



HUALAPAI AND FORT MOJAVE INDIAN TRIBES

180 IBLA 158

Decided December 7, 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

HUALAPAI AND FORT MOJAVE INDIAN TRIBES

IBLA 2010-94

Decided December 7, 2010

Appeal from a Finding of No Significant Impact and Decision Record of the Kingman Field Office (Arizona), Bureau of Land Management, approving the sale of public lands for a shooting range. EA-AZ-030-2002-0057.

Affirmed.

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

BLM properly approves the sale of public lands for use as a shooting range, absent preparation of an EIS, where, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006), it has taken a hard look at the environmental consequences of the sale, considered all relevant matters of environmental concern, including potential impacts arising under the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006), and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. BLM's decision will be affirmed where the appellants fail to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by the statute.

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

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2006), requires BLM to consult with affected Tribes before issuing a final decision

if a proposed undertaking will have an effect on historic properties to which Indian Tribes attach religious and cultural significance. Under NHPA regulations, “[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them . . . .” 36 C.F.R. § 800.16(f). “The goal of consultation is to identify historic properties potentially affected by the undertaking,” and to understand tribal concerns sufficiently to take into account the effects that a proposed Federal undertaking might have on eligible properties. 36 C.F.R. § 800.1(a). BLM, through consultation, must “take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places],” 16 U.S.C. § 470f (2006), and determine whether the effect will be adverse, and avoid or mitigate any adverse effects. *See* 36 C.F.R. § 800.6. Where BLM timely consulted with the interested Indian Tribes in evaluating its decision to approve the sale of public lands for use as a shooting range, and has made a reasonable and good faith effort to locate and record cultural resources on lands they administer and in areas affected by its decision, including conducting several on-the-ground investigations over the parcel to be conveyed, BLM has complied with the NHPA.

APPEARANCES: Dean B. Suagee, Esq., Washington, D.C., for appellants; William W. Quinn, Esq., and Wonsook S. Sprague, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; James F. Odenkirk, Esq., Assistant Attorney General, State of Arizona, Phoenix, Arizona, for the Arizona Game and Fish Department (Intervenor).

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Hualapai and the Fort Mojave Tribes (Tribes)<sup>1</sup> have appealed from a February 10, 2010, Finding of No Significant Impact/Decision Record (FONSI/DR) issued by the Kingman Field Office (Arizona), Bureau of Land Management (BLM). The FONSI/DR approved the sale of public lands to the Arizona Game and Fish Department (AGFD) for a shooting range north of Boundary Cone Road in the

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<sup>1</sup> The Tribes are Federally recognized. *See* 74 Fed. Reg. 40218, 40220 (Aug. 11, 2009).

Mohave Valley, near the California border.<sup>2</sup> BLM based its FONSI/DR on a February 2010 Environmental Assessment (EA) (EA-AZ-030-2002-0057), which analyzed the environmental impacts of the potential sale, including reasonably foreseeable impacts the project may have on cultural and historical properties.

The Tribes contend that BLM's approval of the sale of public lands for a shooting range within the vicinity of lands deemed sacred by the Tribes violates section 102(2)(C) the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (2006), section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2006), and the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013 (2006). For the following reasons, we conclude that BLM's decision accords with those statutes.

### I. BACKGROUND

In 2002, the Kingman Field Office received AGFD's application<sup>3</sup> to purchase 1,200 acres of public land in secs. 35 and 36, T. 19 N., R. 21 W., Gila and Salt River Meridian (GSRM), Mohave County, Arizona, for an outdoor public shooting range.<sup>4</sup> AR 2, Tab 1.<sup>5</sup> The AGFD explained in its application that it required approximately 315 acres on the north side of Boundary Cone Road for pistol bays,

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<sup>2</sup> The same FONSI/DR was appealed by Shirley Montgomery. The Board docketed Montgomery's appeal as IBLA 2010-88 and dismissed it by order dated July 29, 2010, on the basis that Montgomery had failed to point out affirmatively why the decision appealed from is factually or legally erroneous. The Tribes filed a petition for a stay of BLM's DR on Mar. 16, 2010. BLM did not contest the petition and it was therefore granted by order dated Apr. 15, 2010.

<sup>3</sup> The AGFD filed its application with BLM pursuant to the Recreation and Public Purposes Act (R&PPA), 43 U.S.C. §§ 869 to 869-4 (2006). The R&PPA grants the Department discretionary authority to classify and sell or lease public land to a state, county, or other political subdivision for public or recreational purposes. *See* 43 U.S.C. § 869 (2006); 43 C.F.R. Part 2740.

<sup>4</sup> The AGFD initially filed its R&PPA application with BLM's Lake Havasu Field Office seeking to acquire public lands in secs. 28 and 33, T. 19 N., R. 21 W., GSRM. Administrative Record (AR) 1, Tab 1, R&PPA Application; *see* 66 Fed. Reg. 27531 (May 17, 2001). Because of the proposed shooting range's proximity to populated areas and other issues, the AGFD withdrew its application with the Lake Havasu Field Office on July 22, 2002, and re-filed it with the Kingman Field Office on Sept. 30, 2002. AR 1, Tab 37; AR 2, Tab 1.

