



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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MAY 10 2007

CERTIFIED MAIL – Return Receipt Requested

DECISION

Southern Utah Wilderness Alliance : Protest to the Inclusion of
Stephen Bloch, Attorney : Parcels in the May 16, 2006
425 East 100 South : Competitive Oil and Gas Lease Sale
Salt Lake City, Utah 84111 :

Protest Partially Granted and Partially Denied

On March 31, 2006, the Bureau of Land Management (BLM) provided notice that 295 parcels of land would be offered in a competitive oil and gas lease sale scheduled for May 16, 2006. The notice also indicated that the protest period for the lease sale would end on May 1, 2006. By errata dated May 8, 2006, one parcel listed in the notice was deleted from the sale. The lease sale was held on May 16, 2006.

By letter dated May 1, 2006 to BLM, the Southern Utah Wilderness Alliance, the Natural Resources Defense Council, The Wilderness Society, and the National Trust for Historic Preservation (collectively referred to herein as "SUWA") submitted a timely protest to the inclusion of 134 parcels in the lease sale. The protested parcels are located on public lands administered by BLM's Monticello, Vernal, Moab and Price Field Offices (FOs). Pages 1 and 2 of the SUWA Protest list the protested parcels as follows:

Monticello FO – 5 Parcels

UT0506-286 UT0506-297 UT0506-305 UT0506-306 UT0506-307

Vernal FO – 15 Parcels

UT0506-223 UT0506-224 UT0506-225 UT0506-226 UT0506-263
UT0506-274 UT0506-275 UT0506-276 UT0506-278 UT0506-289
UT0506-290 UT0506-291 UT0506-297A UT0506-298 UT0506-299

Moab FO – 1 Parcel

UT0506-299A

Price FO – 113 Parcels (Note -- The text accompanying the list of these Price FO parcels on page 2 of the Protest inaccurately indicates that there are a total of 103 parcels on the list.)

UT0506-120	UT0506-121	UT0506-122	UT0506-123	UT0506-124
UT0506-125	UT0506-126	UT0506-127	UT0506-128	UT0506-129
UT0506-130	UT0506-131	UT0506-132	UT0506-133	UT0506-134
UT0506-135	UT0506-136	UT0506-137	UT0506-163	UT0506-164
UT0506-165	UT0506-166	UT0506-167	UT0506-168	UT0506-169
UT0506-170	UT0506-171	UT0506-172	UT0506-174	UT0506-177
UT0506-184	UT0506-185	UT0506-186	UT0506-187	UT0506-188
UT0506-189	UT0506-190	UT0506-191	UT0506-194	UT0506-195
UT0506-196	UT0506-204A	UT0506-205	UT0506-206	UT0506-207
UT0506-208	UT0506-209	UT0506-210	UT0506-211	UT0506-212
UT0506-213	UT0506-214	UT0506-215	UT0506-216	UT0506-217
UT0506-218	UT0506-219	UT0506-220	UT0506-220A	UT0506-220B
UT0506-220C	UT0506-220D	UT0506-220E	UT0506-220F	UT0506-220G
UT0506-221	UT0506-222	UT0506-227	UT0506-228	UT0506-231
UT0506-232	UT0506-233	UT0506-234	UT0506-235	UT0506-243
UT0506-244	UT0506-245	UT0506-246	UT0506-248	UT0506-249
UT0506-250	UT0506-251	UT0506-252	UT0506-253	UT0506-253A
UT0506-253B	UT0506-253C	UT0506-253D	UT0506-253E	UT0506-253F
UT0506-253G	UT0506-253H	UT0506-253I	UT0506-253J	UT0506-253K
UT0506-253L	UT0506-259	UT0506-260	UT0506-261	UT0506-262
UT0506-262A	UT0506-262B	UT0506-262C	UT0506-269	UT0506-269A
UT0506-269B	UT0506-269C	UT0506-269D	UT0506-269E	UT0506-269F
UT0506-269G	UT0506-269H	UT0506-269I		

Of the 134 parcels listed on pages 1-2 of the SUWA Protest, 2 parcels (UT0506-195 and -269E) were not included in the Final Competitive Sale List. Thus, the Protest effectively concerns 132 parcels.¹ Offers were submitted by qualified bidders on these 132 parcels at the May 16, 2006 sale. Consequently, we are construing the Protest as protesting the issuance of leases for the parcels.

¹ Further, although the list of the protested parcels did not include parcel UT0506-279, page 10 of the Protest referred to this parcel. Like parcels UT0506-195 and UT0506-269E, parcel UT0506-279 was not included on the Final Sale Competitive List.

