



GREG L. WATKINS

179 IBLA 102

Decided: April 16, 2010



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

GREG L. WATKINS

IBLA 2009-142

Decided: April 16, 2010

Appeal of a decision by the California State Director, Bureau of Land Management, dismissing a protest of a land exchange with Jaxon Enterprises. CA 44477.

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

An Environmental Assessment for the proposed action correctly did not address a possible transfer of land to a school district that was not raised as an alternative until after publication of the Decision Record approving the exchange where relevant officials had notice of a proposed exchange.

2. National Historic Preservation Act: Generally

The head of a Federal agency with direct or indirect jurisdiction over a proposed Federal undertaking must make a reasonable and good faith effort to identify all historic properties within the potentially affected area, evaluate and determine whether they are listed in or eligible for inclusion in the National Register of Historic Places, assess the adverse effects upon properties deemed eligible for inclusion in the National Register.

APPEARANCES: Greg L. Watkins, Shasta Lake, California, *pro se*; Erica L.B. Niebauer, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Leonard Bandell, Esq., Redding, California, for Jaxon Enterprises, Inc.

OPINION BY ADMINISTRATIVE JUDGE M^cDANIEL

Greg L. Watkins has appealed a December 5, 2008, decision by the State Director (SD) of the California State Office, Bureau of Land Management (BLM),

dismissing his protest of a land exchange (CA 44477) between BLM and Jaxon Enterprises, Inc. (Jaxon). Administrative Record (AR) Part L, tab 7.¹ His protest addressed the Decision Record (DR) and Finding of No Significant Impact (FONSI) issued by the Redding Field Office Manager (RFOM) on August 11, 2008, based on Environmental Assessment (EA) CA-360-RE-2007-99 (August 2008) which had been prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), to analyze the environmental impacts of the exchange. AR Part G, tabs 5-7. By order dated July 14, 2009, the Board denied BLM's motion to dismiss the appeal for lack of standing and allowed Jaxon to intervene. Both BLM and Jaxon have filed answers to the Appellant's statement of reasons (SOR),² and Appellant has filed a response.

Appellant contends that the RFOM's decision was erroneous in three respects. First, he argues that the RFOM "publicly demonstrated his pre-determined decision to complete this land exchange months before making his formal decision on August 15, 2008," by allowing "a BLM government sponsored trail to be built across the private lands [to be obtained in the exchange] without benefit of obtaining an ROW [right-of-way] easement for this BLM trail." SOR at unpag. 1. Appellant also argues there was no need to construct the trail because an existing historic road qualifies as an R.S. 2477 road and could be used to connect existing portions of the Sacramento Ditch Trail. *Id.* at unpag. 2. Second, Appellant claims that the RFOM "was not cognizant of the true historical significance o[f] 40 acres of government land" constituting one of the parcels to be conveyed to Jaxon, including a homesite and well from the 1850's. *Id.* at unpag. 1. He more broadly contends the RFOM's knowledge and evaluation of the import of several archaeological features, as reflected in the EA, was based upon insufficient historical research. *Id.* at unpag. 3-5. Third, Appellant claims that the RFOM "failed to objectively consider the merits of retaining these lands in federal ownership or of other more beneficial uses, such as for the local school district." *Id.* at unpag. 1, 6.

¹ The record consists of four volumes. Volume 1 contains documents pertaining to the exchange application and review by BLM. It is divided into parts A-P, subdivided by tabs. Volumes 2 and 3 pertain to appraisal of the exchange properties and hazardous materials reports, respectively. The appeal does not raise any issue related to volumes 2 and 3. Volume 4 is titled "Environmental Reports" and includes, along with other documents, four archaeology reports and a disk of the "Proposed Redding Resource Management Plan and Final Environmental Impact Statement" (July 1992).