<sup>5</sup> The record contains 11 labeled file folders and we refer to them accordingly.

handgun and rifle ranges, trap and skeet fields, a sporting clay course, an archery range, parking lots, restrooms, a clubhouse, and shot fall zones.<sup>6</sup> *Id.* In addition to the area needed for shooting range facilities, the AGFD applied for approximately 470 acres in secs. 25, 26, 35, and 36, T. 19 N., R. 21 W., GSRM, for use as a safety buffer. The land incorporating the safety buffer would not be conveyed; it would remain in Federal ownership and would be managed under a Cooperative Management Agreement with the AGFD. *Id.*

Because the Tribes regard the Boundary Cone Butte and the surrounding area as a traditional cultural property and because the AGFD's Boundary Cone Road location for a shooting range would be within visual and auditory proximity of the Butte, the Fort Mojave Tribe opposed the location. The Fort Mojave Tribe claimed that a shooting range "will have an adverse effect on the ability of Tribal members to peacefully enjoy visiting Mojave cultural sites in the area, particularly the sacred mountain called Boundary Cone by non-Mojaves." AR 3, Tab 1; AR 4, Tab 19; *see* Letter from the Hualapai Tribe to BLM, dated Apr. 14, 2004. The Tribe indicated to BLM that activities at the shooting range would be detrimental to Indians visiting the Butte, asserting specifically that gunfire would diminish Tribal members' traditional religious and cultural practices, which take place in the proposed area. The Hualapai Tribe concurred with the views expressed by the Fort Mojave Tribe. *See* AR 4, Tab 19. Because of the spiritual qualities of the aboriginal lands, the Tribes believe that the visual and auditory impacts caused by the shooting range cannot be avoided, minimized, or mitigated.

Because of the inability of BLM, the AGFD, stakeholders, and the Tribes to agree on suitable alternative locations or mitigation measures acceptable to the Tribes, BLM instituted alternative dispute resolution (ADR) in September 2004 to help it resolve the parties' impasse. *See* AR 5, Tab 29, ADR Final Status Report, dated Oct. 26, 2005. Planning criteria developed by BLM, the AGFD, and the project's stakeholders, helped define the project's locale: The facility had to be (1) within a 30-minute drive from Bullhead City (*i.e.*, within the Kingman Field Office's jurisdiction); (2) a sufficient distance from urban development; (3) accessible from existing roads; (4) situated on flat terrain; and (5) within an area with no non-mitigable cultural resources. *Id.* Seven alternative locations, which were approved by the Tribes, were identified and studied. Due to location, topography, shot direction, engineering and economic feasibility, potential power, water, and vehicular access, and other factors, only two sites, *i.e.*, the Boundary Cone Road site and the Willow Road site, situated in sec. 28, T. 18 N., R. 21 W., GSRM, remained feasible locations for an outdoor shooting range.

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<sup>6</sup> While the AGFD sought 25 acres south of the same road, it later withdrew that portion of land from its application. *See* AR 2, Tab 10, Letter from AGFD to BLM, dated Nov. 7, 2002.

For 3 years, BLM field managers, archeologists, and engineers collaborated with Fort Mojave representatives to comprehensively evaluate the Willow Road site alternative. This road, however, crosses into the Fort Mojave Indian Reservation. After much consultation, the Tribe would not commit to granting public access over the road. See AR 6, Tabs 15, 23; AR 7, Tabs 13, 49, 50. Consequently, the Willow Road site was withdrawn as an alternative, leaving only the Boundary Cone Road and the no-action alternative for further evaluation.

In October 2002, BLM conducted a class III cultural resource inventory<sup>7</sup> of the proposed undertaking area in order to identify all historic properties potentially eligible for inclusion on the National Register of Historic Places, an official list of properties protected and preserved pursuant to the NHPA. BLM reviewed its cultural resource database and base maps, the archival maps and county records of the Mohave County Museum, the Mohave County Courthouse maps section, and the historic maps from the General Land Office, to identify previously recorded sites within 0.25 miles of the proposed project area. AR 6, Tab 31, Letter from BLM to Tribes and State Historic Preservation Officer (SHPO), dated July 3, 2006. BLM requested the Fort Mojave Tribe to provide information regarding the role the area plays in Mojave religion, as well as locations where any religious practices occur. See AR 3, Tab 19, Letter from BLM to Fort Mojave Indian Tribe, dated Aug. 2003.

BLM engaged in an on-the-ground field inspection of the entire project area. That inspection identified five undocumented historic sites and one unrecorded prehistoric archeological site within the 315 acres to be conveyed: a telegraph line, a temporary camp, an historic can scatter, an historic water pipeline, and an historic road. See AR 2, Tab 5, Cultural Survey Report. While on site with Tribal representatives, BLM located and recorded within the proposed shooting range area a prehistoric cleared circle, about 3.5 feet in diameter, believed by the Fort Mojave to be a supernatural portal between worlds. See AR 6, Tab 10, Letter from BLM to SHPO,

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<sup>7</sup> BLM defines a class III cultural resource inventory as an “intensive field study,” representing a “total inventory of the cultural properties observable within the target area,” and involving a “professionally conducted, thorough pedestrian survey of an entire target area . . . intended to locate and record all historic properties.” *BLM Manual 8110* § .21C (Rel. 8-73, Dec. 3, 2004). The inventory identifies “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.” *Id.* Acceptable inventory methodologies are listed in the “Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation,” 48 Fed. Reg. 44716 (Sept. 29, 1983), renamed the “Secretary of the Interior’s Historic Preservation Professional Qualification Standards” on June 20, 1997. See 62 Fed. Reg. 33708.

dated Mar. 22, 2006. BLM applied the criteria embodied in 36 C.F.R. § 60.4,<sup>8</sup> and determined that the five historic sites and the cleared circle were not eligible for inclusion on the National Register. *Id.*; see AR 6, Tab 31, Letter from BLM to Tribes and SHPO, dated July 3, 2006. BLM specifically stated that the information provided by the Fort Mojave Tribe regarding the cleared circle “suggests that such features are important to the Tribe, but does not substantiate this feature’s eligibility for the National Register.” AR 6, Tab 31. The Tribes did not comment on BLM’s findings. The SHPO agreed with BLM’s eligibility determination for all the sites identified within the Boundary Cone Road project area. See AR 7, Tab 9, Letter from SHPO to BLM, dated Aug. 24, 2006.

