

January 30, 2008

VIA FAX (970) 882-7035 AND FIRST-CLASS MAIL

Ms. LouAnn Jacobson
Canyons of the Ancients National Monument
27501 Highway 184
Dolores, CO 81323

Dear Ms. Jacobson:

The National Trust for Historic Preservation appreciates the opportunity to comment on the Draft Resource Management Plan/Environmental Impact Statement (Draft RMP) for the Bureau of Land Management's Canyons of the Ancients National Monument (Monument). We are encouraged to see that the Bureau of Land Management (BLM) has embraced the legal significance of the national monument designation, particularly with respect to the protection of cultural and historic objects within the context of their "landscapes" and "communities." Managing cultural resources at the level of "landscapes" and "communities" is an appropriate management approach, which we believe is warranted by the density and significance of the resources in the Monument. We commend BLM for showing the courage and foresight to adopt this strategy in Canyons of the Ancients.

Although we generally endorse the Draft RMP and its stringent controls on uses of public land within the Monument, there are certain aspects of the proposed plan that are either inconsistent with the Proclamation or could be enhanced. Our comments and recommendations point out these areas in an effort to improve the Draft RMP and the overall protection of Monument objects.

Interests of the National Trust. Congress chartered the National Trust in 1949 as a private charitable, educational, and nonprofit organization to "facilitate public participation in the preservation of sites, buildings and objects significant in American history and culture" and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. With the support of more than 287,000 individual members nationwide, including over 4,000 in Colorado, the National Trust advocates to preserve and protect historic properties, including those situated on public lands.

As a preliminary matter, we are concerned that the Draft RMP inaccurately describes the requirements of section 302(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1732(a), which may mislead the public as to how BLM must manage the Monument. Section 302(a) of FLPMA directs BLM to manage public lands for multiple uses except when "dedicated to specific uses according to any other provision of law. . . ." 43 U.S.C. § 1732(a). When public land is dedicated to a specific use, BLM must then manage it in accordance with

the “other provision of law.” Id. In the Draft RMP, BLM misinterprets this principle, mistakenly determining that because public land within the Monument had been dedicated to the protection of historic and scientific objects¹ by presidential Proclamation, it “shall be managed in accordance with the provisions of FLPMA.” Draft RMP at 3, 8 (“the Proclamation require[s] protection of the objects of the Monument while managing resources based on the FLPMA principles of multiple use and sustained yield”).

While we commend BLM for recognizing the applicability of section 302(a) to the management of the Monument and for concluding that public land within the Monument has been dedicated to the protection of historic and scientific objects, we do not agree that the Monument “shall be managed in accordance with the provisions of FLPMA.” Id. On the contrary, section 302(a) clearly requires BLM to manage the Monument in accordance with the Proclamation.

Such an interpretation is consistent with the recent decision of the Interior Board of Land Appeals (IBLA) in Jennifer J. Walt Box D Ranch, 172 I.B.L.A. 300, 313 (2007). In that case, the IBLA affirmed the denial of two grazing permits in Oregon’s Cascade-Siskiyou National Monument because BLM found that the permits, if issued, would harm the objects of interest identified in the national monument’s Proclamation. Id. Referencing section 302(a) of FLPMA, the IBLA held that “the lands within the Monument are now to be managed primarily for the protection of the objects of interest identified in the Proclamation.” Id. (internal quotations omitted). Phrased differently, the IBLA concluded that “the priorities established by a duly issued Presidential Proclamation” supersede the management priorities established by FLPMA, id.—namely, the management of public lands for “multiple use[s] and sustained yield.” 43 U.S.C. § 1732(a). Thus, IBLA held that BLM erred in finding that section 302(a) requires it to manage Canyons of the Ancients in accordance with FLPMA.² In the final plan for Canyons of

¹ The objects of historic interest identified in the Monument Proclamation are numerous—at least 4,965 have been documented to date and an additional 15,000 to 25,000 may exist. Bureau of Land Management, Canyons of the Ancients National Monument Draft Resource Management Plan & Draft Environmental Impact Statement 148–49 (2007) [hereinafter Draft RMP]. They also possess significance—each historic object is eligible for listing in the National Register of Historic Places, id. at 276—and range from prehistoric “cliff dwellings, villages, great kivas, shrines, sacred springs, agricultural fields, check dams, reservoirs, rock art sites, and sweat lodges” to the “complex landscape” on which they are found. Proclamation No. 7317, 65 Fed. Reg. 37,243 (June 13, 2000).

² We do not mean to suggest that the Draft RMP provides inadequate protection for Monument objects or proposes to allow multiple uses of public land within the Monument at the cost of protecting Monument objects. On the contrary, we believe the Draft RMP generally adheres to the terms and intent of the Proclamation. However, we are concerned that certain language in the Draft RMP may engender confusion among the public as to which legal framework applies to the management of the Monument. For example, the statement that “the Proclamation require[s] protection of the objects of the Monument while managing resources based on the FLPMA principles of multiple use and sustained yield” suggests that protecting Monument objects and managing for multiple uses are on equal footing and would be balanced during decisionmaking related to the management of the Monument. However, as shown by the Walt decision, neither the Proclamation nor FLPMA allow BLM to balance the protection of Monument objects with the provision of multiple uses. Jennifer J. Walt Box D Ranch, 172 I.B.L.A. at 313. Instead, “[t]he management of the Monument is subject to the overriding purpose of protecting the objects described in the Proclamation.” Draft RMP at 1. It is imperative that BLM clearly and consistently convey this message to the public in the Final RMP.

the Ancients, BLM should take care to convey that while traditional uses of public land in the Monument may continue, they may continue only to the extent and in a manner consistent with the Monument Proclamation.

I. CULTURAL RESOURCE MANAGEMENT

We are encouraged by BLM's proposed guidance for managing cultural resources. The Draft RMP specifically recognizes BLM's intent to manage Monument objects in accordance with the requirements of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470f, 470h-2 and the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa–470ll. However, we do recommend that BLM clarify how it intends to comply with Section 106 of the NHPA for undertakings in the Monument. In particular, BLM needs to explain how it will resolve adverse effects through the Section 106 process primarily through the use of “avoidance” measures.

A. BLM should clarify how it intends to comply with Section 106 of the NHPA for undertakings in the Monument.

In the Draft RMP, BLM suggests that it will use the Section 106 process as the primary mechanism for protecting Monument objects from the adverse effects of BLM undertakings. See Draft RMP at 276 (stating that Section 106 would “dictate” the management of cultural resources in the Monument). However, as BLM knows, Section 106 does not actually require the protection of historic properties, even those adversely affected by federal undertakings. For example, should BLM find that an application for permit to drill (APD) would adversely affect historic objects in the Monument, then Section 106 would require consultation only “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate [the] adverse effects. . . .” 36 C.F.R. § 800.6(a). Upon the resolution of consultation, Section 106 would impose no obligation on either BLM or the project proponent to adopt alternatives or modifications to the proposal for the protection of historic objects. Thus, the Section 106 process would not necessarily ensure the protection of Monument objects, a result required by the Monument Proclamation.

In the Draft RMP, BLM seems to have anticipated and planned for the limitations of the Section 106 process. In an apparent effort to “fix” or predetermine the outcome of the Section 106 process for undertakings in the Monument, BLM would “modify multiple-use projects and/or activities when possible to avoid significant cultural resources to result in ‘no historic properties affected’ or ‘no adverse effect’ determinations.” Draft RMP at 39 (emphasis added). Doing so would, in all likelihood, ensure that the Section 106 process in fact led to the protection of Monument objects.

We comment on this particular issue not because we find it objectionable or inconsistent with the Proclamation but because we are concerned for the implications of its irregularity. Section 106 is meant to be an open process through which consulting parties discuss and

exchange ideas with the lead agency to resolve the adverse effects of federal undertakings on historic properties. See 36 C.F.R. §§ 800.1–.6. In the Draft RMP, BLM has unilaterally narrowed the range of options for resolving adverse effects because consulting parties would no longer have the ability to offer and evaluate alternatives to “mitigate” or “minimize” the adverse effects of project proposals. Instead, BLM would resolve the adverse effects of most undertakings in the Monument strictly through the development of “avoidance” measures. Draft RMP at 276. Because prospective consulting parties are likely to have close familiarity with the intricacies of Section 106, particularly those with valid existing rights, BLM should provide additional information about the rationale underlying this proposal for complying with Section 106.

Recommendation:

BLM should provide additional information concerning its rationale for restricting the resolution of adverse effects during the Section 106 process to “avoidance” measures. In particular, BLM should provide a thorough explanation of the relationship between the Monument Proclamation and Section 106 and discuss how compliance with the Proclamation requires BLM to prospectively narrow the range of alternatives for resolving adverse effects.

B. BLM should place a greater emphasis on site stabilization in the Draft RMP.

We also believe that the Draft RMP should make a greater effort to stabilize cultural sites, particularly significant sites and those that BLM will develop for public use. According to the Draft RMP, BLM would develop at least thirteen sites for public use and may develop an additional twelve following an evaluation by the Monument archaeologist. Draft RMP at 34. The Draft RMP states that minimal stabilization will take place at developed sites and that, at all other sites, which number in the thousands, “[s]tanding wall features would be thoroughly documented, then allowed to deteriorate though natural erosive forces, except at sites developed for public use.” *Id.* at 287. Due to the significance of sites in the Monument and the availability of funding for cultural resource activities in Colorado through the State Historical Fund, we urge BLM to recommend stabilization as a more appropriate treatment for at least the most significant sites in the Monument and that the Draft RMP should identify site stabilization as a higher priority.

II. FLUID MINERALS AND ENERGY RESOURCES

A. Oil and Gas Leasing.

In the Draft RMP, BLM proposes to place various notices on new oil and gas leases issued in the Monument. One of the proposed lease notices concerns historic objects. Although BLM did not provide the exact wording in the Draft RMP, this lease notice would apparently “alert lessees that no APDs will be granted where physical cultural remains are dense, continuous, and/or chronologically related and/or determined to be communities, throughout the survey area (constant-no breaks). . . .” Draft RMP at 95; *id.* at App. K-13. We strongly support

the use of lease notices as a means of protecting significant cultural resources. However, we do have several questions concerning the notice for historic objects:

- How broad of an area would BLM require the applicant to survey?
- Would BLM grant an APD if the development would cause indirect impacts on historic objects located within the lease but outside of the survey area?
- Would BLM grant an APD if the development would cause indirect impacts on historic objects located outside of the lease and outside of the survey area?

B. Oil and Gas Development.

Prior to the establishment of Canyons of the Ancients, BLM issued oil and gas leases on much of the public land now within the Monument. While some leases have expired over the years, valid leases remain on approximately 80 percent of the Monument. Draft RMP at 224. Consequently, the development of oil and gas resources on existing leases represents a serious threat to the integrity of historic objects throughout Canyons of the Ancients and requires that BLM reconcile discordant legal mandates in the Draft RMP. On the one hand, BLM must honor and abide by the terms of existing leases, but on the other hand, it must manage development associated with existing leases “so as not to create any new impacts that interfere with the proper care and management of the objects protected by [the] proclamation. . . .” CANM Proclamation at 37,245.

The National Trust applauds the balance struck by BLM. Oil and gas development would be allowed to go forward on existing leases but only to the extent “cultural resource communities or sites will not be impacted.” Draft RMP at 97. We believe this approach, if fully implemented, would provide existing lease holders with the certainty that development could proceed in defined areas of the Monument, while protecting the integrity as well as the context of historic objects. Further, we believe this approach is consistent with the Monument Proclamation.

While we fully support the protection of “cultural resource communities and sites,” we believe BLM could strengthen this management directive in the RMP. Under the proposed directive, BLM would protect Monument objects from oil and gas development by implementing a comprehensive program of archaeological surveys, site-specific development plans, and development restrictions and prohibitions. At the core of this initiative is the “community” concept. Through the implementation of the program, BLM would attempt to identify the location of prehistoric “communities” within the Monument. Draft RMP at 27. Prehistoric “communities” would then be afforded the same extraordinary level of protection as historic objects specifically identified in the Monument Proclamation. *See id.* at 97 (prohibiting oil and gas development that would cause “direct impacts to cultural resource communities or sites resulting from any managed activity”). Unfortunately, a prohibition on development may infringe upon valid existing rights, and, thus, BLM should consider providing additional legal

and scientific support for the “community” concept in the RMP. The following recommendations may assist BLM in this effort:

- **Cite and explain references to prehistoric “communities” in the Monument Proclamation.** BLM should explain that although the Proclamation does not specifically identify prehistoric “communities” as protected objects, they are protected by implication. In doing so, BLM should note that the word “community” appears twice in the Monument Proclamation. See CANM Proclamation at 37,243 (“the Ancestral Northern Puebloan people periodically aggregated into larger communities and dispersed into smaller community units”) (emphases added). Additionally, BLM should discuss that the specific list of objects identified in the Proclamation is not exhaustive, see CANM Proclamation at 37,243, and that, as the agency with the authority to implement the Proclamation, it may protect objects suggested but not specifically identified by the Proclamation.
- **Utilize the term “village.”** Unlike prehistoric “communities,” the Monument Proclamation specifically identifies prehistoric “villages” as protected objects. CANM Proclamation at 37,243. Thus, BLM has the authority to prohibit oil and gas development that would cause “new impacts that interfere with the proper care and management” of prehistoric “villages.” Id. at 37,246. BLM could simply adopt the proposed definition of the term “community” for the definition of the term “village” and, thus, achieve the intent of the “community” concept while clearly acting within the scope of its authority under the Proclamation.
- **Utilize historic “districts.”** BLM could use the existing authority and terminology of the NHPA to protect prehistoric “communities.” Under the NHPA, BLM is required to “assume responsibility for the preservation of historic properties which are owned or controlled by [the] agency.” 16 U.S.C. § 470h-2(a)(1). Historic properties under the NHPA include prehistoric “districts” that are eligible for or listed in the National Register. A “district” is defined as “a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development.” Note how similar this definition is to the definition of “community” proposed by BLM in the Draft RMP: “the collective physical remains or expressions of a cultural group’s occupation and use of a geographical area during an established chronological period of time.” Draft RMP at ES-5. Thus, BLM could likely protect prehistoric “communities” to the extent proposed in the Draft RMP by evaluating and identifying prehistoric “communities” as prehistoric or archaeological “districts” under the NHPA.

