



ALL PUEBLO COUNCIL OF GOVERNORS

Officers:
E. Paul Torres, Chairman
Governor J. Michael Chavarria, Vice Chair
Governor Val Panteah, Sr., Secretary

May 1, 2019

BLM, NMSO
SANTA FE
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PAID

RECEIPT # _____

VIA Hand Delivery

Acoma State Director
Cochiti Bureau of Land Management
Isleta New Mexico State Office
Jemez 301 Dinosaur Trail
Laguna Santa Fe, NM 87508
Nambe

Re: **APCG protest of June 20, 2019 Oil and Gas Lease Sale (DOI-BLM-NM-0000-2019-0003-OTHER_NEPA).**

Dear State Director:

Ohkay Owingeh

Picuris

Pojoaque

Sandia

San Felipe

San Ildefonso

Santa Ana

Santa Clara

Santo Domingo

Taos

Tesuque

Ysleta Del Sur

Zia

Zuni

The All Pueblo Council of Governors (hereinafter "APCG") has directed me to file this protest to the Bureau of Land Management's (hereinafter "BLM") June 20, 2019 Notice of Competitive Oil and Gas Internet-Based Lease Sale (hereinafter "June 2019 Lease Sale") (see authorization included as Attachment 1) for the following 2 parcels nominated by the BLM - Farmington Field Office (collectively and hereinafter referred to as "BLM - FFO Parcels"):

1. NM-201906-025
2. NM-201906-047

APCG also protests the following thirty-eight (38) parcels nominated by the BLM - Rio Puerco Field Office (collectively and hereinafter referred to as "BLM - RPFO Parcels"):

- | | | |
|--------------------|--------------------|--------------------|
| 1. NM-201906-012 | 18. NM -201906-030 | 35. NM -201906-048 |
| 2. NM-201906-013 | 19. NM -201906-031 | 36. NM-201906-049 |
| 3. NM-201906-014 | 20. NM -201906-032 | 37. NM-201906-050 |
| 4. NM-201906-015 | 21. NM -201906-033 | 38. NM-2019-06-051 |
| 5. NM-201906-016 | 22. NM -201906-034 | |
| 6. NM-201906-017 | 23. NM -201906-035 | |
| 7. NM-201906-018 | 24. NM -201906-036 | |
| 8. NM-201906-019 | 25. NM -201906-037 | |
| 9. NM -201906-020 | 26. NM -201906-038 | |
| 10. NM -201906-021 | 27. NM -201906-039 | |
| 11. NM -201906-022 | 28. NM -201906-040 | |
| 12. NM -201906-023 | 29. NM -201906-041 | |
| 13. NM -201906-024 | 30. NM -201906-042 | |
| 14. NM -201906-026 | 31. NM -201906-043 | |
| 15. NM -201906-027 | 32. NM -201906-044 | |
| 16. NM -201906-028 | 33. NM -201906-045 | |
| 17. NM -201906-029 | 34. NM -201906-046 | |



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APCG protests the BLM - FFO Parcels and the BLM - RPFO Parcels individually, or when combined, and they should be denied from being offered in the June 20, 2019 Competitive Oil and Gas Lease Sale for one or more of the following reasons.

Acoma

Cochiti

Isleta

(I) Interest Of Protesting Party (Applies to BLM-FFO Parcels & BLM-RPFO Parcels).

Jemez

(II) Inadequate Notice And Tribal Consultation (Applies to BLM-FFO Parcels & BLM-RPFO Parcels).

Laguna

Nambe

(III) BLM's Undertaking Is In Violation Of The National Historic Preservation Act For Failure To Identify And Analyze The Member Pueblos Of APCG's Historic Properties And Traditional Cultural Properties Potentially Located Within The Areas Of Potential Effect For The BLM - FFO Parcels And The BLM - RPFO Parcels (Applies to BLM-FFO Parcels & BLM-RPFO Parcels).

Ohkay Owingeh

Picuris

Pojoaque

(IV) BLM's Issuance Of FONSI's For The Proposed June 2019 Lease Sale, Even With Standard Lease Stipulations, Violates The National Environmental Policy Act (Applies to BLM-FFO Parcels & BLM-RPFO Parcels).

Sandia

San Felipe

San Ildefonso

(V) BLM Should Not Permit The Sale And Issuance Of Leases For The BLM-FFO Parcels, While The BLM Is Undergoing Amendment To The Farmington Resource Management Plan (Applies to BLM-FFO Parcels).

Santa Ana

Santa Clara

(VI) The Sale And Issuance Of Oil And Gas Leases For The BLM - FFO Parcels And The BLM - RPFO Parcels, As Described In The Notice Is A Violation Of The Federal Land Policy And Management Act (Applies to BLM-FFO Parcels & BLM-RPFO Parcels).

Santo Domingo

Taos

Tesuque

(VII) Inadequate Protest Period & Procedures (Applies to BLM-FFO Parcels).

Ysleta Del Sur

These reasons for the APCG's protest are discussed more fully below:

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I. Interest Of Protesting Party (Applies to BLM - FFO Parcels & BLM - RPFO Parcels)

The APCG is comprised of 20 federally recognized Indian tribes. Our members include the Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, San Felipe, San Ildefonso, Sandia, Santa Ana, Santa Clara, Santo



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Santa Clara

Santo Domingo

Taos

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Ysleta Del Sur

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Domingo, Taos, Tesuque, Zia, Zuni, and one Pueblo in Texas, Ysleta Del Sur, each having the sovereign authority to govern their own affairs. The members of APCG have significant historical and cultural ties to the Chaco Canyon National Historic Park and the surrounding regions described, in part, in the BLM Farmington Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment DOI-BLM-NM-F010-2019-0032, and the BLM Rio Puerco Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment, DOI-BLM-NM-A010-2019-0010-EA.

Each Pueblo maintains a strong cultural affinity to Chaco Canyon National Historic Park and associated sites, as the primary ancestral homelands of the Pueblos.¹ The APCG further "recognize that the greater landscape of the Chaco Canyon region is not a resource to be managed parcel by parcel, but a complete, living landscape that since time immemorial has sustained Pueblo people."² In addition, the APCG asserts that "preserving the traditional cultural properties and sacred sites that exist in the Chaco Canyon and in the Greater Chaco Region, including, but not limited to, the Great North Road, the West Road, and Pierre's Site, along with protection of the night skies, soundscapes, view shed and sight-lines within and surrounding Chaco Canyon is essential to the cultural and traditions of APCG members[.]"³ Undoubtedly, there exist Pueblo historic properties and traditional cultural properties, respective of each individual Pueblo, in the BLM Farmington Field Office and the BLM Rio Puerco Field Office's jurisdictional boundaries. More importantly, these areas may exist within the area of potential effects for the proposed parcels.

Under the National Historic Preservation Act, these sites may be eligible under federal criteria for listing as historic properties on the National Register of Historic places.⁴ Therefore, the sale of leases for the BLM - FFO Parcels and the BLM - RPFO Parcels may have adverse effects on APCG member's historic properties or traditional cultural properties eligible for the National Register of Historic Places that have not yet been identified or adequately analyzed. Furthermore, the cumulative effect oil and gas development on Pueblo's cultural resources and historic properties will increase significantly with this June 2019 Lease Sale. This increase is a result of existing and anticipated development that overwhelms the Greater Chaco Region, primarily through the BLM - Farmington Field Office. This effect has increased dramatically by future development as a result of ongoing oil and gas lease sales on neighboring parcels by the BLM - Rio Puerco Field Office, including the December 2018 Lease Sale and the March 2019 Lease Sale. Together, continued oil and gas development proposed by the two Field

¹ All Pueblo Council of Governors, Resolution No. APCG 2016-17 (on file with APCG).

² All Pueblo Council of Governors, Resolution No. APCG 2017-11 (on file with APCG).

³ All Pueblo Council of Governors, Resolution No. APCG 2017-12 (on file with APCG).

⁴ 36 C.F.R. § 60.4; See also 54 USC § 302706(a) (stating: "Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register").



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Offices has significant impacts on APCG members' cultural resources that lie within close proximity to the Chaco Culture NHP as well as throughout the Greater Chaco Region.

Acoma

Cochiti

Isleta

Jemez

Laguna

Nambe

Ohkay Owingeh

Picuris

Pojoaque

Sandia

San Felipe

San Ildefonso

Santa Ana

Santa Clara

Santo Domingo

Taos

Tesuque

Ysleta Del Sur

Zia

Zuni

Despite this cumulative impact, the BLM has yet to complete a comprehensive cultural landscape analysis of the Greater Chaco Region to address the concerns raised by APCG and individual Pueblos in this undertaking and previous actions. Therefore, significant risks exist for APCG members' cultural resources in this June 2019 Lease Sale. As a result, the APCG has significant interests under federal law for the purposes of this protest.

II. Inadequate Notice And Tribal Consultation (Applies to BLM-FFO Parcels and BLM RPFO-Parcels).

Both the BLM - Farmington Field Office and the BLM - Rio Puerco Field Office have failed to provide adequate and meaningful tribal consultation in this undertaking. The federal duty of consultation is one of the paramount duties the federal government has towards tribes that is enshrined in statute, case law, federal regulations, and executive order.⁵ There is no doubt that the June 2019 Lease Sale requires tribal consultation, coming under a number of federal authorities, but primarily through the processes mandated in the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA"), discussed *infra*. From the outset, the BLM - Farmington Field Office and the BLM - Rio Puerco Field Office have failed in their duties to provide adequate and meaningful tribal consultation.

According to BLM's own manual on tribal consultation, that guides the agency in assessing the sufficiency of tribal consultation by comparison to a number of federal district cases, appellate court cases, and Interior Board of Land Appeals decisions:

In cases where agency efforts [related to compliance with tribal consultation under the NHPA] were judged to be sufficient, consultation, and decisionmaking [sic] benefitted from –

- A pattern of numerous and repeated efforts to engage in consultation through various means of communication even when the tribe did not respond;
- A pattern of regularly scheduled consultation meetings with tribes;

⁵ See Sherry Hutt & Jaime Lavellee, Tribal Consultation: Best Practices in Historic Preservation 7 (2005) (available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf). For an exhaustive list of statutory, regulatory, and executive orders requiring tribal consultation, see: Department of the Interior, Bureau of Land Management Manual 1780 "Subject: BLM Manual 1780 Tribal Relations (P)" available at <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>



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- Early engagement to allow maximum contribution from tribes, when the agency has the maximum flexibility and before any alternatives have been finalized;

- Communications through a variety of mediums, including face-to-face meetings, telephone conference calls, notices, shared documents, field trips, and site visits;

- Direct involvement of BLM line officers and elected tribal officials in consultation;

- An engagement with tribes that allows for a reasonable opportunity to identify their concerns, provide input on the projects effects, and participate in resolving any adverse effects;

- The opportunity for tribes to conduct on-site inspection of projects and potentially affected resources;

- Documentation that the agency obtained and considered tribal input and that final decisions took that input into account; and

- Continuation of dialogue after initial authorizations and the involvement of tribes in monitoring, mitigation, and reclamation activities.⁶

BLM's guidance correctly concludes that the sufficiency of consultation cannot be judged by the "sheer number and volume of letters, meetings, or reports provided to tribes[.]"⁷

To the extent the BLM adhered to these guiding practices to fulfill meaningful and adequate tribal consultation in this undertaking is questionable at most. No conclusion can be made by the BLM - Farmington Field Office and the BLM - Rio Puerco Field Office that adequate tribal consultation occurred in order to fully analyze the issues discussed in their respective draft environmental assessments. Instead, the BLM field offices rely on minimal correspondence requesting broad concurrence, based on minimal information as the means to satisfy tribal consultation.

For example, the BLM Farmington Field Office in its letter states "[t]he FFO would like to request concurrence on the level of identification and to initiate consultation under Section 106 following 36 CFR 800."⁸ Attached to this letter are maps drawn at scales of 1:24,000 to 1:216,969. The BLM - Farmington Field Office states within its Environmental Assessment that "[a] letter and map describing the proposed leasing and inviting consultation with the BLM FFO was sent via certified mail to each of the various

⁶ Department of the Interior, Bureau of Land Management Manual 1780 "Subject: BLM Manual 1780 Tribal Relations (P)", at A2-1 through A2-2, *available at* <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>

⁷ *Id.*

⁸ See e.g., Attachment 2, Letter from Mark Matthews, BLM - Farmington Field Office, to Governor Brian Vallo, Pueblo of Acoma (Jan. 24, 2019) (On file with BLM and the Pueblo of Acoma) (Attached);



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Pueblos and tribes listed in Table 4.1 on January 25, 2019 *with a request for response within 30 days of receipt.*⁹ Aside from the incorrect date, the Environmental Assessment incorrectly states that a 30-day deadline of request was written into the letter. Consultation responses were received from the Hopi Tribe and the Pueblo of San Felipe, but the Environmental Assessment does not conclusively state whether these meetings occurred. APCG is aware that the Pueblo of Acoma held a consultation meeting on March 18, 2019 with the BLM Farmington Field Office as part of a joint meeting on the March 2019 Lease Sale. There, requests for sample site visitations by Acoma were requested to confirm the presence of Acoma cultural resources affected by the BLM FFO Parcels, but no demonstrable follow-up to this request occurred.

The BLM Farmington Field Office should not treat silence as an implication that the APCG and its members do not have concerns about the June 2019 Lease Sale. This is certainly the case with the timely filing of scoping comments, previous comments and protests in prior actions, and the APCG's public stance on this issue that is well known to the BLM. The BLM-Farmington Field Office cannot in good faith conclude that tribal consultation was meaningful and adequate, when it provides de minimis information, de minimis communication efforts, falsely claims a response deadline, and does not postpone its protest period to allow for adequate tribal consultation to occur.