While Boundary Cone Butte was not within the proposed project’s borders, BLM nevertheless discussed the landmark with both Tribes. Based on the information they provided, BLM determined that the nature and importance of the property qualified it for eligibility for inclusion on the National Register of Historic Places under criteria (a) and (b) of 36 C.F.R. § 60.4 as being directly associated with events and persons significant in the past. See AR 6, Tab 31. Again, the SHPO concurred with BLM’s determination. See AR 7, Tab 9.

In addition to the class III cultural resource inventory of the Boundary Cone Road area conducted by BLM, the Fort Mojave Tribe “fe[lt] that an ethnographic study is required for this undertaking.” *Id.* Typically, an ethnographic study is employed for gathering empirical data on historic and cultural places and environmental features that have symbolic and other cultural value for Native Americans. See 62 Fed. Reg.

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<sup>8</sup> National Register eligibility is determined in accordance with 36 C.F.R. § 60.4, as follows:

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, 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.

at 33716. BLM requested the Tribe to describe why it believed an ethnographic study was necessary, but the Tribe provided no informative response. *See* AR 3, Tab 19; *see also* AR 3, Tab 26 (the Tribe simply reiterated that “issues . . . will have to be addressed through an ethnographic addendum study to the [cultural] survey report”). BLM informed the Tribe by letter dated October 2, 2003, that in the absence of a specific reason for doing so, it did not plan to conduct an ethnographic study. *See* AR 3, Tab 29. BLM again urged the Tribe to provide any information that would allow it to best evaluate the project’s potential effects and identify possible mitigation measures regarding the mountain area. *Id.* No new information was ever forthcoming.

The Director of the Arizona State Office, BLM, wrote to the Tribes on March 23, 2007, acknowledging that the Tribes have “indicated interest in ethnographic information being obtained prior to a final decision by the BLM on the proposed project. To this end, the BLM would like to offer an opportunity for members of your tribe to meet with our National Tribal Relations Specialist . . . at your earliest convenience.” AR 7, Tab 54.<sup>9</sup> Having heard nothing, BLM asked the Fort Mojave Tribe again during an in-person meeting whether “the Tribes want interviews conducted.” AR 8, Tab 9, Meeting Notes, dated Apr. 11, 2007. Neither the Fort Mojave Tribe nor the Hualapai Tribe ever accepted BLM’s offer to conduct an ethnographic study. Thus, the study never occurred.

In addition to the communications and contacts described above, the record includes documentation, spanning more than a decade, of telephonic conference dictations, notices, and other communications between BLM, the Tribes, SHPO, ACHP, and the general public related to the proposed project. On November 27, 2002, BLM commenced consultation with potentially affected Indian Tribes, *i.e.*, Tribes that may consider the area as a part of their traditional lands. AR 2, Tab 14. BLM contacted, among other Tribes, the Hualapai and the Fort Mojave, and informed them of the AGFD’s proposed shooting range project and the historical sites BLM found during its cultural resource inventory field study. Communication and meetings between BLM and the Tribes continued and many site visits were made to the proposed and alternative locations.

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<sup>9</sup> On Aug. 8, 2006, BLM invited the Advisory Council on Historic Preservation (ACHP) to participate in consultations for identifying properties of religious and cultural significance within the undertaking area. *See* AR 7, Tab 6. During a conference call on Dec. 15, 2006, the ACHP recommended that BLM conduct an ethnographic study of the area to be disturbed. *See* AR 7, Tab 35, e-mail from ACHP to BLM, dated Jan. 22, 2007. The reasons for the ACHP’s recommendation are undocumented.

In 2003, BLM began formal consultation with the SHPO. AR 7, Tab 6. This consultation continued until 2007, when the SHPO's duties were being carried out by the ACHP. AR 8, Tab 15. The ACHP found that the proposed undertaking was incompatible with the special qualifying characteristics of the Boundary Cone Butte as an historic property and recommended that BLM abandon the project. AR 8, Tab 14. Because of the stalemate with the ACHP, BLM formally terminated the consultation process in September 2008. *See* AR 8, Tab 28. In November 2008, the ACHP provided its final comments to Secretary Kempthorne, recommending, among other things, that BLM deny the AGFD's application. AR 8, Tab 33.

BLM did not limit its consultation to interested Tribes, the SHPO, and the ACHP. The agency informed the general public of the proposed action and its impacts on the environment by publishing a draft EA in 2003. *See* AR 3, Tab 41; *see also* 68 Fed. Reg. 14687 (Mar. 26, 2003). BLM revised the EA and published it for public review and comment on June 21, 2006. *See* AR 6, Tab 26; 71 Fed. Reg. 35699. The Tribes did not provide comments on either draft EA. BLM also hosted many public meetings to facilitate dialogue regarding the shooting range and the media covered the project's progress closely. *See* AR 10, Tab 7, EA at App. D.