III. TRANSPORTATION PLANNING

A. BLM must revise the “road” definition.

The National Trust is troubled by BLM’s definition of a “road,” which is inconsistent with the intent of the Monument Proclamation and lacks legal support. In the Draft RMP, BLM defines a “road” as “an open way for the passage of vehicles, persons, or animals on land, regardless of the type of travel.” Draft RMP at ES-6. This definition would permit the designation of roads virtually anywhere because a “vehicle, person, or animal” could conceivably pass over or through any portion of the Monument. In other words, a path, trail, riverbed, or pathway created by animals would all fall within BLM’s definition of a “road.” BLM neither provides legal support for this broad definition nor are we aware that any exists.³

BLM’s attempt to create a new, broad definition of a “road” is also contrary the transportation prohibitions within the Monument Proclamation. The Proclamation restricts rather than liberalizes the management of transportation in the Monument, requiring BLM to “prepare a transportation plan that addresses the actions, including road closures or travel restrictions, necessary to protect” Monument objects and to “prohibit all motorized and mechanized vehicle use off road.” See CANM Proclamation at 37,245. BLM must revise the “road” definition in a manner consistent with the Proclamation’s narrow framework for managing transportation and consistent with the conceptual understanding of what is and is not a road.

Recommendation:

We strongly urge BLM to strike the current “road” definition from the Draft RMP. At a minimum, BLM should consult existing guidance from BLM’s Washington, D.C. office concerning transportation management and adopt an improved definition.

³ Several sources of legal authority, which BLM does not expressly reference in support of the “road” definition, do provide definitions for the term “road.” For example, the legislative history for FLPMA states that the term “roadless” means “the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.” H.R. Rep. No. 94-1163, at 17 (1976). Thus, under this definition, tracks created by the repeated passage of vehicles, people, wildlife, or anything else, do not necessarily constitute a road. Instead, a mechanical improvement is necessary in order to meet the definition of a road. In short, “use” or “nonuse” of a route is an insufficient basis for determining what constitutes a road. Another source—an Instruction Memorandum (IM) on travel management issued by BLM in 2006—defines a “road” as “[a] linear route declared a road by the owner, managed for use by low-clearance vehicles having four or more wheels, and maintained for regular and continuous use.” Bureau of Land Management, Instruction Memorandum 2006-173 (June 16, 2006). Even this definition recognizes that roads require more than simply use by vehicle, person, or animal. While there are aspects of this IM that we disagree with, it at least suggests that the definition put forward by BLM in the Draft RMP is inconsistent with the agency-wide definition of a road.

B. BLM must fully integrate the Proclamation requirements into the transportation plan.

BLM should make a stronger commitment to protecting Monument objects in the proposed management for transportation. In the Draft RMP and in accordance with the Proclamation, BLM is developing a transportation plan in which it proposes a relatively modest network of roads. In fact, BLM would reduce the overall number of road miles currently open to the public from 131 to seventy-four, and would manage any road not designated as open in the plan as closed. *Id.* at 123–24. All roads not designated as open would be reclaimed within ten years. *Id.* at 124. We strongly support these aspects of the transportation plan.

However, we do believe that the transportation plan should contain a stronger commitment to protecting Monument objects during the management of the road network. Under the current proposal, BLM would consider a number of criteria “in order to help to determine whether to add or remove additional roads from the transportation management network in the future.” *Id.* at App. G-2. While one of these criteria is whether use of the road avoids impacts to Monument objects, the plan does not necessarily require that BLM close roads found to be impacting Monument objects. Instead, BLM would “consider” the impacts of roads on Monument objects in association with other criteria of the transportation plan, including whether the road served the Draft RMP’s recreation objectives. *Id.*

We believe BLM must close any road in the Monument that is impacting Monument objects because the Proclamation requires BLM to take any action “necessary to protect the objects identified in the Proclamation” through the Monument’s transportation plan. CANM Proclamation at 37,245. The dominant criteria for managing roads in the Monument should be whether the use of a road is impacting Monument objects.