The BLM-Rio Puerco Field Office issued a letter on December 17, 2018 with attached maps drawn at scales of 1:150,000 and 1:166,000, respectively, making general requests for information or concerns about specific areas, or reference to available information about traditional cultural concerns in the proposed lease sale area.¹⁰ The BLM - Rio Puerco Field Office states within its Environmental Assessment: "[c]onsultation with the appropriate tribes... was initiated on December 17, 2018."¹¹ Despite the APCG previously raising concerns, the BLM - Rio Puerco Field Office's record demonstrates that no notice or consultation was sent to the Pueblos of Picuris, Pojoaque, Nambe, Santa Ana, Taos, and Ysleta Del Sur. Further, while the BLM Rio Puerco Field Office claims it only received requests for consultation from the Pueblo of Tesuque. During the time since the initial letter, individual APCG members, like the Pueblo of Acoma, raised concerns that tribal consultation could not occur.¹² In fact, APCG member, the Pueblo of Acoma, requested tribal consultation at its earliest opportunity after the lapse in federal appropriations ended, and prior to the issuance of the draft

⁹ BLM Farmington Field Office Oil and Gas Lease Sale, March 2019, Environmental Assessment DOI-BLM-NM-F010-2019-0001, at 53 (Section 4.2) (emphasis added).

¹⁰ See e.g., Attachment 3, Letter from Angel Martinez, BLM - Rio Puerco Field Office, to Governor Kurt Riley, Pueblo of Acoma (Dec. 17, 2018) (On file with BLM and Pueblo of Acoma) (Attached);

¹¹ BLM Rio Puerco Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment DOI-BLM-NM-A010-2019-0010-EA, at 59 (Section 4.2).

¹² See Attachment 4, Letter from Governor Brian D. Vallo, Pueblo of Acoma, to Tim Spisak, BLM NM State Office (Jan. 10, 2019) (Letter raised concerns about the BLM not allowing for tribal consultation on APDs, and the March and June 2019 lease sales, during the government shutdown, citing email from BLM-Farmington District office Tribal Program Coordinator).



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environmental assessment.¹³ The BLM Rio Puerco Field Office should not treat silence as an implication that the APCG and its members do not have concerns about the June 2019 Lease Sale, especially when the Field Office was closed due to the lapse in federal appropriations.

Together, the BLM Farmington and Rio Puerco Field Offices' requests for such detailed and complex information by the Pueblos based off of overly broad and minimal information is insufficient under the BLM's own manual to be considered sufficient tribal consultation.¹⁴ De minimis communication and one-time meetings cannot be considered good faith efforts to conduct meaningful and adequate consultation. The BLM subsequently, cannot consider that it has meaningfully met its duties of tribal consultation in fulfillment of its NEPA and NHPA requirements

III. BLM's Undertaking Is In Violation Of The National Historic Preservation Act For Failure To Identify And Analyze Pueblos' Respective Historic Properties And Traditional Cultural Properties Potentially Located Within The Undertaking's Areas Of Potential Effect. (Applies to BLM-FFO Parcels and BLM-RPFO Parcels)

The BLM's sale and issuance of oil and gas leases for the BLM-FFO Parcels and the BLM - RPFO Parcels, listed *supra*, is an undertaking as defined by 54 U.S.C. Section 300320 and 36 CFR Section 800.16(y). This finding has been recognized by federal courts.¹⁵ Upon becoming an undertaking, BLM must then fulfill its duties under Section 106 of the NHPA. In short, subsequent Section 106 steps after determining an action constitutes an undertaking, include: 1) defining the area of potential effects ("APE"); 2) a reasonable and good faith effort to identify historic properties and cultural properties within the APE; and 3) assessing whether the undertaking may cause adverse effects to identified properties.¹⁶

A. BLM Must Complete The Section 106 Process Prior To Committing Itself To A Course Of Action.

¹³ See Attachment 5, Letter from Governor Brian D. Vallo, Pueblo of Acoma, to Tim Spisak, BLM NM State Office (Jan. 30, 2019) (Letter cc'd to BLM Farmington District and Field Office and the BLM Rio Puerco Field Office requesting for full accounting of BLM oil and gas activity during the 35 day lapse in federal appropriations and requesting immediate consultation on the June 2019 Lease Sale) (Attached).

¹⁴ Compare with *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (where the BLM was required to engage in further investigations after tribes provided broad responses to the BLM's request for information describing the location of sacred sites and cultural activities by letter with maps drawn at a scale of 1:24,000).

¹⁵ See *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, at 1152 (D. MT. 2004) (stating "[t]he sale of oil and gas leases is a 'project activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,' and may also be construed as a[sic] activity 'requiring a Federal permit, license or approval.' "); See also, *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006) (concluding that the issuance of lease extensions is an "undertaking" requiring National Historic Preservation Act analysis).

¹⁶ 54 U.S.C. § 306108; 36 C.F.R. 800. et seq..



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Critically, BLM must initiate the Section 106 process “early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” 36 C.F.R. § 800.1(c). “This directive makes it pellucid that agencies are not expected to delay NHPA review until all details of the proposal are set in cement.” *Safeguarding the Historic Hanscom Area’s Irreplaceable Res., Inc. v. Federal Aviation Admin.*, 651 F.3d 202, 215 (1st Cir. 2011). The Section 106 regulations also direct BLM to “consider [its] section 106 responsibilities as early as possible in the NEPA process, and plan [its] public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” 36 C.F.R. § 800.8(a)(1). This “early coordination” requirement is designed to ensure that BLM fully engages consulting parties in the decision-making process, “when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.” *Id.* § 800.8(a)(2). BLM must complete the Section 106 process “prior to” committing itself to a course of action that might affect historic properties. 54 U.S.C. § 306108.

The issuance of an oil or gas lease, is not a “lease” in the traditional sense, rather the granting of a fee simple determinable estate in the minerals in and under the lands covered by the lease. This private property interest is subject to the stipulations that are attached to the lease, as set forth in the Notice of Sale. As the Advisory Council on Historic Properties states: “[t]he purpose of the lease is to give the lessee the right to use the leased land to explore for, drill for, extract, remove, and dispose of oil and gas deposits.”¹⁷ Issuing leases therefore limits BLM’s ability to prohibit oil and gas development, as well as other on the ground activities or indirect impacts (such as increased traffic to areas, increasing the likelihood of indirect effects such as looting or vandalism to historic properties). A leasing decision ultimately, “can narrow the ‘broad alternatives’ available to avoid, minimize or mitigate any adverse effects that may results from activities carried out under the lease.”¹⁸

An irretrievable commitment of resources can occur when a lease is sold without adequate stipulations to retrieve the commitment of resources.¹⁹ Here, between the BLM-FFO Parcels and the BLM-RPFO Parcels, neither has directly attached No Surface Occupancy stipulations on the nominated parcels. Despite additional stipulations meant to protect cultural resources through general means of agency review and possible disapproval of certain activities (applied to the BLM- FFO Parcels and the BLM-RPFO through their respective applicable stipulations: F-40-CSU; NM-11LN; RP-6; and WO-NHPA), the BLM-Farmington and Rio Puerco Field Offices admits the existence of

¹⁷ See Letter from Reid Nelson, Advisory Council on Historic Preservation, to Kent Hoffman, BLM-Utah State Office (Apr. 26, 2019) (Attachment 6) at 2.

¹⁸ *Id.*

¹⁹ See e.g. *Conner v. Burford*, 848 F.2d 1441, 1449 (9th Cir. 1988) (Where the distinction between No Surface Occupancy and non-No Surface Occupancy stipulations is critical, in light of other stipulations that only provided a modicum of protection).



ALL PUEBLO COUNCIL OF GOVERNORS

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processes to circumvent these stipulations that would prevent all surface-disturbing activity.

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For example, cited previously, but not cited in the June 2019 Environmental Assessment, the BLM - Farmington Field Office in its March 2019 Lease Sale Environmental Assessment states that although most impacts *may* be mitigated in the Section 106 process, there exists "an infrequently-used process by which an agency may complete the Section 106 process without mitigating adverse effects, following non-concurrence with consulting parties and the Advisory Council on Historic Preservation [.]"²⁰ The BLM - Farmington Field Office has not indicated that this referenced process has been rescinded, so APCG assumes this Section 106 workaround is still available to the agency in this June 2019 Lease Sale.

Another example, the BLM - Rio Puerco Field Office in its draft Environmental Assessment states despite its stipulation RP-6, "[u]se or occupancy will be authorized only when the lessee/operator demonstrates that the area is essential for operations[.]" and when the lessee provides a satisfactory protection plan.²¹ Worse, the BLM concludes, without basis, "[g]iven the large size of each of the lease parcels...future development (projected to be around six vertically-drilled wells for the entire lease sale area) can be sited to avoid possible direct or indirect adverse effects at the APD stage."²²

These assurances outside the stipulations are a means to ensure oil and gas development *can occur*, and result in the irretrievable commitment of resources by this June 2019 Lease Sale.

B. BLM Must Assess The Potential For Adverse Effects.

BLM must fully assess the potential for adverse effects on the Chaco Culture National Historic Park, Pueblo Pintado, the Great North Road, the Raton Well, and other significant archaeological and cultural resources in the landscape surrounding the area of potential effect. Further, the BLM must fully assess the adverse effects to a potential cultural landscape, that upon proper analysis, may determine these described locations (and other historic properties) to be connected in an interrelated cultural landscape. Under Section 106, BLM must "apply the criteria of adverse effect to historic properties within the area of potential effects." 36 C.F.R. § 800.5(a). Those criteria include "cumulative" effects, as well as effects on "the property's setting that contribute to its historic significance" and "visual, atmospheric or audible" effects "that diminish the integrity of the property's significant historic features. . . ." *Id.* § 800.5(a)(1), (a)(2)(iv), (v). The analysis of any historic property's setting cannot be done in a vacuum without

²⁰ BLM Farmington Field Office Oil and Gas Lease Sale, March 2019, Environmental Assessment DOI-BLM-NM-F010-2019-0001, at 44.

²¹ BLM Rio Puerco Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment DOI-BLM-NM-A010-2019-0010-EA, at 51.

²² *Id.*



ALL PUEBLO COUNCIL OF GOVERNORS

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the determination of cultural landscape that may contribute to each respective historic property, as well as to their relation to one another.

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C. BLM Must First Identify Historic Properties, Including Traditional Cultural Properties, In Order To Determine Adverse Effects.

Under the Section 106 process, BLM must **first** identify historic properties, including traditional cultural properties within the area of potential effect.²³ Importantly, this process is for the purposes of identifying any historic property for an "Indian tribe ... that might attach religious and cultural significant to properties within the area of potential effects."²⁴ BLM has a duty to identify traditional cultural properties and other historic properties that may be eligible for the National Register of Historic Places, that are of religious and cultural significance to APCG's 20 member Pueblos. APCG has routinely reiterated that its member Pueblos have a significant interest in the area due to the likely presence of Pueblos' respective historic properties, traditional cultural properties, and other cultural resources located on land within the jurisdiction of the BLM Farmington and Rio Puerco Field Offices.²⁵ Under Section 106, the level of effort required of BLM in the identification process, is that of a "reasonable and good faith effort"²⁶ This "may include background research, consultation, oral history interviews, *sample field investigation, and field survey.*"²⁷

The BLM Rio Puerco Field Office does not carry forward in its Environmental Analysis a detailed analysis on the impacts on cultural resources. Instead dismissing this issue, in AIB-8, by concluding no historic properties will be affected by the sale, despite only 11% of the 37,230 acres being inventoried.²⁸ APCG further questions the BLM Rio Puerco Field Office conclusions made in the BLM's analysis of the impact on Native American traditional, cultural, and religious concerns. Here, the BLM using TCP and sacred sites database is based predominantly on *Navajo Sacred Places* (1974), and the 1988 *Report of an Ethnographic Study and Archaeological Review of Proposed Coal Lease*

²³ 36 C.F.R. §. 800.4(b).

²⁴ *Id.*

²⁵ See All Pueblo Council of Governors, Resolution No. APCG 2014-04 (on file with APCG); All Pueblo Council of Governors, Resolution No. APCG 2015-17 (on file with APCG); All Pueblo Council of Governors, Resolution No. APCG 2016-17 (on file with APCG); All Pueblo Council of Governors, Resolution No. APCG 2017-11 (on file with APCG); All Pueblo Council of Governors, Resolution No. APCG 2017-12 (on file with APCG); See also, APCG Scoping Comments to the Farmington Field Office Proposed December 2018 Oil & Gas Leases (Jul. 20, 2018) (on file with the BLM and APCG). APCG has also made this point to the BLM Farmington Field Office in its related work in consultations, comments, and participation as a Cooperating Agency on the Bureau of Land Management and Bureau of Indian Affairs Farmington Mancos-Gallup Resource Management Plan Amendment/Environmental Impact Statement.

²⁶ 36 C.F.R. § 800.4(b)(1).

²⁷ *Id.* (emphasis added).

²⁸ See BLM Rio Puerco Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment DOI-BLM-NM-A010-2019-0010-EA, at 16.



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*Tracts in Northwestern New Mexico.*²⁹ The BLM Rio Puerco Field Office does not indicate whether these reports, or other relied upon materials, utilized or consulted with qualified experts able to identify the Pueblos' cultural resources, TCPs, and sacred sites. The BLM is required to ensure that "appropriately qualified historic preservation specialists evaluate the significance of all cultural properties potentially affected by a proposed undertaking."³⁰ APCG and individual Pueblos have continuously asserted the BLM does not have the requisite data needed to determine the presence of Pueblo cultural resources, TCPs, or sacred sites.³¹ Therefore, the BLM cannot, in good faith, conclude the presence (or lack thereof) of APCG members' cultural resources, TCPs, or sacred sites in its analysis.