While preparing evidence and analysis in the EA for determining whether the proposed action will have a significant effect on the human environment, BLM found that there existed a public need for the shooting range facility. Uncontrolled shooting on public lands had been occurring within the area. *See* AR 10, Tab 7, EA at 5. The range, if built, would allow individuals to practice marksmanship and other gun-related hobbies in a controlled environment. *Id.* at 1. The range would also promote safe hunting and shooting practices, provide the public with safe shooting areas, support the State's Hunter Education Program, and encourage hunters to become more proficient with their equipment. *Id.* Finally, the range would provide State, Tribal, and local law enforcement with an accessible place to achieve and maintain firearm qualifications. *See id.*

In the EA, BLM evaluated the impacts the shooting range would have on the traditional and cultural features of Boundary Cone Butte. AR 8, Tab 12, Letter from BLM to Tribes, SHPO, and ACHP regarding determination and finding of adverse effect<sup>10</sup> on Boundary Cone Butte, dated May 10, 2007; AR 10, Tab 7, EA at 10, FONSI at unpaginated 1-4, DR at 9. The sound-measuring studies showed that the noise levels on and near the shooting range would be within Arizona's outdoor shooting

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<sup>10</sup> The NHPA regulations define "[a]dverse effect" to include physical destruction of the property, alteration of the property, restoration of a property or a "change of the character of the property's use or physical features within the property's setting that contribute to its historic significance." 36 C.F.R. § 800.5(a)(2)(iv).

range standards, which require gunfire heard from the nearest occupied structure not to exceed 64 decibels. *See* AR 10, Tab 7, EA at 9; Ariz. Rev. Stat. § 17-602(D).

BLM further determined that, while implementing the proposed action would add man-made structures and disturbances to the natural landscape, the project would meet visual objectives for the area. *See* AR 10, Tab 7, EA at 13-14. The majority of Mohave Valley, including the Boundary Cone Road location, is classified as Visual Resource Management Class IV. Class IV allows consideration of activities that require major modification of the existing character of the landscape, which means that the level of change to the landscape can be high, may dominate the view, and may be the major focus of viewer attention. *Id.*<sup>11</sup>

The Tribes generally identified the Butte and the sacred cleared circle as culturally significant; however, they did not explain how the shooting range would impact current practices occurring at these or other sacred sites, or otherwise suggest measures to mitigate any impacts. Nevertheless, in the DR, BLM stated that “in recognition of the [Tribes’] continued use of Boundary Cone Butte and the surrounding area in traditional cultural practices,” it would require AGFD to incorporate certain mitigation measures into a Plan of Development (POD) for the project. *See* AR 10, Tab 7, DR at 3.

The mitigation measures specified in the DR require AGFD to (1) relocate burrowing owl and chuckwalls to “appropriate habitat outside the project area if it is determined that an individual of either species would be destroyed or the burrow of a burrowing owl would be disturbed or destroyed by project implementation”; (2) “limit the ‘footprint,’ or area of ground disturbance to no more than 20 (twenty) acres,” with “no surface occupancy on the remaining 295 acres of the patented land”; (3) “monitor noise levels, through a third party consultant, and submit a report annually to ensure that levels remain below the State noise standards for shooting range facilities,” with “[b]erms and backstops . . . designed to optimize noise reductions within the surrounding environment”; (4) “restrict operating hours or close the range . . . during established events identified by the [Tribes] to reduce possible conflict with tribal practice of traditional cultural activities associated with Boundary

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<sup>11</sup> In analyzing the shooting range’s location and the cumulative impacts it could have on the surrounding environment, BLM observed that the Mohave Valley’s landscape has been impacted significantly by public and private development. *See* AR 10, Tab 7, EA at 19. Development projects such as roads, housing, golf courses, power and pipelines, land fills, casinos, and a power plant already spot the Valley. BLM acknowledged that adding a shooting range into the mix of development and disturbance “will continue to impact the landscape and [the Tribes’] cultural heritage.” *Id.*

Cone Butte,” and “coordinate annually with the [Tribes] to identify and create a calendar of specific dates when the shooting range would be closed”; (5) work with the Tribes “to establish a process to accommodate unanticipated events that warrant closure of the range”; (6) fence or otherwise avoid the “cleared circle” and close an existing access road “to prevent public access and disturbance, providing for a minimum of 250' diameter of undisturbed surface around the feature, as measured from the center of the feature,” and install, prior to any construction activity taking place, and retain in place during the life of the shooting range, the “patented land perimeter fence, ‘cleared circle’ feature buffer perimeter fence, and the shooting range buffer perimeter fence . . . prior to any construction activity taking place”; (7) “coordinate with the concerned tribes to provide [information] opportunities, such as kiosks, pamphlets, etc., at the shooting range”; (8) “hold an annual face-to-face meeting with the concerned [T]ribes and the BLM”; and (9) “coordinate with the [Tribes] to provide adequate shooting range access to tribal law enforcement personnel to complete and maintain firearms training and qualifications.” *Id.*, DR at 3-5.

