



SOUTHERN UTAH WILDERNESS ALLIANCE

177 IBLA 89

Decided April 9, 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

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2008-249

Decided April 9, 2009

Appeal from decisions of the Utah State Office, Bureau of Land Management, lifting suspensions of operation and production on 16 onshore oil and gas leases. UTU 80913, *et al.*

Affirmed in part; set aside and remanded in part.

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

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (2006), does not mandate a “Class II” sample-based cultural resource survey before an onshore Federal oil and gas lease sale.

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

At the lease sale stage, BLM must consult with any Indian tribes, bands, or pueblos that BLM knows attach religious or cultural significance to any historic properties in the area of potential effects for the lease sale, and may not postpone such consultation until later exploration or development.

APPEARANCES: Stephen H. M. Bloch, Esq., Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; James E. Karkut, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Kathleen C. Schroder, Esq., Denver, Colorado, for Intervenor Petro-Canada Resources (USA) Inc.; William E. Sparks, Esq., Denver, Colorado, for Intervenor EOG Resources, Inc.

OPINION BY ADMINISTRATIVE JUDGE HEATH

The Southern Utah Wilderness Alliance (SUWA) has appealed from 9 decisions of the Utah State Office, Bureau of Land Management (BLM), all dated June 20, 2008, lifting suspensions of operations and production on 16 Federal oil and gas leases.¹ For the reasons explained below, we affirm the decisions in part and set aside and remand the decisions in part.²

*BACKGROUND**A. The Subject Leases, SUWA's Lease Sale Protest, and SUWA's Appeal*

The subject leases originally were issued following an August 19, 2003, Competitive Oil and Gas Lease Sale. On August 4, 2003, 15 days before the lease sale was held, SUWA protested inclusion in the sale of 19 parcels administered by the Moab and Vernal Field Offices on grounds that existing analyses prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), were not a sufficient basis upon which to move forward with the sale of these parcels. SUWA also alleged that BLM had failed to comply with the consultation procedures of section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2006). SUWA challenged BLM's determination that leasing the parcels would have "no potential to affect" sites eligible for inclusion in the National Register of Historic Places, on grounds that BLM did not perform the appropriate review and consultation. BLM denied the protest on October 2, 2003, and SUWA appealed as to 16 of the parcels (the 16 leases identified in note 1, *supra*). SUWA's appeal was docketed as IBLA 2004-124.

Eleven of the leases administered by the Vernal Field Office (Nos. UTU80913, UTU80914, and UTU80942-UTU80950) are situated between 2 and 10 miles from Nine Mile Canyon in Carbon County, Utah. As discussed below, Nine Mile Canyon has an unusual concentration of historic sites. The remaining two leases administered by the Vernal Field Office (Nos. UTU80936 and UTU80937) are situated next to the Green River southwest of Dinosaur National Monument in Uintah

¹ Nos. UTU80913, UTU80914, UTU80916, UTU80936, UTU80937, UTU80942-UTU80950, UTU80967, and UTU80970.

² On Feb. 13, 2009, both BLM and Intervenor Petro-Canada Resources (USA) Inc. ("Petro-Canada"), moved to strike or to disregard SUWA's Reply, filed more than two months after BLM's and Intervenor's Answers. On Feb. 19, 2009, SUWA filed an opposition to those motions and a motion in the alternative for leave to file the Reply. In view of the disposition of this matter, BLM's and Petro-Canada's motions and SUWA's motion in the alternative are denied as moot.

County, Utah. The three leases administered by the Moab Field Office (Nos. UTU80916, UTU80967, and UTU80970) are situated in the Book Cliffs area in Grand County, Utah. See maps attached to the letter from BLM's Vernal Field Office to the State Historic Preservation Officer (SHPO), dated March 25, 2008 ("SHPO Letter"), Administrative Record (AR) 4th Tab, "NHPA Compliance", 3rd Document (Doc.) attachments.

In an Order dated January 31, 2007 ("2007 Order"), this Board rejected SUWA's NEPA-based claims. AR 6th Tab, "IBLA Decisions". However, the Board set aside and remanded the decision to allow BLM to comply with NHPA procedures, as discussed more fully below.

B. The NHPA and Compliance Processes

As explained in the 2007 Order (at 7), the NHPA is designed to ensure that Federal agencies identify and consider historic properties in Federal undertakings. *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 347 (2005) ("*Mandan*"), citing *Southern Utah Wilderness Alliance v. Norton*, 277 F. Supp. 2d 1169, 1193 (D. Utah 2003). Section 106 of the NHPA, 16 U.S.C. § 470f (2006), provides in relevant part:

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 . . . 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 . . . 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 [of Historic Places].

Further, section 101(d)(6) provides that "[p]roperties of traditional religious and cultural importance to an Indian tribe" may be eligible for inclusion on the National Register. 16 U.S.C. § 470a(d)(6)(A) (2006). In carrying out its responsibilities under section 106, the agency must consult with relevant Indian tribes. *Id.*, § 470a(d)(6)(B). A BLM-administered Federal oil and gas lease sale is a Federal undertaking. *Montana Wilderness Association v. Fry*, 310 F. Supp. 2d 1127, 1153 (D. Mont. 2004) ("*Montana Wilderness*"); *Southern Utah Wilderness Alliance*, 164 IBLA 1, 22-23 (2004) ("*SUWA*"); *Mandan*, 164 IBLA at 350-51; 2007 Order at 8.

As we recently explained in *Escalante Wilderness Project v. BLM*, 176 IBLA 300 (2009):

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; 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). See 36 C.F.R. §§ 800.2, 800.3, 800.4, 800.5, 800.6.

