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INTRODUCTION

This *amici curiae* brief is filed in support of the State of New Mexico, which has challenged the decision by the Bureau of Land Management (“BLM”) on January 24, 2005, to amend the Resource Management Plan (“RMP”) for Sierra and Otero Counties in south-central New Mexico, to open up the vast majority of the planning area to mineral leasing. The State also challenged the first lease sold under the amended RMP – the 1,600-acre “Otero Mesa Lease.”

In addition to its ecological diversity and environmental sensitivity, Otero Mesa also has tremendous historic and cultural significance. Although only 6-10% of the area has been surveyed for cultural resources, BLM estimates the area includes more than 50,000 archaeological and historical sites (nearly 20 sites per square mile), including historic trails dating from 1539 traversing both westward and south into Mexico. Otero Mesa also has traditional cultural and religious significance to many Indian tribes in New Mexico, Texas, and Arizona, including the Ysleta del Sur Pueblo, Mescalero Apache, White Mountain Apache, San Carlos Apache, and Fort Sill Apache Tribes.¹ As a result of BLM’s actions, mineral development will harm historic properties throughout Otero Mesa, including traditional cultural properties (“TCPs”)² and historic trails.

The Governor of New Mexico and other state officials, including the New Mexico State Historic Preservation Officer (“SHPO”), contend that BLM failed to comply with Section 106 of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470f, the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1712(c),

¹ At least five other tribes claim a cultural affiliation to the planning area: the Hopi, Navajo Nation, Comanche, Isleta Pueblo, and Kiowa. AR 12567.

² The term TCP is used throughout this memorandum to encompass sites and properties of traditional religious and cultural significance, as defined in 16 U.S.C. § 470a(d)(6).

and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(2)(C), prior to approving the Otero RMP Amendment, and failed to comply with the NHPA and NEPA prior to issuing the Otero Mesa Lease. The National Trust for Historic Preservation (“National Trust”), Ysleta del Sur Pueblo, and the Association on American Indian Affairs (“AAIA”), (collectively *Amici*), are particularly concerned with BLM’s failure to comply with the NHPA.

The Administrative Record demonstrates BLM did not make a “reasonable and good faith effort” to consult with the New Mexico SHPO or Indian tribes culturally affiliated with Otero Mesa in identifying potentially significant historic and cultural resources potentially affected within the planning area. Similarly, BLM failed to account for the adverse effects of mineral development on historic trails, and failed to seek ways to avoid, mitigate, or minimize harm to the trails. As a result of BLM’s noncompliance with its statutory obligations, TCPs and historic trails will be threatened by oil and gas development.

BLM’s decision in this case could have far-reaching implications for historic and cultural resources on federal lands throughout the West. Currently, BLM is drafting or amending more than 100 RMPs in eleven western states. Many of the public lands governed by these RMPs have significant Native American resources, including TCPs, and thousands of miles of historic trails. In contrast to more discrete historic or archaeological sites, avoiding harm to these traditional cultural resources is difficult because of their size and the importance of the landscape as an element of their integrity and significance. As a result, the land use planning process is the appropriate stage to identify potentially affected cultural resources and ensure that resource protection

alternatives are not foreclosed by key planning decisions that are based on insufficient information. If BLM defers consultation with tribes and identification of cultural resources until after RMPs are amended and leases are issued, as it did in the Otero Mesa, TCPs and historic trails throughout the 261 million acres of public land managed by BLM would be at risk of degradation or destruction, in violation of the NHPA.

STATEMENT OF THE CASE

A. Factual Background.

On February 25, 1998, BLM made an internal decision to amend the 1986 Las Cruces RMP³ in response to the oil and gas industry's request because the RMP did not address planning decisions regarding which areas within the Las Cruces RMP should be "open," "closed," or "restricted" for mineral development. FEIS at S-1. The amendment process was intended to examine alternatives for managing mineral development, analyze new information, and examine the potential environmental impacts of mineral development. *Id.* at S-1 to S-5.

Scoping for the Otero RMP Amendment occurred from October to December 1998, but as early as March 1998 BLM began negotiating the details of the RMP amendment with oil and gas industry representatives through a New Mexico BLM/Industry Work Group. AR 1581-1583. BLM did not formally contact any Indian tribes until May 26, 1999. AR 4014-4023. Even then, BLM contacted only five Indian tribes – Ysleta del Sur Pueblo, Mescalero Apache, San Carlos Apache, White Mountain Apache, and Fort Sill Apache – excluding other tribes with possible interests in cultural

³ The Las Cruces RMP was originally the White Sands Resource Area RMP. See Amendment and Final Environmental Impact Statement for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties [hereinafter cited as "Otero RMPA" or "FEIS"].

resources within the planning area. Id. This contact, which consisted of a single form letter sent to each tribe, was the only documented attempt within a period of almost three years to contact Indian tribes directly to obtain information about TCPs. AR 4014-4023; 12537.