Similarly, the BLM Farmington Field Office relies on existing records that may not incorporate data from qualified experts able to identify Pueblo cultural resources, TCPs, or sacred sites. In the BLM Farmington Field Office's Cultural Resources Report, the BLM lists several sources of ethnographic literature and maps, used to identify potential TCPs and sacred sites.³² This includes the 2003 RMP/EIS, the *Navajo Tribe v. United States of America - Docket 229*, and associated 1974 report *Navajo Sacred Places*, and the 2006 Navajo ethnographic report, *"We Will Help You With What We Know" Diné (Navajo) Traditional Cultural Places in Dinétah*. The BLM Farmington Field Office states, "[t]hese sources provide the majority of the items in FFO's TCP candidate databases."³³ APCG gravely questions whether these sources, which make the bulk of the FFO's database, contain the requisite data to identify the individual Pueblo's cultural resources, TCPs, and sacred sites of APCG's 20 member Pueblos, many of which consider the Greater Chaco Region to be an essential component of their ancestral homeland. Unless the BLM Farmington Field Office can demonstrate its sources incorporated or consulted with qualified experts able to identify the Pueblos' cultural resources, TCPs, and sacred sites; the BLM Farmington Field Office cannot, in good faith, conclude the presence (or lack thereof) of APCG members' cultural resources, TCPs, or sacred sites in its analysis.

In addition, the BLM Farmington Field Office cites in its cultural resource report to a March 7, 2018 opinion by the Advisory Council on Historic Preservation to conclusively support the "BLM's position that a review of existing data sources (e.g., past records reviews, cultural resource databases, ethnographic literature, and information shared with the agency during consultation) is generally sufficient to meet the 'reasonable and good faith'" identification standard at the leasing stage."³⁴ The BLM's

²⁹ *Id.* at 65.

³⁰ See. BLM Manual 8110 - Identifying and Evaluating Cultural Resources, at .3(31)(B) (Dec. 03, 2004), available at: https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter/blmpolicymanual8110_0.pdf

³¹ See, e.g. fn 23.

³² Haymes, Geoff, *June 2019 Oil & Gas Lease Sale - Cultural Resources Records Review and Determination of Effect*, (Feb. 28, 2019) (on file with the BLM FFO and the Pueblo of Acoma), at 7.

³³ *Id.*

³⁴ *Id.* at 2.



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own statement contains the converse reality: sometimes review of existing data sources is insufficient. This certainly can be the case, in the BLM Farmington Field Office's base of its analysis relies upon studies about non-Acoma cultural resources, coupled with Class III surveys of the two BLM-FFO Parcels ranging from 17.8% to 24%.³⁵

The respective actions by both BLM field offices is often referred to as a "Class I" inventory that examines currently available records and information for cultural resources found on each parcel or related areas. BLM often uses this approach in its oil and gas lease sales.³⁶ As justification for only conducting a Class I inventory review, BLM has often cited to the United States Department of Interior Board of Land Appeals (hereinafter "IBLA") decision 2008-249, in similar undertakings such as the deferred March 2018 Lease Sale.³⁷ However, IBLA 2008-249, should be limited to its facts and the particular issue in front of the IBLA at that time. BLM cites³⁸ IBLA 2008-249 at 177 IBLA 98 stating:

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

However, to assume in this undertaking for the June 2019 Lease Sale, that a Class I inventory is the maximum necessary action to identify individual Pueblo's historic properties and traditional cultural properties, at this stage, is a misread of the decision and an inflation of the proposition as applied to this undertaking. It may also not be a reasonable and good faith effort to rely solely on a Class I inventory. Rather, IBLA 2008-249 goes on to clearly state:

To say that a Class I inventory always is sufficient at the lease sale stage in all cases without qualification would be an overstatement. There may be circumstances in which there is such a paucity of available information that a Class I inventory is essentially meaningless.³⁹

³⁵ *Id.* at 10-11.

³⁶ See, e.g., Presentation, *Farmington Field Office March 2018 Lease Sale*, 18-19 (Dec. 14, 2017) (BLM powerpoint presentation held at the BLM Farmington Field Office for interested organizations describing BLM's Section 106 identification efforts to be completed through a literature review, with justification from cited Interior Board of Land Appeals decision, IBLA 2008-249) (on file with BLM and APCG).

³⁷ See Presentation, *Farmington Field Office March 2018 Lease Sale*, 18-19 (Dec. 14, 2017) (BLM powerpoint presentation held at the BLM Farmington Field Office for interested organizations describing BLM's Section 106 identification efforts to be completed through a literature review, with justification from cited Interior Board of Land Appeals decision, IBLA 2008-249) (on file with BLM and the APCG).

³⁸ *Id.*

³⁹ IBLA 2008-249 at 177 IBLA 100 (emphasis added).



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The BLM has not demonstrated that there is sufficient information, subject to a Class I inventory, that adequately identifies individual Pueblo's historic properties and traditional cultural properties at this stage of the undertaking.

In the BLM Farmington and Rio Puerco Field Office's Class I inventories, neither office has demonstrated whether qualified experts able to identify individual Pueblo's historic properties were used, consulted, or contributed to the analysis relied upon. Continuously, APCG has asserted that insufficient data exists to adequately identify the respective Pueblos' cultural resources. For example, some Pueblos maintain shrines, springs, watercourses/watersheds, agricultural lands, concretions, cupule boulders, rock spires, land formation doorways/windows, viewsheds, fossils, plant and mineral gathering collection loci, hunting tracts, trails and, and other blessing places in their cultural repertoire. These may be cultural resources upon appropriate analysis, and contribute to the relationship of individual Pueblos to Chaco Canyon and the Greater Chaco Region. Archaeologists know few of these cultural resources because these types of cultural resources, that may be eligible historic properties, are not usually within the common domain of archaeological training and experience. Their reliable identification and culturally appropriate evaluation under federal criteria for National Register eligibility, depends on the training and experience of traditional practitioners, who are qualified experts, from affiliated Pueblo communities during the time the cultural resource inventories were completed in the field.

As a result, there exists a "paucity" of information pertaining to the 20 Pueblos' respective historic properties and traditional cultural properties in this area of the proposed June 2019 Lease Sale. This should give rise to the BLM to conduct more intensive efforts, such as sample field investigations or field surveys, including Class III surveys with the collaboration or contribution by qualified experts able to identify the 20 Pueblos' cultural resources.⁴⁰ Any lack of information in a Class I inventory about the historic properties or traditional cultural properties of the 20 Pueblos should not be construed to mean they do not exist within the APE. A literature review only, may have the unintended effect of privileging archaeological resources over cultural resources that may only be known to or through the analysis of qualified Pueblo cultural experts who are able to distinguish the cultural resources of a respective Pueblo.⁴¹ This is especially

⁴⁰ This may also include the conducting of a district wide ethnographic study, for the Rio Puerco and Farmington Field Offices, to understand how the historic properties and traditional cultural properties, if any, fit into a larger cultural landscape that may be considered for protection.

⁴¹ For further discussion, see generally Kurt F. Anschuetz & Kurt E. Dongoske, *Hadiya:wa: Hearing What Traditional Pueblo Cultural Advisors Talk About*, (Paper presented in the Symposium, *Collaborative and Community Archaeology*, 82nd Annual Meeting of the Society for American Archaeology, Apr. 2, 2017) (on file with authors). Anschuetz and Dongoske go on to state: "Administrative subscription to a worldview in which individual parts of living, dynamic cultural process lack distinction is especially problematic in Section 106 consultation. This approached enables federal agency management professionals to impose their preferred contexts for assessing integrity and evaluating the information potential of historic properties, which they can



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the case when the APCG has conveyed its belief that there is the potential for Pueblo historic properties and traditional cultural properties to be identified in the parcels' area of potential effect, warranting further field surveys and perhaps the need for an analysis of a larger cultural landscape.⁴²

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The BLM may argue that in accordance with the timing guidelines of 36 C.F.R. Section 800.1(c), that the inclusion of stipulations in the Notice, would accomplish the Section 106 identification requirements at a later time in the undertaking; that however, is not the manner in which the NHPA is required to be complied with. In *Montana Wilderness Ass'n v. Fry*, 310 F. Supp.2d 1127 (D. MT. 2004), one of the issues the Court examined was whether during the sale of oil and gas leases, could lease stipulations alone, be sufficient to avoid adverse effects and meet the BLM's duties to identify historic properties. The Court stated in pertinent part⁴³:

If the lease sales are an undertaking, BLM is required to initiate the NHPA process in accordance with the regulations... NHPA is a procedural statute. The process of identifying properties and consulting with affected tribes as well as members of the public is the goal sought by the statute. *Lease stipulations do not accomplish the same goal, and cannot replace the BLM's duties under NHPA.* moreover, it is conceivable that *different lease stipulations would evolve from a larger discussion of possible effect on historic tribal lands from oil and gas leasing.*

This finding is consistent with the discretion that an agency is afforded under 36 C.F.R. Section 800.1(c) which allows an agency to conduct "nondestructive project planning activities before completing compliance with section 106[.]" It cannot be emphasized enough that this discretion is capped in that an agency may do such activities, provided that:

[S]uch actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so

recognize based on *their* training and experience." *Id* at 5. In addition, Anschuetz and Dongoske state: "Federal agency managers, who are often trained and experienced archaeologists, tend to privilege archaeology's scientific values over those of Native peoples." *Id.* at 7.

⁴² This is similar to the assertion of the Pueblo of Sandia in the case, *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995). There, the Pueblo of Sandia did not provide specific information describing location of traditional cultural properties and associated cultural activities, even though the area was of great importance to the Pueblo. The Court found that the information the tribes did communicate to the agency "was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought." 50 F.3d at 860.

⁴³ 310 F. Supp.2d at 1152-53 (emphasis added).



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that a broad range of alternatives may be considered during the planning process for the undertaking.⁴⁴

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Waiting to identify historic properties when triggered by stipulations, *after* a lease has been sold is a violation of the procedural duties described in *Montana Wilderness Ass'n*, and BLM's trust responsibility to the 20 Pueblos members of APCG.⁴⁵ By waiting until *after* a parcel has been leased for BLM to fulfill its Section 106 obligations is too late; as the very legal nature of the parcel has fundamentally been altered. At that point, the owner of the lease has obtained additional rights, subject to the BLM's stipulations. It is conceivable that if BLM were to identify historic properties and traditional cultural properties at this stage, prior to the parcels being leased, different outcomes could be had entirely, based on the analysis of adverse effects not previously analyzed. These may include the development and consideration of different alternatives, the development of different stipulations as suggested in *Montana Wilderness Ass'n*, 310 F. Supp.2d at 1152-53, a different finding of significant impact, or even the decision by the BLM to not offer a lease for sale at all.

Further, by inclusion of lease stipulations as a substitute for the identification of historic properties later; the BLM cannot automatically then assume that no adverse effect will occur. Recently, the Advisory Council on Historic Preservation ("ACHP") in an opinion on the BLM Utah March 2019 Lease Sale:

When an agency is proposing lease sales in an area of known significant historic properties like San Juan County, or in adjacent areas where the presence of high concentrations of historic properties is likely even if presently unknown, it is our position that the BLM cannot assume that leasing will have no adverse effect on historic properties. An adverse effect finding does not need to be predicated on certainty. The regulations at 36 CFR § 800.4(d)(2) state: "If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5" (emphasis added).⁴⁶

The ACHP goes on to further disagree with the BLM's assertion that it is possible to site single oil and gas wells within each parcel without causing direct or indirect effects, primarily through subsequent Class III surveys prior to any ground disturbance. The ACHP stated:

⁴⁴ 36 C.F.R. §800.1(c).

⁴⁵ See Executive Order No. 13084; see also Executive Order No. 13175.

⁴⁶ Letter from Reid Nelson, Advisory Council on Historic Preservation, to Kent Hoffman, BLM-Utah State Office (Apr. 26, 2019) (Attachment 6) at 2.



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[T]he BLM has not provided any detailed documentation on how direct environmental or atmospheric (such as noise, vibration, or visual elements), indirect, or cumulative effects (including those of past lease sales in close geographic proximity to the parcels in questions) will be considered, nor has it indicated how adverse effects to potentially eligible districts or landscapes that may be identified in subsequent survey efforts within these parcels would be avoided in later phases.⁴⁷

Here, the BLM Farmington Field Office concludes, without reliable data on any of the 20 Pueblos of APCG's cultural resources discussed *supra*, that no adverse effects to historic properties will occur. The BLM Rio Puerco Field Office similarly concludes, without reliable data on the 20 Pueblos of APCG's cultural resources discussed *supra*, that "[a]dverse effects to these previously record properties and those *likely to exist within the lease parcels* can be avoided, minimized, or mitigated by standard archaeological and historic recordation techniques and the application of the standard stipulations at the APD stage including WO-NHPA, NM-11-In and RP-6." The Greater Chaco Region, as partially defined by the San Juan Basin, is a critical portion of many Pueblos' ancestral homeland, likely containing many site specific or landscape-level historic properties. For the BLM Farmington Field Office and the Rio Puerco Field Office to conclude, that no adverse effects will occur, without any knowledge of specific Pueblo cultural resources, types of Pueblo cultural resources (and how they can/cannot be mitigated using standard archaeological and recordation techniques), is contrary portions of ACHP's most recent opinion, and a failure to comply with the NHPA.

NHPA "has been characterized as a 'stop, look and listen' provision."⁴⁸ The duties mandated by the NHPA, are procedural in nature. Here, these duties can only be accomplished if the BLM fulfills its procedural obligations under Section 106 to first identify individual Pueblo's historic properties and traditional cultural properties by qualified experts who can assess the significance of any such properties prior to the lease sale. Only then can the BLM make an assessment of the adverse effects this lease sale will have on those properties. For the arguments presented above, this must be completed as part of this undertaking and prior to the sale and issuance of oil and gas leases in the June 2019 Lease Sale. Doing otherwise is a failure of BLM's duty and a violation of the NHPA.

D. BLM Must Reevaluate Previously Identified Historic Properties.

Despite the BLM Farmington Field Office and the Rio Puerco Field Office reliance on Class I inventories, as discussed *supra*, the BLM must reevaluate previously identified historic properties based on concerns raised by APCG and its individual members.