176 IBLA at 308 (footnotes omitted).³

ACHP rules further provide that an agency may develop and substitute alternate procedures to govern its NHPA section 106 compliance by entering into programmatic agreements with the ACHP or devising other Federal agency program alternatives. 36 C.F.R. § 800.14. If the ACHP “finds the procedures to be consistent with” the rules at Part 800, it will approve their adoption. 36 C.F.R. § 800.14(a)(2). As described in *Escalante Wilderness Project v. BLM*, 176 IBLA at 309, and in the 2007 Order at 10-13, BLM has entered into a Programmatic Agreement (PA) with the ACHP and the National Conference of State Historic Preservation Officers which provided for, among other things, the development of State-specific operating protocols between BLM and the SHPO. Petro-Canada Answer Ex. 9. Pursuant to that PA, on March 7, 2001, the BLM Utah State Office and the Utah SHPO entered into a State Protocol Agreement (Protocol). Petro-Canada Answer Ex. 10.

The Protocol states that it “supplements the above-referenced national PA, and pertains to Sections 106, 110, 111(a) and 112(a) of the NHPA. It describes specific procedures regarding how the Utah SHPO and the BLM will interact and cooperate under the national PA.” Protocol at unpaginated 1. Section IV.C. provides: “BLM

³ The ACHP regulations define the term “historic property” as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior.” 36 C.F.R. § 800.16(l)(1).

will seek and consider the views of the public and Indian Tribes when carrying out the actions under the terms of this Protocol. BLM may coordinate this public participation requirement with those of the NEPA and the Federal Land Policy and Management Act of 1976 (FLPMA).” *Id.* at unpaginated 3. Section VI.A. further provides: “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. BLM will ensure that project-specific surveys and other efforts to identify historic properties are conducted in accordance with appropriate professional standards.” *Id.*

Section VII.A. of the Protocol addresses SHPO review following consultation. It provides that BLM will request the SHPO’s review in situations that include undertakings affecting properties listed on, or eligible for listing on, the National Register. *Id.* at unpaginated 4. It also provides that BLM will not request SHPO review in four situations, namely: (1) “No Potential to Effect [sic]” determinations; (2) “No Historic Properties Affected; no sites present”; (3) “No Historic Properties Affected; no eligible sites present”; (4) “No Historic Properties Affected; eligible sites present, but not affected as defined by 36CFR800.4.” *Id.* Finally, section VII.E. provides: “In the event that potentially eligible historic properties are discovered during the course of ground disturbance and cannot be avoided, work in the immediate vicinity of the discovery will cease. BLM will evaluate the site, and, in consultation with the SHPO, select the appropriate mitigation option.” *Id.* at unpaginated 6.

C. *The January 31, 2007, Order in IBLA 2004-124*

In the 2007 Order, following recent precedents in *Mandan*, 164 IBLA at 344, 348, *SUWA*, 164 IBLA at 22-23, and *Montana Wilderness*, 310 F. Supp. 2d at 1152, we held that relying on an unsupported “no potential to affect” determination for the lease sale did not allow BLM to defer NHPA compliance until the filing of an Application for Permit to Drill (APD) in the exploratory phase, and that an appropriate level of compliance effort is required at the lease sale stage. *See* 2007 Order at 9-10.⁴ Because BLM had not undertaken any review of the parcels at issue at the lease sale stage, we set aside the denial of the protest. 2007 Order at 13-15. On February 7, 2007, the BLM Utah State Office issued 5 decisions to the respective

⁴ We held in *Escalante Wilderness Project v. BLM* that under 36 C.F.R. § 800.3(a), a “no potential to affect” determination “is a categorical one, focused on the type of activity . . . and is *not* dependent upon conditions on the ground.” 176 IBLA at 312. We further noted: “This provision [36 C.F.R. § 800.3(a)] 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.” *Id.* at 313.

lessees directing suspensions of all operations and production on all 16 leases under 43 C.F.R. § 3103.4-4. AR 5th Tab (“SOP Decisions”). The decisions each stated (at 1) that the suspensions would remain effective until BLM completed the appropriate NHPA review.

D. BLM’s NHPA Compliance During the Suspensions

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. “Existing cultural resource data are obtained from published and unpublished documents, BLM cultural resource inventory records, institutional site files, State and national registers, interviews, and other information sources.” *Id.*⁵

From February 20-22, 2008, during the period the suspensions were in effect, the BLM Vernal Field Office conducted a Class I inventory of available records and information for the 13 leases administered by that office.⁶ Because the Moab Field Office does not have a cultural resources specialist, BLM contracted with a private professional archaeologist to conduct the Class I inventory for the 3 leases under the jurisdiction of that office. She undertook that inventory on February 21, 2008. SHPO Letter at unpaginated 1; Clarification Memorandum at 4. The Class I inventories identified only one recorded cultural property, Site 42Gr2021 on Lease UTU80916 administered by the Moab Field Office (parcel UT069 in the lease sale). It was a small scatter of lithic debris. Clarification Memorandum at 2.⁷

⁵ A “Class I” inventory contrasts with a “Class II Probabilistic Field Survey” and a “Class III Intensive Field Survey.” 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.

⁶ See Feb. 25, 2008, “A Cultural Resource Evaluation & Comments Concerning the Suspended Oil and Gas Leases in the Vernal and Moab Field Offices August 2003” (“Cultural Resource Evaluation”), attached to the SHPO Letter, at unpaginated 1; Memorandum from Archaeologist, Vernal Field Office, to Archaeologist, Division of Lands and Minerals, [BLM] Utah State Office, dated Aug. 27, 2008 (“Clarification Memorandum”), AR 4th Tab, 1st Doc., at 2.