Recommendation:

The National Trust strongly urges BLM to revise the transportation plan in a way that requires the closure of roads impacting Monument objects. Additionally, we encourage BLM to clarify that the primary objective of transportation management in the Monument is the protection of Monument objects and not the achievement of other management objectives, like recreation.

C. BLM must comply with Section 106 of the NHPA and Instruction Memorandum 2007-030 in preparing the transportation plan.

We remind BLM to ensure that it satisfies the requirements of Section 106 of the NHPA and the directives of Instruction Memorandum 2007-030, effective 12-15-06 (“Cultural Resource Considerations for Off-Highway Vehicle (OHV) Designation and Travel Management”) in preparing the transportation plan for the Monument. The Travel Management Network Methodology outlined in Appendix G does not clearly indicate that these requirements and directives will be satisfied. Section 106 of the NHPA requires BLM to take into account the

effect of its approval of an undertaking on historic properties. 16 U.S.C. § 470f. Because the designation of transportation routes constitutes an undertaking with the potential to adversely affect historic properties, BLM must comply with the requirements of Section 106 as part of the process for approving transportation routes and prior to finalizing such designations. Compliance with Section 106 will help evaluate and understand the impact of routes and roads on Monument objects that must be protected in accordance with the Proclamation.

Additionally, Instruction Memorandum No. 2007-030 provides agency-wide direction for complying with Section 106 of the NHPA when designating and managing ORVs through either designation of areas or trails as open, closed or limited to use by ORVs. The IM recognizes that:

Designation of areas and specific networks of roads and trails in limited use areas generally has the beneficial effect of controlling impacts of OHV use on public lands, including on historic properties. Designation provides a purposefully designed and clearly delineated travel network for OHV usage, reduces the potential for user caused route proliferation, and facilitates travel management and law enforcement. The 43 CFR Part 8340 authorizes the closure of areas, roads and trails to the types of travel that have caused or may cause adverse effects to historic properties. In addition, route designations prohibit indiscriminate cross country travel that causes or may cause adverse impacts to historic properties.

IM No. 2007-030. Further, it indicates that “[s]election of specific road and trail networks and imposition of other use limitations should avoid impacts on historic properties wherever possible,” requiring that “existing cultural information must be considered.” *Id.* The IM also directs BLM to conduct a Class III inventory of cultural resources prior to route designation in travel planning, even for designation of existing routes, when “there is a reasonable expectation that a proposed designation will shift, concentrate or expand travel into areas where historic properties are likely to be adversely affected.” *Id.* BLM should utilize this IM in conjunction with the requirements of Section 106 when preparing the transportation plan.

Recommendations:

We recommend that BLM explicitly integrates the requirement to comply with Section 106 of the NHPA and the directives of IM No. 2007-030. We believe inclusion of these requirements will help to ensure that protection of cultural resources is a central focus in the designation of both existing routes and future routes/roads.

IV. RECREATION

The National Trust endorses the proposed prohibition on recreational shooting and geocaching. These uses, like others in the Monument, must be consistent with the Monument Proclamation. See *Jennifer J. Walt Box D Ranch*, 172 I.B.L.A. at 313. While the Proclamation is silent on recreational shooting and geocaching, it does require BLM to manage “for the purpose of protecting” Monument objects. CANM Proclamation at 37,244. In the Draft RMP,

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BLM concluded that recreational shooting, in conjunction with other recreational uses like geocaching, “may create widespread, adverse impacts [on historic objects] over time.” Draft RMP at 276. BLM’s conclusion is a reasonable prohibition on these uses as a means of protecting Monument objects and is supported by the Proclamation.

In conclusion, the National Trust is very encouraged by the Draft RMP, as well as BLM’s clear commitment to the protection of the significant cultural resources recognized within the Monument Proclamation. Our comments focus on several aspects of the Draft RMP that could greatly improve the Final RMP. We hope that you will seriously consider these comments.

Again, we appreciate the opportunity to provide comments on the Draft RMP. Please do not hesitate to contact us if we can provide BLM with additional comments or support during the development of the Monument’s RMP.

Respectfully submitted,

A handwritten signature in blue ink that reads "Ti Hays". The signature is written in a cursive style with a large initial "T" and a long horizontal stroke extending to the right.

Ti Hays
Public Lands Counsel

cc: Sally Wisely, Colorado State Director, BLM
Georgianna Contiguglia, Colorado SHPO
Barb Pahl, Mountains/Plains Regional Director, NTHP