3101.1-2, “[a] lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resources in a leasehold * * *,” subject to three restrictions or reservations: (1) stipulations attached to the lease, (2) restrictions deriving from specific nondiscretionary statutes, and (3) reasonable measures as required by BLM to minimize adverse impacts to other resource values. No ground disturbing activities may take place on any of the leased lands until the lessee submits an application for permit to drill, which must include both a drilling plan and a surface use plan of operations, and BLM approves it. See 43 CFR 3162.3-1(c) and (d). In
(continued...)

To the extent the Nation has raised additional arguments not expressly addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. The Nation's petition for stay is denied as moot. The motions to dismiss filed by BLM, Hartman, and Zier are also denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

^{17/} (...continued)

addition, as noted in 43 CFR 3162.3-1(h), “[t]he surface use plan of operations for National Forest System lands shall be approved by the Secretary of Agriculture or his/her representative prior to approval of the Application for Permit to Drill by the authorized officer.”