⁷ The Cultural Resource Evaluation initially stated (at unpaginated 2) that “[t]here
(continued...)

The Cultural Resource Evaluation was prepared immediately following the conclusion of the Class I inventories. It noted: “Data was derived from Cultural Program files which include: 1. 7.5’ topographic quadrangles, 2. 7.5’ Orthophotoquads with inventory and site overlays, 3. pertinent studies and reports which cover the areas of concern.” Cultural Resource Evaluation at unpaginated 2. It also explained:

The documented cultural resources are located in such a fashion that avoidance is feasible for the development of oil and gas potential therefore the staff archaeologist determined that under the Protocol Review threshold Part VII.A.C(4) is: “No Historic Properties Affected; eligible sites present but not affected as defined by 36CFR800.4” for the June 2008^[8] oil and gas lease sale. On all parcels, however, once a project specific proposal is submitted and prior to the approval of construction or any ground disturbing activity, an additional Section 106 cultural resource assessment would be completed where site specific issues would be addressed as appropriate. Likewise, the presence of newly found cultural resources in the parcels may cause additional parameters to be placed upon development strategies in areas within the parcels.

Id. at unpaginated 1.

On February 27 and 28, 2008, the Vernal Field Office sent consultation letters to the Northern Ute Tribe, the Ute Mountain Ute Tribe, the Navajo Nation, the Northwestern Band of the Shoshone, the Eastern Band of the Shoshone, the Goshute Indian Tribe, the Nambe Pueblo, the Southern Ute Tribe, the Santa Clara Pueblo, the White Mesa Ute Tribe, and the Zia Pueblo. Each of the letters identified the 16 leases and explained (1) the Board’s 2007 Order and the purpose of the remand; (2) that BLM was undertaking NHPA section 106 consultation, including Native American consultation; and (3) NHPA processes when a project-specific exploration or development proposal is submitted. AR 4th Tab, 4th through 14th Docs. Each of the letters stated: “We request your comments on any items of concern with the proposed lease parcels.” *Id.* (all letters) at 2. The letters also attached maps of the 16 leases. BLM received no response from any of the tribes, bands, or pueblos.

⁷ (...continued)

are no recorded cultural sites located on any of the suspended parcels.” The Clarification Memorandum corrected the omission of Site 42Gr2021.

⁸ The correct date is the August 2003 lease sale. Clarification Memorandum at 1.

On March 25, 2008, the Vernal Field Office sent the SHPO Letter, together with the Cultural Resource Evaluation, legal descriptions of the leases, and maps showing all 16 leases, to the SHPO.⁹ Based on the Cultural Resource Evaluation, BLM requested the SHPO's concurrence in a determination of "no historic properties affected." SHPO Letter at unpaginated 2. Dr. Matthew T. Seddon, the Deputy SHPO, signed his concurrence on April 4, 2008. *Id.*

E. The June 20, 2008, Decisions Lifting the Suspensions and SUWA's Appeal

Following these procedures, BLM issued the 9 decisions to the lease interest holders lifting the suspensions on June 20, 2008. AR 2nd Tab ("SOP Lifting Decisions"). SUWA filed its Notice of Appeal (NOA) on July 21, 2008.¹⁰ The NOA initially identified all 16 leases as subjects of the appeal. However, in its Statement of Reasons (SOR) dated October 14, 2008, SUWA did not include Lease Nos. UTU80936 and UTU80937. SOR at 1-2. As noted above, these two leases, administered by the Vernal Field Office, are located adjacent to the Green River just southwest of Dinosaur National Monument in Uintah County, Utah, and are more than 50 miles away from Nine Mile Canyon in a generally east-northeast direction. On November 12, 2008, Kerr-McGee moved to dismiss the appeal as to those two leases. SUWA did not oppose the motion. The Board granted the motion by order dated December 11, 2008.

In its SOR, SUWA asserts four principal theories. First, for a number of reasons, SUWA argues that the Class I inventory undertaken on remand after the 2007 Order does not comply with NHPA requirements and that BLM was obligated to do more at the lease sale stage. SOR at 7, 12-13, 17-20. Second, SUWA contends that BLM failed in its obligations to consult with Native American tribes, the SHPO, and the public. SOR at 9-11, 20-25. Third, SUWA alleges that the Cultural Resource Evaluation is inadequate. SOR at 25-28. Fourth, SUWA argues that BLM failed to include cultural resource protective stipulations in the lease instruments. SOR at 28-31. Each of these will be addressed in turn in the analysis below.

⁹ For unexplained reasons, the legal description of Parcel UT069 (Lease UTU80916) was omitted, but the map of that parcel was included.

¹⁰ EOG Resources, Inc. (EOG), a lease interest owner in Lease Nos. UTU80945, UTU80947, UTU80949, and UTU80950, moved to intervene. That motion was granted on Sept. 19, 2008. In the same order, the Board granted intervenor status to Anadarko Petroleum Corp., parent of Kerr-McGee Oil and Gas Onshore LP ("Kerr-McGee"), the lessee of Lease Nos. UTU80936 and UTU80937. Subsequently, both Kerr-McGee and Petro-Canada, a lease interest owner in, and operator of, Lease Nos. UTU80945 and UTU80947, moved to intervene. That motion was granted on Sept. 23, 2008.

ANALYSIS

I. Adequacy of NHPA Compliance at the Lease Sale Stage

A. In this Case, the Class I Inventory Was Adequate at the Lease Sale Stage and a Class II Sample-Based Cultural Resource Survey Was Not Required Before the Lease Sale.