Based on the decision in Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253 (D. Utah 2006), BLM is granting the SUWA Protest with respect to 70 parcels.² The 62 remaining protested parcels are:

Price FO – 44 parcels

UT0506-120	UT0506-121	UT0506-122	UT0506-123
UT0506-129	UT0506-172	UT0506-185	UT0506-187
UT0506-189	UT0506-190	UT0506-191	UT0506-194
UT0506-196	UT0506-208	UT0506-209	UT0506-210
UT0506-211	UT0506-212	UT0506-213	UT0506-214
UT0506-215	UT0506-218	UT0506-219	UT0506-220
UT0506-221	UT0506-227	UT0506-228	UT0506-231
UT0506-232	UT0506-233	UT0506-234	UT0506-235
UT0506-246	UT0506-259	UT0506-260	UT0506-261
UT0506-262	UT0506-262A	UT0506-262B	UT0506-262C
UT0506-269	UT0506-269C	UT0506-269D	UT0506-269H

Vernal FO – 13 parcels

UT0506-223	UT0506-224	UT0506-225	UT0506-226
UT0506-274	UT0506-275	UT0506-276	UT0506-278
UT0506-289	UT0506-290	UT0506-291	UT0506-298
UT0506-299			

Monticello FO – 5 parcels

UT0506-286	UT0506-297	UT00506-305	UT0506-306
UT0506-307			

The SUWA Protest contends that BLM’s decision to offer the protested parcels for lease violates the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, et seq., and the National Historic Preservation Act (NHPA), 16 U.S.C. 470 et seq., and their implementing regulations and policies. (Protest at 2). For the reasons discussed below, the Protest, as it relates to the remaining above-listed 62 parcels, is denied.

² These parcels are UT0506-124, UT0506-125, UT0506-126, UT0506-127, UT0506-128, UT0506-130, UT0506-131, UT0506-132, UT0506-133, UT0506-134, UT0506-135, UT0506-136, UT0506-137, UT0506-163, UT0506-164, UT0506-165, UT0506-166, UT0506-167, UT0506-168, UT0506-169, UT0506-170, UT0506-171, UT0506-174, UT0506-177, UT0506-184, UT0506-186, UT0506-188, UT0506-205, UT0506-206, UT0506-207, UT0506-216, UT0506-217, UT0506-222, UT0506-243, UT0506-244, UT0506-245, UT0506-248, UT0506-249, UT0506-250, UT0506-251, UT0506-252, UT0506-253, UT0506-263, UT0506-204A, UT0506-220A, UT0506-220B, UT0506-220C, UT0506-220D, UT0506-220E, UT0506-220F, UT0506-220G, UT0506-253A, UT0506-253B, UT0506-253C, UT0506-253D, UT0506-253E, UT0506-253F, UT0506-253G, UT0506-253H, UT0506-253I, UT0506-253J, UT0506-253K, UT0506-253L, UT0506-269A, UT0506-269B, UT0506-269F, UT0506-269G, UT0506-269I, UT0506-297A, and UT0506-299A

A. BLM's Inclusion of the Protested Parcels in the May 2006 Lease Sale Complies With NEPA.

SUWA makes the following arguments in contending that BLM's inclusion of the protested parcels in the lease sale failed to comply with NEPA: (1) BLM's Price FO does not have an adequate pre-leasing NEPA document in place with respect to the protested parcels on Price FO lands; (2) BLM is required by 40 C.F.R. § 1506.1 and Instruction Memorandum (IM) No. 2004-110 (Change 1) to defer leasing of all parcels in the Price, Vernal, and Monticello FOs that have been proposed for ACEC status until the respective FO land use plan revisions are completed; (3) BLM failed to take the required "hard look" required under NEPA concerning the effects of leasing on certain lands with wilderness characteristics, on endangered species, and on Capitol Reef National Park. (Protest at 2-19). These arguments are addressed below.

1. BLM's Price FO has existing, adequate pre-leasing NEPA documents with respect to the protested parcels on Price FO lands.

In March 2006, the Price FO examined the existing NEPA analyses concerning the lands it administers and determined that those analyses sufficiently assessed the environmental consequences of leasing the proposed lease parcels on FO lands. The Price FO used a Documentation of Land Use Plan Conformance and NEPA Adequacy Worksheet (DNA) to make and document that assessment. It is well-settled that a DNA is an appropriate means by which BLM may assess whether an existing NEPA analysis adequately analyzes the anticipated impacts of an action so that the agency may proceed without performing further NEPA review. See Pennaco Energy v. U.S. Department of the Interior, 377 F.3d 1147, 1162 (10th Cir. 2004); Center for Native Ecosystems, 170 IBLA 331, 345-46 (2006).

In its DNA, the Price FO determined that the following NEPA documents concerning FO lands adequately analyzed the impacts of leasing the relevant protested parcels: the 1975 Price District Oil and Gas Environmental Analysis Record (1975 Price EAR); the 1984 Price River Resource Area Management Framework Plan Supplement (1984 MFP Supplement); the 1988 Price River Resource Area EA Supplement on Cumulative Impacts on Oil and Gas Lease Categories (1988 EA Supplement); and the 1991 San Rafael Resource Management Plan/Final EIS (1991 San Rafael RMP/EIS). See Price DNA at 3-19 & Attachment 1. The Price FO determined that these documents analyzed, among other things, an appropriate range of alternatives. For example, the 1975 Price EAR evaluated the proposed action, leasing, as well as the no-leasing alternative. The 1984 MFP Supplement evaluated the alternatives of no action, leasing, leasing with special stipulations, and no leasing. The 1991 San Rafael RMP/EIS evaluated seven alternatives ranging from maximum oil and gas development to reduced production in favor of other resources values. See Price DNA at 5.