⁴⁷ *Id.*

⁴⁸ *Montana Wilderness Ass'n*, 310 F. Supp.2d at 1150, citing *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994); *Muckleshoot Indian Tribe v. U.S. Forest Svc.*, 177 F.3d 800, 805 (9th Cir. 1999).



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Section 106 requires an agency to apply National Register criteria to identified properties within an APE.⁴⁹ To be considered eligible for listing on the National Register, a property must possess "integrity of location, design, setting, materials, workmanship, feeling, and association" and meet at least one of the four criteria:

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Ohkay Owingeh

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Criterion (a) "are associated with events that have made a significant contribution to broad patterns of our history"; or

Criterion (b) "are associate with the lives of persons significant in our past"; or

Criterion (c) "embody the distinctive characteristics of a type, period, or method of construction; or that represent the work of a maser; or that possess high artistic values; or that represent a significant and distinguishable entity whose components may lack individual significance"; or

Criterion (d): "have yielded or may be likely to yield, information important in prehistory or history."⁵⁰

In the BLM Farmington and Rio Puerco Field Office's Class I inventories, neither office has demonstrated whether qualified experts able to identify individual Pueblo's historic properties were used, consulted, or contributed to the analysis relied upon. Those historic properties that have been identified should be revisited to determine their eligibility for the National Register.

According to 36 C.F.R. Section 800.4(C)(1): "[t]he passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible." As discussed, *supra*, a historic property's evaluation depends on the training and experience of the evaluator. Too often, trained archaeologists do not have the expertise equivalent to Pueblo traditional practitioners, who are qualified experts, to make a fuller analysis under the National Register criteria.

Given, the BLM's growing understanding of the importance and connection of Chaco Canyon, the Greater Chaco Region, and Ancestral Puebloan features to the Pueblos; the BLM should seriously question whether prior National Register evaluations for identified historic properties were sufficient, and whether many of these properties have

⁴⁹ 36 C.F.R. § 800.4(C)(1).

⁵⁰ 536 C.F.R. § 60.4.



ALL PUEBLO COUNCIL OF GOVERNORS

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broader significance or whether they may comprise a cultural landscape and to assess potential effects to all contributing characteristics.⁵¹

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IV. BLM's Issuance Of FONSI's For The Proposed June 2018 Lease Sale, Even With Standard Lease Stipulations, Violates The National Environmental Policy Act (Applies to BLM FFO-Parcels and BLM-RPFO Parcels).

The BLM Farmington and Rio Puerco Field Offices' reliance on their respective Environmental Assessments to support their Findings of No Significant Impact ("FONSI") is unsupportable under the National Environmental Policy Act ("NEPA"). An environmental impact statement is required when a major federal action "significantly affect[s] the quality of the human environment." 42 U.S.C. §4332(2)(C). For NEPA, a federal action "affects" the environment when it "will or *may* have an effect" on the environment. 40 C.F.R. § 1508.3 (emphasis added); *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10th Cir. 1996) ("If the agency determines that its proposed action *may* 'significantly affect' the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.") (emphasis added).

As discussed in section III above, the BLM cannot in good faith state there is no effect on the APCG's 20 Pueblo members from the proposed lease sale when the BLM Farmington and Rio Puerco Field Offices have not completed Section 106 of the NHPA. See 36 C.F.R. §800.8(a)(1) ("The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties."); see also 40 C.F.R. §1508.27(a) and (b) (whether there may be significant effects for NEPA requires consideration of "context" and "intensity").

The BLM Farmington and Rio Puerco Field Office's in order to justify their respective FONSI's and avoid conducting a full environmental impact statement, appear to punt any concerns APCG and individual Pueblos may raise about effects to cultural resources. Any real analysis of impacts to these cultural resources is postponed, through reliance on lease stipulations that may, or may not, require later Class III surveys when applications to drill are filed.

It is improper under NEPA for the BLM to rely on future, unspecified mitigation to avoid a finding of significance. See, e.g., *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) ("[M]itigation measures, while necessary, are not alone

⁵¹ Compare with Letter from Reid Nelson, Advisory Council on Historic Preservation, to Kent Hoffman, BLM-Utah State Office (Mar. 7, 2018) (available at: https://eplanning.blm.gov/epl-front-office/projects/nepa/82261/152087/186303/ACHP_Concurrence_Letter_to_BLM_03072018.pdf). ACHP opinion recommending the BLM consider reevaluation of previously identified historic properties.



ALL PUEBLO COUNCIL OF GOVERNORS

Officers:

E. Paul Torres, Chairman

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sufficient to meet the [agency's] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved.”)(emphasis in original). By failing to analyze reasonably foreseeable impacts to the individual Pueblo's cultural resources from the lease sale in the Environmental Assessments, the BLM is improperly shifting the type of analyses for the BLM FFO Parcels and BLM RPFO Parcels from the *prevention* of impacts to unspecified later post-approval attempts to mitigate impacts. Promises of future mitigation measures do not help individual Pueblos, APCG, or the public, evaluate impacts before a lease is sold and construction is later approved. *See id.*, 668 F.3d at 1084.

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Circular and self-serving FONSI (there can be no significant impacts now because we'll find a way to mitigate impacts if they are shown later) do not comport with the mandates of NEPA. *See, e.g., Morris v. United States NRC*, 598 F.3d 677, 690 (10th Cir. 2010) (NEPA “requires only that the agency take a ‘hard look’ at the environmental consequences *before* taking a major action”) (emphasis added). Furthermore, the BLM’s hard look analysis “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010) (internal citation omitted); *see also* 40 C.F.R. § 1502.2(g) (“Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”); *id.* at § 1502.5 (“The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.”).

It is also important to remember that environmental effects to be considered under NEPA must include cultural, historic, and social effects, whether direct, indirect, or cumulative, *see* 40 C.F.R. §1508.8, and that cultural and social effects for NEPA covers a wider range of resources and socio-cultural attributes of Tribal life ways and religious practices than solely “historic properties” that are part of a Section 106 consultation under the NHPA. The sale of BLM FFO Parcels and BLM RPFO Parcels, could result in uses of the land that are incompatible with maintaining the quality of individual Pueblos’ cultural resources, sacred sites, and historic properties.

In other words, indirect impacts to cultural, social and historic resources could occur from oil and gas development on the BLM FFO Parcels and BLM RPFO Parcels when such development affects a Pueblo's broader cultural interactions with the entire landscape environment. Such impacts, even if deemed indirect or cumulative impacts instead of direct impacts, are still “significant” as that term applies to NEPA and require further analyses. Because there is a potential for impacts to associated traditional use areas and life ways resulting from the sale of the BLM FFO Parcels and the BLM RPFO Parcels, the BLM should defer the June 2019 Lease Sale to prepare environmental impact





ALL PUEBLO COUNCIL OF GOVERNORS

Officers:
E. Paul Torres, Chairman
Governor J. Michael Chavarria, Vice Chair
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statements to analyze these impacts after completing the requisite NHPA work with individual Pueblos.

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V. BLM Should Not Permit The Sale And Issuance Of Leases For The BLM-FFO Parcels. While The BLM Is Undergoing Amendment To The Farmington Resource Management Plan (Applies to the BLM-FFO Parcels)

Currently, the BLM and BIA as co-lead agencies, are engaged in amending the 2003 Resource Management Plan. Under the forthcoming Farmington Mancos-Gallup Resource Management Plan Amendment (hereinafter "RMPA") and Environmental Impact Statement (hereinafter "EIS"), a wide range of impacts from oil and gas development to various resources, including cultural resources, are being considered.⁵² The current sale of oil and gas leases, and their associated development, may run contrary to the eventual management alternatives that are being considered in the RMPA/EIS. BLM should not issue these oil and gas leases without finalizing the RMPA, in order to give full consideration and time for the development of a comprehensive and fully analyzed set of alternatives. This is certainly the case when horizontal drilling is of primary analysis in the RMPA/EIS, and are proposed as likely development on many of the BLM-FFO Parcels.

Under NEPA, BLM must evaluate the "reasonably foreseeable" site-specific impacts of oil and gas leasing, prior to making an "irretrievable commitment of resources." *New Mexico ex rel. Richardson, New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (agencies are to perform hard look NEPA analysis "before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values"); *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 ([o]n land leased without a No Surface Occupancy Stipulation the Department cannot deny the permit to drill; it can only impose 'reasonable' conditions which are designed to mitigate the environmental impacts of the drilling operations.). Courts have held that BLM makes such a commitment when it issues an oil and gas lease without reserving the right to later prohibit development. *New Mexico ex rel. Richardson*, 565 F.3d at 718. The issuance of oil and gas lease sales, and potential requests for permits to drill shortly thereafter, is an irretrievable commitment that would not be subject to the RMPA/EIS.

Under 40 C.F.R. Section 1506.1(c)(3), an agency should refrain from taking interim major federal actions, while a program environmental impact statement is in progress. Although the BLM is relying upon the 2003 Resource Management Plan and associated environmental impact statement; its development of the 2014 RMPA/EIS should give the agency pause. Issuing the oil and gas leases now prejudices the RMPA/EIS, by "determin[ing] subsequent development" inherently "limit[ing]

⁵² See, Notice of Intent, 79 Fed. Reg. 10548 (Feb. 25, 2014).



ALL PUEBLO COUNCIL OF GOVERNORS

Officers:
E. Paul Torres, Chairman
Governor J. Michael Chavarria, Vice Chair
Governor Val Panteah, Sr., Secretary

alternatives”⁵³ that the parcels would otherwise be subject to under the 2014 RMPA/EIS. Therefore, issuing the leases in the current sale is prejudicial to the 2014 RMPA/EIS, and BLM is prohibited from undertaking this action, as described in the Notice, until the completion of the 2014 RMPA/EIS.

VI. The Sale And Issuance Of Oil And Gas Leases, As Described In The Notice Is A Violation Of The Federal Land Policy And Management Act.

Under the Federal Land Policy and Management Act (hereinafter “FLPMA”), BLM is tasked with managing public land and their resources, including cultural resources. FLPMA specifically requires BLM to conduct its management “in a manner that will protect the quality of scientific, scenic, *historical*, ecological, environmental, air and atmospheric, water resource, and *archaeological* values.”⁵⁴ This management of public land must be done under the basis of “multiple use and sustained yield.”⁵⁵ Importantly, “cultural resources need not be determined eligible for the [National Register] to receive consideration under the FLPMA.”⁵⁶ It is the policy of the BLM to manage “cultural resources under its jurisdiction or control according to their relative importance, protecting against impairment, destruction and inadvertent loss, and encouraging and accommodating the uses determined appropriate through planning and public participation.”⁵⁷

Here, the BLM Farmington Field Office has already leased the vast majority of its lands for oil and gas development, with significant development already taking place. The BLM Rio Puerco Field Offices December 2018, March 2019, and now June 2019 Lease Sale, are packed in an area that juts into the BLM Farmington Field Office's boundary -- further contributing to the overwhelming development in the San Juan Basin.

Given the mandate BLM is ordered with under FLPMA to balance development with “nonrenewable resources” under the multiple use framework, BLM’s decision to offer the sale of additional oil and gas leases, as described in the Notice, violates the FLPMA mandate. APCG’s 20 member Pueblo’s cultural resources within the control of the BLM field offices will likely suffer impairment, destruction, or inadvertent loss through the June 2019 Lease Sale. This injury is a result of the lack of full analysis under BLM’s duties under the NHPA and NEPA to identify the respective historic properties and traditional cultural properties of the Pueblos that may be affected by this undertaking.

⁵³ 40 C.F.R. § 1506(c)(3).

⁵⁴ 43 U.S.C. § 1701(a)(8)(emphasis added).

⁵⁵ *Id.* at §1701(a)(7).

⁵⁶ BLM Manual 8100 - The Foundations For Managing Cultural Resources, at .03(F) (Dec. 03, 2004), available at: <https://www.blm.gov/sites/blm.gov/files/Manual%20-%20Foundations%20for%20Managing%20Cultural%20Resources.pdf>

⁵⁷ *Id.*

Acoma

Cochiti

Isleta

Jemez

Laguna

Nambe

Ohkay Owingeh

Picuris

Pojoaque

Sandia

San Felipe

San Ildefonso

Santa Ana

Santa Clara

Santo Domingo

Taos

Tesuque

Ysleta Del Sur

Zia

Zuni



ALL PUEBLO COUNCIL OF GOVERNORS

Officers:

E. Paul Torres, Chairman
Governor J. Michael Chavarria, Vice Chair
Governor Val Panteah, Sr., Secretary

Full analysis under the NHPA and NEPA may further contribute to the balancing of “nonrenewable resources” under the FLPMA mandate.

Acoma

Cochiti

Isleta

Jemez

Laguna

Nambe

Ohkay Owingeh

Picuris

Pojoaque

Sandia

San Felipe

San Ildefonso

Santa Ana

Santa Clara

Santo Domingo

Taos

Tesuque

Ysleta Del Sur

Zia

Zuni


VII. Inadequate Protest Period & Procedures (Applies to BLM FFO-Parcels and BLM-RPFO Parcels).

The APCG objects to the procedures used in administering the June 2019 Lease Sale, and its inadequate protest period and method of submission.⁵⁸ Arbitrarily, the BLM issued a 10-day protest period with the receipt of protests by mail or hard copy, only. This is in contrast to the 31-day protest period and the delivery of protests by mail, hard copy and fax that the agency used in its previous March 2018 Lease Sale Notice.⁵⁹ Receipt of protests in order to provide adequate time for mailing or hand delivery further truncate the time in which to protest. The result of this decision unduly prejudices submission and the content of protests as the necessary final documents that are highly technical, cannot be sufficiently and meaningfully analyzed in 10 days. Compounding this problem is the fact that tribal consultation has not been completed, and in many cases is noted to be ongoing at the time of the Environmental Assessment's completion.⁶⁰ Therefore, the requirement of a 10-day protest period is arbitrary, capricious, and prejudicial to APCG's protest and violates the agency's trust responsibility to its 20 member Pueblos.