[1] SUWA asserts that in addition to examining existing cultural records for the lease parcels, the 2007 Order requires BLM to undertake sample-based cultural resources surveys. SOR at 7, citing 2007 Order at 9 (quoting *Mandan*, 164 IBLA at 355). SUWA misconstrues the 2007 Order and takes the quoted statement from *Mandan* out of context. In *Mandan*, in distinguishing the case from *SUWA* (in which the Board found no meaningful evaluation of whether an oil and gas lease sale would result in adverse effects on cultural resources), we held:

In the present case, the record is not “devoid of any meaningful evaluation.” [*SUWA*, 164 IBLA at 23.] As BLM detailed in its decision at page 2, when individual lease parcels are reviewed prior to lease sale, the cultural resource specialist examines

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

164 IBLA at 355. In short, *Mandan* does not *require* a sample-based cultural resource survey at the lease sale stage. If the cultural resource specialist concludes from the examination of existing cultural resource records, existing ethnographic data, and archaeological and historical literature that the analysis requires more information, BLM then may add sample-based resource surveys and further tribal consultation to augment the existing information. Sample-based resource surveys — *i.e.*, Class II surveys — are an available option, not a requirement in every lease sale. Further, contrary to SUWA’s statement, SOR at 20, there is no indication that sample-based surveys had actually been conducted in *Mandan*.

BLM correctly notes that the Board in *Mandan* rejected the argument that BLM was required to survey the lease sale lands and found that BLM's review of available information (including cultural resource records, previous information from tribal consultations, existing ethnographic data, and archaeological and historic literature specific to the area) was sufficient NHPA analysis at the lease sale stage in that case. BLM Answer at 7. In *Mandan*, we held:

[A] phased approach to section 106 compliance, in accordance with 36 CFR 800.4(b)(2) and 36 CFR 800.5(a)(3), has been endorsed by the courts in circumstances where no surface-disturbing activity is to occur until the section 106 process is completed. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 553-54 (8th Cir. 2003); *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 674-78 (D. N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

164 IBLA at 354-55 (footnotes omitted).¹¹ We further explained:

The [Mandan] Nation's refusal to recognize the validity of a phased approach to compliance with section 106 of the NHPA undermines its conclusion that BLM violated the NHPA in proceeding with the lease sale. There is no evidence that BLM and the Forest Service have deferred section 106 compliance entirely to the APD approval stage. . . . [T]he agencies continually narrow their focus, from the large land areas potentially subject to oil and leasing to the particular lands to be leased, and, finally, to the exact sites proposed for surface-disturbing activities. Such an approach allows for identification, consideration, and mitigation of adverse effects on cultural resources at each phase of the oil and gas decision-making process.

. . . Finally, there is nothing in the record to suggest that any cultural resources which might be identified during the APD approval process could not be adequately protected under the stipulations incorporated in the leases, or by modifying the siting or design of drilling and other facilities or the timing of operations, or by undertaking other "reasonable measures," pursuant to 43 CFR 3101.1-2.

¹¹ Title 36 C.F.R. § 800.4(b)(2) provides in pertinent part: "Where alternatives under consideration consist of corridors or large land areas . . . the agency official may use a phased process to conduct identification and evaluation efforts."

164 IBLA at 357-58. These observations and analysis apply in the instant case as well.¹²

In the 2007 Order, in rejecting BLM's view that simply a promise of future NHPA compliance was sufficient at the lease sale stage, we said that in *Mandan* we "insisted on evidence of an effort to examine historic records." Order at 14.¹³ Further, in *SUWA* (issued shortly before *Mandan*), we held:

Compliance with section 106 at the leasing stage is intended to ascertain . . . the presence of historic properties, including unidentified but identifiable eligible properties. . . . Such identification at the leasing stage, *based on current records, regardless of whether those records are found with SHPO or BLM*, and notification to Indian tribes and other interested parties seeking to identify potentially eligible properties, *is likely sufficient where BLM reasonably requires more site-specific data, including a cultural resource survey, at the APD stage.*

164 IBLA at 28 (emphasis added).

SUWA asserts that the Board concluded in the 2007 Order that BLM's review of existing information was insufficient "[b]ecause the existing information about the presence of cultural resources in the lease parcels was so sparse," SOR at 17-18 and Reply at 3. That is not why the 2007 Order remanded the NHPA issue to BLM. The 2007 Order found that BLM's action was insufficient because it had not conducted a review at all. The 2007 Order said nothing about the extent or supposed

¹² We further observed in a footnote at the end of the excerpt just quoted: Under 43 CFR 3101.1-2, "[a] lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resources in a leasehold * * *," subject to three restrictions or reservations: (1) stipulations attached to the lease, (2) restrictions deriving from specific nondiscretionary statutes, and (3) reasonable measures as required by BLM to minimize adverse impacts to other resource values. No ground disturbing activities may take place on any of the leased lands until the lessee submits an application for permit to drill, which must include both a drilling plan and a surface use plan of operations, and BLM approves it. See 43 CFR 3162.3-1(c) and (d).

164 IBLA at 358 n.17. These same regulations apply in this case.

¹³ The 2007 Order indicates that BLM must do "parcel-based analysis of available data to conduct the meaningful review necessary under the Protocol," 2007 Order at 13, and must review information pertaining to the parcels in question. *Id.* at 15.

insufficiency of existing information. SUWA infers from the fact that on-the-ground surveys have not been conducted for most of the area that existing records are inadequate for the lease sale stage. That is a *non sequitur* and without basis in regulation or precedent.

BLM now maintains that under *Mandan*, it may fulfill its duty at the pre-leasing stage by reviewing available information, and that this was reinforced in *Western Watersheds Project*, 175 IBLA 237, 260 (2008), where BLM reviewed existing information but did not conduct new surveys before a geothermal lease sale. BLM Answer at 8.¹⁴ To say that a Class I inventory always is sufficient at the lease sale stage in all cases without qualification would be an overstatement. There may be circumstances in which there is such a paucity of available information that a Class I inventory is essentially meaningless. But it is apparent from the Cultural Resources Evaluation that such is not the case here.