After considering, among other things, (1) the effects of the proposed action on Boundary Cone Butte and its visitors, (2) a no-action alternative, and (3) many alternative sites, BLM approved conveyance of the 315 acres of land within the Boundary Cone Road area to the State for \$3,150.00, subject to numerous reservations, conditions, limitations, and protective stipulations mentioned above. *See* AR 10, Tab 7, DR at 1, 3. The Tribes appealed.<sup>12</sup>

## II. DISCUSSION

### A. BLM's Decision Complies with NEPA

The Tribes generally argue that BLM violated section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), by failing to take a hard look at the cumulative

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<sup>12</sup> We note here that on Apr. 27, 2009, U.S. Representative Trent Franks, Arizona, introduced to the 111th Congress H.R. 2100, which provides for the conveyance, at no cost of the Boundary Cone Road location, as described in the AGFD's R&PPA's application, to the AGFD to be used as a public shooting range. More recently, Senator John McCain, Arizona, introduced on July 12, 2010, S. 3565, a bill that would, if passed, declare BLM's decision at issue in this case “legally sufficient for the purposes of, but not limited to- (A) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); (B) the National Historic Preservation Act (16 U.S.C. 470 et seq.),” and that the decision “shall not be subject to judicial review by any court of the United States.” The bill also seeks to convey the Boundary Cone Road location to the AGFD. To date, both bills have been referred to both houses' respective Natural Resources Committees; neither bill has come up for vote.

impacts the shooting range would have on traditional, religious, and cultural practices on Boundary Cone Butte. They also state that BLM did not accurately identify relevant cultural concerns during its NEPA analysis. See Statement of Reasons (SOR) at 10, 14-16.<sup>13</sup>

[1] A BLM decision approving an action based on an EA and FONSI, absent preparation of an environmental impact statement, generally will be affirmed if BLM has taken a “hard look” at the proposal being addressed and has identified relevant areas of environmental concern so that it can 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. *Biodiversity Conservation Alliance*, 169 IBLA 321, 331 (2006); *National Wildlife Federation*, 169 IBLA 146, 154-55 (2006); *Rainer Huck*, 168 IBLA 365, 401 (2006); *Colorado Mountain Club*, 161 IBLA 371, 381-82 (2004). In determining whether BLM took a hard look at environmental consequences, including cumulative impacts, the Board is guided by a rule of reason. See *National Wildlife Federation*, 169 IBLA at 155; *Colorado Mountain Club*, 161 IBLA at 381.

A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision or FONSI is premised on a clear error of law or a demonstrable error of fact, or that BLM failed to consider a substantial environmental question of material significance to the proposed action. *Biodiversity Conservation Alliance*, 169 IBLA at 331; *National Wildlife Federation*, 169 IBLA at 155; *Rainer Huck*, 168 IBLA at 402. Mere differences of opinion about the likelihood or significance of environmental impacts provide no basis for reversal. *Oregon Chapter of the Sierra Club*, 172 IBLA 27, 46-47 (2007); *Western Slope Environmental Resource Council*, 163 IBLA 262, 285 (2004); *Colorado Mountain Club*, 161 IBLA at 381; *San Juan Citizens Alliance*, 129 IBLA 1, 14 (1994).

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<sup>13</sup> BLM argues that the Tribes failed to comment on the draft EAs and therefore cannot challenge BLM’s actions regarding NEPA. See BLM Answer at 13; see also *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (Parties to a case must “structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” (Quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978)); 43 C.F.R. § 4.410(c)(1) (“[W]here BLM provided an opportunity for participation in its decisionmaking process, a party to the case . . . may raise on appeal only those issues . . . [r]aised by the party in its prior participation.”). We find that BLM had notice of the Tribes’ objections relating to environmental impacts and therefore dispose of the Tribes’ NEPA concerns on their merits.

A review of the record clearly shows that BLM incorporated in the EA all the information the Tribes offered the agency regarding their spiritual involvement with the Boundary Cone Butte and the surrounding area. The record also shows that BLM undertook a series of surveys and studies. For instance, BLM conducted a cultural survey, recorded five historic sites and the cleared circle site, and determined the Boundary Cone Butte to be eligible for listing in the National Register of Historic Places as a traditional cultural property. The agency carried out sound studies to measure gunfire noise. In the EA, BLM discussed the Tribes' relationship to the Butte and identified and considered the environmental impacts the shooting range would likely have on those relationships. Finally, BLM required inclusion in the project of protective measures to minimize auditory and visual impacts to the surrounding environment. DR at 3-4. We conclude that BLM satisfied its procedural obligations under NEPA to identify and discuss potential direct, indirect, and cumulative impacts. The Tribes have not demonstrated that the FONSI is premised on a clear error of law or demonstrable error of fact, or that BLM failed to consider a substantial environmental question of material significance to the proposed action. *Biodiversity Conservation Alliance*, 169 IBLA at 331.

1. *BLM Adequately Considered Executive Order 12898*

The Tribes state that BLM failed to take a hard look at potential environmental impacts to the minority populations, of which the Tribes are a part, in violation of Executive Order (EO) 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629 (Feb. 16, 1994). See SOR at 13-14. This EO was issued to improve the internal management of the executive branch and instructs BLM to consider the impacts of its programs on minority and low-income populations "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its . . . activities on minority populations . . . in the United States." EO 12898, sec. 1-101, 59 Fed. Reg. at 7629. It "is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person." *Id.* at sec. 6-609. Nevertheless, "while the Order affords no right, enforceable by any member of the public against BLM, should BLM fail to live up to this mandate . . . , it is still proper to inquire as to whether it did so, since the Order binds BLM." *Antonio J. Baca*, 144 IBLA 35, 39 (1998) (citing *Mendiboure Ranches, Inc.*, 90 IBLA 360, 365-70 (1986)). The Tribes identify themselves as minority populations protected by the EO, and claim that BLM's failure to identify them as such is contrary to the EO's directive. See SOR at 13-14. We are not persuaded that BLM failed to identify and analyze the disproportionate adverse environmental effects the shooting range may have on the area's Native Indians.