The SUWA Protest does not acknowledge the Price FO's above-referenced assessment of NEPA adequacy, nor does it attempt to show that the assessment is wrong. SUWA simply makes the sweeping generalization that the Price FO does not have an adequate pre-leasing NEPA document in place with respect to the relevant protested parcels and, consequently, BLM's inclusion of those parcels in the lease sale violates NEPA. (Protest at 2-4). SUWA relies entirely on the decision in Southern Utah Wilderness Alliance, 166 IBLA 270, 285 (2005) as support for its generalization. (Protest at 2-3). In that decision, the Board held that a supplemental EA

prepared by the Price FO did not constitute an adequate pre-leasing NEPA analysis regarding 10 protested parcels because it did not contain a detailed enough analysis of the impacts of oil and gas leasing. In so ruling, the Board did not consider the principal pre-leasing document BLM relied on in determining to include the 10 parcels in the relevant oil and gas lease sale -- the 1975 Price EAR -- because BLM had inadvertently omitted the 1975 Price EAR from the record in the appeal it submitted to the Board. Upon remand, BLM discovered this omission and petitioned the Board for partial reconsideration of its decision. In its petition, BLM argued that the 1975 Price EAR contained a sufficiently detailed analysis of impacts to constitute an adequate pre-leasing document. SUWA opposed the petition, which was pending at the time SUWA filed its protest to the May 2006 lease sale. (Protest at 4 n.1).

The Board subsequently granted BLM's petition for reconsideration and held that the 1975 Price EAR, as supplemented by the 1984 Plan/EA Supplement and the 1988 EA, was extensive, addressed the potential environment impacts of issuing the leases, considered the option of not issuing leases, found that there was no significant impact, and was the functional equivalent of an EA. The Board further held that "[t]he Price EAR sets out a careful, extensive review of the environmental effects of oil and gas leasing in the Price area[]" and is "a strong document." See Southern Utah Wilderness Alliance (On Reconsideration), 166 IBLA 270A, 270D-270E (2006). Consequently, the Board vacated that portion of its original decision finding inadequate pre-leasing NEPA analysis for the Price River Resource area. Id. at 270F. As a result, SUWA's total reliance on the pre-reconsideration portion of the decision to support its generalizations about the adequacy of the Price FO NEPA documents is misplaced and its assertions lack merit.

We are aware that the district court in Southern Utah Wilderness Alliance v. Kempthorne, 457 F. Supp. 2d 1253 (D. Utah 2006) subsequently ruled that the 1975 Price EAR was not an adequate pre-leasing document. However, that ruling did not appear to be necessary to the ultimate holding in the case that BLM violated NEPA with respect to the 16 parcels at issue by not supplementing its existing NEPA analyses concerning wilderness characteristics of the underlying lands before issuing leases for the parcels. Further, we believe that, as between the two decisions, the Board's decision on reconsideration is a more thorough examination of the adequacy of the 1975 Price EAR and, consequently, is more persuasive.

2. BLM is not required by 40 C.F.R. § 1506.1 or IM No. 2004-110 (Change 1) to defer leasing of parcels on Price, Vernal, or Monticello FO lands that have been proposed for ACEC status until the respective FO land use plan revisions are completed.

The SUWA Protest contends that, under 40 C.F.R. § 1506.1 and IM No. 2004-110 (Change 1), BLM must defer leasing of all the parcels on Price, Vernal, and Monticello FO lands that have been proposed³ for ACEC status until the respective FO land use plan revisions have been completed. As discussed below, that is not the case.

³ The SUWA Protest discusses "proposed" ACECs. However, ACECs are "nominated" as part of BLM's land use planning process. Nominated areas that BLM determines meet the "relevance and importance criteria" are further considered as "potential" ACECs, in the planning process, and are only considered "proposed" ACECs if they are incorporated in BLM's preferred alternative in a proposed plan.