SUWA argues repeatedly that BLM was obligated to gather more information at the lease sale stage than was then compiled, and that its failure to do so violated the NHPA. SUWA argues:

The lack of available information about the presence of cultural resources in the lease parcels necessitates BLM do more than just review available files. . . . BLM did not . . . conduct any new cultural resource surveys [or] gather any information from tribal consultation Despite the Board's detailed account of the insufficiency of available data, BLM still failed to collect substantial new or different information.

SOR at 20; *see id.* at 18. As discussed above, the proposition for which SUWA argues is not what the applicable precedents hold. Under *SUWA*, *Mandan*, and *Western Watersheds Project*, the Class I inventory satisfied the NHPA requirements and the phased compliance allowed under the regulations at the lease sale stage in those cases. SUWA's theory here is not consistent with the holdings of those decisions.

¹⁴ Petro-Canada also relies on *Western Watersheds Project* for the proposition that a Class I inventory and Cultural Resource Evaluation are sufficient compliance at the lease sale stage. Petro-Canada notes that in that case we held that a Class I inventory was adequate for geothermal lease issuance when viewed together with tribal consultation efforts and protective stipulations. Petro-Canada Answer at 10. Petro-Canada further notes that most of the land BLM manages has not been surveyed for cultural resources, citing the Monticello Resource Management Plan (RMP), the Moab Proposed RMP, and the Price Proposed RMP. *Id.* at 11.

SUWA attempts to distinguish *Western Watersheds Project* on the basis that in that case, “11% of the lease parcels had already been surveyed.” Reply at 6, *citing* 175 IBLA at 260 (where we noted that “11% of the project area comprising the 3 leases has been surveyed for cultural resources”). In the instant case, SUWA argues, “the Board has already noted that only 1% of the parcels have been surveyed.” *Id.*, citing the Board’s statement, 2007 Order at 15, that “the record shows that 99 percent of the resource area has not been surveyed.” SUWA misquotes the 2007 Order. The “resource area” referred to in the Order was the entire Diamond Mountain Resource Area, comprising some 700,000 acres. We did not say that “only 1% of the parcels” had been surveyed. In addition, in the instant case, one out of 14 lease parcels (Lease UTU80916) was the subject of a prior archaeological survey. A brief examination of the maps attached to the SHPO letter indicates that Lease UTU80916 is more than 1 percent of the total area of the leases, though apparently less than 11 percent. SUWA does not explain why a prior survey of 11 percent of a leased area is sufficient but the survey in the instant case is insufficient, or what it believes the threshold of sufficiency to be. SUWA’s attempted distinction of *Western Watersheds Project* is unpersuasive.

B. SUWA’s Construction of the 2007 Order, Earlier Decisions, and Applicable Requirements.

SUWA asserts that in *SUWA*, 164 IBLA 1, the Board concluded that the record was devoid of any meaningful evaluation on BLM’s part “even though BLM conducted a ‘Class I Cultural Resources Site File Search’ at two field offices and the Utah Division of State History.” SOR at 19 (*citing* 164 IBLA at 10-11, 13-14). This is a misstatement of what occurred in that case. The so-called “Class I searches” in *SUWA* were conducted not by BLM but by Alpine Archeological Consultants, Inc., a contractor or consultant for SUWA. 164 IBLA at 13, 15. There is nothing that indicates that BLM did a Class I inventory. Moreover, the portions of the *SUWA* opinion in 164 IBLA at 10-11 that SUWA cites say nothing about a file search at all. The Board’s point in that case was that BLM did nothing to fulfill responsibilities under the NHPA. Thus, SUWA’s assertion that the Board found BLM’s efforts lacking in spite of BLM having conducted a Class I inventory is contrary to the record.

SUWA then claims that in the present case, BLM “conducted a Class I record review *both before issuing the leases and after suspending them.*” SOR at 19 (emphasis added) (*citing* the 2007 Order at 11). Similarly, in its Reply, SUWA asserts that before the lease sale, “BLM’s efforts to investigate cultural resources located on the lease parcels consisted of a review of existing records.” Reply at 3. SUWA then asserts: “In response to the Board’s Order, BLM *again* conducted a record review. However, BLM has not provided any explanation of whether—or how—this record review *differed from the previous one.*” Reply at 4 (emphasis added). These

statements are not an accurate characterization of BLM's actions or of the 2007 Order. The 2007 Order actually states at 11:

While the Vernal DNA refers to a Vernal Field Office cultural report, we did not find it in the record. The Moab Field Office report is a two-paragraph paper denominated a "Staff Memo." *Without mention of any particular parcel*, this Memo states that the Moab Field Office conducted a Class I overview of known cultural resources and concluded that "it is possible that development could occur without adverse impacts."

(Protest Book, Volume 3 of 4, Moab Field Office Staff Memo.)

(Emphasis added.)

In short, the supposed Class I inventory was limited to the Moab office (whose jurisdiction encompasses only 3 of the leases), and even in that case there is no evidence that a Class I inventory was actually conducted for the particular parcels offered in the lease sale. SUWA overstates the record regarding what occurred before the lease sale. The 2007 Order did not conclude that a review of existing records was inadequate, because as of that time, BLM had not undertaken a review of existing records. The Class I inventory was done in February 2008 in response to the 2007 Order. BLM did not "again" conduct a record review that did not "differ[] from the previous one" because BLM has done only one Class I inventory, not two.