The Tribes' argument is wholly belied by the voluminous record. For the last decade, BLM has taken into account how constructing a shooting range facility near Boundary Cone Road would affect the Fort Mojave and Hualapai people. The EO requires BLM, in consultation with the affected Tribes, to identify all of the environmental impacts potentially caused by the proposed project and then to adopt measures to mitigate such impacts. *See Save Medicine Lake Coalition*, 156 IBLA 219, 266-67 (2002), *rev'd sub nom.*, *Pit River Tribe v. BLM*, 469 F.3d 768 (2006). BLM fulfilled this requirement.

## 2. *BLM Violated Neither the AIRFA Nor Executive Order 13007*

Again, using NEPA's "hard look" standard, the Tribes contend that BLM failed in its EA to consider the provisions of AIRFA, 42 U.S.C. § 1996 (2006).<sup>14</sup> They assert that "[i]n its failure to acknowledge the national policy supporting religious freedom for American Indians, including access to sacred sites . . . , BLM has produced a flawed EA." SOR at 11. While BLM did not explicitly mention the AIRFA in its EA, the agency adhered to the policy by seriously considering the consequences of the proposed action on the exercise of the Tribes' religious beliefs.

Congress enacted the AIRFA to require Federal agencies to consult with Tribal officials and religious leaders when agency actions could abridge the Tribe's religious freedom. However, AIRFA "does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices, [provided the agency] avoids unnecessary interference with Indian religious practices." *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir. 1983); *see also Klamath Tribes*, 135 IBLA 192, 199 (1996); *Blackfeet Tribe*, 103 IBLA 228, 237-40 (1988). BLM will be deemed in compliance with AIRFA if, during the decision-making process, it obtains and considers the Tribes' views, and if, in project implementation, it avoids unnecessary interference with Indian religious practices. *Red Thunder, Inc.*, 124 IBLA 267, 286-87 (1992); *Kenneth W. Bosley*, 91 IBLA 172, 178 (1986).

In this case, consultation and field visits revealed that the Boundary Cone Road and its surrounding area are indeed very important to the religious practices of the Tribes. However, apart from the cleared circle, the Tribal representatives did not identify any site-specific conflicts, or assert that it practiced rites, ceremonies, celebrations, or any other type of occupancy or activity within the area. BLM

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<sup>14</sup> This statute provides: "[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (discussing the statute's advisory status).

attempted to mitigate adverse impacts as best it could with the information it gathered from the Tribes. Because the record establishes that BLM took into account the religious significance of the Boundary Cone Road location to the Tribes, we conclude that BLM did not violate the spirit or the letter of AIRFA.

The Tribes also argue that, by ordering the construction of a fence around the cleared circle, BLM has rendered the religious site no longer accessible, in violation of EO 13007.<sup>15</sup> See SOR at 11; Ex. F, ¶ 12 (Linda Otero, Fort Mojave Tribe, Affidavit) (“It is my belief that the proposed mitigation measure of putting a fence around the Cleared Circle will disrupt the sanctity and energy of this place such that it is unlikely that . . . Mojave people will be able to use the Cleared Circle for ritual purposes.”). This EO imposes an obligation on BLM to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and . . . avoid adversely affecting the physical integrity of such sacred sites.” 61 Fed. Reg. at 26771.

The record indicates that the Tribes have never articulated to BLM, even after solicitation, the manner in which they seek agency accommodation for the ceremonial use of this sacred site. Nevertheless, BLM decided that the site was vulnerable to public disturbance and found that a fence would best protect the site. The fence will be a minimum of 250 feet away from the center of the 10-square-foot feature. Thus, the enclosed area around the circle will be 49,062.5 square feet, which is well over an acre of protected space. Again, the fence will be constructed so that it blends into its surroundings. We find that such measures reflect BLM’s sensitivity to tribal claims that the cleared circle is sacred to them, and that BLM imposed the measures for the site’s protection and preservation. Such action comports with EO 13007.

#### *B. BLM Adhered to the National Historic Preservation Act*

[2] The Tribes contend that BLM’s decision to approve the shooting range must be set aside because it violates the NHPA. Section 106 of the NHPA requires BLM to consult with affected Tribes before issuing a final decision if a proposed undertaking will have an effect on historic properties to which Indian Tribes attach religious and cultural significance. See 16 U.S.C. §§ 470a(d)(6), 470f. Under the NHPA regulations, “[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them . . . .” 36 C.F.R. § 800.16(f). “The goal of consultation is to identify

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<sup>15</sup> Like EO 12898, EO 13007 “is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.” EO 13007, sec. 4, 61 Fed. Reg. 26771 (May 24, 1996). As with EO 12898 and the AIRFA, BLM is required to comply with the policy articulated in EO 13007.

historic properties potentially affected by the undertaking,” and to understand tribal concerns sufficiently to take into account the effects that a proposed Federal undertaking might have on eligible properties. *Id.* § 800.1. Thus, BLM, through consultation, must “take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places],” 16 U.S.C. § 470f (2006), and determine whether the effect will be adverse, and how to avoid or mitigate any adverse effects. *See id.* § 800.6. To do otherwise would violate the NHPA.