The San Carlos Apache Tribe responded immediately to BLM's form letter on June 3, 1999, stating "[t]his area is one of considerable traditional cultural significance to Apaches," requesting that BLM "make every effort not to develop natural areas," and emphasizing the need for BLM "to arrange for more detailed consultation" with the Mescalero Apache as well. AR 4209. On August 6, 1999, the Mescalero Apache requested maps of the RMP and EIS area to identify cultural resources and TCPs. AR 4386. The Mescalero Apache also expressed an interest in "consultation and commenting on BLM undertakings in the future." Id.

Despite receiving prompt feedback from at least two tribes that oil and gas development would harm significant cultural sites, BLM concluded early that "[n]o American Indian religious sites or [TCPs] had been identified" within the RMP area, AR 2979, 3338-3339, and, without conducting any additional studies, BLM refused to revise this unsupported conclusion throughout the entire planning process. See FEIS at 3-29; Otero ROD at 26-27. Indeed, there is no evidence BLM ever responded to either letter, or attempted to initiate consultation with the tribes to understand the potential for TCPs within the planning area.⁴ Instead, BLM released a Draft EIS in October 2000, which continued to assert blindly that no TCPs were known to exist in Otero Mesa. Draft RMPA/EIS at 3-37.

⁴ BLM erroneously asserted in the ROD that the Mescalero Apache "never responded to BLM telephone and written contacts." ROD at 27.

On June 26, 2002, BLM received copies of letters from the Ysleta del Sur to Senators Domenici and Bingaman and Representative Reyes expressing the tribes' concerns regarding potential degradation and desecration of sacred and religious sites caused by oil and gas development in the planning area. AR 12468-12471. On August 9, 2002, Ysleta del Sur's attorney, Robert J. Truhill, sent four volumes of the Ysleta del Sur Pueblo Archives, documenting that "the tribe does assert a cultural affiliation to the project area and requires consultation in the future with respect to this project." AR 12526-12527. In addition, Mr. Truhill enclosed a copy of the tribe's "Consultation Policy," which outlined what the Ysleta del Sur consider an appropriate consultation process. AR 12528-12530.⁵

BLM claims it conducted several face-to-face meetings with Ysleta's attorney, a hired ethnographer, and the tribe's War Chief, but there is no record of those meetings. ROD at 27. BLM hired a mediator to assess the potential for mediation. She concluded in September 2002 that the Mescalero Apache and Ysleta del Sur "do not feel they have been consulted adequately or even at all." AR 12560 (emphasis added). The consultant recommended BLM "strengthen the consultation on cultural issues on a government to government basis with affected Native American Tribes." *Id.* Nonetheless, without further consultation, BLM issued its Final EIS and Proposed RMP Amendment in December 2003.

⁵ In April 2003, BLM also received a report describing the Ysleta's cultural affiliation to Alamo Mountain and Otero Mesa from John A. Peterson, a long-time consulting archaeologist to the Ysleta. AR 14058-14069.

On March 5, 2004, Governor Richardson submitted a detailed review pursuant to FLPMA,⁶ describing inconsistencies between the Proposed RMPA and other federal and state plans, policies, and programs. AR 16733-16779. Governor Richardson concluded that BLM's assessment of impacts on Native American TCPs was inadequate and inconsistent with Section 106 of the NHPA, and with BLM's own internal policies, the Native American Consultation Manual and Handbook 8160 and H-8160-1. AR 16755. Governor Richardson also concluded BLM failed to make a "good faith effort" to consult with Indian tribes that have a cultural affiliation to the planning area, and BLM's plan to postpone the assessment of impacts to TCPs until after the lease sale was inconsistent with state and federal requirements. AR 16756. Governor Richardson also argued BLM failed to identify and accurately record segments of the Butterfield, Mormon Battalion, Santa Fe to El Paso Stage Route, and Jornada del Muerto trails. AR 16760. BLM rejected the majority of Governor Richardson's concerns, and in January 2005, issued the Otero ROD.

Six months later, on July 20, 2005, BLM conducted the first lease sale under the amended RMP, and the Otero Mesa Lease was sold to a lessee who had already acquired leases for 6,400 acres within the same area years earlier. AR 20168. Throughout the RMPA process, BLM recognized this area as sensitive and required No Surface Occupancy ("NSO") stipulations. AR 16766, 18536-18558, 18460. Nonetheless, BLM sold the lease without NSO stipulations and without review under either NEPA or Section 106.

⁶ See 43 U.S.C. § 1712(c)(9); 43 C.F.R. § 1610.3-2.

B. Statutory and Regulatory Framework of the National Historic Preservation Act.

The National Historic Preservation Act articulates the federal government's policy to "administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations." 16 U.S.C. § 470-1(3). To ensure that federal agencies consider the effects of their actions on cultural and historic resources, Congress enacted Section 106 of the NHPA as a procedural requirement that federal agencies must follow prior to approving any proposed action. See Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999) (Section 106 is a "stop, look, and listen" provision); United States v. 162.20 Acres of Land, More or Less, Situated in Clay County, Miss., 639 F.2d 299, 302 (5th Cir. 1981) ("While the [NHPA] may seem to be no more than a 'command to consider,' . . . the language is mandatory and the scope is broad.").

Section 106 prohibits federal agencies from approving or engaging in any federal undertaking unless and until the agency takes into account the potential effects of the undertaking on any historic properties listed in or eligible for the National Register of Historic Places ("National Register"), and provides the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment on the undertaking. 16 U.S.C. § 470f. As required by Congress, the ACHP promulgated regulations to establish mandatory procedural requirements for compliance with Section 106, which are binding on all federal agencies. Id. § 470s; see 36 C.F.R. Part 800 (as amended 2004). The Section 106 regulations require Federal agencies to: (1) "make a reasonable and good faith effort" to identify historic properties, 36 C.F.R. § 800.4(b)(1); (2) determine the eligibility of historic properties for the National Register, id. § 800.4(c); (3) assess any

effects the undertaking may have on historic properties, id. § 800.5; and (4) if the effects are adverse, develop and evaluate alternatives or modifications to the project to avoid, minimize, or mitigate those effects based on consultation with the SHPO, Indian tribes, the ACHP, and other consulting parties, id. § 800.6(a).

In 1992, Congress amended the NHPA, in part to strengthen Native American participation in decisionmaking for actions having the potential to affect historic properties of tribal significance. See Title XL, Pub. Law 102-575, 106 Stat. 4753 (Oct. 30, 1992). As a result, the NHPA formally recognizes TCPs as historic resources eligible for the National Register, and requires that Federal agencies “consult with any Indian tribe . . . that attaches religious and cultural significance” to such properties. 16 U.S.C. § 470a(d)(6)(A)-(B).

In this case, there is no dispute that BLM did not complete the Section 106 review process prior to approving the Otero RMPA and the Otero Mesa Lease. Instead, the disputed issue is when the requirements of Section 106 are triggered. BLM’s practice is to defer Section 106 compliance until such time as a lessee has submitted an Application for Permission to Drill (“APD”), 43 C.F.R. § 3162.3-1, (which has not yet occurred). See ROD at 26, 28. In addition, BLM occasionally uses lease stipulations to confirm the deferral of Section 106 review to the time when an APD is submitted. For the reasons described in more detail below, *Amici* believe that, as a matter of law, Section 106 compliance is required prior to approving the RMPA in this case, and at the very least, prior to approving any lease within the planning area.

ARGUMENT

I. BLM'S ACTIONS VIOLATED SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT.

A. BLM Must Comply With Section 106 Prior to Approving the Otero RMP Amendment.

The application of Section 106 to BLM's approval of an RMP or an RMPA presents this Court with an issue of first impression. *Amici* are aware of no published case that has addressed this issue. However, the relevant statutes and regulations strongly support a conclusion that approval of the RMPA required prior compliance with Section 106 to ensure that effects on historic properties are truly "taken into account." In addition, BLM's own internal policies and procedures confirm that TCPs, by their nature, cannot be avoided and mitigated adequately after-the-fact.

1. The NHPA Statute and Regulations Require Early Review.

BLM is required to complete the Section 106 review and consultation process "prior to" approving the expenditure of any federal funds on an "undertaking." 16 U.S.C. § 470f; 36 C.F.R. § 800.1(c). The application of Section 106 involves an initial two-step inquiry to determine whether the action is an undertaking, and if so, whether it has the potential to adversely affect historic properties. 36 C.F.R. §§ 800.3(a), 800.16(y); see Montana Wilderness Association v. Fry, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004). In this case, the answer is yes to both prongs of the inquiry.

"Undertaking" is defined broadly to include any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 16 U.S.C. § 470w(7). Undertakings may have adverse effects if they have the potential to "alter, directly or indirectly, any of the characteristics of a historic property that qualify

the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, . . . setting, . . . feeling, or association.” 36 C.F.R. § 800.5(a).

Under the Section 106 regulations, BLM must “ensure” that Section 106 review is initiated early in the planning process so that a broad range of alternatives can be considered. 36 C.F.R. § 800.1(c). The regulations do allow agencies to engage in “nondestructive project planning activities” before completing the Section 106 review. Id. However, if those planning activities “restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties,” as is the case here, then prior compliance with Section 106 is required. Id.; see also Yerger v. Robertson, 981 F.2d 460 (9th Cir. 1992).

The Otero RMPA cannot be construed as a “nondestructive project planning activity” because the programmatic decisions made within the Otero RMPA unlawfully restrict BLM’s ability to consider a sufficient range of alternatives associated with future mineral development. The Otero RMPA was adopted, pursuant to FLPMA for the specific purpose of determining where and under what conditions to allow mineral development, see 43 C.F.R. § 1601.0-5(k). FEIS at S-1. In particular, BLM’s management and planning decisions will “open” up 95 percent of the 2 million acre planning area to oil and gas leasing.⁷ The effect of this action is to foreclose BLM’s ability to consider alternatives that “close” larger landscapes to development in order to protect and preserve TCPs or historic trails. Therefore, the Otero RMPA is an undertaking with the potential to adversely affect historic resources.

⁷ Only 3 percent of the planning area will be closed to oil and gas development, and only 2 percent will be conditioned on NSO restrictions. ROD at 6.

2. Traditional Cultural Properties, By Their Nature, are Difficult to Avoid and Protect Once Planning Decisions are Made or Vested Rights are Conveyed for Oil and Gas Development.

When an undertaking has the potential to adversely affect TCPs, the risk is heightened when alternatives and mitigation measures are foreclosed in the absence of early Section 106 review. Unlike other historic properties, which are tangible, TCPs may involve large and amorphous boundaries, and their significant attributes can often be ascribed to “extensive views of natural landscape without modern intrusions.”⁸ As a result, it may be difficult or impossible to avoid, minimize or mitigate adverse effects during the APD approval process.

In Muckleshoot Indian Tribe, the Ninth Circuit invalidated the Forest Service’s commitment to study and document a 17.5-mile historic aboriginal trail, as mitigation for transferring one-quarter of the trail to Weyerhaeuser, who was planning to log the trail area. 177 F.3d at 808-09. The court held that the proposed mitigation was not sufficient for purposes of Section 106, because it did not consider “adequate restrictions or conditions” that would “ensure preservation of the property’s significant historic features.” *Id.*; see also Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995). The court also noted the important distinction between historic properties valued for their archaeological, historical, or architectural research, versus TCPs valued for their religious or cultural significance to Indian tribes. *See id.* at 808.

Additionally, BLM’s internal policies and guidance demonstrate that adverse effects to TCPs caused by mineral development are difficult to address during the leasing

⁸ Patricia Parker and Thomas F. King, National Register Bulletin No. 38 – Guidelines for Evaluating and Documenting Traditional Cultural Properties, at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/>.

and APD processes. The New Mexico State BLM has issued two Instruction Memoranda (“IM”) on tribal consultation.⁹ The 2004 New Mexico IM, effective during the Otero RMPA process, states:

[i]n most cases, TCPs and sacred sites from oil and gas developments cannot be mitigated in the same sense as archeological properties. Because no additional studies or physical protective measures can compensate for the loss of integrity and original setting conditions, effects to these types of properties are nearly always considered to be adverse.

at 2. The State Director recognized the need for additional guidance on tribal consultation for TCPs, stating:

[i]f consultation regarding TCPs and sacred sites is postponed until the APD stage, major resource conflicts could be identified late in the development process after lease rights are in place and alternative strategies for taking into consideration highly sensitive values attached to these properties are foreclosed.

Id. at 2 (emphasis added). Further, the 2004 IM requires that early in the RMP or amendment process the Field Office must:

consult with all Indian Tribes having religious, cultural, or historical connections . . . [to] identify sensitive TCPs or sacred sites whose management, preservation, or use would be incompatible with oil and gas or other land-use authorizations . . . [and] identify ‘red flag’ Federal mineral lands that should be closed to leasing.

Id. (emphasis added).

The 2005 New Mexico IM replaced the 2004 IM, changing some of the language, but not its purpose. Both IMs emphasize tribal consultation at the RMP stage to identify, evaluate, and protect TCPs and sacred sites, and the identification, evaluation, and protection or mitigation of archeological resources at the APD stage. 2005 New Mexico

⁹ See BLM N. Mex. State Director, Instruction Mem. No. NM-2004-035 (March 1, 2004) (“Consultations with Indian Tribes Regarding Traditional Cultural Properties and Sacred Sites in the Fluid Minerals Program”) [hereinafter “2004 New Mexico IM”], and BLM N. Mex. State Director Instruction Mem. No. NM-2005-037 (June 3, 2005) (“Strategies to Ensure Adequacy of Native American Consultation”) [hereinafter “2005 New Mexico IM”].

IM at 1-2. Both recognize that early RMP-level tribal consultation is “[t]he best time to foresee and forestall potential conflicts between BLM authorizations, such as oil and gas development and sacred sites and TCPs.” Id. at 2. The IMs confirm the sensitive nature and unique characteristics of TCPs, and support the conclusion that BLM must comply with Section 106 by accounting for TCPs during the Otero RMPA process.

BLM’s Washington Office also issued National Instruction Memorandum No. 2005-003, (Oct. 5, 2004), entitled “Cultural Resources and Tribal Consultation for Fluid Minerals Leasing,” [hereinafter “National IM”]. This National IM further supports the notion that addressing impacts to TCPs from oil and gas development is most appropriately done during the RMP process. See National IM at 2-4. The National IM states that:

[b]ecause of the scale and sensitivity of some properties of traditional cultural and religious importance to tribes and sacred sites under E.O. 13007, [the RMP process] is the appropriate stage at which to initiate consultation regarding concerns that may conflict with one or more of the other land uses under consideration.

Id. at 2.

In accordance with the Section 106 regulations, and as supported by BLM’s internal policies, the most appropriate time to identify, evaluate, and seek to avoid, minimize or mitigate adverse effects to TCPs is during the RMP process. As discussed in more detail below, BLM’s attempt to bypass its consultation obligation at the planning stage by adding a lease stipulation deferring Section 106 compliance cannot cure its failure to consider effects prior to approving the RMP Amendment. As one court noted, this obligation to comply with Section 106 is applicable “at any stage where the Federal agency has authority . . . to provide meaningful review of . . . historic preservation goals.”

Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 280 (3rd Cir. 1983)
(emphasis added).

Given the scale and nature of TCPs and their vulnerability to harm, BLM must comply with the requirements of Section 106 during the RMP amendment process. After the RMP is finalized and leases have been executed in reliance on this plan, and the economic interests of lessees have vested, it is simply too late to avoid destruction of these sensitive resources.

B. BLM Failed to Consult Adequately with Indian Tribes Regarding the Existence of TCPs.

1. The Record Does Not Support A Finding that BLM Made A “Reasonable and Good Faith Effort” to Consult With Native American Tribes to Identify TCPs.

The Otero RMPA process triggered compliance with the tribal consultation provision of Section 106 of the NHPA as a means of identifying and evaluating TCPs within the planning area. 16 U.S.C. §§ 470a(d)(6)(A), (B). The Section 106 regulations require Federal agencies to “make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.” 36 C.F.R. § 800.3(f)(2)(emphasis added). The agency must gather information “from any Indian tribe . . . identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and be eligible for the National Register.” Id. § 800.4(a)(4)(emphasis added).

The Tenth Circuit, in defining a “reasonable and good faith effort,” held that “a mere request for information is not necessarily sufficient to constitute the ‘reasonable effort’ section 106 requires.” Pueblo of Sandia, 50 F.3d at 860. A reasonable effort

“depends on the likelihood that such properties may be present.” Id. at 861 (citing supra note 11 National Register Bulletin No. 38, at 86). Certainly, when an agency has any information or reason to believe that an area may have religious and cultural value, then it has an affirmative obligation to consult with tribes and further investigate whether TCPs are present. See id. at 861-62; see also Muckleshoot Indian Tribe, 177 F.3d at 805-07.

In Pueblo of Sandia, the Forest Service sent form letters to tribes and individuals requesting comments on a proposal to create a new management strategy for Las Huertas Canyon, which is near the Sandia Pueblo reservation. 50 F.3d at 857-60. Despite contrary information,¹⁰ the Forest Service made a determination that no TCPs or religious resources were present, id. at 860, just as BLM did in this case. The court held that the Forest Service did not make a reasonable or good faith effort to consult with the tribes, and that the information warranted further discussions between the Forest Service and the tribes. Id. at 861-62.

As in Pueblo of Sandia, BLM’s efforts fall short of the “reasonable and good faith effort” to consult with the tribes that attach religious and cultural significance to historic properties in the planning area required by the Section 106 regulations. On May 26, 1999, 15 months after making an internal decision to amend the RMP, BLM sent form letters to five Indian tribes. AR 4014-4023. BLM’s letter conveys a false impression that future actions can fully consider adverse effects to TCPs, stating the:

[a]nalysis in the RMP amendment for all resources is quite generic due to the development occurring anywhere within Sierra or Otero County. . . . BLM will

¹⁰ E.g., the Forest Service overlooked or disregarded a letter from the Governor of the Sandia Pueblo stating that Las Huertas Canyon has religious and traditional significance, and an anthropologist’s detailed ethnographic overview of the Sandia Pueblo’s religious and cultural connection to the area. 50 F.3d at 860-61.

undertake site-specific environmental assessments within the context provided by the plan amendment and EIS now being prepared.

AR 4015. This form letter fails to disclose the fact that BLM's decision to "open" an area is made during the RMP. If the RMP has not identified TCPs, leases will be issued without consideration of the potential adverse effects to TCPs.

The San Carlos Apache and Mescalero Tribes' timely responses to BLM indicated that the planning area did have TCPs, and emphasized the need for further information – maps of the RMP and EIS area – and consultation. See AR 4209, 4386. Despite these tribal comments, there is no evidence that BLM responded to either letter, or attempted to initiate formal consultation to further explore the potential for TCPs within the planning area with these, or other tribes.

BLM was also informed of the planning area's significance to the Ysleta del Sur Pueblo. Not only did BLM receive the Pueblo's letters to Senators Domenici and Bingaman and Congressman Reyes, AR 12468-12471, the Pueblo's attorney sent BLM the Pueblo's four volume archives, AR 12528-12530. Also, BLM received a report detailing Ysleta's affiliation to Alamo Mountain and Otero Mesa and the cultural significance they hold for the tribe. AR 14058-14069.

In response, BLM claimed it conducted several face-to-face meetings with Ysleta representatives, but there is no record of those meetings. ROD at 27. BLM also asked a mediator to meet with Ysleta and Mescalero tribes. AR 012536. Although the consultant recommended against mediation, she concluded "[t]he tribes' concern is that, without additional information such drilling is likely to impact significant landscapes, plant gathering areas, springs, caves and possible rock shelter sites and cache." AR 12567. The consultant also explained these tribes felt they had not been "consulted adequately or

even at all,” and suggested BLM “strengthen the consultation” with affected tribes, in accordance with Section 106. AR 12560 (emphasis added).

Thus, the Record demonstrates that BLM did not consult in a “reasonable and good faith” manner with the tribes to identify, evaluate, or develop appropriate measures to avoid, minimize or mitigate potential adverse effects to TCPs. Despite direct, specific information indicating the existence of TCPs, AR 12567, as well as the tribes’ dissatisfaction of BLM’s cursory comments, BLM failed to take appropriate action to follow-up with the tribes. More importantly, throughout the Otero RMPA planning process, BLM flatly disregarded the evidence from the tribes, and the mediator, and repeatedly parroted the conclusion that “[n]o American Indian religious sites or traditional cultural places have been identified within the Planning Area” FEIS at 3-29. This conclusion is directly contradicted by the Record. See, e.g., AR 2979.

2. BLM Failed to Follow Its Own Internal Guidance on Tribal Consultation.

BLM’s current internal guidance on tribal consultation, which is consistent with guidance that has been in place for over a decade, further highlights BLM’s failure to adequately consult with tribes in the process of amending the Otero RMP. BLM Handbook H-8120-1 (rev. Dec. 2004), entitled “Guidelines for Conducting Tribal Consultation” [hereinafter “Handbook”], explains that:

[t]he best time to foresee and forestall potential conflicts between BLM-authorized land uses and tribally significant historic properties is during [RMP/EIS process]. Planning and environmental review procedures are good ways to elicit information from tribes concerning [TCPs] and other places with ‘traditional or historic importance’ pursuant to NHPA Sec. 101(d)(6).

Id. at II-3. The Handbook instructs BLM to “initiate appropriate consultation with potentially interested Native Americans, as soon as possible after the general outlines of

the land use plan or the proposed land use decision can be described.” Id. at V-5

(emphasis added). “Treating tribal information as a necessary factor in defining the range of acceptable public-land management options” is one important component of tribal consultation. Id. at I-2.

The Handbook instructs that “consultation usually demands more effort than routine public participation,” which “means [a] dialogue between a BLM manager and an American Indian . . . tribal government.” Id. at V-1. Initial contact must be made “by letter and telephone, explaining the reason for the contact; requesting direct participation and input in the decisionmaking process; and asking them to identify traditional cultural or religious leaders and practitioners who they think should also be contacted.” Id. at V-6. In addition, the Handbook notes a manager should conduct a follow-up “personal telephone call to tribal officials as part of government-to-government consultation,” if he or she does not receive a timely response to a letter. Id. at V-1.

Contrary to its own directives, BLM failed to initiate early consultation with tribes. Instead, BLM contacted the tribes only after making initial planning decisions – indeed, five months after completing the scoping process, and fifteen months after deciding to amend the RMP. BLM then compounded its error by communicating through form letters, which downplayed the significance of the potential harm. Even when two tribes promptly responded with information and serious concern about harm to TCPs, and when BLM’s own consultant warned that consultation was inadequate, BLM continued to disregard that information and, incredibly, to deny the existence of TCPs.

The inadequacy of BLM’s tribal consultation is perhaps best illustrated by the counter example of BLM’s early, continuous, and solicitous consideration of the

concerns of the oil and gas industry through the New Mexico/Industry Working Group. In contrast to tribal governments, who did not even get their first form letter until fifteen months after meetings with Industry began, Industry groups were given unprecedented opportunities to provide input into the development of alternatives and to comment on internal working drafts of documents. See, e.g., AR 1564; 3946; 3949-3950; 4221-4225. Such a comparison represents a profound disrespect – and unlawful disregard – for the cultural heritage and religious practices of sovereign tribal governments. Despite the clear guidance in the Handbook, the Section 106 regulations, and the State and National IMs, BLM failed to initiate early consultation and truly engage tribes in the planning process.

II. BLM’S APPROVAL OF THE OTERO MESA LEASE VIOLATES SECTION 106.

While the application of Section 106 to an RMP amendment may be an issue of first impression, the requirement to comply with Section 106 prior to issuing a lease for oil and gas drilling is not. Courts and other tribunals that considered this issue concluded that the sale of a lease parcel is an “undertaking” triggering compliance with Section 106 of the NHPA. See Montana Wilderness Association, 310 F. Supp. 2d at 1152; see also National IM; 2005 New Mexico IM.

Here, the Otero Mesa Lease, parcel 200507001, was sold without complying with the procedural requirements of Section 106. BLM admits it did not seek to consult with any Indian tribes, the New Mexico SHPO, or other interested parties prior to issuing the lease. AR 15547-15549. Instead, BLM argued its consultation in the RMPA was adequate, and its “special cultural lease stipulation,” ROD at 27, appropriately defers its

Section 106 requirements until the APD stage. Id. However, BLM’s reliance on the RMPA and stipulation is flawed.

A. BLM’s Failure to Comply With Section 106 Prior to Executing Leases for Mineral Development Violate Section 106.

1. The Section 106 Regulations Do Not Permit Agencies to Completely Defer the Section 106 Reviews Associated With An Undertaking.

The Section 106 regulations do not permit agencies to completely defer their Section 106 obligations with respect to an undertaking. While the Section 106 regulations do allow Federal agencies to defer some aspects of the Section 106 process,¹¹ under no circumstances is an agency permitted to completely defer the entire Section 106 process until the undertaking is completed. To the contrary, this deferral is contrary to the unambiguous directive of the Section 106 regulations requiring agencies to “complete the section 106 process ‘prior to . . . the issuance of any license. . . .’” 36 C.F.R. § 800.1(c). The only agency actions permitted prior to the completion of the Section 106 process are those that do not “restrict subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties.” Id.

Although some Courts have allowed agencies to “conditionally” issue a license prior to compliance with Section 106, that procedure is allowed only where post-licensing compliance is adequate to protect historic properties. See City of Grapevine v. Department of Transportation, 17 F.3d 1502 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 1043 (1994) (FAA did not violate Section 106 when it conditionally approved plans to

¹¹ Under 36 C.F.R. §§ 800.4(b)(2), 800.5(a)(3), a federal agency may use a “phased process to conduct identification and evaluation” when the agency is examining alternatives consisting of corridors or large land areas, or where access to properties is restricted, but again, only “[w]here alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted.” See also Southern Utah Wilderness Alliance v. Norton, 277 F. Supp. 2d 1169, 1194-95 (D. Utah 2003).

build new airport runway and other facilities subject to post-approval compliance with Section 106, so long as compliance occurred prior to construction of challenged runway.); see also Illinois Commerce Commission v. ICC, 848 F.2d 124, 1261 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

However, as argued above, the management decisions made within the Otero RMPA foreclose BLM's ability to look at a broad range of alternatives such as "closing" broad landscapes from leasing. Even at the leasing stage, the ability of the Section 106 process to protect TCPs will be significantly constrained by the failure to comply prior to approving the RMP. At that point, the decision has already been made to "open" 95 percent of 1.8 million acres for leasing and development, 26 percent with controlled surface use. The difficulty, if not impossibility, of protecting large landscapes from destruction becomes even more acute after individual leases are issued, and the lessees submit APDs in reliance on the vested economic interests represented by these leases.

Even if the issuance of individual leases and the subsequent approval of APDs by lessees could be viewed simply as a subsequent stage of a single undertaking, the Section 106 regulations still do not permit the BLM's wholesale deferral of Section 106 to the APD stage. Rather, the Section 106 regulations provide that, even where a "phased" process for identifying potential historic properties is used, only the "final identification and evaluation of historic properties" can be deferred. 36 C.F.R. § 800.4(b)(2). The agency is still required to:

establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties.