SUWA further argues that BLM's Class I inventory of available information after the 2007 Order "failed to 'identify all historic properties within the area potentially affected by the proposed undertaking'" because of "the lack of available information about the cultural resources of the lease parcels." SOR at 19 (*quoting* the 2007 Order at 8). In so arguing, SUWA omits key words from the portion of the 2007 Order that it quotes and misconstrues the applicable standard. The 2007 Order at 8 states that "the agency must 'make a reasonable and good faith effort to identify all historic properties within the area potentially affected by the proposed undertaking'" (*quoting Save Medicine Lake Coalition*, 156 IBLA at 260). This simply reiterated the standard from the ACHP regulations at 36 C.F.R. § 800.4(b)(1), which requires the agency to "make a *reasonable and good faith effort* to identify all historic properties within the area potentially affected by the proposed undertaking." (Emphasis added.) Similarly, section VI.A. of the Protocol, quoted above, states that BLM will make "reasonable efforts" to identify historic properties and sacred sites and "will assure that project-specific surveys" are conducted in accordance with appropriate professional standards. Particularly in the context of phased NHPA compliance, neither the Protocol nor the regulation, nor prior IBLA precedent, necessarily require conducting additional surveys (such as Class II sample-based surveys) to acquire more information at the lease sale stage.

Petro-Canada notes that the Cultural Resource Evaluation determined that the leases are in areas of “low” sensitivity for cultural resources. Petro-Canada Answer at 12. The Cultural Resource Evaluation, at unpaginated 2, explains that “[a] LOW rating is predicated on the results of previous inventories in and near the parcel whose results indicated sites were not present and/or preservation factors were not conducive to site preservation e.g. erosion, steep slopes, highly erodable [sic] soils.” Cultural Resource Evaluation at unpaginated 2. It further stated that parcel sensitivity rankings are “based on the results of inventories done to date” which include “oil and gas surveys, road Rights-of-Ways, power line Rights-of-Ways, waterline, pipeline surveys, etc.” *Id.* In the 2007 Order we noted:

The 1994 RMP/EIS states that the “Nine Mile Canyon is an outstanding area of archeological importance” where “site densities exceed 100 per square mile.” (RMP/EIS at 3.3.) A map shows the lands along the Green River and Nine Mile Canyon to contain the highest density of archaeological features in the Diamond Mountain Resource Area. *Id.* at 3.2, Map 3.1 (Archaeological High Density Zones).

2007 Order at 14-15. In this case, however, while 11 of the 14 leases are in the general area of Nine Mile Canyon, none of them are in the canyon along the Green River. Two of the leases are more than 5 miles from the canyon, and all are 2 miles or more away from the canyon. Thus, the fact that the canyon itself has an unusual concentration of historic properties carries no implication for the leases involved here.

For all of these reasons, we conclude that the Class I inventory conducted in February 2008 satisfied NHPA requirements at the lease sale stage.

II. *Consultation with Native American Tribes, the SHPO, and the Public*

A. *Failure to Consult with the Hopi Tribe and the Laguna Pueblo*

[2] The ACHP regulations at 36 C.F.R. § 800.3(f)(2) provide: “The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.”¹⁵ SUWA argues that BLM failed the Indian consultation requirements by not

¹⁵ The ACHP rules at 36 C.F.R. § 800.4(a)(1) require BLM to “[d]etermine and document the area of potential effects, as defined in § 800.16(d).” Section 800.16(d) in turn provides:

Area of potential effects means the geographic area or areas within

(continued...)

sending letters to or notifying either the Hopi Tribe or the Laguna Pueblo. SOR at 21. SUWA points out that the Hopi Tribe has claimed cultural affiliation with the Nine Mile Canyon area and that Nine Mile Canyon is a “Traditional Cultural Property” of the Hopi Tribe.¹⁶ With regard to the Laguna Pueblo, SUWA cites statements in the August 2008 Vernal Proposed RMP that the Laguna Pueblo had requested to consult for future projects in the Vernal Field Office. Reply at 9. However, SUWA does not attach the pages it cites regarding the Laguna Pueblo as part of the excerpts from the Vernal Proposed RMP. Reply Ex. 4. The pages it does attach mention the Hopi Tribe but not the Laguna Pueblo.

Nevertheless, BLM acknowledges that it should have mailed consultation letters to the Hopi Tribe and the Laguna Pueblo. BLM Answer at 11.¹⁷ BLM argues that the oversight, “while serious, does not justify setting aside BLM’s decisions under appeal” because “SUWA has not provided any evidence of any cultural resources or historic properties that BLM would have learned about from the Hopi Tribe and/or the Laguna Pueblo.” *Id.* The fact that SUWA has not provided evidence of any historic properties that BLM would have learned about from either the Hopi Tribe or the Laguna Pueblo does not excuse admitted non-compliance with NHPA procedural requirements. It is not SUWA’s burden to show that the tribe would have provided evidence of specific cultural resources.

Petro-Canada argues that BLM will again be required to consult with tribes before approving surface-disturbing activities on the leases. Petro-Canada Answer at 16. Assuming *arguendo* that is so, it does not allow BLM to postpone required tribal consultation until the APD stage. Petro-Canada further argues that the Hopi Tribe

¹⁵ (...continued)

which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

BLM determined the area of potential effects for the lease sale to be the 16 parcels that are the subject of the lease sale. *See, e.g.*, SHPO letter at unpaginated 1; consultation letters to Indian tribes, bands, and pueblos at 1.

¹⁶ Reply at 8-9 and 8 n.6 (*citing* Reply Ex. 3, July 2008 Petro-Canada Twin Hollow Exploratory Drilling Environmental Assessment (EA) at 32-33, referring to letters as early as Mar. 12, 2007, in which the Tribe claimed Nine Mile Canyon as a Traditional Cultural Property).