SUWA first quotes selected language from 40 C.F.R. §1506.1 and IM No. 2004-110 (Change 1) and asserts: “In other words, when BLM is in the midst of a land use planning process and considering alternate land uses and protections for certain tracts nominated for oil and gas leasing, it is entirely appropriate – and indeed mandated by NEPA – for BLM to defer leasing those lands pending completion of the land use plan.” (Protest at 5). However, neither the regulation nor the IM include the mandate read into them by SUWA. Rather, under 40 C.F.R. § 1506.1(c), an agency may continue to operate under “an existing program statement” and consider proposed actions allowed under the plan while an EIS or new program statement is underway. Since a land use plan EIS is a “program statement” under 40 C.F.R. § 1506.1(a), BLM may consider and approve actions that are covered by an existing EIS, even if the actions would limit the choice of alternatives in the new plan EIS. See 40 C.F.R. § 1506.1(c); ORNC Action v. BLM, 150 F.3d 1132, 1140 (9th Cir. 1998) (concluding that an RMP is an existing program statement for purposes of NEPA); Colorado Environmental Coalition, 169 IBLA 137, 144 (2006) (“Nothing in NEPA or the CEQ regulations requires BLM to postpone or deny a proposed action that is covered by the EIS for the current land use plan, in order to preserve alternatives during the course of preparing a new land use plan and EIS.”); Southern Utah Wilderness Alliance, 163 IBLA 14 (2004); accord BLM Land Use Planning Handbook H-1601-1.VII.E at 47. Thus, BLM is not required to defer leasing pending the completion of a land use plan revision where leasing the relevant lands is authorized in the current plan. In the present case, each of the current plans in the Price, Vernal, and Monticello FOs allow the lands underlying the protested parcels to be offered for lease. Consequently, 40 C.F.R. § 1506.1 does not prohibit leasing the relevant parcels while the respective land use plans are being revised.

Further, nothing in IM No. 2004-110 (Change 1) supports SUWA’s contention. As the language quoted in the SUWA protest makes clear, the IM encourages BLM to consider whether temporarily deferring oil and gas leasing on lands for which the governing plan is being revised might be appropriate, but it does not require deferral. In this case, the respective DNAs show that each FO, consistent with the IM, considered whether to offer or defer the subject parcels. Each FO identified the resource values of the lands underlying the parcels, determined that the existing NEPA analyses adequately considered the effects of leasing on those resources and, for those parcels not recommended for deferral, concluded that leasing would not prevent BLM from protecting those and other resource values under the alternatives being considered in the ongoing planning efforts. See Price DNA at 3-8, 11-18, Interdisciplinary Team Analysis Record Checklist Rationale; Vernal DNA at 3-9, Consolidated Interdisciplinary Team Review of Preliminary Parcels for May 2006 Oil and Gas Lease Sale (Attachment 2); Monticello DNA at 3-3-16; Interdisciplinary Team Analysis Record Checklist.

SUWA also refers to BLM’s February 2000 Report to Congress - - Land Use Planning for Sustainable Resource Decisions and contends that the report “made clear that existing land use plans such as the San Rafael RMP/EIS do not accurately reflect current, unanticipated levels of interest and attention.” (Protest at 5). However, the purpose of the report was to support BLM’s efforts to obtain funding for future planning and in no way states or implies that existing NEPA analyses insufficiently assess impacts of proposed oil and gas leasing.

The SUWA Protest next identifies certain parcels on Price and Vernal FO lands that are located within areas that have been nominated as ACECs and contends that all of the identified parcels should be deferred from leasing pending completion of the relevant land use plan revisions. SUWA alternately argues that the parcels should be deferred because BLM previously

recommended deferral of some of those parcels, certain language in the Price FO DNA on potential ACECs appears inconsistent with that in the Price FO's Draft RMP/EIS, and/or the relevant and important values on the ACEC parcels will not be protected in the event the parcels are leased. (Protest at 6-10). In making these arguments, SUWA ignores the critical question with respect to the ACEC parcels -- whether their relevant and important values constitute new and significant information not previously analyzed under NEPA -- and nowhere in its Protest does SUWA make any argument or provide any information to suggest that this is the case. However, the Price and Vernal FOs each considered this precise question and determined although the relevant and important values for the potential ACECs (i.e., cultural, fossil, geologic, etc.) constituted new information, it was not significant new information from a NEPA standpoint because leasing and subsequent development would not impact those values to a degree not already considered in the NEPA analysis underlying the respective land use plans. See Price DNA at 6, 11-12; Vernal DNA at 4, 6, Attachment 2 at 3-5. Further, each FO concluded that the application of appropriate management constraints, including stipulations and lease notices, would adequately protect the relevant and important values of the potential ACECs. See *id.*

3. BLM Complied With the "Hard Look" Requirement of NEPA

The SUWA Protest contends that BLM's pre-lease sale review failed to take the "hard look" required under NEPA in three ways: (1) by not determining whether its existing NEPA analyses are valid in light of new information or circumstances involving wilderness characteristics; (2) by ignoring staff recommendations on lease notices intended to protect certain endangered species; and (3) by not adequately assessing the potential impacts of oil and gas leasing on Capitol Reef National Park. (Protest at 10-16). The bulk of SUWA's "hard look" argument pertains to parcels with wilderness characteristics that BLM offered for lease but has deferred from sale based on the decision in Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253 (D. Utah 2006). Consequently, that portion of SUWA's argument will not be discussed further.

With respect to endangered species, SUWA contends that the Monticello FO staff identified pertinent lease notices developed by BLM and the U.S. Fish and Wildlife Service for parcels UT 0506-286 and UT 0506-297 regarding the Southwestern Willow Flycatcher and certain endangered fish species but these notices are not attached to the parcels. SUWA argues that BLM should defer leasing until the notices have been attached to the two leases. (Protest at 16). As a matter of clarification, by errata dated May 8, 2006, prior to the lease sale, BLM attached the pertinent notice to the parcels. Thus, this portion of the SUWA Protest is moot.