Id. (emphasis added). Further, the agency must still demonstrate that ultimately it has undertaken a “reasonable and good faith effort” to identify and evaluate historic resources. SUWA, 164 IBLA 1, 27-28 (Nov. 10, 2004) (concluding that without evidence on record to support a “no potential to effect” determination associated with the lease at issue, BLM could not argue it was following a “phased identification and evaluation”); see also The Mandan, Hidatsa and Arikara Nation, 164 IBLA 343, 357-58 (Feb. 9, 2005) (concluding BLM’s use of a “phased” process was appropriate because the record supported that during the land use process and prior to issuing the lease BLM had made a reasonable effort to identify and evaluate cultural resources through tribal consultation).

In any event, BLM cannot argue that it is following a “phased” Section 106 process because its effort to identify the “likely presence of historic properties . . . through consultation” was wholly inadequate. A “phased” process for mineral development requires BLM to take into consideration information about the presence of historic resources at each stage. This requirement ensures decisions made at each stage are substantiated. Here, the Record demonstrates that BLM did not adequately consult with at least Ysleta and Mescalero Apache during the RMP Amendment process to identify the “likely presence” of TCPs, nor did BLM make any effort to consult with the tribes prior to approving the Otero Mesa Lease. As a result, the BLM’s failure to comply with Section 106 prior to the approval of the Lease violates Section 106.

2. BLM's Stipulations Cannot Cure BLM's Failure to Consult with Ysleta del Sur Pueblo and other Tribes.

Further, BLM's violation of Section 106, specifically its failure to consult with Indian tribes to identify TCPs, cannot be justified by attaching the "special cultural lease stipulation" for two reasons. First, BLM cannot simply attach stipulations to a lease without evaluating possible adverse effects to TCPs. In Montana Wilderness Association, the court stated "[t]he process of identifying properties and consulting with affected tribes as well as members of the public is the goal sought by the [NHPA]. Lease stipulations do not accomplish the same goal, and cannot replace the BLM's duties under NHPA." 320 F. Supp. 2d at 1152. As explained above, BLM did not make a "reasonable and good faith effort" to consult with Indian tribes. Instead, BLM constructed the stipulations in the ROD as an attempt to gloss over its inadequate tribal consultation, an approach rejected in Montana Wilderness Association.

Second, BLM's instructions for applying the stipulation violate Section 106's mandatory consultation process. In particular, the Otero ROD states that, in carrying out its obligation to identify historic properties potentially affected by a specific drilling proposal, BLM will solicit information from tribes. ROD at 28. However, BLM's commitment is substantially qualified, i.e., "formal consultation will only occur if BLM has reason to believe, as a result of information from tribes or cultural surveys, that [TCPs] may be affected by the proposed undertaking." Id. (emphasis added). As stated in previous sections, BLM has an affirmative obligation to consult with Indian tribes. BLM cannot, as it attempts to do here, alter its legal responsibility to enter into tribal consultation. See Attakai, et al. v. U.S., 746 F. Supp. 1395, 1406-07 (D. Arizona 1990) (finding that alternative SHPO consultation procedures followed by the BIA Phoenix

Office were contrary to the Section 106 regulations). Deferring Section 106 by attaching the lease stipulation violates BLM's obligation to consult with Indian tribes, and thus invalidates the Otero Mesa Lease.

B. BLM Failed to Take Into Account Adverse Effects on Historic Trails in the Otero RMPA Planning Area Prior to Approving the Otero Mesa Lease.

The Otero RMPA planning area has many landscape-level historic resources, including Mormon Battalion, Butterfield, and Jornada del Muerto historic trails, that must be examined during the RMP process. Like tribal TCPs, historic trails require greater attention during the RMP process because their historic integrity is connected to the landscape and viewshed. BLM attached an arbitrary ¼ mile NSO buffer for the historic trails, the same ¼ mile buffer used in the 1986 Las Cruces RMP, though the 1986 RMP did not adequately address impacts associated with mineral development. AR 311; FEIS at 4-45. However, mineral development, even beyond the ¼ mile buffer, may adversely affect the integrity of historic trails by adding visual intrusions into the landscape setting. Despite this, BLM made no effort to appropriately identify and evaluate the setting or viewshed of historic trails prior to approving the Otero Mesa Lease. See FEIS at 3-26 through 3-29; 4-43 through 4-46. This blind adoption of the old ¼ mile buffer, without any evidence supporting its legitimacy, underscores BLM's failure to adequately identify and evaluate the possible adverse effects associated with leasing in the planning area.

CONCLUSION

For the reasons stated above, the National Trust, Ysleta del Sur Pueblo, and AAIA request that this Court enter judgment in favor of the State of New Mexico on its NHPA

claims in this case, set aside the ROD and FEIS for the Otero RMP Amendment, and enjoin all actions by BLM in furtherance of the RMPA.

Respectfully submitted this 24th day of October, 2005.

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