¹⁷ This distinguishes the instant situation from that in *Western Watersheds Project*, 175 IBLA at 262, where BLM had no reason to know of interest in the area at issue on the part of a particular Indian band located approximately 250 miles away.

did not respond to Petro-Canada's Rye Patch EA analyzing 7 exploratory wells on land abutting and overlapping Petro-Canada's two leases here. *Id.* That fact might mean, at most, that the Tribe does not have any comments regarding Petro-Canada's two leases. It implies nothing about the Tribe's views regarding the other leases. Further, Petro-Canada contends that entertaining SUWA's argument implies that we are, in effect, permitting SUWA to represent the Tribe. Answer at 17. That is incorrect. The question is whether BLM has undertaken the required procedures. The Tribe is not the only party who may raise that question.

Under the circumstances, particularly in light of BLM's own admission, we have little choice but to set aside the lifting of the suspensions with respect to the 11 leases under the Vernal Field Office's jurisdiction (Lease Nos. UTU80913, UTU80914, and UTU80942-UTU80950) so that BLM can complete its consultation with the Hopi Tribe and the Laguna Pueblo. When that consultation process is complete, BLM may lift the suspensions of these leases.

At the same time, the 3 leases administered by the Moab Field Office (Lease Nos. UTU80916, UTU80967, and UTU80970) are nowhere close to the area of Nine Mile Canyon. They are more than 50 miles away, and there is nothing in the record indicating that either the Hopi Tribe or the Laguna Pueblo have claimed cultural affiliation with the area where those leases are located. It follows that there was no failure to consult with the Hopi Tribe and the Laguna Pueblo as to those leases.

B. Alleged Failure to Consult with the SHPO in Good Faith

SUWA argues that the consultation with the SHPO was not in "good faith." SOR at 22. SUWA cites (1) the incorrect statement in the SHPO letter that correspondence had been sent to the Hopi Tribe and the Laguna Pueblo; (2) the "misrepresent[ation] . . . that BLM might add a protective stipulation to the leases;" and (3) the supposed misrepresentation about the nature of the communication with the tribes, *i.e.*, that BLM allegedly did not ask the tribes to identify traditional cultural properties. *Id.* at 22-23.

All three of these arguments fail. First, the incorrect statement in the SHPO letter regarding letters being sent to the Hopi Tribe and the Laguna Pueblo was corrected in the Clarification Memorandum at 2.

Second, BLM's statement that it might add a protective stipulation to the leases was not a misrepresentation, particularly in light of the fact that BLM has done just that. BLM recently filed a "Notice Regarding Amendment of Leases to Include Cultural Resource Protection Stipulation," dated January 21, 2009. Therein, BLM advised that all the lease interest holders in the 14 leases at issue had executed

amendments to the lease instruments to include the standard cultural resources protective stipulation.¹⁸

Third, SUWA's claim that BLM did not ask the tribes to identify traditional cultural properties or any other areas of traditional cultural importance, but instead requested comments on any items of concern with the proposed lease parcels, is groundless. The context and sole point of the letters to the tribes and other Indian groups was the NHPA consultation regarding the suspended leases, and requesting comments on any items of concern seeks exactly the information that SUWA claims BLM failed to request.

Finally, as Petro-Canada points out, there is no suggestion of any intent on BLM's part to mislead the SHPO. Petro-Canada Answer at 17-18. There is nothing in the record that indicates that the consultation with the SHPO was not in good faith.

C. Alleged Failure to Consult with the Public

SUWA argues that BLM did not consult with the interested public in good faith. SOR at 23. SUWA says that BLM made no effort to consult with SUWA or with any other member of the public about the decisions to lift the suspensions, and claims that this failure was arbitrary and capricious. *Id.* at 24. SUWA does not assert that BLM failed to consult with the public with regard to the lease sale. As Petro-Canada points out, BLM posted notice of the lease sale and accepted public protests before issuing the leases. Petro-Canada Answer at 19. SUWA filed such a protest. SUWA's argument here fails because the lifting of the lease suspensions is not a new undertaking separate from the lease sale. For that reason, BLM was not obligated to notify all parties who had previously commented or participated at the time of the lease sale of the decision to lift the lease suspensions. Further, as EOG points out, SUWA has had multiple opportunities to provide BLM with any information it has regarding specific cultural resources on these leases, but has provided none. EOG Answer at 20.

¹⁸ The stipulation reads in relevant part:

This lease may be found to contain historic properties and/or resources protected under the National Historic Preservation Act (NHPA)
The BLM will not approve any ground disturbing activities that may affect any such properties or resources until it completes its obligations under applicable requirements of the NHPA and other authorities. The BLM may require modification to exploration or development proposals to protect such properties, or disapprove any activity that is likely to result in adverse effects that cannot be successfully avoided, minimized, or mitigated.

III. *The Cultural Resource Evaluation*

SUWA argues that the Cultural Resource Evaluation attached to the March 25, 2008, letter to the SHPO is inadequate as a cultural report and fails to explain a determination of “no potential to affect” cultural or historic properties. SOR at 25-26. Contrary to SUWA’s assumption, the function of the Cultural Resource Evaluation is not to support a “no potential to affect” determination. That determination was the basis of BLM’s initial conclusion that NHPA section 106 compliance procedures were not required at the lease sale stage, which the Board set aside in the 2007 Order. Also contrary to SUWA’s assertion, the Board did not “instruct[] BLM to ‘justify the asserted “no potential to effect” decisions.’” SOR at 28 (*quoting* the 2007 Order at 12). The Board required BLM to undertake the required NHPA procedures. The Cultural Resource Evaluation explains that after undertaking those procedures (*i.e.*, the Class I inventory), “the staff archaeologist determined that under the Protocol review threshold Part VII.A.C(4) is: ‘No Historic Properties Affected; eligible sites present but not affected as defined by 36CFR800.4.’” Cultural Resource Evaluation at unpaginated 1. It recommended a “No Adverse Effect” determination. *Id.* at unpaginated 3. The Deputy SHPO expressly concurred in a determination of “no historic properties affected” on April 4, 2008.

This does not mean that BLM has concluded that no eligible cultural sites exist on any of the lease parcels or that future surface-disturbing activities would not possibly affect any such sites. But because the review of all the available information did not show any eligible sites (and revealed only one site that apparently would not be eligible under current criteria), and in view of the size of the lease parcels, BLM and the SHPO concluded based on the available information that the lease sale itself will not result in an adverse effect. That is not the same as a categorical “no potential to affect” determination that excuses the agency from any further NHPA compliance in view of the type of activity involved. On the contrary, when the lessee applies for approval for surface-disturbing activities, the next phase of NHPA compliance begins. That may result in the discovery of sites not disclosed in the lease sale phase.

For these reasons, the Cultural Resource Evaluation served its purpose as part of the phased approach to NHPA section 106 compliance. SUWA’s argument regarding the Cultural Resource Evaluation is without merit.

IV. *Alleged Failure to Include Protective Stipulations in Leases*

SUWA argues that both *Mandan* and the 2007 Order mean that “BLM has to amend the existing leases” to include a cultural resources protection stipulation. SOR at 8; *see id.* at 28-29. While this argument is not meritorious, it is now effectively mooted by the fact that all the leases have been amended to include the stipulation.

However, SUWA goes further to argue that if BLM does not impose a “no surface occupancy” stipulation, it would lack the authority to protect cultural resources discovered at the APD stage. *Id.* at 28. This is not correct. This argument implies that BLM could not protect cultural resources on any lease unless it allowed development only from outside the lease boundaries. BLM has ample authority to protect cultural resources discovered during the APD stage. Even in the absence of express lease stipulations such as those now in force for all 14 leases in this case, the BLM authorized officer may require wells to be drilled at locations that will avoid damage to cultural resources or historic sites as a condition of approval of the APD. See 43 C.F.R. §§ 3101.1-2, 3162.3-1(c), 3162.3(h)(1) and (2), and 3162.5-1(a) and (b); Onshore Oil and Gas Order No. 1, 72 Fed. Reg. 10308, 10335 (Mar. 7, 2007); *Mack Energy Corp.*, 153 IBLA 277, 280-81, 287-88 (2000) (BLM may attach an NHPA stipulation requiring the lessee to conduct certain field testing for prehistoric objects as part of APD approval).

SUWA additionally asserts that the cultural resources protective stipulation added to the leases “does nothing to protect areas outside of the geographical boundaries of the particular parcels.” Reply at 17. SUWA asserts that the protective stipulation

does not preserve BLM’s ability to require mitigations or disapprove activities that impact cultural resources in Nine Mile Canyon, which is outside the boundaries of the particular parcels but will still be affected by parcel exploration and development. Transportation access to the Vernal Field Office lease parcels at issue will primarily be dirt roads that run through Nine Mile Canyon and its tributaries. Increased industrial traffic through the canyon has generated plumes of dust that is settling on and diminishing the clarity of the Canyon’s rock art. . . . Exploration and development of the parcels at issue in this case will only exacerbate this problem. The new stipulation’s failure to address this issue renders it unable to fully protect all cultural resources that could be potentially impacted by the lease parcels.

Id. at 18.¹⁹ SUWA’s complaint is with any transportation activity related to any oil and gas development in the larger area of which Nine Mile Canyon is a part. In effect, SUWA is trying to broaden NHPA compliance with respect to the sale of these leases into an issue that involves not only lands well separated from the lease area, but also the impact of activities related to operations on numerous other leases already issued, on which activities unrelated to this lease sale are already taking place. The well-known and numerous cultural sites in Nine Mile Canyon are outside the area of potential effects for the lease sale, which, as discussed above, consists of

¹⁹ SUWA asks the Board to instruct BLM to cancel the leases. SOR at 14; Reply at 3.

the lease parcels that are the subject of the lease sale. No NHPA compliance effort in connection with this lease sale is necessary to document the numerous already well-documented sites in Nine Mile Canyon.

The question of the effect of dust from transportation along routes miles away from the lease sale areas may be subject to other governmental regulation. If so, that question would be addressed under the authorities that may apply to it, not through a procedural requirement applicable to the parcels that are the subject of the lease sale.²⁰ That is not an NHPA compliance question for this lease sale.

CONCLUSION

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 as to Lease Nos. UTU80916, UTU80967, and UTU80970 (administered by the Moab Field Office) and is set aside as to Lease Nos. UTU80913, UTU80914, and UTU80942-UTU80950 (administered by the Vernal Field Office) and remanded to allow BLM to complete the required consultation process with the Hopi Tribe and the Laguna Pueblo.

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
R. Bryan McDaniel
Administrative Judge

²⁰ In the Jan. 8, 2009, letter from the Price Field Office to SUWA's counsel, BLM made a determination of "adverse effect" for the West Tavaputs Plateau Natural Gas Field Development Plan because of potential impacts on rock art panels from dust generated by industrial traffic. BLM proposed to develop a programmatic agreement to address mitigation of this effect. Reply Ex. 5. A similar opportunity for SUWA to raise its concerns may arise in the context of a development plan for the 11 Vernal Field Office-administered leases involved in this appeal, should one be submitted.