SUWA contends that "the Price field office DNA failed to analyze the potentially significant direct, indirect, and cumulative impacts of the development of . . . 18 parcels on Capitol Reef National Park", as well as the cumulative impacts on the Park from the lease sale and recent or foreseeable development in the Last Chance Desert region.⁴ (Protest at 17-19). SUWA first argues that the Price FO DNA makes virtually no mention of the proximity of these parcels to

⁴ The Last Chance natural gas field mentioned by SUWA (Protest at 18), includes wells that were drilled between 1934 and 1980. There is no production from the field, and there has been no change in the status of the field since completion of the BLM NEPA documents listed in Item C. of the Price FO DNA.

the Park, nor does it directly address or respond to a letter dated March 17, 2006 to BLM from Superintendent Albert Hendricks recommending measures to minimize the possible affects of oil and gas development on these parcels on Park resources (viewshed, access and traffic, soundscape, night skies, wildlife, vegetation, watersheds, wilderness, and cultural resources). By letter dated April 7, 2006, BLM responded to Superintendent Hendricks. The BLM letter included a list of the relevant parcels and the various notices and stipulations attached to each parcel. The letter explained that BLM would implement the stipulations and notices already attached to the parcels and outlined guidelines that would be used for management of any leasehold under the BLM's authority. See Price DNA at National Park Service section. The BLM letter also provides that for those portions of any lease visible from Capitol Reef National Park, visual impacts will be minimized and for those portions of any lease immediately adjacent to the Park boundary, surface use will be controlled to reach consistency with applicable National Park Service (NPS) plans, and access to leased lands will not be allowed on NPS service roads. In addition, the BLM letter also notes that application of the stipulations, notices, Best Management Practices (BMPs), standard operating procedures, and site-specific mitigation would minimize impacts to Park resources.

SUWA's contention that the Price FO DNA did not analyze the potential impacts of leasing and development of the relevant parcels on the resources of Capitol Reef National Park is surprising given that a DNA cannot fulfill the functions of a NEPA document. However, BLM considered such matters during its preparation of the 1991 San Rafael Resource RMP/EIS, which the Price FO DNA identifies as one of the existing NEPA analyses which applies to the proposed lease sale. See Price DNA at 2, 4, 5, 6, 14, 15; San Rafael RMP/EIS at A-3, C-9, -10, -11. Moreover, the SUWA Protest did not point out and BLM is not aware of any new and significant information or circumstances relative to the resources of Capitol Reef National Park that would require supplemental NEPA analysis. See Price DNA at 15.

B. BLM's Inclusion of the Protested Parcels in the May 2006 Lease Sale Complies with the NHPA.

The SUWA Protest also contends that BLM did not comply with the requirements of the National Historic Preservation Act (NHPA) in the Section 106 consultation it completed in connection with the May 2006 lease sale. SUWA argues that BLM violated the NHPA based on: (1) the fact that the Price FO's "no adverse effect" determinations made for the May sale differed from determinations involving prior lease sales; (2) SUWA's belief that the consultation the FOs undertook with Native American tribes was not a reasonable and good faith effort; and (3) SUWA's opinion that more consultation with members of the public should have taken place. However, BLM's Section 106 consultation fully complied with the NHPA.

To comply with the NHPA at the oil and gas leasing stage, BLM must: (1) identify the area of potential effect (APE) under consideration; (2) identify properties within the APE that are listed historic properties or eligible for inclusion in the National Register of Historic Places; and (3) determine whether the proposed leasing may have adverse effects on the listed or eligible properties. In the event BLM concludes that the leasing may have adverse effects, it must identify ways of avoiding, minimizing, or mitigating those adverse effects. If BLM is conducting the Section 106 consultation process under the 36 C.F.R. Part 800 regulations, it must seek the concurrence of the Utah State Historic Preservation Officer (Utah SHPO) in BLM's determination. See 36 C.F.R. § 800.4(d). If BLM is conducting the process under the 2001

Protocol Agreement between the Utah BLM and the Utah SHPO, BLM is not required to seek the concurrence of the Utah SHPO if it determines that no listed or eligible properties are present or that there would not be an adverse effect on properties that are present. See Protocol VII.A.C. As discussed below, each of the FOs properly completed these steps.

1. Background – FO Section 106 Consultation

a. Price FO

The SUWA Protest reflects uncertainty about whether the Price FO's Section 106 consultation process followed the procedures set forth in the 36 C.F.R. Part 800 regulations or the 2001 Protocol. (Protest at 20 n.10). As a matter of clarification, except for parcel UT0506-271A, the Price FO Section 106 consultation was completed under the Protocol. Since the only Price FO parcel in the May 2006 lease sale not in an area covered under the Protocol is parcel UT0506-271A, BLM consulted with the SHPO regarding this parcel and the SHPO concurred in BLM's "no adverse effect" finding. For the remaining parcels, the Price FO made a "no historic properties affected" determination and was not obligated to consult with the SHPO. See Price DNA at 8; see also Protocol VII.A.C.