CONCLUSION

BLM's decision to lease the BLM-FFO Parcels and BLM-RPFO Parcels, without fully complying with its legal obligations is unjustifiable. The APCG protests the sale and issuance of these leases, and their sale should be denied for the above stated reasons. If you should have any questions or require additional information, please contact APCG for further information.

Sincerely,


E. Paul Torres, Chairman
All Pueblo Council of Governors

⁵⁸ See BLM New Mexico, Oklahoma, Texas & Kansas Competitive Oil and Gas Lease Sale Notice (Jun. 20, 2019).

⁵⁹ See BLM Farmington Field Office March 2018 Lease Sale E-planning page (available at: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=133953>).

⁶⁰ See, e.g. BLM Rio Puerco Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment DOI-BLM-NM-A010-2019-0010-EA, at 60; BLM Farmington Field Office Oil and Gas Lease Sale, June 2019, Environmental Assessment, DOI-BLM-NM-A010-2019-0010-EA at 51.



ALL PUEBLO COUNCIL OF GOVERNORS

Officers:
E. Paul Torres, Chairman
Governor J. Michael Chavarria, Vice Chair
Governor Val Panteah, Sr., Secretary

Acoma

Attachments:

Cochiti

1. APCG Authorization

Isleta

2. Letter from Mark Matthews, BLM - Farmington Field Office, to Governor Brian Vallo, Pueblo of Acoma (Jan. 24, 2019)

Jemez

3. Letter from Angel Martinez, BLM - Rio Puerco Field Office, to Governor Kurt Riley, Pueblo of Acoma (Dec. 17, 2018)

Laguna

Nambe

4. Letter from Governor Brian D. Vallo, Pueblo of Acoma, to Tim Spisak, BLM NM State Office (Jan. 10, 2019)

Ohkay Owingeh

5. Letter from Governor Brian D. Vallo, Pueblo of Acoma, to Tim Spisak, BLM NM State Office (Jan. 30, 2019)

Picuris

Pojoaque

6. Letter from Reid Nelson, Advisory Council on Historic Preservation, to Kent Hoffman, BLM-Utah State Office (Apr. 26, 2019)

Sandia

San Felipe

San Ildefonso

Santa Ana

Santa Clara

Santo Domingo

Taos

Tesuque

Ysleta Del Sur

Zia

Zuni





ALL PUEBLO COUNCIL OF GOVERNORS

ATTACHMENT 1

Officers:

E. Paul Torres, Chairman
Governor J. Michael Chavarria, Vice Chair
Governor Val Panteah, Sr., Secretary

May 1, 2019

Acoma

Tim Spisak, Director
New Mexico State Office

Cochiti

Bureau of Land Management
301 Dinosaur Trail

Isleta

Santa Fe, NM 87508

Jemez

Laguna

**Re: Authorization for Submission of Protest - BLM New Mexico June 20, 2019
Competitive Oil and Gas Lease Sale (DOI-BLM-NM-0000-2019-0003-OTHER_NEPA)**

Nambe

Dear Mr. Spisak,

Ohkay Owingeh

Picuris

Pojoaque

In accordance with the Bureau of Land Management, New Mexico State Office's Notice of Competitive Oil and Gas Lease Sale for the June 20, 2019 Lease Sale; on behalf of the All Pueblo Council of Governors, I am notifying you that I, Chairman E. Paul Torres have been authorized by the All Pueblo Council of Governors to submit protests for all parcels as part of the June 20, 2019 Oil and Gas Lease Sale .

Sandia

San Felipe

If you have any questions regarding their authorization to submit protests on behalf of the All Pueblo Council of Governors, please contact our Executive Director, Alicia Ortega at APCG@indianpueblo.org or 505.470.1732.

San Ildefonso

Santa Ana

Sincerely,

Santa Clara

Santo Domingo

E. Paul Torres, Chairman
All Pueblo Council of Governors

Taos

Tesuque

Ysleta Del Sur

Zia

Zuni





United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Farmington District Office
6251 College Blvd., Suite A
Farmington, New Mexico 87402
www.blm.gov/nm



In Reply, Refer To:
3100 (F010000)

JAN 24 2019

RECEIVED

FEB 04 2019

CERTIFIED MAIL – RETURN RECEIPT REQUESTED:
7018 0680 0002 3051 8854

PUEBLO OF ACOMA
GOVERNORS OFFICE

Pueblo of Acoma
Governor Brian Vallo
P.O. Box 309
Acoma, NM 87034

Dear Governor Vallo:

The Bureau of Land Management Farmington Field Office (FFO) has initiated the process to analyze two (2) nominated parcels for a future BLM Competitive Oil and Gas Lease Sale. Currently these parcels are proposed for the June 2019 Competitive Oil and Gas Lease Sale.

One of the proposed parcels, NM 201906-25, has previously been nominated and consulted on as a portion of both the October 2014 Competitive Oil and Gas Lease Sale as well as the December 2018 Lease Sale. It was previously proposed as parcel NM201812-071 and is now known as NM 201906-25. The parcel encompasses the NW quarter of Section 13, Township 24N, Range 2W and is located near the community of Lindrith, in Rio Arriba County NM. Consultation for the proposed parcel, began in March of 2014, and to date has not received any adverse comments regarding the parcel.

This sale also includes proposed parcel NM201906-47, which encompasses the SW quarter of Section 33, Township 24N, Range 7W and is located north of Lybrook, in Rio Arriba County NM. Proposed parcel NM201906-47 was previously included in federal minerals lease NMNM127900 which was relinquished by the previous owner on November 15, 2018, making it available once again for competitive lease.

This letter is to notify the Pueblo of Acoma of the opportunity and invitation to consult concerning the level of identification efforts necessary for this undertaking, with the Bureau of Land Management under Section 106 following 36 CFR 800.

Please find the enclosed maps, which shows the location of each nominated parcel. Each parcel contains 160 acres. The total area of nominated parcels under consideration for the Farmington Field Office is 320 acres.

The lease sale does not directly authorize surface disturbance; rather, the leaseholders are granted future rights of development to the leased mineral estate. The lease sale, and future development, are both federal undertaking requiring compliance with NEPA and NHPA and ESA. Site-specific analysis, addressing surface disturbance, would be completed during the plans for development of a lease or at the Application for Permit to Drill (APD) phase, as a portion of the staged approach the BLM takes to fluid

mineral development. Cultural resource inventories and evaluations will be undertaken at the APD stage, and impacts to archaeological sites will be assessed prior to oil and gas lease development. However, prior to the lease sale, the FFO conducts a review of existing records and information for each proposed lease sale parcel to identify historic properties recorded or projected to fall within the area of potential effect of the lease sale. The FFO archaeological staff uses the information, in consultation with tribal partners, to assess the likelihood that adverse effects to previously recorded properties and those likely to exist within any lease sale parcel can be avoided, minimized or mitigated by standard archeological and historical recordation techniques.


Based on the information gathered during the lease sale existing records review, the FFO archaeologist will make a Determination of Effect for the undertaking of the lease sale. Sensitive cultural resources could include but are not limited to historic properties, sacred sites, or threatened and endangered species; relevant mitigation measures would be developed if needed.

The FFO would like to request concurrence on the level of identification and to initiate consultation under Section 106 following 36 CFR 800. Please feel free to contact us in writing at the address:

Bureau of Land Management
Farmington Field Office
6251 College Blvd
Farmington, New Mexico 87402

You may also directly contact myself – Mark Matthews at (505) 564-7618 (mmatthews@blm.gov), our Field Manager Richard A. Fields at (505) 564-7611 (rafields@blm.gov), or our Planning and Environmental Coordinator Ryan Joyner at (505) 564-7662 (rjoyner@blm.gov) with any questions or comments.

Sincerely,


Mark Matthews
Acting Farmington District Manager

Enclosure:







1. Project Overview Map
2. Parcel 25 Map
3. Parcel 47 Map

FFO June 2019 Competitive Oil and Gas Lease Sale Proposed Parcel Overview

Map Contents

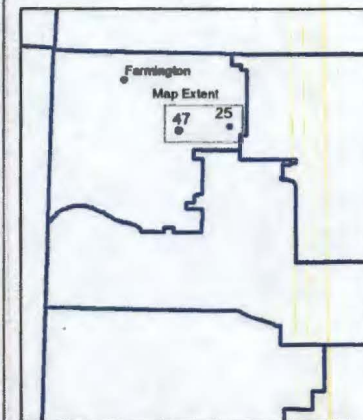
 June 2019 Proposed Parcels

Surface Ownership

-  Bureau of Land Management
-  Forest Service
-  National Park Service
-  Private
-  State
-  Tribal

0 2.25 4.5 9 Miles

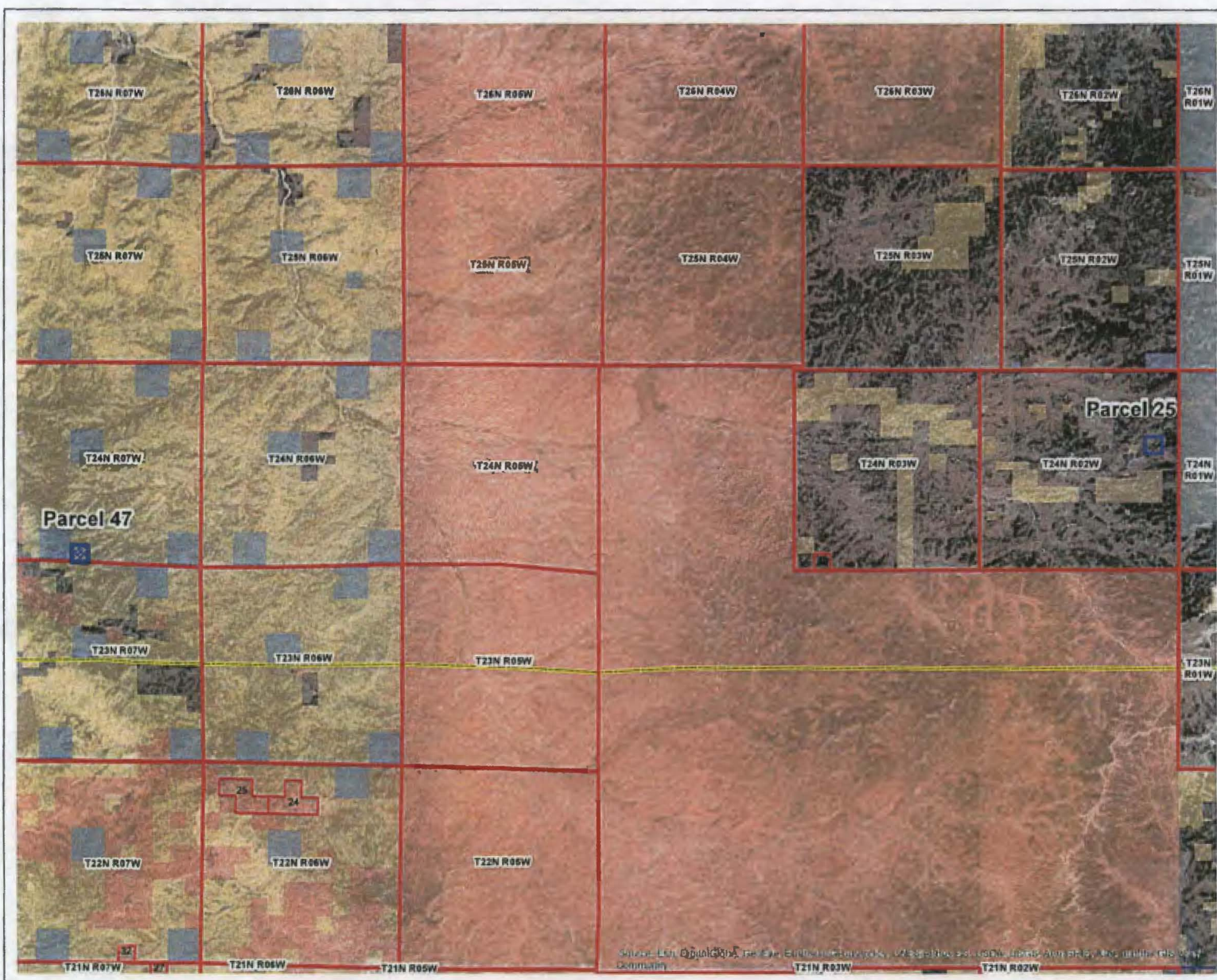
1:216,969



This is a summary as made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual or aggregate use with other data. Original data were compiled from various sources and may be updated without notification.