In this case, initiating contact, identifying historic properties, assessing adverse effects on those properties, and resolving adverse effects, duties known as “the section 106 process,” are governed by the 1997 National Programmatic Agreement (PA)<sup>16</sup> and the 1997 Protocol for Managing Cultural Resources On Lands Administered by the Bureau of Land Management In Arizona (Protocol).<sup>17</sup> *See* 36 C.F.R. § 800.14(b) (authorizing Federal agencies to develop and implement alternative procedures that are consistent with the regulations for implementing section 106 of the NHPA). The PA, which outlines provisions similar to those found in 36 C.F.R. Part 800, subpart B (sections 800.3 - 800.13), requires BLM to work with SHPOs and the Advisory Council in tailoring proposed undertakings so that, to the extent possible, they do not harm historic properties. The PA also authorizes BLM to comply with the NHPA by following its own cultural resource program policies and procedures, found in the BLM 8100-Series Manuals and Handbooks. In considering the Tribes’ NHPA arguments, we will apply the principles of the PA and the Protocol, and the procedural details in BLM’s Manuals and Handbooks.

### 1. *BLM Timely Consulted with the Tribes*

The Tribes declare on appeal that BLM violated the NHPA because the AGFD filed its R&PPA application for lands around the Boundary Cone Road before BLM began the consultation process. SOR at 17-18. According to the Tribes, BLM should have joined them in the search for acceptable locations *before* BLM accepted the application. “[T]here does not appear to have been any effort on the part of BLM to engage concerned [T]ribes in the search for acceptable locations. Instead, BLM took no further action to include the Tribes in consultation until a location had been

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<sup>16</sup> Available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning\\_and\\_Renewable\\_Resources/coop\\_agencies.Par.88790.File.dat/PA\\_Final\\_03\\_1997.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/coop_agencies.Par.88790.File.dat/PA_Final_03_1997.pdf)

<sup>17</sup> Available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning\\_and\\_Renewable\\_Resources/coop\\_agencies/cr\\_publications.Par.9723.File.dat/Protocol%20final\\_AZ.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/coop_agencies/cr_publications.Par.9723.File.dat/Protocol%20final_AZ.pdf)

selected.” SOR at 18. The Tribes cite no authority for its proposition, and their assertion is contrary to the record.

The NHPA process governs consultations regarding historic properties within the area of an undertaking, not the actual location of that undertaking. *Compare* 16 U.S.C. § 470f with 42 U.S.C. § 4332(2)(E) (2006) (NEPA, not the NHPA, requires BLM to consider appropriate alternatives to the proposed action). BLM only incurs an obligation to comply with the NHPA when it is presented with an “undertaking.” “Undertaking means a project, activity, or program . . . under the direct or indirect jurisdiction of a Federal agency . . . [that requires] a Federal permit, license or approval.” 36 C.F.R. § 800.16(y). Conveying Federal lands is an undertaking subject to the NHPA. *See George Younghans*, 135 IBLA 251, 254 (1998). Thus, while BLM’s section 106 guidelines state that “consultation with [T]ribes should be initiated at the beginning of project planning,” Protocol at 4, an undertaking did not occur until the AGFD filed its application. BLM can only consider conveying public lands pursuant to the R&PPA “upon application filed by a duly qualified applicant.” 43 U.S.C. § 869 (2006).

BLM commenced consultation with the Tribes two months after AGFD filed its application and continued discussions for many years before it issued the final decision here on appeal. *See* 16 U.S.C. § 470a(d)(1)(A) (2006); *BLM Handbook 8210*, Ch. II, p. 2 (Rel. 8-75, Dec. 3, 2004); 65 Fed. Reg. 77698, 77700 (Dec. 12, 2000) (“[I]t is crucial that agencies initiate the section 106 process at a point where alternatives have not yet been foreclosed.”); *cf.* 36 C.F.R. § 800.1(c) (stating that early consultation with tribes is important “to ensure that all types of historic properties and all public interests in such properties are given due consideration”). The record makes clear that BLM complied with the obligation to timely consult with the Tribes.

## 2. *BLM Had No Duty to Conduct an Ethnographic Study*

The Tribes next posit that BLM violated the NHPA by failing to make a reasonable and good faith effort to identify and evaluate properties that are potentially eligible for inclusion on the National Register. According to the Tribes, “[f]ailure to conduct an ethnographic study after both the ACHP and SHPO has recommended that BLM do so demonstrated lack of good faith and was unreasonable.” SOR at 20; *see* Reply at 8-11. While we agree that BLM is required to make a reasonable and good faith effort to locate and record cultural resources on lands they administer and in areas affected by undertakings they authorize, nothing in BLM’s section 106 guidelines, the regulations, or our case law specifically require BLM to conduct an ethnographic study. *Western Watersheds Project*, 175 IBLA 237, 254 (2008); *Southern Utah Wilderness Alliance*, 164 IBLA 1, 22 (2004); *BLM Manual 8110*; *cf.* 36 C.F.R. § 800.4(b)(1).