² Jaxon states that it believed "that Appellant was precluded from filing a protest or bringing this appeal . . . due to the Settlement Agreement [SA] reached in a State Court action titled *Watkins v. City of Shasta Lake, et al.*," but admits "it is not our intent or desire to have the IBLA determine whether Mr. Watkins did or did not breach the terms of the [SA]." Jaxon Answer at 2, 5.

After a complete review of the record, as explained below, the Board finds that Appellant's arguments do not justify setting aside the decision to complete the exchange. Accordingly, we affirm.

I. Background

In 2002 Jaxon originally proposed a land exchange to obtain approximately 240 acres of Federal Land, but after receiving a BLM feasibility report, it informed BLM in a January 8, 2004, letter that it wished to amend its exchange proposal to obtain three parcels of Federal land, including only 20 acres identified in its original proposal. AR Part B, tabs 1, 2, 14. The SD approved a revised feasibility report for the three parcels in August 2005, calculated to include approximately 101.52 acres. AR Part D, tab 1. With a minor addition of 0.03 acres, those lands are the same Federal lands at issue on appeal. They are located based upon the Mount Diablo Meridian (MDM), California, as follows:

Parcel F1: SE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 35, T. 33 N., R. 5 W., 40.00 acres
(APN #006-820-001)

Parcel F2: lots 2 & 3, sec. 26, T. 33 N., R. 5 W., 41.52 acres
(APN #006-780-006)

Parcel F3: lot 3, N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 34, T. 33 N., R. 5 W., 20.03 acres
(APN #065-540-005).³

Only Parcel F3 was part of Jaxon's original exchange proposal. Parcels F1 and F2 are within the city limits of the City of Shasta Lake (the City), and Parcel F3 is either adjacent to or slightly west of the city boundary. EA, AR Part G, tab 5, at 44. All three parcels are reported to be adjacent to lands Jaxon owns and apparently Jaxon plans to use them in developing residential subdivisions. *Id.* at 10; AR Part B, tab 16; Part D, tab 1 (feasibility report) at unpag. 4 and map. In exchange, BLM would receive three parcels based upon the MDM, totaling 275.74 acres:

Parcel P1: portions of sec. 21, T. 33 N., R. 5 W., totaling 175.69 acres
(APN #065-520-001)

Parcel P2: lots 1 & 2, sec. 5, T. 32 N., R. 5 W., 81.69 acres
(APN #064-010-002)

Parcel P3: N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 27, T. 33 N., R. 5 W., 18.36 acres
(APN #065-530-003).⁴

³ AR Part D, tab 1, Ex. A.

⁴ AR Part D, tab 1, Ex. B.

These parcels would provide access to or land for trails in the Interlakes Special Recreation Management Area (ISRMA). EA, AR Part G, tab 5, at 2, 4, 10, 40. Ownership of parcels P1 and P2 would allow completion of the Sacramento River Trail. *Id.* at 23, 28, 37.

Notice of the proposed exchange was published in the *Record Searchlight*, and in March 2006 individual notices were sent to various parties, including public officials and agencies, adjoining landowners, affected ROW holders, Native American Tribes, and three interested parties. AR Part D, tab 3, Part E, tabs 2-4; *see* 43 C.F.R. § 2201.2. BLM received numerous comments, including a letter from the Appellant and a petition from residents, addressed to BLM and the City, to preserve use of the “Beltline Road.”⁵ AR Part F, tab 5.

After issuance of the DR and FONSI, BLM published notice of its decision in the *Record Searchlight*, with individual notices sent to various parties. AR Part I; *see* 43 C.F.R. § 2201.7-1. Appellant filed a 15-page protest presenting 78 numbered points and arguments (hereafter cited as paragraphs), accompanied by 14 supporting signatures. AR Part K, tab 7. Numerous other parties filed protests, and the City requested that it receive two ROWs for existing roads on Parcel F1 and a public access easement for the portions of the Beltline Road on both Parcels F1 and F2. AR Part K, tab 6.⁶

The City also protested the inclusion of a portion of Parcel F1 in the exchange, requesting “that BLM fully analyze [its] future highest and best public uses” and stating that on September 26, 2008, the City provided comments to BLM from the Gateway Unified School District about its “desire to use the property for a school farm.” *Id.* In September 2008 the School District offered to exchange with BLM two 20-acre parcels, which it had obtained from BLM 40 years earlier and that were no longer considered suitable, for the 40-acre parcel for the School’s agricultural program. Part K, tab 8. BLM treated the communications from the City and the School District as protests and dismissed them because it had considered “all

⁵ “Beltline Road” refers to an 80-foot wide asphalt service road that once ran along a series of a conveyor belts, or “Beltline,” extending 9.6 miles between Redding and a concrete-mixing plant near Shasta Dam, that was used to move mine tailings and other material for use as aggregate in the construction of the dam. *See generally* AR Vol. 4, tab 1 at 11 and tab 4, app. D. Although nothing remains of the conveyor belts except some portions of structural supports and the road has not been maintained, the public has continued to use portions of the road for walking, horseback riding, and motorized travel. *See* AR Part F, tab 5, petition.

⁶ An Oct. 9, 2008, letter from Jaxon to the City states Jaxon and BLM agreed that the City would receive the ROWs when Jaxon receives Parcel F1. AR Part B, tab 27.

reasonable alternatives that were presented during the comment period,” the City/School District alternative was offered after the scoping period had ended, and it was “not reasonable for BLM to analyze alternatives that are hypothetical or speculative.” AR Part L, tab 6 at 4, tab 8 at 3. Also, BLM reasoned, excluding Parcel F1 would change the value of the Federal lands and prevent the exchange from being completed, contrary to BLM’s determination that “the public interest would be well served by completing the exchange.” *Id.*, tab 6 at 3-4. As stated above, on the same day the SD dismissed Appellant’s protest.

II. No Error in BLM Decision Concerning Trail Construction on Parcel P1

Appellant challenges the RFOM’s exchange decision because he allegedly exhibited prejudice by his prior approval to build a trail on private exchange parcel Parcel P1, and because an existing road made the new trail unnecessary. BLM has stated that “[n]o deeded easements or other form of written authorization has been granted by the exchange proponent to BLM for trails crossing the private parcels.” AR Part L, tab 7 (Response #43). We find insufficient evidence in the record about construction of the trail on P1 to support Appellant’s claims. In a January 30, 2008, letter, Brent Owen, whose role in this matter is not shown by the record, informed BLM that he had “met with Jaxon Baker last Tuesday seeking permission to continue construction of the Sacramento Ditch trail across his property.” AR Part B, tab 21; *see* Answer at 4. It appears that a trail was in fact constructed because in letters between Jaxon and BLM, dated September 19, 2008, October 3, 2008, and January 1, 2009, Jaxon asked BLM to erect a gate to avoid its potential liability from allowing the public to use the trail over its property, and BLM asked Jaxon to defer closing the trail to allow BLM to review and respond to any protests filed. AR Part B, tabs 24-26.

These letters raise several questions that Appellant does not adequately answer. First, there is no information about Brent Owen’s identity, the nature of his business, or why he met with Jaxon on behalf of BLM to request permission to construct a portion of the trail over Jaxon’s property. Jaxon Answer at 4; *See* Declaration of Leonard Bandell, attached thereto. There is no evidence in the record that Owen was acting of behalf of BLM or on BLM’s authorization. Jaxon, not BLM, owned the property and any authorization for Owen to construct a trail across those lands necessarily would have come from Jaxon.

Second, information in the record about payment for trail construction is insufficient to support Appellant’s allegation. Appellant’s response asserts that the trail was built on “the historic Sacramento Ditch,” which “had not been used for about 150 years” and was overgrown with vegetation. Response at 2. He claims that, “[w]hile BLM may not have funded actual construction, BLM did fund . . . inmate crews to clear the heavy vegetation from the entire length of the Sacramento Trail, including the portion across private parcel P1.” SOR at unpag. 2. He asserts

that Owen was “compensated for construction of other segments of BLM trails” and may have financed the trail construction on Parcel P1, but admits that “it may be impossible to ascertain who paid for the construction of the trail across Parcel 1.” *Id.* BLM denies Appellant’s allegations that it “blatantly demonstrate[d] that it ‘permitted’ or ‘constructed’ any trail across P1 in anticipation of the proposed land exchange,” and contends that Appellant’s “statements are opinions only, unsupported by the AR.” *Id.* at 6. Appellant has provided no evidence that BLM made any such payment or compensated Owen for any trail construction on Parcel 1.

Third, Appellant appears to draw unsupported inferences regarding the legal status of the trail. Appellant inferred from the EA that Jaxon must have given BLM an easement for the trail over Parcel P1 and pointed out that the EA did not say anything about what it may have cost. AR Part K, tab 7 at 10, ¶43.⁷ In rejecting his protest, BLM stated that “[n]o deeded easements or other form of written authorization has been granted by the exchange proponent to BLM, for the trails crossing the private parcels.” AR Part L, tab 7 at 19 (Response #43); *see* Part G, tab 5 at 7 (Jaxon “is not willing to consider granting an easement”); BLM Answer at 5.

Appellant’s argument that construction of the trail shows that the RFOM was predisposed to complete the exchange prior to issuing the FONSI and DR, and thus that he was unable to properly evaluate the exchange and make an objective decision, is not supported by the record. The fact that BLM concluded the proposed exchange was in the public interest and should be approved does not imply any improper prejudgment. Further, Appellant does not claim that the SD was misled by improper findings in the EA and thereby erred in responding to points raised in the protest; he merely claims that the SD “should have remanded the decision back to the Redding office” and “may not have clearly understood the implications” of the comments in his protest. SOR at unpag. 2. Thus, Appellant’s argument does not offer the Board a basis for finding error in the the SD’s decision.

In addition, Appellant argues there was no need to construct a trail on Parcel P1 because an existing historic road dating back to the 1850’s, which crosses the same 175 acres of private land and roughly parallels the Sacramento Ditch, qualifies as an ROW under R.S. 2477 and could be used to connect portions of the Sacramento Ditch Trail after BLM acquires the parcel. SOR at unpag. 2.⁸ However, BLM has no

⁷ Appellant quotes the EA at 23: “Existing trails are already present on all three [private] parcels and could be maintained to assist in limiting new construction.” BLM’s Answer quotes the same paragraph as showing that “[t]rail construction on private parcels was discussed” in the EA. BLM Answer at 4.

⁸ BLM correctly points out that contrary to Appellant’s argument on appeal, his
(continued...)

authority to decide that it or another party may or may not construct a trail on private property based upon an R.S. 2477 ROW, and, therefore, could not do so in regard to Parcel P1.⁹ On the other hand, if the Government acquires Parcel P1 in the exchange, it will become Federal land on which BLM could construct (or maintain) a trail without making a non-binding determination as to whether there is an R.S. 2477 ROW. See Memorandum of the Secretary, “Departmental Implementation of *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005)” at 3, and attached Guidelines for Implementation at 1. The Government’s acquisition of the parcel, however, will not preclude a proper party from asserting in court that an R.S. 2477 ROW was established prior to repeal of that statute in 1976, just as the exchange will not preclude a claim that the Federal land transferred to Jaxon is subject to an R.S. 2477 ROW. See Part G, tab 5 at 13, 26, 34. Thus, the question of whether there is an R.S. 2477 ROW on Parcel P1 is irrelevant to the decision to complete the exchange and has no role in resolving this appeal.

⁸ (...continued)

protest raised R.S. 2477 in relation to a possible reservation in the deed to Federal Parcel F1 rather than private Parcel P1. BLM Answer at 6-7.

Section 8 of the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, was codified as section 2477 of the 1875 *Revised Statutes* and subsequently became 43 U.S.C. § 932 (1970). It stated in its entirety: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” R.S. 2477 (2d ed. 1878). The statute was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 2793, effective Oct. 21, 1976, but valid existing rights were preserved. 90 Stat. at 2786; see 43 U.S.C. § 1701 note (a) (2006). Thus, the question would be whether a ROW was established and maintained, as a matter of fact and law, prior to repeal of the statute.

⁹ In *Southern Utah Wilderness Alliance v. BLM* (SUWA), 425 F.3d 735, 757 (10th Cir. 2005), the Court concluded that only the courts can issue a definitive, binding determination of a party’s rights under R.S. 2477, and that “nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder.” Therefore, whether an R.S. 2477 ROW was actually established prior to repeal of the statute, and has not been abandoned, is a matter to be decided by a court under Federal law, “borrowing” appropriate portions of state law, not BLM. *Id.* at 757, 762-63; *id.* at 768; see *Kane County v. Kempthorne*, 495 F. Supp. 2d 1143, 1154-55 (D. Utah 2007), *aff’d sub nom. Kane County v. Salazar*, 562 F.3d 1077 (10th Cir. 2009).

III. No Error in Not Considering the Conveyance of Parcel F1 to the School District

[1] Appellant’s protest discussed the possibility of transferring the 40-acre Parcel F1 to the Gateway Unified School District and argued that the EA was deficient in failing to analyze use of the land for education purposes. AR Part K, tab 7, ¶¶21-24 at 6, ¶35 at 8. As noted above, both the City and the School District sent BLM letters suggesting the use of the parcel for a school farm and the City protested the inclusion of all of Parcel F1 in the exchange. BLM considered both letters as protests but rejected them because (1) the suggested alternative had not been submitted prior to issuance of BLM’s DR determining to complete the exchange, (2) “all reasonable alternatives . . . presented during the comment period were considered,” (3) it was “not reasonable for BLM to analyze alternatives that are hypothetical or speculative,” and (4) “discussion of alternatives that were not presented during scoping of the environmental analysis is unwarranted.” AR Part L, tab 6 at 4, tab 8 at 3. BLM used the same wording in rejecting similar points presented in Appellant’s protest. AR Part L, tab 7 at 11 (Response #21), 12 (Responses #22, #23, #24), and 16 (Response #35). Because the record indicates that the possibility of a transfer was raised only after BLM had notified local government officials and the public of the proposed exchange and published notice of its decision to complete the exchange, we find no error in its not considering the conveyance of Parcel F1 to the School District. *See* AR Part I; AR Part E, tab 2, 3; *see generally*, AR Part F.¹⁰

IV. Compliance with the National Historic Preservation Act

[2] Section 106 of The National Historic Preservation Act (NHPA) establishes “a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.” 16 U.S.C. § 461 (2006); *see id.* § 470-1. It requires:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. . . .

¹⁰ Moreover, Appellant has not argued that the exchange, as approved by BLM, would be contrary to the applicable 1993 Redding RMP, and that BLM has otherwise failed to comply with its obligations under 43 U.S.C. § 1716(a) (2006).

BLM must make a reasonable and good faith effort to identify all historic properties within the area potentially affected by a proposed undertaking, evaluate and determine whether identified properties are listed or eligible for inclusion in the National Register of Historic Places (NRHP),¹¹ assess the adverse effects upon listed or eligible properties, and develop and evaluate the means to mitigate or avoid such effects. 36 C.F.R. §§ 800.3, 800.4, 800.5, 800.6; *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995); *Escalante Wilderness Project v. BLM*, 176 IBLA 300, 308 (2009).

A. *BLM's Findings as to Cultural Resources*

The EA states:

The Federal parcels involved in the exchange were the scene of a variety of human activities associated with habitation and/or mining activities dating from the late 1800s to the early 1950s. The parcels are located near the former 19th century gold mining community of Churntown and within the vicinity of Shasta Dam boomtowns. Prior to European settlement, the project area was located within the ethnographic territory of the Wintu

There are 11 recorded historic sites or isolates, within the area, none of which are considered eligible for inclusion on the [NRHP]

AR Part G, tab 5 at 11. Two sites are portions of the “Beltline” in F1 and F2. *Id.*

Other locations include the remnants of three early to mid-20th century home sites; two late 19th-early 20th century cabin ruins near local placer workings in the nearby streams; two mining ditch segments; a Shasta Dam construction-era dump; ruins of several tarpaper shacks and dumps from the Shasta Dam construction period; and a powder flask that had been used as a claim marker. Faint road segments and minor prospecting evidence are also present.

Id. at 12. The EA identifies four archaeology reports written in 1996, 2002, 2003, and 2005 in which the “sites have been documented, discussed and evaluated” for NRHP eligibility. *Id.* Based upon these reports, the EA concludes:

¹¹ The statute addresses not only properties listed in NRHP, but also those “eligible for inclusion” because they “meet the National Register criteria.” 36 C.F.R. § 800.16(l)(2); see 16 U.S.C. § 470w(5) (2006). Criteria for evaluating properties for inclusion in the NRHP are provided at 36 C.F.R. § 60.4.

The proposed exchange will have no effect on properties listed on or deemed eligible for inclusion on the [NRHP], i.e. the features do not merit protection under the [NHPA]. The features were determined to have only local significance due to their relatively poor integrity, lack of association with important persons, non-distinctive designs and widespread distribution of these types of features on public and private lands within western Shasta County.

Id. at 25; *see id.* at 34 (the “no action” alternative). Similarly, the FONSI states that “no significant scientific, cultural or historical resources” would be affected by the proposed action because 11 historic sites were evaluated pursuant to the NHPA and none were “determined to be eligible for inclusion” in the NRHP. AR Part G, tab 6 at 3.

B. Appellant’s Arguments Concerning BLM’s Findings

In his protest, Appellant explained that he had visited BLM’s Redding office and reviewed the four reports and saw that, although they “did locate the cellar and well, on the 40 acre parcel,” *i.e.* Parcel F1, because the reports stated these structures:

“were remnants of three early to mid-20th century home sites [and] two late 19th-early 20th century cabin ruins near local placer workings in the nearby streams,” the reports failed to discover any of the historical significance of the sites. It should have been realized that these buildings date to the early 1850’s or 28 years before the first building was constructed in Redding.

AR Part K, tab 7, ¶18 at 5; *see id.* first ¶69¹² at 14 (“The analysis of the ditches and building sites should have been dated to the mid 1800’s, and not to a later period.”). Appellant contended that BLM’s review of the three Federal parcels had failed “to identify how these sites fit into the local history of the City of Shasta Lake,” there was “a lot more historical information” available “than was captured in the research obtained for the EA,” and that “[f]ailure to properly research the significant history of these three parcels compromised the decision to trade away these public lands.” AR Part K, tab 7, ¶67 at 13.

In regard to Parcel F1, Appellant explained that on September 24, 2008, he had made a PowerPoint presentation to the Shasta Lake Historical Society showing:

¹² Appellant’s protest contained two paragraphs numbered “69.”

[a] picture of the Mahan family, the owners of the well and cellar on the 40-acre parcel. This family was one of the first families in the historic Churntown area. John and Margaret Wallace Mahan lived in this home. Daughters Julia and Mary were born in this house. Julia married John Flanagan and of the 8 Flanagan children, Margaret and Mary were born and raised in Churntown. . . . Much of the flat meadow area around the home site remains, and with the 6" waterline bisecting the property, it could once again be used for agricultural purpose[s].

AR Part K, tab 7, ¶19 at 6. Appellant asked BLM how to submit an electronic copy of his PowerPoint presentation as part of his protest. *Id.* Appellant provided information in addition to that cited in the EA to show that these “three government parcels were a part [of] a significant amount of local history” that began in 1849.¹³

¹³ He informed BLM that “Churntown was first discovered on Jan 28, 1849, with the first log cabin being completed on Jan 10th 1850, [which was] within 100' of the southern boundary of the 41-acre parcel [F2, a] battle with the local Indians took place here on the morning of January 11, 1850,” “[t]he 40-acre parcel [F1] was the homestead of John Mahan, who settled on it in 1855,” and “[t]he Mahan ranch house, of which the cellar and well still exi[s]t, was also the Churntown schoolhouse for a while.” AR Part K, tab 7, first and second ¶69 at 14. Elsewhere, his protest explained that Parcel F1 was the site of a mining claim John Mahan had located about 1860 which “continued to be worked by granddaughter Margaret Flanagan Bradshaw” until 1969 or 1970, and that water had been “last conveyed via the historic mining ditch from [L]ittle [C]hurn [C]reek to this mining claim about 1969.” *Id.* ¶¶20 at 6, 68 at 13. The legal basis for an 1855 “homestead” is unclear because the first Homestead Act was not enacted until 1862. Ch. 75, 12 Stat. 392 (R.S. 2289, 2290 (2d ed. 1878)). Because 1860 is prior to the first Federal mining law enacted in 1866, ch. 262, 14 Stat. 251, a mining claim would have been located under “the local customs or rules of miners.” 30 U.S.C. § 22 (2006); *see generally United States v. Shumway*, 199 F.3d 1093, 1097-99 (9th Cir. 1999). In regard to the well, Appellant explained:

The hand dug well on the 40-acre parcel was dug by professional well digger, Jack Dalton. This well was the last one old Jack dug. Jack was described as a ne'r-de-well, and a wino, but he was good at his trade. He dug this well in about 1868. We know this because Julia Flanagan, who was born in the Mahan house in 1864, was a small girl when the well was dug. Old Mc Gee who owned a store in Newtown, about a mile and [a] half south of the well, shot Jack to death the night he finished digging this well. Jack Dalton had purchased a jug of wine with the money he received from Mr. Mahan. He returned for another jug later that night and was shot. Mc Gee turned himself in for murder

(continued...)

C. *BLM's Response to Appellant's Protest*

BLM responded to Appellant's claim that the building sites date from the 1850's by stating: "There is no archaeological evidence to place any of the discovered structure remnants in the Gold Rush or early post-Gold Rush period. All physical evidence (surface and near-surface) suggests late 19th century into the 20th century time period associations." AR Part L, tab 7 at 11 (Response #18). BLM requested that Appellant send a compact disk of his PowerPoint presentation, but stated "[s]uch information does not change the significance levels of the historic properties due to integrity losses." *Id.* (Response #19). In regard to Appellant's broader argument that BLM had failed to properly research the history of the three Federal parcels, BLM explained that, while it appreciated the added historical data he had provided, "this information does not bring the subject historical properties up to a [NRHP] level due to losses of integrity" and "does not change the outcome of the Decision." *Id.* at 26 (Response #67); *see id.* (Response #68). Similarly, BLM stated that the information Appellant provided about Churntown was "insufficient to change the determinations of significance due to historic property integrity losses or change the outcome of the Decision" and that the ditches "while retaining some integrity on BLM administered lands . . . are commonplace in the greater region, have no outstanding architectural features nor length," and "were not associated with anyone paramount in the political or economic development of Shasta County or the region, and offer little further research value beyond their documentation." *Id.* at 27 (Response #69a).

BLM acknowledged that John Mahan was listed in a publication titled *The Dictionary of Early Shasta County History*, but pointed out that "the Flanagan name is not listed" and that "these individuals arguably have minor local importance it would seem in the larger picture of county history," and further stated that the information "does not change the outcome of the Decision." *Id.* Responding to Appellant's claim that the "cellar and well" on Parcel F1 were from the Mahan ranch, BLM stated that it appreciated the additional information, but it "does not change the significant determinations due to heritage resource integrity losses" and "does not change the outcome of the Decision." *Id.* (Response #69b).

¹³ (...continued)

in the town of Shasta. John Mahan felt so bad for Jack Dalton that he purchased a new set of clothes for Jack to be buried in. . . .

Id. ¶70 at 14. His SOR includes pictures of John and Margaret Wallace Mahan from his PowerPoint presentation and also a picture of the well. SOR at unpag. 3-4.

D. BLM Complied with the National Historic Preservation Act

We find that Watkins is not arguing that the survey of cultural resources on the Federal parcels to be exchanged out of Federal ownership is inadequate. It is clear from the record that there has been a full Class III survey of cultural properties on these parcels, apparently supplemented twice. *E.g.*, EA at 12.¹⁴ Watkins does not allege that BLM's survey was inadequate to discover all properties eligible for inclusion in the NRHP, or that there are any cultural properties or resources that BLM failed to discover. Watkins argues that BLM fails to appreciate the real significance of the Mahan family cabin (including its real age), the real age of the "historic mining ditches" of which some remains apparently still exist, and the significance of the Beltline (or the part of it that crosses one of the parcels). SOR at unpag. 3-6. BLM concluded that none of the sites were eligible for inclusion in the NRHP, primarily due to an absence of integrity, and as a result, that it has no further obligation under section 106 of the NHPA. AR Part L, tab 7 (Response #78). *See Red Thunder, Inc.*, 124 IBLA 267, 286 (1992).) Thus, Watkins essentially questions BLM's conclusion that the sites are not eligible for inclusion in the NRHP.

While Watkins has certainly exhibited his extensive knowledge of local history, he does not explain how the additional information he offers establishes that BLM's determination is incorrect. BLM considered his additional information and concluded that it was insufficient to change the determination that the sites were not eligible for inclusion in the NRHP. AR, Part L, tab 7 at 11, 26-29. While Watkins clearly disagrees with those determinations, he does not discuss the four criteria for inclusion listed in 36 C.F.R. § 60.4, explain how any of the sites meet any of those criteria, or explain how BLM misapplied those criteria.¹⁵

¹⁴ Under the *BLM Manual*, a "Class I" inventory is a "professionally prepared study that includes a compilation and analysis of all reasonably available cultural resource data and literature, and a management-focused, interpretive, narrative overview, and synthesis of the data." *BLM Manual* § 8110.21A1. A Class II survey is "a statistically based sample survey, designed to aid in characterizing the probable density, diversity, and distribution of cultural properties in an area." *BLM Manual* § 8110.21B. A Class III survey "describes the distribution of properties in an area; determines the number, location, and condition of properties; determines the types of properties actually present within the area; permits classification of individual properties; and records the physical extent of specific properties." *BLM Manual* § 8110.21C.

¹⁵ The criteria in 30 C.F.R. § 60.4 to evaluate eligibility for inclusion in the NRHP are:

The quality of significance in American history, architecture,
archeology, engineering, and culture is present in districts, sites,

(continued...)

It is Appellant's burden to show error in BLM's determination that none of the sites are eligible for inclusion. We do not find that he has met that burden. The detailed information he has presented is important to the Mahan family history and may be of interest to the local area. However, even setting aside the lack of any explanation or analysis on Appellant's part, it is not apparent how any of the sites rises to the level of eligibility for inclusion in the NRHP.

V. Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the December 5, 2008, decision of the California State Director is affirmed.

/s/
R. Bryan McDaniel
Administrative Judge

¹⁵ (...continued)

buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

We note that under the State Protocol Agreement Among the California State Director of the Bureau of Land Management and the California State Historic Preservation Officer and the Nevada State Historic Preservation Officer, executed on Oct. 15, 2007 (California State Protocol), BLM is authorized in projects such as this one to "act on the S[tate] H[istoric] P[reservation] O[fficer]'s behalf" with respect to, among other things, "determinations of eligibility." California State Protocol at 6. In this case, BLM clearly followed the procedures of the California State Protocol in complying with its obligations under the NHPA.

I concur:

_____/s/
Geoffrey Heath
Administrative Judge