Source: Esri, DigitalGlobe, GeoEye, Earthstar (United States), CNR, Aeri, USDA, AeroGRID, IGN, SRTM3, and the U.S. Geological Survey



FFO June 2019 Competitive Oil and Gas Lease Sale Proposed Parcel 25

Map Contents

 June 2019 Parcel 25

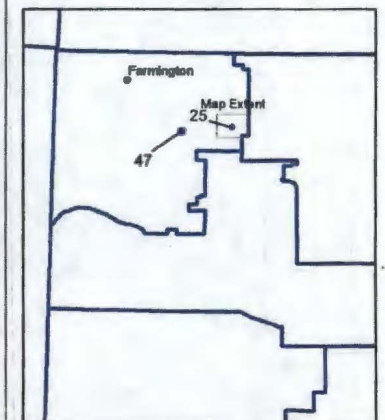
Surface Ownership

-  Bureau of Land Management
-  Forest Service
-  National Park Service
-  Private
-  State
-  Tribal

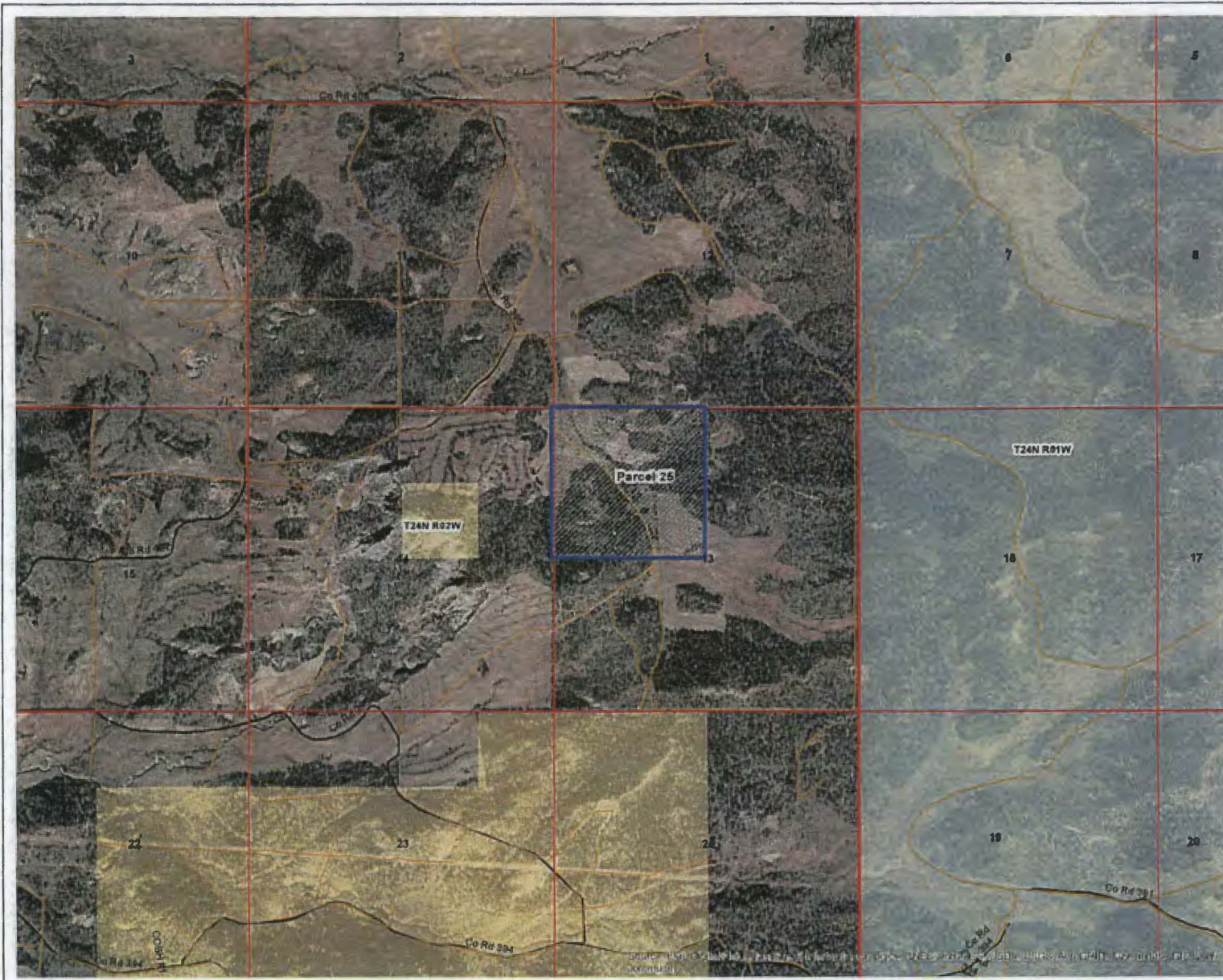
0 0.25 0.5 1 Miles



1:24,000



This map was made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual or aggregate use with other data. Original data were compiled from various sources and may be updated without notification.





United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Rio Puerco Field Office

100 Sun Ave., N.E.

Pan American Bldg., Suite 330

Albuquerque, New Mexico 87109

www.blm.gov/nm

In Reply Refer to:

8120, (010)

December 17, 2018

CERTIFIED RETURN RECEIPT NUMBER

7018 0680 0000 1271 6256

Governor Kurt Riley

Pueblo of Acoma

P.O. Box 309

Acoma, NM 87034

Attention: 2nd Lt. Governor Robert T. Garcia

RECEIVED

DEC 18 2018

PUEBLO OF ACOMA
GOVERNORS OFFICE

Dear Governor Riley,

This letter is to notify The Pueblo of Acoma of the opportunity and invitation to consult with the Bureau of Land Management (BLM) under Section 102 of the National Environmental Policy Act (NEPA) and Sections 101(d)(6) and 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. Sections 302706 and 306108) concerning the New Mexico BLM proposed March 2019 oil and gas lease sale. The Rio Puerco Field Office (RPFO) is proposing to offer thirty-nine parcels totaling 38,443 acres of Federal mineral estate land during the proposed New Mexico BLM June 2019 oil and gas lease sale. The proposed Lease Sale would involve lands administered by the BLM, the State of New Mexico and private land owners. The lease sale does not directly authorize surface disturbance; rather, the leaseholders are granted future rights of development to the leased mineral estate.

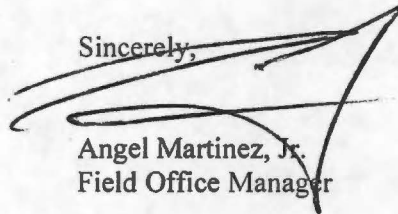
The lease sales and future development are both Federal undertakings requiring compliance with NEPA and NHPA. The RPFO intends to use a staged approach in the identification and evaluation of cultural resources prior to oil and gas lease development. In general, identification of historic properties takes place later, at the Application for Permit to Drill (APD) stage of lease development. Cultural resource inventories and evaluations will be undertaken at the APD stage and impacts to archeological sites will be assessed. However, prior to the lease sale, the Field Office conducts a review of existing records and information for each proposed lease sale parcel to identify historic properties recorded or projected to fall within the area of potential effect of the lease sale. The cultural heritage staff uses the information from the existing records review to assess the likelihood that adverse effects to previously recorded properties and those likely to exist within each lease sale parcel can be avoided, minimized, or mitigated by standard archeological and historical recordation techniques. Based on the information gathered during the lease sale existing records review, the Field Office cultural heritage specialist will make a Determination of Effect for the undertaking of the lease sale.

The BLM requests input from The Pueblo of Acoma regarding potential concerns within the

parcels being considered for the December lease sale. Please communicate to us areas of specific concern, or provide or refer us to any available information that would help us to understand the significance and nature of traditional cultural or other concerns in the proposed lease sale area.

Please direct your comments to Angel Martinez, Rio Puerco Field Office Manager, at 505-761-8918 or Sean I. Daugherty, Archaeologist, at 505-761-8702, or in writing to the above address. If you plan to come to the office to meet with us in person, please call for an appointment to ensure someone is available to speak with you.

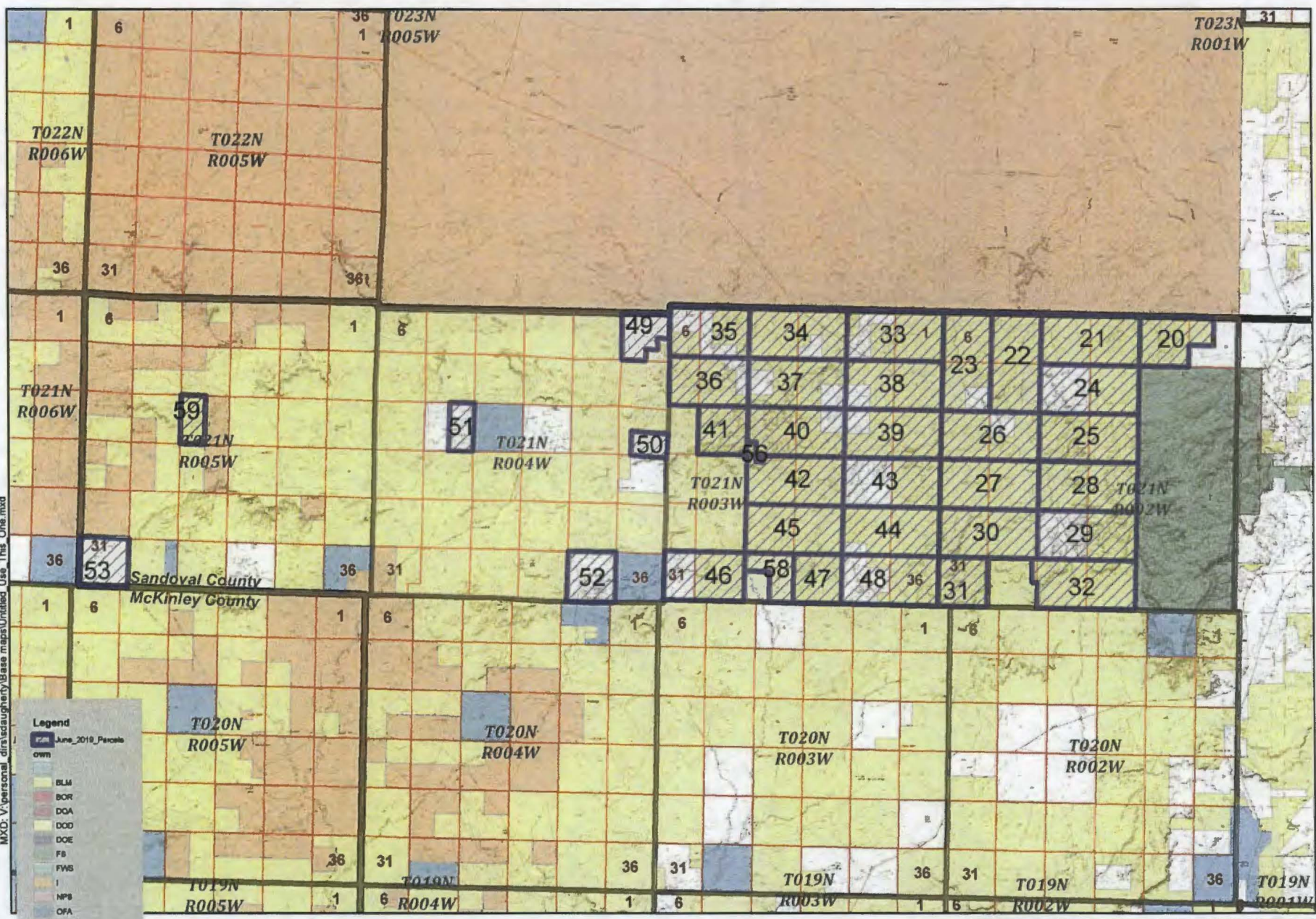
Sincerely,

A stylized handwritten signature in black ink, consisting of several sweeping, connected strokes that form a unique, somewhat abstract shape.

Angel Martinez, Jr.
Field Office Manager

2 Enclosures

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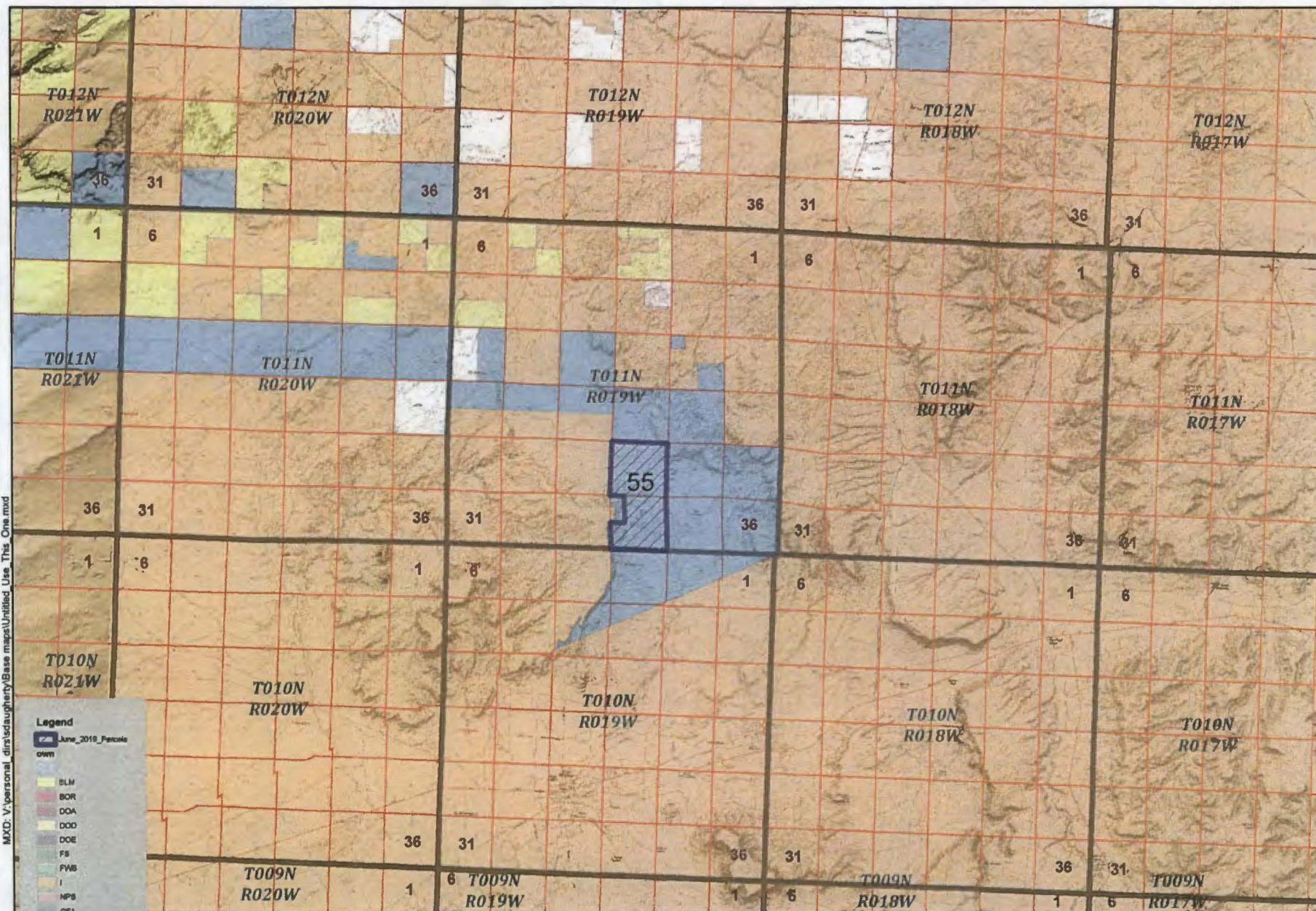
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June 2019_Parcels
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- S
- SGF
- SP

June 2019 Proposed Oil and Gas Lease Parcels.