In reaching its "no historic properties affected" determinations, the Price FO determined that the APE for the lease sale would consist of the proposed lease parcels (listed in DNA Attachment 3). Cultural resource specialists then reviewed archaeological site files in the Price FO. On January 27, 2006, the FO mailed consultation letters to the following: the Southern Ute Tribe; Navajo Nation; Shoshone Business Council; Hopi Tribe; Goshute Tribe; Pueblo of Zuni; Uintah and Ouray Tribe; Ute Mountain Ute Tribe; Northwestern Band of Shoshone Nation; Shoshone-Bannock Tribes; and Paiute Indian Tribe of Utah. Each letter identified the townships and ranges in which the proposed lease parcels were located, and included a list of the proposed lease parcels and a map showing their locations. Each letter indicated that "[l]easing of these oil and gas parcels could have effects upon sites on or eligible for the National Register of Historic Places in that leasing gives a right to the lessee to develop at least some place on the lease[.]" asked the respective tribe to identify any concerns that it may have with leasing the parcels, and stated that if BLM received no response to the letter within 30 business days, it would conclude that the tribe had no concerns. See Price DNA at Native American Consultation section. The Goshute Tribe and the Paiute Tribe sent responses, but raised no objections or concerns regarding the proposed leasing. No other tribal entity responded. Based on this cultural resources review and consultation with Native American Tribes, the Price FO reached its "no historic properties affected" determination.

b. Vernal FO

Because the Protocol does not apply to lands within the Vernal FO, the FO's Section 106 consultation followed the procedures set forth in the 36 C.F.R. Part 800 regulations. The FO determined that the APE for the lease sale would consist of the lease parcel boundaries. See Vernal FO DNA at 5. The Vernal FO archaeologist then reviewed available cultural resource inventories. See Vernal DNA Attachment 2 at 6-14.

As part of the Section 106 process, the Vernal FO mailed several consultation letters to relevant Native American Tribes, and received a few responses. For example, on January 31, 2006, the

Vernal FO mailed consultation letters with legal descriptions of the proposed lease parcels to: the Confederated Tribes of the Goshute Reservation; Laguna Pueblo; Santa Clara Pueblo; Zia Pueblo, Hopi Tribe, Navajo Nation, Eastern Shoshone Tribe, Northwestern band of the Shoshone Nation; Ute Indian Tribe; Southern Ute Tribe; White Mesa Ute Tribe; and the Ute Mountain Ute Tribe. On February 1, the Vernal FO sent another letter to the tribes listing 3 additional parcels, with their legal descriptions. Each letter indicated it was being sent “for your review and to provide an opportunity for Tribes to coordinate and consult on any cultural resources or Native American religious concerns.” The letters requested that any responses be provided to the Vernal FO within 30 business days. The Vernal FO received the following 3 response letters: (1) on February 8, 2006, the Southern Ute Indian Tribe advised the FO that there were “no properties of religious or cultural significance to the Southern Ute Indian Tribe that are listed on the National Register within the area of potential [effect] or that the proposed project would not have an effect on any such properties that may be present[]”; (2) on February 14, 2006, the Pueblo of Laguna advised the FO that the lease sale would not affect traditional religious or cultural properties; and (3) on February 21, 2006, the Confederated Tribes of the Goshute Reservation advised the FO that they had no comments. See Vernal DNA at Native American section.

On March 8, 2006, the Vernal FO mailed another letter listing all of the proposed parcels to the above-listed tribes, including additional parcels and legal descriptions not listed in the earlier letters. The March 8 letters requested that any responses be provided to the Vernal FO within 30 business days. The FO received the following 3 response letters: (1) on March 13, 2006, the Pueblo of Laguna advised the FO that the proposed lease sale would not have an effect at that time; (2) on March 14, 2006, the Confederated Tribes of the Goshute Reservation advised the FO that they had no comments; and (3) on May 1, 2006, the Hopi Cultural Preservation Office of the Hopi Tribe requested that parcels 223, 224, 225, 226 and 263 be withdrawn from the lease sale based on its concerns that leases in Nine Mile Canyon should not include canyon or side canyon bottoms and areas within ¼ mile of the rim. The Vernal FO considered the Hopi request, and deferred the portions of the 5 parcels in the bottom of Nine Mile Canyon. By letter dated June 16, 2006, the FO advised the Hopis that the portions of the lease parcels in the bottom of Nine Mile Canyon had been deferred until the FO’s revision of the current land use plan was completed. See Vernal at DNA Native American section. The Vernal FO did not receive any other responses to its consultation letters.

Based on this cultural resource review and consultation with Native American Tribes, the Vernal FO reached its “no historic properties affected” determination. See id. On March 31, 2006, the Utah SHPO concurred with that determination. See Vernal DNA at Cultural Resource section.

c. Monticello FO

The Monticello FO’s Section 106 consultation followed the procedures set forth in the 36 C.F.R. Part 800 regulations. The FO determined that the APE for the lease sale would consist of the acres within each proposed parcel. See Monticello DNA at 4. The FO archaeologist then reviewed available cultural resource inventories. See id. Based on this cultural resource review and consultation with Native American Tribes, the FO reached its “no adverse effect” determination. See Monticello DNA at 4.

As part of the Section 106 process, on January 31, 2006, the Monticello FO mailed consultation letters with a list and a map of the proposed parcels to the following Native American Tribes: the Hopi Tribal Historic Preservation Office, the Navajo Nation Tribal Historic Preservation Office; Aneth Navajo Chapter; Red Mesa Navajo Chapter; Huerfano Navajo Chapter; Oljato Navajo Chapter; Mexican Water Navajo Chapter; Navajo Mountain Navajo Chapter; Teecnospos Navajo Chapter; and Dennehotso Navajo Chapter. Among other things, the FO indicated the letters were being sent “for your review and to provide an opportunity for you to coordinate and consult on any Cultural Resource, Traditional Cultural Properties or Native American Religious Concerns.” The letters requested that the respective tribe advise BLM of any comments or concerns it had regarding the nominated parcels within 30 business days. See Monticello DNA Appendix E. No tribes submitted responses.

Based on this cultural resource review and consultation with Native American Tribes, the FO reached its “no adverse effect” determination. See Monticello DNA at 4. By letter dated January 31, 2006, the Monticello FO submitted its “no adverse effect” determination to the Utah SHPO. See Monticello DNA at 11; Appendix E. On March 1, 2006, the Utah SHPO concurred with that determination. See id.

2. BLM Adequately Consulted with Native American Tribes.

The SUWA Protest asserts that the above-referenced consultation letters “are insufficient to meet BLM’s duty under the NHPA to make a ‘reasonable and good faith effort’ to seek information from Native American tribes.” (Protest at 24). In support of this assertion, SUWA cites to the decision in Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995). In that decision, the court held that the U.S. Forest Service did not make the reasonable and good faith efforts required under the NHPA in determining whether a canyon contained traditional cultural properties because the Forest Service withheld relevant information regarding the presence of such properties from the New Mexico SHPO when seeking its concurrence in the agency’s conclusion that no such properties were present in the canyon. In that case, the Forest Service requested detailed information from local Native American Tribes and apparently ignored the information it received. See 50 F.3d at 860. However, nowhere in the decision does the court hold that the NHPA requires a particular consultation letter format or provide any support for SUWA’s assertion that the Price, Vernal, and Monticello FOs did not make reasonable and good faith efforts to seek information from the relevant Native American Tribes. The Pueblo of Sandia decision is plainly distinguishable from the present situation and provides no support for SUWA’s assertions.

The SUWA Protest also suggests that the FO consultation letters were defective because they did not advise the Native American tribes of the FOs’ preliminary assessments that leasing the proposed parcels would have no adverse effects. However, SUWA has not cited to any authority to support its view that BLM must disclose such ongoing assessments when asking Native American tribes to provide BLM with any information, articulate concerns, or consult regarding any cultural resources, traditional cultural properties, or religious concerns in connection with a proposed lease sale. Likewise, SUWA’s suggestion that the Price FO consultation letters were defective because they did not advise the recipients that the FO archaeologist had certain concerns about the potential impacts of a lease sale in 2005 is groundless. The process of seeking the views of Native American tribes would quickly become an unwieldy paperwork exercise if BLM were required to provide each tribe from whom it requested information copies of all

previous cultural resource assessments it had prepared on the relevant lands. Finally, SUWA has presented no information demonstrating that any Native American tribe to whom BLM sent consultation letters believes that the letters were not an adequate means to solicit its views and input on any cultural resources, traditional cultural properties, or religious concerns in connection with the parcels proposed for inclusion in May 2006 lease sale.

3. The FOs' No-Adverse Effect Determinations Are Not Arbitrary and Capricious.

The SUWA Protest acknowledges that the Utah SHPO concurred with the respective FO no-adverse effect determinations, but SUWA argues nonetheless that such determinations were arbitrary and capricious because the SHPO's concurrence was, in SUWA's view, "a reluctant, qualified concurrence." (Protest at 20). SUWA also disagrees with the FO assumptions that at least one well can be placed somewhere on each particular lease parcel without affecting cultural properties. (Protest at 21-22). However, SUWA's mere disagreement with the SHPO's assessment and the assumptions of BLM's experts does not establish any error in BLM's Section 106 consultation, let alone that the FOs' determinations were arbitrary and capricious. The SUWA Protest also points to the fact that the Price FO archaeologist had certain concerns about the potential impacts of a lease sale in 2005 as evidence that the more recent conclusion of no-adverse effect determination was arbitrary and capricious. For the same reason, SUWA's interpretation of the different assessments is mere opinion that does not establish error on BLM's part. SUWA also contends that the BLM has relied on unenforceable lease notices to reach its no-adverse effect determination. (Protest at 23). It appears that SUWA is referring to the following stipulation that has been applied on all of the parcels included in the May 2006 lease sale:

This lease may be found to contain historic properties and/or resources protected under the National Historic Preservation Act (NHPA), American Indian Religious Freedom Act, Native American Graves Protection and Repatriation Act, E.O. 13007, or other statutes and executive orders. 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."

BLM is empowered to and will enforce this stipulation. Consequently, SUWA's assertion that BLM loses control over its ability to protect cultural resources on a parcel after it has been leased lacks merit.

4. BLM Has Provided for Adequate Public Participation in the NHPA Process.

The SUWA protest contends that BLM has not provided for or documented an adequate public participation process for the May 2006 sale in accordance with the NHPA and Section IV.C of the Protocol, which states that "BLM will seek and consider the views of the public when carrying out the actions under the terms of this Protocol" (Protest at 25). However, SUWA has not cited to any authority as to the degree of public involvement required by the NHPA or the Protocol, nor has it suggested what type of public involvement it believes is necessary.

SUWA's contention overlooks that BLM's oil and gas program is a staged and ongoing process, and that specific implementations of the program have been analyzed in several NEPA documents with public involvement beginning in the 1970s. (The relevant NEPA documents for the FOs covered by the SUWA Protest are identified in Section C of each of the FO DNAs.). The first stage of this process is the land use planning stage at which decisions, such as which lands may be designated as available for oil and gas leasing, occurs. The land use planning process for the Price, Vernal, and Monticello FOs has involved the preparation of EAs and EISs⁵ that included opportunities for public participation at various stages in the process, including scoping, public comment on the draft documents, and the opportunity for public protest of planning decisions to the BLM Director.

The second stage of BLM's oil and gas program consists of its quarterly sales, for which public notice is provided. At this point, members of the public have the opportunity to become apprised of the specific parcels proposed for lease and, prior to sale, provide input to BLM on any matter related to the sale, including information on the presence of cultural resources or concerns about potential impacts to such resources. In the event BLM completes a DNA in connection with a sale, that document and all underlying documents are made available to the public on request. At the third stage, the application for permit to drill (APD) stage, BLM prepares additional NEPA analysis on the relevant proposed development. At this point, the public has additional opportunities to participate in the process, through scoping and review and comment of the relevant document, and again may provide BLM with information regarding cultural resources or advise BLM of concerns about potential impacts to such resources.

With respect to the May 2006 sale, BLM provided notice of the sale, including listing the specific parcels proposed for inclusion in the sale, for a minimum of 60 days. As demonstrated by the SUWA Protest, members of the public had the opportunity to provide input to BLM on any concerns regarding the parcels proposed for inclusion in the sale and the opportunity to protest such inclusion. Although SUWA now argues that BLM failed to provide for an adequate public participation process under the NHPA, SUWA has not informed BLM what degree of public participation is required NHPA or the Protocol, or provided any legal authority for its assertion. Moreover, SUWA has not suggested, much less shown, that BLM's Section 106 Consultation has overlooked a potentially eligible property.

C. Conclusion

For the above-stated reasons, the SUWA Protest regarding the 132 parcels is granted with respect to the 70 parcels subject to the decision in Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253 (D. Utah 2006), and denied with respect to the other 62 parcels. BLM will complete appropriate NEPA analysis regarding the public lands underlying the 70 parcels for which the Protest is granted and, based on such analysis, determine whether and/or under what conditions the lands may be leased. BLM received sale offers on the 62 parcels for which the

⁵ The governing land use plan for certain Price FO parcels (UT0506-185, UT0506-187, UT0506-189, UT0506-191, UT0506-194, UT0506-196, UT0506-227, UT0506-228, UT0506-231, UT0506-235, UT0506-259 through UT0506-262 and UT0506-269) is the Price Resource Area Management Framework Plan (MFP), which predates RMPs and is not a NEPA document, but was prepared subject to public review and input.

Protest is denied. Resolution of other protests may govern whether or not a lease for a particular parcel may be issued.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and the enclosed Form 1842-1. If an appeal is taken, the notice of appeal must be filed in this office (at the address shown on the enclosed Form) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay pursuant to 43 C.F.R. Part 4, Subpart B § 4.21, during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied,
2. The likelihood of the appellant's success on the merits,
3. The likelihood of immediate and irreparable harm if the stay is not granted, and
4. Whether the public interest favors granting the stay.

Copies of the notice of appeal, petition for stay, and statement of reasons also must be submitted to each party named in this decision and to the Office of the Solicitor, Intermountain Region, 125 South State Street, Suite 6201, Salt Lake City, Utah 84138, at the same time the original documents are filed in this office. You will find attached a list of those parties who purchased the subject parcels at the May 16, 2006 lease sale and therefore must be served with a copy of any notice of appeal, petition for stay, and statement of reasons.



Selma Sierra
State Director

Enclosures

1. Form 1842-1 (2pp)
2. List of purchasers (1pp)

cc: List of purchasers

James Karkut, Office of the Solicitor, Intermountain Region,
125 South State Street, Suite 6201, Salt Lake City, UT 84138