As noted, BLM conducted several on-the-ground investigations over the entire parcel to be conveyed. BLM also reviewed databases, base and historic maps, archival records, as well as any information it obtained from the Tribes to best document historical properties in the project area. BLM is only required to make a reasonable and good faith effort to identify archaeological properties eligible for the National Register. We conclude that BLM has satisfied that requirement without conducting an ethnographic study.

The Tribes' argument that BLM erred in not following the ACHP's recommendation that it conduct an ethnographic study is misplaced. BLM is required to take the ACHP's comments into account in reaching a final decision on the undertaking if it finds that there is an adverse effect on historical properties. *See* 36 C.F.R. § 800.7(c)(4)(i); *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of the Interior*, 547 F. Supp. 2d 1033, 1047 (D. Ariz. 2008) (stating that the agency must consider, not adopt, the opinions and recommendations of the ACHP). In this case, BLM offered to conduct an ethnographic study, but the Tribes declined the proposal. The record thus demonstrates that BLM not only considered the ACHP's comments, but also attempted to follow them. Section 106 does not require more.

### *3. BLM Appropriately Consulted with the Tribes Regarding the Cleared Circle*

The Tribes believe that BLM failed to consult appropriately with them in evaluating the cleared circle for National Register eligibility. *See* SOR at 21-22; Reply at 11-12. However, the record shows that BLM personnel met with Tribal members at the cleared circle site and discussed with them the site's significance. *See* AR 6, Tab 31, Letter from BLM to Tribes and SHPO, dated July 3, 2006. The Tribes did not comment on BLM's determination that the cleared circle is ineligible for National Register listing. The SHPO concurred with BLM's findings. *See* AR 7, Tab 9, Letter from SHPO to BLM, dated Aug. 24, 2006. We conclude that BLM consulted appropriately with the Tribes regarding the significance of the cleared circle.

### *4. BLM's Project Location Criteria Did Not Violate the NHPA*

The Tribes complain that BLM did not engage in good faith consultation under the NHPA because the project's criteria, as defined and applied by BLM, were so narrowly drawn as to preclude a genuine search for alternative locations for the shooting range. SOR at 24. The ADR process, described *supra*, involved consideration of a number of alternative sites for the shooting range, within the terms of the project's criteria. In its EA, BLM considered only the Boundary Cone Road site alternative and the no-action alternative, having eliminated, based on the criteria, other alternatives known to be unacceptable at the outset. It is clear that BLM need not consider alternatives which do not meet the purposes of the project. *Bristlecone*

*Alliance*, 179 IBLA 51, 78 (2010). Based on the record before us, we conclude that BLM's criteria for excluding certain sites as alternative locations were reasonable. See AR 10, Tab 7, EA at App. B. (Proposed Shooting Range Planning Criteria). Therefore, we find that BLM engaged in good faith consultation concerning alternative locations for the shooting range.

*C. BLM Did Not Violate the Native American Graves Protection and Repatriation Act*

Because the lands to be conveyed to the AGFD were once the Tribes' aboriginal lands, any human remains and associated funerary objects are the property of the Tribes, and are therefore subject to protection by the United States, the Tribes argue that, while the shooting range location is not known to contain Native American graves, BLM has a fiduciary duty under the NAGPRA to protect inadvertent discoveries of Native human remains. Codified, in pertinent part, at 25 U.S.C. §§ 3001-3013 (2006), the NAGPRA lays out procedures and obligations applicable to an agency's action when Native American human remains or associated funerary objects are discovered on public lands. According to the Tribes, BLM did not reserve these valid, existing, and protected rights in its DR, and the AGFD, upon receiving the land, is not required to comply with the NAGPRA because the land will no longer be owned by the Federal government. SOR at 26; Reply at 13-14. Such a conveyance, the Tribes aver, must be made subject to the NAGPRA.

We need not address the question of whether the conveyance of Federal land pursuant to the R&PPA must comport with the NAGPRA. Here, no burial sites have been identified by either the Tribes or by BLM during its cultural resource inventory. More importantly, Arizona has adopted a statute, which mirrors the NAGPRA, and which applies to Indian remains found on State-owned or controlled lands. See Ariz. Rev. Stat. § 41-844. Thus, the Tribes' interests in protecting their ancestors' graves will be protected under State law.

*D. BLM Sufficiently Explained the Acreage Amount to be Conveyed*

The Tribes also mention that there exists no rational connection between deciding to transfer 315 acres of land to the AGFD when only 20 acres will be utilized for the actual facility. SOR at 27-28; Reply at 14. For this reason, they argue that BLM's DR violates the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006), because it is "arbitrary and capricious." SOR at 27; see Reply at 14. As we have previously discussed, we conclude that the conveyance of more than 20 acres so that the AGFD can install "safety fans [and] shot fall zones" around the facility is reasonable and in the public interest. See AR 10, Tab 7, EA at 3.

*III. CONCLUSION*

BLM took a “hard look” under section 102(2)(C) of NEPA at the direct, adverse, and cumulative effects of conveying public lands to the AGFD for a shooting range. The range of alternatives was appropriate. The EA demonstrated that the environmental consequences of the action were either insignificant or, if significant, could be eliminated or reduced to insignificance by protective stipulations. BLM in good faith engaged the Tribes in lengthy consultation to fulfill its NHPA obligations. We also reject the Tribes’ AIRFA, EO 12898, EO 13007, and NAGPRA claims.

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.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge