



ESCALANTE WILDERNESS PROJECT, ET AL. v. BUREAU OF LAND MANAGEMENT

176 IBLA 300

Decided January 14, 2009



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

ESCALANTE WILDERNESS PROJECT, ET AL.  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 2005-4

Decided January 14, 2009

Appeal from a decision issued by Administrative Law Judge James H. Heffernan upholding on appeal a Finding of No Significant Impact and Final Decision by the Field Manager of the Kanab Field Office, Bureau of Land Management, to issue 10-year grazing permits. UT-110-03-01; UT-110-03-03.

Affirmed in part, reversed in part.

1. National Environmental Policy Act of 1969: Finding of No Significant Impact

NEPA requires that BLM take a hard look at the environmental impacts of a proposed grazing regime, and a FONSI is appropriately affirmed unless appellants demonstrate by a preponderance of the evidence that the EA contains errors of law or fact or that it fails to consider a substantial environmental question of material significance.

2. National Historic Preservation Act: Generally

Under the Utah Protocol, a determination of no potential to cause effects to historic properties must be categorical in nature as to the type of activity involved. A determination by BLM under that Protocol that issuance of specific grazing permits will have no potential to cause effects is inappropriate because it is project- and circumstance-specific.

3. National Historic Preservation Act: Generally

Determinations under the Utah Protocol, other than no potential to cause effects, that eliminate the need for consultation with the State Historic Preservation Officer must be based on a reasonable effort by BLM to identify all historic properties in a project area and generally cannot be made in reliance on a Class II archeological survey.

4. National Historic Preservation Act: Generally

Although BLM is entitled to rely upon the opinions of its experts, such reliance is not warranted when the expert opinion is not supported by record evidence and is flawed by errors in methodology, data, and analysis.

APPEARANCES: Joro Walker, Esq., Sean Phelan, Esq., Salt Lake City, Utah, for the appellants; Jared C. Bennett, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Escalante Wilderness Project, Sierra Club Glen Canyon Group, Western Watersheds Project, and Great Old Broads for Wilderness (appellants) appeal from the September 1, 2004, decision issued by Administrative Law Judge Heffernan (ALJ Decision) which affirmed the February 10, 2003, Finding of No Significant Impact and Notice of Final Decision (FONSI/Decision) by the Field Manager of the Kanab Field Office, Bureau of Land Management (BLM), issuing 10-year grazing permits on the Cave Creek, Coop Creek, Gordon Point, and Neuts Canyon Allotments.<sup>1</sup> Appellants argue that BLM failed to analyze adequately the environmental and cultural resource impacts of the decision before issuing the permits. We find that BLM satisfied its obligations under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), except as to cultural resources, and under section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732 (2000), and affirm those portions of Judge Heffernan's decision. However, we also find that BLM failed to meet the statutory requirements of section 106 of the National Historic Preservation

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<sup>1</sup> The FONSI/Decision includes the approval of grazing permits on five allotments. However, the Cogswell Point Allotment contains only 10 acres of public land, and appellants apparently did not object to approval of that permit.

Act (NHPA), 16 U.S.C. § 470f (2000), so we reverse as to that portion of Judge Heffernan's decision.

The Cave Creek, Coop Creek, Gordon Point, and Neuts Canyon Allotments encompass land which was historically grazed without restriction and has been grazed under permits issued pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315-316o (2000), since the passage of that Act in 1934. Environmental Assessment of Ten Year Grazing Permit Issuance - Group 14: Cogswell Point, Cave Creek, Coop Creek, Gordon Point, Neuts Canyon Allotments, EA-UT-046-01-023, dated Feb. 7, 2003 (EA), at 1. Grazing permits in these Allotments were renewed upon application pursuant to the Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 123, 113 Stat. 1501, 1501A-159 (1999), which authorized BLM to issue new grazing permits for those expiring in Fiscal Year 2000 under the same terms and conditions as the previous permits pending the completion of statutorily required review and analysis, with the proviso that such permits would be modified if subsequent analysis and consultation indicated that a change was necessary. EA at 1.

The analysis required by Pub. L. No. 106-113 is documented in the EA, which BLM completed on February 7, 2003. Relying on the EA, the Field Manager issued the FONSI/Decision to cancel the existing permits and issue new 10-year permits which slightly modified the way in which grazing could be conducted on the Allotments. Escalante Wilderness Project and Sierra Club Glen Canyon Group appealed the decision to this Board, while Western Watersheds Project and Great Old Broads for Wilderness appealed the decision to the Hearings Division. By Order dated May 15, 2003, we referred the appeal brought by Escalante Wilderness Project and Sierra Club Glen Canyon Group to the Hearings Division, which consolidated the appeals. After a three-day hearing and extensive post-hearing briefing, Judge Heffernan issued his decision on September 1, 2004, affirming the FONSI/Decision in all respects. Appellants appeal from the ALJ Decision.

#### *FEDERAL LAND POLICY AND MANAGEMENT ACT COMPLIANCE*

Appellants argue that BLM failed to comply with FLPMA because it did not balance competing resource values before issuing the grazing permits. Statement Of Reasons (SOR) at 23-26. Judge Heffernan held that BLM met its responsibility by weighing competing interests in the Zion Management Framework Plan, which the EA specifically incorporates by reference. ALJ Decision at 20. We agree. BLM may properly rely on multiple use analysis performed in the governing land use document when making specific land use decisions consistent with those documents. *Colorado Environmental Coalition*, 161 IBLA 386, 396 (2004); *Southern Utah Wilderness Association*, 122 IBLA 165, 172-73 (1992) (holding that alternative uses "need not be

considered anew each time BLM decides to lease the land or grant leave to undertake an activity”).

*NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE*

Appellants assert that BLM violated NEPA by failing to analyze adequately the environmental impacts of issuing these grazing permits on cultural resources, water quality, biological soil crusts, and soil stability, by failing to analyze cumulative impacts, and by failing to consider alternatives for the Cave Creek and Coop Creek Allotments. SOR at 13-23. The crux of appellants’ argument is that BLM did not perform adequate site-specific analysis on the Allotments before deciding to issue the grazing permits.

[1] Section 102(2)(C) of NEPA requires consideration of potential impacts of a proposed action in an environmental impact statement (EIS) if that action is a “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000). A BLM decision approving an action based on an EA and FONSI, rather than an EIS, generally will be affirmed if BLM has taken a “hard look” at the proposal being addressed and identified relevant areas of environmental concern so that it could make an informed determination as to whether the proposal’s impacts are insignificant or will be reduced to insignificance by the adoption of appropriate mitigation measures. *Oregon Chapter of the Sierra Club*, 172 IBLA 27, 46-47 (2007). The question before us is whether Judge Heffernan correctly concluded that this EA demonstrates that BLM took a “hard look” at the issues of concern to appellants. To prevail on appeal, appellants must demonstrate by a preponderance of the evidence that the EA does not support the FONSI because the EA either contains an error of law or a demonstrable error of fact, or fails to consider a substantial environmental question of material significance. *Wilderness Watch*, 176 IBLA 75, 87 (2008), and cases cited therein.

At the hearing, appellants raised scientific challenges to the findings in the EA relating to environmental issues including water quality, biological soil crusts, and soil stability by presenting the expert testimony of Allison Jones.<sup>2</sup> Tr. at 40-52, and 58-61. Jones contested the scientific conclusions in the EA by referencing the results of a “meta-analysis” of the grazing literature that she performed in 2000. Jones synthesized “numerous scholarly, academic and research-related sources covering arid portions of the Inter-Mountain West,” regrouping and re-analyzing the raw data from the studies in an attempt to find broad trends. ALJ Decision at 3;

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<sup>2</sup> Ms. Jones earned a B.A. in Environmental Studies from the University of California, Santa Cruz and an M.S. in Biology, with an emphasis in Conservation Biology, from the University of Nevada, Reno. Tr. at 29.

Tr. at 32. Her analysis was not site-specific, and she visited only one of the Allotments, Neuts Canyon, and viewed another, Coop Creek, from adjacent private land. Tr. at 90. She concluded that livestock grazing will negatively impact water quality, biological soil crusts, and soil stability on the Allotments. Tr. at 48, 49, and 59.

Jones compared the differing amounts of biological soil crusts found in the Allotments to those in Grand Staircase Escalante National Monument, which Jones characterized as “right next-door” to the Neuts Canyon Allotment. Tr. at 47. She argued that the higher relative density of biological soil crusts observed on “rested” land in the National Monument indicate that grazing has the potential to “seriously degrade” biological soil crusts in the Allotments. Tr. at 48. Jones noted that the EA did not address soil stability. *Id.* She believed this was an error of analysis on BLM’s part because in her expert opinion, grazing has a high potential to affect soil stability by increasing infiltration rates, bulk density of soil, and erosion. Tr. at 49-52. Finally, Jones testified that grazing has a negative effect on water quality. Tr. at 58-59. She stated that negative effects can include fecal matter in the water, increased sedimentation, and thermal pollution. Tr. at 60-61.

Judge Heffernan weighed this testimony against the testimony of several experts presented by BLM, including Dr. James E. Bowns, Robert Stager, and Randy T. Beckstrand,<sup>3</sup> who testified based on observations made during on-site visits to the Allotments and comparisons to comparable allotments. They concluded that the range was in good health and able to sustain the use anticipated in the FONSI/Decision.

Stager testified that BLM’s on-site measurements of biological soil crusts in the Allotments do not support appellants’ assertion that the Allotments should have higher percentages of biological soil crusts. Tr. at 158-59. He believed that grazing on the Allotments would have no detrimental impact on the biological soil crusts, particularly in light of the very low density of cattle, *i.e.*, a total of 50 cattle on approximately 4,000 acres in the Allotments. Tr. at 184. Bowns stated his belief that biological soil crusts would not be expected at the elevation of the Allotments because “[c]ryptobiotic crust, or cryptogamic crusts, are inversely related to vascular plant cover. And the higher [in] elevation you go, the more cover you have, the less chance

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<sup>3</sup> Bowns is a Professor of Biology at Southern Utah University with a joint appointment at Utah State University as a rangeland extension specialist. Tr. at 113. Stager is a BLM Utah State Office Rangeland Management Specialist working out of the BLM Utah State Office. Tr. at 150. Beckstrand identifies himself as a BLM Rangeland Management Specialist, who works in a “lead capacity.” Tr. at 334.

there's going to be crust." Tr. at 328; *see* Tr. at 306. Even on bare ground at high elevations, Bowns would not expect to see crusts. Tr. at 329.

Stager explained that soil stability was not independently addressed in the EA because the site-specific analysis conducted on the Allotments "did not indicate any problem with soil stability," and there was no impact beyond what was expected. Tr. at 159-61. Bowns testified that Tropic shale, a notoriously unstable and highly erodible soil, was present in parts of the Allotments, but stated, "[y]ou're always going to find some bare soil and some gullies from runoff . . . . But I didn't notice a disproportionate amount of that sort of thing, no more than I would expect for that country." Tr. at 119. He further clarified he would expect to see the soil impacts he observed on the Allotments even on non-grazed land. Tr. at 119-20. He believed that soil stability issues were due to topographic position or slope, not grazing. He further stated that Tropic shale was not a productive soil and therefore unlikely to produce forage that would draw attention from livestock. Tr. at 119, 327. Finally, he stated that the vegetation existing in the Allotments would help to stabilize the soil. Tr. at 124-25.

Stager testified that BLM had been unable to test water quality directly on the Allotments because the streamflow was intermittent due to preceding drought years, conditions under which BLM did not believe it could obtain accurate water quality data. Tr. at 161-64. BLM intends to test water quality as soon as conditions permit. Nevertheless, Stager stated that BLM's State Office hydrologist had examined the streambanks, looking for channel narrowing and the species composition, to find indirect evidence of water quality issues, and was satisfied with the state of the riparian areas. Tr. at 162, 164. Without direct evidence of water quality issues, BLM compared the riparian areas on the Allotments with comparable riparian areas in which water was flowing to make the best possible determination of water quality. Using this method of analysis, BLM concluded that grazing would have no impact on water quality in the Allotments. Tr. at 164, 184.

Bowns also stated his belief that generalized region-wide analysis, such as Jones' meta-analysis, is not a useful tool for making local grazing decisions:

I think it would be very risky to do that, particularly in a small area. You have a number of range sites, and we try to leave those, or compare them within the range site; not vary from that. . . . I think you would get a lot of different results by comparing different areas, different range sites. . . . I don't think you could make very good decisions with that.

Tr. at 116-17.

Judge Heffernan concluded that BLM had taken a “hard look” at the impacts of the proposed grazing regime sufficient to meet the requirements of NEPA. He noted that “it is not enough that Appellants offer a contrary opinion. Rather, in order to prevail, Appellants must demonstrate by a preponderance of the evidence that BLM erred in evaluating the data provided in reaching its conclusions.” ALJ Decision at 11. We agree that appellants presented only a difference of opinion regarding the environmental impacts of grazing, not evidence that the EA contains an error of law or a demonstrable error of fact or that it fails to consider a substantial environmental question of material significance. *See Wilderness Watch*, 176 IBLA at 87. We consequently agree that appellants failed to carry their burden of proof with respect to water quality, biological soil crusts, and soil stability.

We also agree with Judge Heffernan that the EA includes adequate discussions of possible cumulative impacts of grazing on the Allotments, *see* ALJ Decision at 18; EA at 32-35, and that appellants identified neither cumulative impacts that BLM should have considered but did not, nor alternatives that BLM failed to consider that would have met the objective of the proposed action while causing less significant impacts. *See Biodiversity Conservation Alliance*, 169 IBLA 321, 347 (2006) (“Such alternatives should include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact.”); *Defenders of Wildlife*, 169 IBLA 117, 136 (2006) (“[A]ppellants have not identified any specific cumulative impacts which were ignored or overlooked by BLM.”). We therefore affirm Judge Heffernan on these issues.

Finally, as to the EA’s treatment of cultural resources, appellants argue that BLM failed to take a “hard look” at the environmental effects of the issuance of the permits on cultural resources within the Allotments, first by failing to identify cultural resources present in the Allotments, and then by “hypothesiz[ing], without particularized data and analysis, that no impacts would occur.” SOR at 14. The EA briefly addresses impacts to cultural resources as follows:

Cultural values in this area are not unduly sensitive to grazing impacts due to the nature of the features found on site in combination with the stability of the soil matrix.

The impacts of the BLM’s livestock grazing program on cultural resources was considered in a series of grazing EIS documents prepared 17+ years ago. . . . The renewal of grazing permits, in the absence of

any changes in livestock distribution or construction of range facilities, does not constitute a potential impact to cultural resources. This issue will therefore not be addressed further in this EA.

EA at 20 (Table 6).

BLM responds to appellants' argument by asserting its reliance on the opinion of its archeologist Doug McFadden, who concluded that "grazing on these allotments would not adversely affect cultural resources." Answer at 11. As a result, "[g]iven BLM's expert archeologist's findings that grazing would have no effect on cultural resources within the allotment [sic], the brief discussion of cultural resources within the EA is sufficient." *Id.* at 17. However, considering our findings below that BLM's compliance with NHPA is flawed and that McFadden's opinion with respect to cultural resources and grazing within these Allotments is not supported by the evidence, we cannot conclude that BLM has taken a "hard look" at the environmental effects of the issuance of the permits on cultural resources.

#### *NATIONAL HISTORIC PRESERVATION ACT COMPLIANCE*

Appellants argue that BLM violated its obligations under NHPA by failing to identify historic properties within the project area, instead relying inappropriately on a Class II archeological survey, and by reaching a "no effect" determination that is not supported by the record. SOR at 9-11. BLM responds that appellants provide no objective proof or expert testimony contradicting the conclusions of BLM archeologist McFadden with respect to the presence, types, and densities of historic properties or the likely effects of the issuance of the permits on any such historic properties. Answer at 12.

In his decision, Judge Heffernan evaluated testimony introduced at hearing and concluded that archeologist McFadden was persuasive in his testimony. In affirming BLM's decision as to compliance with NHPA, Judge Heffernan stated "[a]ppellants did not prove that Mr. McFadden's conclusions with respect to cultural resources were factually or legally incorrect." ALJ Decision at 10. We, however, conclude that BLM's "no potential to cause effects" determination was inappropriate and that McFadden's conclusions were not supported by record evidence. Therefore, BLM violated the requirements of NHPA.

#### *NHPA Requirements*

Section 106 of NHPA requires any Federal agency "having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking" to "take into account the effect of the undertaking" on any site that is included in or eligible for

inclusion in the National Register of Historic Places (National Register).<sup>4</sup> 16 U.S.C. § 470f (2000). It is undisputed that the action at issue here, grazing permit renewals, is an “undertaking” as intended by the statute and defined in the implementing regulations. 16 U.S.C. § 470w(7) (2000); 36 C.F.R. § 800.16(y).

In making decisions with respect to undertakings, Federal agencies must take into account the effect of the undertaking by taking a number of actions prescribed by regulations of the Advisory Council on Historic Preservation (ACHP). *See* 36 C.F.R. Part 800. Practically, these actions include determining if the undertaking is a type of activity that potentially may cause effects on historic properties; identifying the area of potential effects of the undertaking; making a reasonable and good faith effort to identify, by seeking information through consultation, documentary research, and field survey (archeological or other), historic properties in the area of potential effects; determining if located properties are eligible for inclusion in the National Register by applying the National Register criteria;<sup>5</sup> and assessing and, if necessary, resolving, adverse effects of the undertaking on eligible historic properties. *See* 36 C.F.R. §§ 800.3(a)(1), 800.4, 800.5, 800.6. Throughout this process, Federal agencies must consult with appropriate parties, including the relevant State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO).<sup>6</sup> *See* 36 C.F.R. §§ 800.2, 800.3, 800.4, 800.5, 800.6. In addition to these standard procedures, the regulations authorize Federal agencies to develop and implement alternative procedures for implementing Section 106 of NHPA if they are consistent with the regulations and authorized by the ACHP. 36 C.F.R. § 800.14(a).

BLM has developed and is subject to a number of agreements and procedures that augment and partially supplant the regulations. In 1980, BLM entered into a

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<sup>4</sup> Originally conceived as an “honor roll” of historic places worthy of Federal protection, the National Register includes “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture.” 36 C.F.R. § 60.1.

<sup>5</sup> There are four specific criteria to be applied in evaluating properties under the National Register. *See* 36 C.F.R. § 60.4. The criterion most often applicable to archeological sites, and specifically applicable in this case, states that significant properties eligible for inclusion in the National Register are properties “(d) that have yielded, or may be likely to yield, information important in prehistory or history.” *Id.*

<sup>6</sup> The SHPO is a Federally-mandated state official who “reflects the interests of the State and its citizens in the preservation of their cultural heritage” and assists Federal agencies in NHPA compliance. 36 C.F.R. § 800.2(c)(1)(i). The THPO is an equivalent official representing an Indian tribe to assist Federal agencies with compliance involving undertakings on tribal lands. 36 C.F.R. § 800.2(c)(2)(i)(A).

“Programmatic Memorandum of Agreement between the Department of the Interior, BLM, ACHP, and the National Conference of State Historic Preservation Officers regarding the Livestock Grazing and Range Improvement Program” (Grazing PA). The Grazing PA recognized that “livestock grazing and range improvement activities undertaken by the Bureau of Land Management may have an effect upon [eligible] properties” and set out BLM’s obligation to conduct Class I and Class II<sup>7</sup> inventories at the appropriate time during planning for grazing management program decisions. In 1997, BLM entered into another Programmatic Agreement among the same parties which provided for, among other things, the development of State-specific operating protocols between BLM and the SHPO (1997 PA).

In 2001, BLM and the Utah SHPO executed a State Protocol Agreement (Utah Protocol) for routine compliance with NHPA. The Utah Protocol specifically states that “BLM will make reasonable efforts to identify all historic properties and sacred sites on BLM-administered lands and private lands where a BLM undertaking will occur within Utah.” Utah Protocol, VI.A. It also established parameters regarding circumstances under which BLM would seek, or would not seek, SHPO consultation.

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

Utah Protocol, VII. Further, the Utah Protocol states that BLM will not request SHPO review with respect to “No Potential to Effect determinations by qualified BLM staff.” Utah Protocol, VII.A.C(1).

Finally, Utah BLM utilizes two additional guidance documents for NHPA compliance. Handbook H-8110, Guidelines for Identifying Cultural Resources, Bureau of Land Management, Utah (2002), states that “[a]n appropriate level of inventory

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<sup>7</sup> A Class I inventory is a professional review and analysis of all reasonably available information about cultural resources (including historic properties) within a large area. A Class II inventory is a probabilistic field survey, statistically based, in which sample areas are surveyed in order to characterize the likely character, density, and distribution of cultural resources in an area. A Class III inventory is an intensive field survey to determine what historic properties actually exist within an area. See BLM Manual 8110.21 (12/03/04).

and evaluation must be conducted prior to authorizing, assisting, or funding any land use activity . . . which may affect cultural resources.” H-8110, II.B. It also states that under certain circumstances, a Field Manager may waive inventory requirements, H-8110, II.C, D, and provides a list of such types of actions, H-8110, Appendix 1. The second document, Handbook H-8120 Guidelines for Protecting Cultural Resources, Bureau of Land Management, Utah (2002), states that “Utah policy for protecting cultural resources is to: Adequately identify and evaluate cultural resources which may be affected by a proposed land use.” H-8120, I.A. It includes guidance on “Cultural Resource Compliance on Grazing Permit/Lease Renewals.” H-8120, Appendix 10.

### *BLM’s Determination*

Under the FONSI/Decision, BLM found that cancelling existing permits and issuing new 10-year grazing permits on the four Allotments “will not have a significant effect on the human environment.” FONSI/Decision at 1. Additionally, the EA states that renewing the grazing permits “does not constitute a potential impact to cultural resources.” EA at 20.

In responding to appellants’ arguments, BLM consistently asserts that because of its determination concerning the effect of the issuance of the grazing permits on historic properties, the Utah Protocol requires no consultation with the SHPO and no further action from BLM. BLM Post-Hearing Response at 41-42; BLM Post-Hearing Sur-Reply at 12. BLM justifies its determination by relying on the expertise and knowledge of the area of BLM Archeologist McFadden, and McFadden’s hearing testimony. *See Answer at 10-15.* During that testimony, McFadden indicated his primary reliance on a Class II inventory sample survey of the Kolob Terrace, the area within which the subject grazing Allotments are located, a report of which was published in 1983, “Results of the 1982 Class II Archaeological Survey of the Alton and Kolob Tracts in Northwestern Kane County, Utah,” under the direction of Paul R. Nickens, Ph.D., Kanab Resources Area, BLM, December 1983 (Nickens Report).<sup>8</sup>

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<sup>8</sup> McFadden stated: “I did rely on several reports. The key report for me was a sample inventory that was conducted back in 1983, but it was the best, it is the best available information, and I consider it a more than adequate report. And I based my conclusions on, largely on that report.” Tr. at 474.

Tr. at 474-75. McFadden further testified that, based on extrapolations<sup>9</sup> from the Nickens Report,

I considered the resource that could be impacted, the types of sites, their density, their sensitivity to grazing, and my conclusion was that grazing would have relatively low impacts on these types of sites. The other half of the equation would be the nature of the action itself, which was a Grazing Renewal of a Permit; basically the status quo as far as archeology is concerned.

Tr. at 477. He then concluded that the action had “no potential to affect” historic properties. Tr. at 479.

On cross-examination, appellants challenged McFadden’s reading and interpretation of the Nickens Report, and introduced several government documents that addressed damage to archeological sites from grazing in areas nearby the subject Allotments. See Tr. at 484-506. They follow this on appeal with arguments that BLM failed to identify historic properties on the Allotments, SOR at 10; Reply at 3-4, BLM’s determination is not supported by the record, SOR at 11-13; Reply at 6-9, and BLM failed to consult with the SHPO, Reply at 5-6.

BLM responds to these arguments by stating, in sum, that in the absence of expert testimony or objective proof, appellants “provide only the lay-person opinion of their legal counsel who is obviously not qualified to challenge the technical findings of an archeologist with 27 years of experience.” Answer at 15.

#### ANALYSIS

##### *“No Potential to Cause Effects” Determination*

BLM relies on its “no potential to cause effects” determination to satisfy its obligations under NHPA. Such a determination, if appropriate, eliminates BLM’s obligation to consult with the SHPO and other parties, and generally completes BLM’s

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<sup>9</sup> During the hearing, the following discussion took place: “Was . . . this Survey of Kolob Terrace [Nickens Report], was it designed for extrapolation for smaller areas within the Kolob Terrace? A. [McFadden Answer] It was . . . [W]e can extrapolate to the larger whole as to the nature of the resource.” Tr. at 474.

NHPA obligations, both under the regulations<sup>10</sup> and the Utah Protocol.<sup>11</sup> In this case, the “no potential to cause effects” determination was made by BLM archeologist McFadden after considering the nature of the proposed action and the specific on-the-ground conditions relating to that action, including the type, character, and density of the historic properties in the area and the likely sensitivity of those particular types and densities of properties to impacts from grazing. See Tr. at 477-79. This consideration was based on his extrapolation of data found in the Nickens Report. We find, however, that this determination was inappropriate as a misapplication of the Utah Protocol and the applicable regulations.

[2] The regulations state that in initiating the NHPA compliance process, the agency official must determine if the proposed action is an “undertaking” subject to compliance with NHPA. If so, then the official then must determine

whether it [the undertaking] is *a type of activity* that has the potential to cause effects on historic properties. . . . If the undertaking is *a type of activity* that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

36 C.F.R. § 800.3(a) (emphasis added). The determination is a categorical one, focused on the type of activity (in this case, issuance or renewal of grazing permits), and is *not* dependent upon conditions on the ground. That is made clear by the ACHP in the preamble to its most recent revision of the regulations.<sup>12</sup>

Section 800.3(a)(1) was amended to better state the premise of the rule that only an undertaking that presents a type of activity that has the potential to affect historic properties requires review. The previous language implied that making such a determination related to the circumstances of the particular undertaking, rather than the more generic analysis of whether the type of undertaking had the potential to affect historic properties.

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<sup>10</sup> After such a determination, “the agency official has no further obligations under section 106 or this part.” 36 C.F.R. § 800.3(a)(1).

<sup>11</sup> “[T]he BLM will not request the review of the SHPO in the following situations . . . (1) No Potential to Effect [sic] determinations by qualified BLM staff.” Utah Protocol, VII.A.C.

<sup>12</sup> The effective date of this revision was Jan. 11, 2001. 65 Fed. Reg. 77698 (Dec. 12, 2000).

65 Fed. Reg. at 77700. In responding to comments on the proposed revision, the ACHP further clarified as follows:

Several comments requested clarification that under § 800.3(a) the agency should not be considering case-specific issues, and that in this section the reference is to “type and nature” of the undertaking. In light of these comments and practical experience, the Council agreed that such a change was necessary. The language in § 800.3(a) was amended to state that the determination is as to whether the undertaking is a “type” of activity that has the potential to cause effects on historic properties, assuming such properties would be present.

*Id.* at 77703. This provision has even been described as a “categorical exemption” or “categorical exception,” *Save Our Heritage v. F.A.A.*, 269 F.3d 49, 62-63 (1st Cir. 2001), similar to a categorical exclusion under NEPA, *see* 40 C.F.R. § 1508.4.

The Utah Protocol necessarily incorporates this regulatory provision in its section eliminating SHPO consultation in the event of “No Potential to Effect determinations.” Otherwise, the protocol would violate the 1997 PA authorizing and encouraging its development,<sup>13</sup> and would violate the regulatory requirement that alternative NHPA compliance procedures be consistent with ACHP regulations.<sup>14</sup> If not consistent, BLM compliance procedures would revert back to those in the ACHP regulations, which BLM clearly did not follow.

It is indisputable that BLM’s determination in this case was not categorical in nature, but project and circumstance specific. Accordingly, it was not an appropriate “no potential to cause effects” determination. BLM is capable of making, and has made such categorical determinations. BLM’s H-8110 Handbook provides a list of actions which have been determined not to require an archeological inventory, such as certain withdrawal terminations, renewals of certain rights-of-way, and issuance and modification of regulations, among other things. *See* H-8110, Appendix 1. There is even a separate section addressing rangeland and grazing actions exempt from archeological inventory, but the issuance or renewal of grazing permits is not included, nor is grazing generally. *See id.*, Appendix 1 at 5. In contrast, BLM has

<sup>13</sup> “WHEREAS the BLM’s program also has as its purpose to ensure that the bureau’s procedures for compliance with Section 106 are consistent with regulations issued by the Council [ACHP] . . . .” 1997 PA, Basis for Agreement.

<sup>14</sup> “An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part *if they are consistent* with the Council’s [ACHP’s] regulations . . . .” 36 C.F.R. § 800.14(a) (emphasis added).

made determinations that grazing *may affect* historic properties, such as in the Grazing PA, which would seem to conflict with the concept that grazing has no potential to cause effects. Without a categorical determination that issuance and renewal of grazing permits cannot affect historic properties, BLM cannot make a “no potential to cause effects” determination in this case.<sup>15</sup>

[3] The Utah Protocol provides for three additional determinations that eliminate SHPO consultation, based upon no historic properties being affected: (1) no historic properties are present, (2) no National Register eligible properties are present, or (3) National Register eligible properties are present, but they are not affected. Utah Protocol, VII.A.C. However, these determinations must be based upon a reasonable effort by BLM to identify all historic properties in the project area, and BLM made no such effort here. Archeologist McFadden readily acknowledged that he utilized the Nickens Report to reach his conclusions. His testimony makes it clear that he was not looking for all historic properties present in the Allotments; instead, he was attempting to extrapolate from the results of the Class II survey. *See, e.g.*, Tr. at 474. Class II surveys are not intended to be used to locate all historic properties within a project’s area of impact, and BLM recognizes that such use generally would not satisfy NHPA requirements. “Class II inventories are generally not adequate to meet the identification requirements of Section 106 of the [NHPA] . . . .” H-8110, III.B.<sup>16</sup> *See In re Lick Gulch Timber Sale*, 72 IBLA 261, 313-17 (1983). Accordingly, none of the exemptions from SHPO consultation apply here.

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<sup>15</sup> Although such an appropriate determination would complete BLM’s NHPA compliance process, without further action or consultation with the SHPO, it is unclear how such a determination should be made. The ACHP, when questioned about how an agency would make such a determination, replied “[t]he Council decided that due to the broad differences among undertakings which would make such guidance too lengthy, this issue will be more appropriately addressed in supplemental guidance material to Federal agencies.” 64 Fed. Reg. 27044, 27053 (May 18, 1999). We are not aware of any such guidance having yet been issued to BLM by the ACHP.

<sup>16</sup> Class II surveys may be adequate if “the sample distribution and sample rate are sufficient to demonstrate that the area sampled did not support human use to a degree that would make further inventory useful.” H-8110, III.B. *See Romero-Barcelo v. Brown*, 643 F.2d 835, 859 (1st Cir. 1981), *rev’d on other grounds sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983); *see also* H. B. Holt, *Federal Archeology Today: Survey Requirements and Predictive Alternatives*, 6 *American Archeology* (2) 131 (1987).

*Expert Opinion*

[4] Even if we were convinced of the appropriateness of the process, BLM's "no potential to cause effects" determination would still be unacceptable. BLM relied upon the expert opinion of Archeologist McFadden in making the determination. Answer at 12. At the hearing, Judge Heffernan concluded that McFadden's testimony was credible and that appellants had failed effectively to challenge that testimony. ALJ Decision at 10. BLM is entitled to rely upon the opinion of its experts, but only "where it is reasonable and supported by record evidence." *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 400 (2007); *Fred E. Payne*, 159 IBLA 69, 77 (2003). In this case, the specific record evidence underlying McFadden's opinion is the Nickens Report, and McFadden's opinion is not supported by that evidence for several reasons.

First, McFadden extrapolated from the Class II survey results in the Nickens Report to determine historic property location, density, and sensitivity to damage from grazing within the Allotments to support the management decision of approving grazing permit renewals. The Class II survey was initiated by BLM in anticipation of coal development in the region and did not focus on grazing. See Nickens Report at 1, 3. The Nickens Report itself, however, is replete with statements discussing the weakness of its sample design, its biased sample, the insufficiency of its predictive capabilities, and its potentially skewed estimates of site densities, advising that "[c]aution should consequently be used in making broad projections about the site universe." Nickens Report at 57; see, e.g., *id.* at 72, 75, 78, 85. In fact, the Abstract at the very beginning of the report states that "[t]he regional predictive model derived from the analyses did not, however, prove to be precise enough for use as a management tool." Nickens Report at iii. Apparently, McFadden had more faith in the use of the Nickens Report than did Dr. Nickens.

Second, McFadden's use of the Nickens Report was flawed. He testified that of the 57 historic properties found in the Kolob Area sample units, the report mentioned only 2 that had been impacted by grazing, and "I'm really not sure what they meant."<sup>17</sup> Tr. at 475. In fact, three of the historic properties (42Ka2362, 42Ka2373, 42Ka2507) specifically were impacted by chaining, construction of range improvements, and grazing generally, and six more were described as being damaged

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<sup>17</sup> McFadden suggested that "grazing impact" could mean simply the presence of cattle on the site, and BLM counsel suggested that such an impact "[c]ould be something as insignificant as a cow pie." Tr. at 475. In fact, the Nickens Report does not describe "cow pies" as impacting sites, as a more careful examination of this "primary document" would have revealed both to McFadden and BLM counsel.

by erosion,<sup>18</sup> *see* Nickens Report at 99-150, which can be caused or exacerbated by grazing, *see, e.g.*, Appellants' Exhibit W at 28-29 (Glen Canyon National Recreation Area Planning Document, Grazing Component (Plan) and Environmental Assessment (February 8, 1999), National Park Service); Appellants' Exhibit V at 3.12 (Grand Staircase-Escalante National Monument Proposed Management Plan Final Environmental Impact Statement (July 1999), Bureau of Land Management).

McFadden also describes the historic properties as "lithic scatters," "a result of chipping stone tools and camps" that are "relative uncomplex sites, with few features on them. And I would say that they are not particularly vulnerable to grazing impacts." Tr. at 476. In fact, of the 57 historic properties found in the Kolob Area, 17 were lithic scatters, 37 were temporary camps, 1 was an historic habitation and coal mine site, 1 was an historic Navajo sweat lodge and hearth, and 1 was a prehistoric village site with a surface structure, hearths, possible pithouses, and a large concentration of datable artifacts. *See* Nickens Report at 99-150. The historic sites and the prehistoric village are hardly "lithic scatters" that are "relatively uncomplex." Of all of those sites, the 2 historic sites, the prehistoric village, and 13 of the temporary camps were recommended as eligible for inclusion in the National Register. The eligible temporary camps were important because of the presence of datable artifacts (stone and/or pottery), possible hearths, and/or the potential for buried cultural deposits. *Id.* It is clear that the features present on the historic sites and the prehistoric village could be impacted by stock grazing, primarily as the result of trampling around stock concentrations (near water sources, along fences, under shade trees) and stock trails. Even the lithic and ceramic artifact concentrations found at temporary camps, however, could suffer damage.

Several studies . . . have shown that features such as artifact concentrations . . . are extremely susceptible to dispersal and destruction as a result of trampling. Individual artifacts are broken and damaged, while the overall visibility of scatters is reduced through downward displacement of individual artifacts into the soil, and horizontal dispersal across and below the surface. Critical information regarding activity areas, internal site organization, seasonality, artifact technology and site function is lost as a result of these impacts.

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<sup>18</sup> The absence of more specific descriptions of damage from grazing is no surprise, considering the Nickens Report was produced primarily to support coal leasing and mining activities, not grazing.

Appellants' Exhibit W at 28; *see also* Appellants' Exhibit V at 3.12.<sup>19</sup> BLM itself also has recognized such impacts. "Even partial displacement of original [vertical and horizontal] relationships lowers the reliability, or may completely negate the significance, of such measurements in reconstructing the activities and sequence of events which occurred at the site." H-8120, I.B.2. It is difficult to see how the historic properties described in the Nickens Report could be "not particularly vulnerable to grazing impacts"<sup>20</sup> without more specific analysis.

Finally, McFadden's failure to directly compare the Nickens Report data to the subject Allotments, *see* Tr. at 485, and his failure to field check any of the data in light of its clear limitations, show that his opinion was not supported by the evidence and not credible. Also, BLM counsel's misuse of the data to assert that "[o]nly three eligible historic properties exist within the allotments" in bolstering his argument that few important sites could be impacted by grazing, *see* Answer at 11, is not useful. In fact, 4 eligible sites were found within the Allotments on a sample of 595 surveyed acres out of 3,870 acres of BLM land on the Allotments. That does not mean that only 3 or 4 eligible sites exist on the Allotments. Instead, it could mean that as many as 26 eligible historic properties may be present on the Allotments.

The testimony of BLM's expert was not "reasonable and supported by record evidence." In fact, McFadden's opinion was not supported by the evidence and was based on flawed methodology, data, and analysis. BLM is not entitled to rely on such opinion. *See Salinas Ramblers Motorcycle Club*, 171 IBLA at 400.

Judge Heffernan's decision affirming the Field Manager's decision to issue the permits did not evaluate the unique requirements of NHPA, nor did it evaluate BLM's duties under the Utah Protocol. Judge Heffernan relied on McFadden's testimony that there would be no impact from the issuance of the grazing permits without questioning whether BLM had met its procedural duties or even questioning the conflicting elements of McFadden's own testimony. Our review of the record and the applicable law has led us to a conclusion opposite of Judge Heffernan's. BLM's efforts

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<sup>19</sup> The abrupt dismissal of these authorities as irrelevant by McFadden and BLM counsel, *see* Tr. at 514-15; Answer at 15, is completely misleading. The authorities describe well-accepted ways in which grazing may damage historic properties in general, including artifact concentrations, clearly not limited to particular geographic areas.

<sup>20</sup> As for McFadden's conclusion that "what damage can be done to them as a result of grazing has been done," Tr. at 516, the Nickens Report documents some sites damaged by grazing and other sites without such damage, suggesting that after 100 years of grazing not all sites had yet been damaged.

to comply with NHPA were inadequate under the statute and its implementing regulations and agreements. Similarly, the EA did not take the required “hard look” at the effects of issuing the permits on cultural resources.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part and reversed in part.

\_\_\_\_\_/s/\_\_\_\_\_  
H. Barry Holt  
Chief Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce R. Harris  
Deputy Chief Administrative Judge