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1:166,000
For Internal Use Only Date: 12/13/2018

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June 2019 Proposed Oil and Gas Lease Parcels.



for Internal Use Only Date: 12/13/2018

Brian D. Vallo, Governor
Mark Thompson, 1st Lt. Governor
Bernard E. Lewis, 2nd Lt. Governor
Davy D. Malie, Tribal Secretary
Duane M. Torivio, Tribal Interpreter



PUEBLO OF ACOMA
OFFICE OF THE GOVERNOR

ATTACHMENT 4

25 Pinsbaari Drive

P. O. Box 309
Acoma, NM 87034

Telephone: (505)552-6604

Fax: (505)552-7204

January 10, 2019

Tim Spisak
BLM New Mexico State Office
301 Dinosaur Trail
Santa Fe, NM 87508
E: BLM_NM_Comments@blm.gov

Re: Demand for immediate halting of the Bureau of Land Management processing of APDs during federal lapse in appropriations

Dear Mr. Spisak:

Recently, the Pueblo of Acoma became aware that despite the federal lapse in the Department of the Interior appropriation, at least one of the Bureau of Land Management ("BLM") New Mexico Field Offices are continuing to process Applications for Permits to Drill ("APD").¹ This activity appears to violate 31 U.S.C. § 1342 (Limitation on Voluntary Services) and 54 U.S.C. § 306108 ("Section 106" of the National Historic Preservation Act), to the extent that permits are being issued without any tribal consultation. This is also a violation of the BLM's federal trust responsibility to Indian tribes. To the extent that any action is being taken beyond that permitted by federal statute, that action should stop immediately. 31 U.S.C. § 1342 states:

An officer or employee of the United States Government ... may not accept voluntary services ... exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

¹ See Laura Paskus, Federal Shutdown wallops workers, leaves public lands open for drilling, NM Political Report (Jan. 9, 2019), <http://nmpoliticalreport.com/2019/01/09/federal-shutdown-wallops-workers-en/> (stating: "The shutdown affects federal agencies such as the Department of the Interior, Department of Agriculture, Homeland Security and Health and Human Services... [m]eanwhile, the U.S. Bureau of Land Management has continued to process applications for permits to drill, ensuring energy development isn't slowed on public lands.").

... [T]he term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."

The continued issuance of APDs for oil and gas development, despite the continued lapse in appropriations, is not an emergency involving the safety of human life or the protection of property. Any continued receipt of voluntary services by BLM employees or contractors to process APDs or take other action is a violation of federal law.

Further, the National Historic Preservation Act, 54 U.S.C. § 306108 (often referred to as "Section 106") requires the agency to "take into account the effect of the undertaking on any historic property." In fulfilling these duties, BLM: "... under section 306108 of this title... shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance..."² However, under BLM's Onshore Oil and Gas Order Number 1, which guides the BLM's processing of APDs, the BLM has restrictive timeframes for processing an APD. This includes but is not limited to limitations on times for notice, comment, data gathering, and approval.³

Continued processing of APDs or other actions until funding is secure violates the National Historic Preservation Act and federal trust responsibility as well. Because of the lapse of federal appropriations, there is no BLM staff available for Section 106 consultation, or other government-to-government consultation that Indian tribes may request.⁴ BLM's processing of APDs starts the clock on many provisions of the Onshore Oil and Gas Order Number 1. This effectively eliminates tribal and public participation into this process.

Further, the BLM has not announced any extensions of time for commenting on current or forthcoming oil and gas Scoping Periods or Protest Periods for its prospective March and June 2019 Lease Sales. For example, the BLM New Mexico Office has a forthcoming Protest Period for its March 2019 Lease Sale beginning January 18, 2019. BLM New Mexico also opens scoping on its June 2019 Lease Sale beginning on January 7 through January 18, 2019, despite no documents being available. Even if the lapse in federal funding is resolved prior to or during these periods, the closure of the BLM does not allow for consultation or the opportunity for meaningful

² 54 U.S.C. 302706

³ See 43 CFR Part 3160; See also Bureau of Land Management - Onshore Oil and Gas Operations: Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations (available at: https://www.regulations.gov/document?D=BLM_FRDOC_0001-0104).

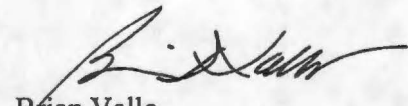
⁴ See e.g., Email from Lola Henio, BLM - Farmington District Office, to Aaron M. Sims, Chestnut Law Offices P.A. (Dec. 26, 2018) (on file with BLM and the Chestnut Law Offices P.A.) (Attachment 1).

analysis of these undertakings to occur. Therefore, upon receipt of federal funding, the BLM must postpone, at a minimum, all forthcoming Scoping Periods or Protest Periods commensurate with the duration of the lapse of appropriations.

Finally, as a federal agency, the BLM has a trust responsibility to the Pueblo of Acoma, and other tribes, which is enshrined in federal law and executive orders. This trust responsibility extends to your agency, even during times like these when there has been a lapse in federal appropriations. Here, the appropriate response should be the halting of all oil and gas leasing, permitting activity, and other actions, until the BLM is able to ensure the incorporation of meaningful participation of tribes and the protection of our rights in these federal processes.

Sincerely,

PUEBLO OF ACOMA



Brian Vallo
Governor

Enclosure

CC: Sen. Tom Udall
Sen. Martin Heinrich
Rep. Ben Ray Lujan
Rep. Debra Haaland
Rep. Xochitl Torres-Small
All Pueblo Council of Governors
Ed Roberson, BLM Utah State Office
Danita Burns, BLM Albuquerque District Office
Angel Martinez, Rio Puerco Field Office
Mark Matthews, BLM Farmington District Office
Richard Fields, BLM Farmington Field Office

ATTACHMENT 1 - 01/10/2019 Letter

Aaron M. Sims

From: Henio, Lola [lhenio@blm.gov]
Sent: Wednesday, December 26, 2018 9:35 AM
To: Timothy Menchego; Terry Morgart; Aaron M. Sims; Ann Berkley Rodgers; Pinu'u Stout; Brandon V.; poi09103@isletapueblo.com; general.counsel@isletapueblo.com; bchavarria@santaclarapueblo.org; DWall@utemountain.org; Garrett Briggs; Terry Knight
Subject: Lola Henio on Furlough

Good Morning,

I'm writing to let you know that I am on furlough at this time. I know I had said I would be working with several of you to schedule Government-to-Government Consultation for next month, if we could wait until I come back that would be great. Please be patient with me as I will be a little behind on just about everything.

I will not be monitoring my government email or telephone/cellphone during this time. Please let other Pueblos and Tribes know as well. I apologize. Thank you for your understanding.

Much Respect,
Lola Henio

--

>X< >X< >X< >X< >X< >X< >X< >X<
Lola Henio, Tribal Program Coordinator
BLM-Farmington District Office
6251 N. College Blvd, Suite A
Farmington, NM 87402

Telephone: (505) 564-7720
Email: lhenio@blm.gov

Brian D. Vallo, Governor
Mark Thompson, 1st Lt. Governor
Bernard E. Lewis, 2nd Lt. Governor
Davy D. Malie, Tribal Secretary
Duane M. Torivio, Tribal Interpreter



25 Pishuari Drive
P. O. Box 309
Acoma, NM 87034
Telephone: (505)552-6604
Fax: (505)552-7204

PUEBLO OF ACOMA
OFFICE OF THE GOVERNOR

January 30, 2019

Mr. Tim Spisak, Director
BLM New Mexico State Office
301 Dinosaur Trail
Santa Fe, NM 87508
E: BLM_NM_Comments@blm.gov

Re: Request for Update on BLM New Mexico Undertakings due to Federal Lapse in Appropriations

Dear Mr. Spisak:

I am writing to you on behalf of the Pueblo of Acoma, concerning the scheduling of a number of previously announced oil and gas undertakings that are of interest to the Pueblo. Due to the federal lapse in appropriations, the BLM has now "reopened" in the middle of, or nearer to, a number deadlines for scoping periods, protest periods, lease sale periods, and pending applications for permits to drill ("APD"). These periods are not only an important time for the Pueblo to help inform the BLM of its concerns, but it is a critical legal time period for the raising and preservation of objections. Even more important is the commencing of meaningful and adequate Section 106 consultation under the National Historic Preservation Act ("NHPA"). Section 106 consultation should occur early in an undertaking's planning to ensure a broad range of alternatives are considered. *See* 36 CFR § 800.1(c) ("Timing").

The Pueblo of Acoma was deeply concerned when it was informed, the BLM was still processing APDs during the lapse in federal appropriations, despite there being no staff to conduct consultation. The response from the BLM New Mexico State Office's Chief of Communications, informing the Pueblo that all federal laws were being complied with, including NHPA, during the lapse was troubling¹. Furthermore, the Pueblo of Acoma did not receive any communications or requests for consultation from the BLM Farmington Field Office or the BLM Rio Puerco Field Office. Attempted contact to the agency via phone, directly to Field Offices, or individual APD project managers were unanswered. Acoma had previously been informed that

¹ *See* Attachment 1 Email from Cathleen Rineer-Garber, BLM New Mexico State Office, to Governor Brian D. Vallo, Pueblo of Acoma (Jan. 28, 2019) (on file with the BLM and the Pueblo of Acoma) (Attachment 1).

all tribal consultation was postponed.² , Lastly, no new information was updated on BLM's e-planning website for a number of different undertakings.

The Pueblo is aware of at least one new APD that was submitted in the San Juan Region during the lapse in federal appropriations and is aware of numerous APDs that were pending prior to the shutdown. If the BLM Chief of Communications' statement is correct, then the Pueblo should fully have expected continuous communication about APDs, and other oil and gas activity, occurring within the Greater Chaco Region - where the Pueblo of Acoma has been significantly involved for the past five years.

I. Oil and Gas Undertakings, Scheduling:

Due to the lapse in federal appropriations and no opportunity for consultation or opportunity for evaluation of pertinent information, the Pueblo of Acoma demands the BLM New Mexico State Office, and its district and field offices, at a minimum, postpone all previously scheduled or announced oil and gas activities commensurate with the lapse in federal appropriations. We also request a detailed update on the following matters:

a) **Farmington Mancos - Gallup Administrative Draft Resource Management Plan Amendment and Environmental Impact Statement ("RMPA")**

Please provide an updated timeframe for completion of the RMPA and next opportunities for cooperating agency/public participation.

b) **BLM - New Mexico December 2018 Lease Sale**

Please provide an update on when the Pueblo of Acoma may expect resolution of its protests. For the December 2018 Lease Sale, the Pueblo, along with the APCG is still awaiting a response from the BLM D.C. office on a proposal for ethnographic study of those parcels proposed to be leased by the Farmington Field Office. Please provide an update on the status of the issuance of leases sold by the BLM - Rio Puerco Field Office.

c) **BLM - New Mexico March 2019 Lease Sale**

Please provide an updated schedule for the March 2019 Lease Sale protest period, in addition to an updated schedule for the earliest opportunities for Section 106 consultation prior to the protest period (See Section III below). The Pueblo of Acoma has previously submitted scoping comments raising significant concerns about the BLM - Farmington Field and Rio Puerco Field Offices' proposed March 2019 lease parcels.

d) **BLM - New Mexico June 2019 Lease Sale**

² See e.g., Email from Lola Henio, BLM - Farmington District Office, to Aaron M. Sims, Chestnut Law Offices P.a. (Dec. 26, 2018) (on file with BLM and the Chestnut Law Offices P.A.) (Attachment 2).

Please provide an updated schedule for the scoping period and information about the proposed lease parcels. We also request an updated schedule for the earliest opportunities for Section 106 consultation (See Section III below).

e) **Applications for Permits to Drill**

a. **BLM - Farmington Field Office: Hilcorp Energy Company, A9 Lateral Compressor Project.**

Please provide an update on available dates for Section 106 consultation. The Pueblo of Acoma previously corresponded with the BLM Farmington Field Office by letter on November 26, 2018 about concerns with the project.³ Correspondence prior to the shutdown with the BLM FFO Tribal Program Coordinator discussed possible consultation meetings in January 2019.

b. **Ongoing Activity During Lapse in Federal Appropriations.**

Please provide a comprehensive update on the status of ongoing APDs that were commenced prior to the lapse in federal appropriations and the status of APDs received during the shutdown. This update should provide a summary of work completed during the lapse in appropriations.

II. Communication with the Pueblo of Acoma

I would also like to provide you with contacts and requested methods of communication as your district and field offices communicate with the Pueblo. Please note the following changes:

a) **Contacts**

In future correspondences on BLM undertakings please send appropriate mail and email correspondences to:

Pueblo of Acoma - Office of the Governor (505-552-6604)

Governor Brian D. Vallo (governor@poamail.org)

Interpreter Duane Torivio (interpreter@poamail.org)

Acoma Tribal Historic Preservation Office (505-552-5127)

Todd Scissons, THPO Officer (Tscissons@poamail.org)

You may continue to send mail to the following address:

Pueblo of Acoma

Attn: Governor Brian D. Vallo; Todd Scissons, Acoma THPO

P.O. Box 309

³ See Letter from Gov. Kurt Riley, Pueblo of Acoma, to Rick Fields, BLM - Farmington Field Office (Nov. 26, 2018) (on file with the Pueblo of Acoma and the BLM - FFO).

Acoma, NM 87034

Finally, we request, a follow up with my office by phone or email to ensure that we have received your correspondence. Many times USPS mail can be delayed or lose time as it is being internally recorded and processed at the Pueblo.

b) Information to include

In future undertakings, especially requests for consultation, please provide as much information about a project as possible. This may include, but not be limited to: maps (both project area and regional maps for context), cultural resource reports, information on nearby archaeological/cultural resources, sacred sites, or TCPs, and other information that you may find pertinent to our involvement. This information will better ensure the Pueblo is able to make a fully informed decision about participating or not. Often, we do not receive enough information (or information in context) to make a decision to respond.

III. Requests for Section 106 Consultation

The Pueblo of Acoma requests Section 106 consultation with the BLM - Farmington Field Offices and the BLM - Rio Puerco Field Office on the following undertakings:

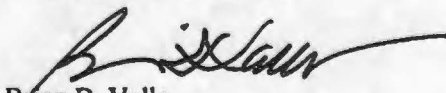
- a) BLM - New Mexico March 2019 Lease Sale
- b) BLM - New Mexico June 2019 Lease Sale
- c) BLM - New Mexico Farmington Field Office deferred parcels, March 2018 & December 2018 Lease Sales.

IV. Conclusion

Thank you for your timely attention to this request. I hope the information you provide in response to this letter will better ensure a positive working relationship between the Pueblo and your agency.

Sincerely,

PUEBLO OF ACOMA


Brian D. Vallo
Governor

Enclosures

CC: Danita Burns, BLM Albuquerque District Office
Angel Martinez, Rio Puerco Field Office
Mark Matthews, BLM Farmington District Office
Richard Fields, BLM Farmington Field Office
Todd Scissons, Acoma Tribal Historic Preservation Office
Ann Berkley Rodgers, Chestnut Law Offices, P.A.
Aaron Sims, Chestnut Law Offices, P.A.

Attachment 1 - 01/30/2019 Letter

Aaron M. Sims

Subject: FW: BLM Response to January 10, 2019 Letter

From: Governor Brian Vallo [<mailto:Governor@poamail.org>]
Sent: Monday, January 28, 2019 5:38 PM
To: Ann Berkley Rodgers; Aaron M. Sims
Subject: FW: BLM Response to January 10, 2019 Letter

From: Rineer-Garber, Cathleen <crineergarber@blm.gov>
Sent: Monday, January 28, 2019 1:58 PM
To: Governor Brian Vallo <Governor@poamail.org>
Subject: BLM Response to January 10, 2019 Letter

Hello Governor Vallo:

Per our phone conversation on January 17, here is a written response to your January 10, 2019 letter to Tim Spisak, NM State Director for the BLM regarding your concerns about BLM activities continuing during the government shutdown. I apologize for the delay in getting this to you. Please let me know that you received this email and if you would still like a mailed response on letterhead.

- The Bureau of Land Management's (BLM) employees continue to process Applications for Permit to Drill (APDs) during the lapse in appropriations because this activity falls under the "exempt" category. Exempt employees are paid from non-appropriated permanent appropriations (receipts) and unobligated balances from prior year appropriations and will continue to work as directed by their supervisors and the continued availability of funds.
- All APDs are required to be filed electronically and fees are to be paid by check, credit card, or electronically via www.pay.gov. APDs are made available for public review for 30 days (the BLM National Operation Center automatically updates the pending Notice of Staking and APD list every night at <https://reports.blm.gov> website from the Automated Fluid Minerals Support System (AFMSS) 2 database).
- The APD review process is continuing to follow all legally required steps prior to completion. All APDs processed and approved by the BLM must be reviewed to ensure compliance with the National Environmental Policy Act (NEPA).
- Cultural resources, sensitive or threatened and endangered species, or other resource survey information may be needed in order to comply with the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), or to complete a staff review or an environmental analysis under NEPA. As such, the BLM will bring in the appropriate specialists as needed (subject to the availability of funds) to comply with the various requirements to process drilling permits.
- Consistent with BLM policy, NEPA documents are available on the BLM's E-Planning website: https://eplanning.blm.gov/cpl-front-office/eplanning/ncpa/ncpa_register.do
- Many APDs do not generate a high level of interest for public review; thus, are not typically made available for public comment. This is consistent with NEPA.
- The BLM is focused on serving the American public by trying to get as many people to work and paid under these difficult circumstances. The Bureau of Land Management's Contingency Plan (<https://www.doi.gov/sites/doi.gov/files/2019-01-blm-contingency-plan.pdf>) outlines the activities BLM will continue to carry out during a lapse of appropriations. The plan is consistent with guidance provided in Office of Management and Budget's Circular A-11.
- The BLM is currently working to reschedule and publicize any changes to protest and scoping periods for upcoming oil and gas lease sales in March and June.

Once again, I apologize for the delay,

Cathy Garber

Aaron M. Sims

Attachment 2 - 01/30/2019 Letter

From: Henio, Lola [lhenio@blm.gov]
Sent: Wednesday, December 26, 2018 9:35 AM
To: Timothy Menchego; Terry Morgart; Aaron M. Sims; Ann Berkley Rodgers; Pinu'u Stout; Brandon V.; poi09103@isletapueblo.com; general.counsel@isletapueblo.com; bchavarria@santaclarapueblo.org; DWall@utemountain.org; Garrett Briggs; Terry Knight
Subject: Lola Henio on Furlough

Good Morning,

I'm writing to let you know that I am on furlough at this time. I know I had said I would be working with several of you to schedule Government-to-Government Consultation for next month, if we could wait until I come back that would be great. Please be patient with me as I will be a little behind on just about everything.

I will not be monitoring my government email or telephone/cellphone during this time. Please let other Pueblos and Tribes know as well. I apologize. Thank you for your understanding.

Much Respect,
Lola Henio

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>X< >X< >X< >X< >X< >X< >X< >X<
Lola Henio, Tribal Program Coordinator
BLM-Farmington District Office
6251 N. College Blvd, Suite A
Farmington, NM 87402

Telephone: (505) 564-7720
Email: lhenio@blm.gov



ATTACHMENT 6

Preserving America's Heritage

April 26, 2019

Mr. Kent Hoffman
Deputy State Director, Land and Minerals
Bureau of Land Management
Utah State Office
440 West 200 South, Suite 500
Salt Lake City, UT 84101

REF: *Review of "no adverse effect" finding
Bureau of Land Management Oil and Gas Lease Sale for March 2019
San Juan, Box Elder, and Uintah Counties, Utah*

Dear Mr. Hoffman:

On March 27, 2019, the Advisory Council on Historic Preservation (ACHP) received the Bureau of Land Management's (BLM) request to review its finding of "no adverse effect" for the referenced undertaking. Our advisory comments were requested pursuant to Sections 800.5(c)(2) and (3) of the regulations implementing Section 106 of the National Historic Preservation Act (NHPA), "Protection of Historic Properties" (36 CFR Part 800). We have reviewed the information you provided, which included comments from the Utah State Historic Preservation Officer, San Juan County Planning Department, Friends of Cedar Mesa, Hopi Tribe, and Southern Utah Wilderness Alliance.

San Juan County

At the time the ACHP received this request for dispute resolution, the BLM had elected to defer the oil and gas leases for nineteen parcels in San Juan County to a future sale. We anticipate that the BLM will define these deferred lease sales as a separate undertaking as they have independent utility in purpose, location, and temporality and are not connected to or dependent on the Box Elder and Uintah County lease sales addressed later in this letter. However, our combined response is intended to accommodate the BLM's request to review the deferred parcels as a part of the current analysis. We understand that the parcels in San Juan County have been deemed highly sensitive for the presence and density of significant cultural resources, which include many Pre-Columbian settlements, rock art panels, kivas, and other remains. We appreciate the agency's decision to defer sale of these parcels, but as objections to the BLM's determination of effect regarding these sales remain, we provide the following advisory comments.

First, the BLM has previously acknowledged that leasing is an undertaking and initiated consultation under Section 106 of the NHPA with the Utah State Historic Preservation Officer (SHPO). As we have stated in our review of similar undertakings, a leasing decision can narrow the "broad range of

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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alternatives” available to avoid, minimize or mitigate any adverse effects that may result from activities carried out under the lease. The ACHP membership’s comments in a Forest Service and BLM case, “Regarding the Release from Suspension of the Permit to Drill by Solenex LLC in Lewis and Clark National Forest, Montana,” sent to the Secretary of Interior and Secretary of Agriculture on September 21, 2015, support this position (see enclosed). That comment stated in part:

For the Section 106 process to work effectively, the agency’s consideration of a ‘broad range of alternatives’ must include avoidance alternatives, if they exist.... For this reason, the ACHP urges agencies to develop policies and procedures that require the initiation of Section 106 consultation prior to leasing decisions.

Based on this position, the ACHP does not agree that, in all circumstances and regardless of location, leasing will not have an adverse effect on historic properties. The purpose of the lease is to give the lessee the right to use the leased land to explore for, drill for, extract, remove, and dispose of oil and gas deposits. Such actions, as acknowledged by the BLM, are a reasonably foreseeable consequence of leasing and therefore must be considered during this Section 106 review. When an agency is proposing lease sales in an area of known significant historic properties like San Juan County, or in adjacent areas where the presence of high concentrations of historic properties is likely even if presently unknown, it is our position that the BLM cannot assume that leasing will have no adverse effect on historic properties. An adverse effect finding does not need to be predicated on certainty. The regulations at 36 CFR § 800.4(d)(2) state: “If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5” (emphasis added). Based on the information on the concentration of properties presented by the National Trust for Historic Preservation and Friends of Cedar Mesa (in their joint letter to the BLM dated February 28, 2019), there exists evidence for sufficient concentrations of historic properties that may warrant further efforts to identify historic properties and consider potential effects to them prior to the issuance of any lease.

The BLM has asserted that it is possible to site a single oil and gas well within each parcel without causing direct or indirect effects to known historic properties, and that ground Class III surveys and consultation will be conducted prior to approval of any ground disturbing activities. However, the BLM has not provided any detailed documentation of how direct environmental or atmospheric (such as noise, vibration, or visual elements), indirect, or cumulative effects (including those of past lease sales in close geographic proximity to the parcels in questions) will be considered, nor has it indicated how adverse effects to potentially eligible districts or landscapes that may be identified in subsequent survey efforts within these parcels would be avoided in later phases. Unlike prior lease sales with high concentrations of cultural resources, the BLM in this case has not committed to a No Surface Occupancy stipulation to be recorded in the lease parcels in question. Therefore, it logically follows that there is the potential for direct adverse effects of this reasonably foreseeable event. Furthermore, we would argue that there is a reasonable probability for the lease to result in adverse effects on historic properties (as outlined in some of the consulting parties’ submissions) from related activities resulting from well pad development, such as increased traffic and noise.

In specific localities with a special sensitivity to direct, indirect, and cumulative effects, like the world-class resources in this area of southeastern Utah, the most appropriate way to address such potential adverse effects would be to develop a Programmatic Agreement (PA) that would guide consideration of effects to historic properties in lease development and issuance.

In conclusion, the ACHP does not agree with BLM’s finding of “no adverse effect” for the proposed lease sales in this historically significant and sensitive area. While the ACHP appreciates the BLM’s deferral of

lease sales in San Juan County, because of the potential to adversely affect historic properties in direct, indirect, and cumulative ways, we continue to believe that there exists the potential for this undertaking to adversely affect historic properties and encourage the BLM to execute a PA prior to the lease sale. We understand the scheduling issues BLM may be facing and remain available to advise BLM on consultation timelines and strategies for the development of an agreement document should it choose to do so. The ACHP's opinion is advisory in this case and the BLM must take it into account in making a final decision. According to the regulations (at 36 CFR § 800.5(c)(3)(ii)(B)):

If the agency official's initial finding [of no adverse effect] will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 [for this undertaking] are fulfilled.

Box Elder and Uintah Counties

Unlike the nineteen parcels deferred from the March 2019 lease sale in San Juan County, it is our understanding that the twenty-two contested parcels in Box Elder and Uintah Counties do not exhibit the same density or class of significant archaeological and cultural resources. Based on our review of these parcels, the views of the Utah SHPO, and our review of similar BLM lease sales in Utah over the past few years, it is the ACHP's advisory opinion that the BLM has correctly applied the Criteria of Adverse Effect pursuant to 36 CFR § 800.5(a)(1) in these cases.

As previously stated our opinion is based on BLM's ability and willingness to "microsite" oil and gas wells within parcels without directly or indirectly affecting historic properties, through conducting surveys and subsequent consultation to avoid adverse effects prior to approval of any ground disturbing activities. Additionally, the BLM has committed to recording a No Surface Occupancy stipulation in several of these lease sales, thus avoiding surface development on the parcels in question. For other parcels, as described in previous correspondence to the ACHP, the BLM states it will not approve any ground-disturbing activities until it completes its obligations under Section 106 through a separate Section 106 review for each site-specific proposal for development within the leased area.

Conclusion

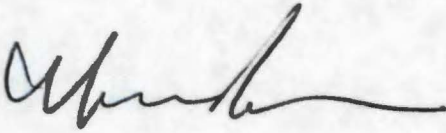
In addition to the recommendations offered above, we would like to point out the importance of encouraging open and meaningful consultation in the Section 106 process in undertakings like this. In consideration of the consistent response from and concern amongst consulting parties, we encourage the BLM, in future lease sale consultations, to:

- Review potential barriers to participation and, wherever possible, remove them. This includes not requiring hard-copy requests for consulting party status where other formal correspondence (including electronic) would suffice;
- Continue to invite and engage in Section 106 consultation on lease parcels deferred to future sales, including those for which the BLM does not intend to conduct additional cultural resource surveys;
- Document and share the source material and methodology for its analysis in the associated Cultural Resources Report(s), to the extent practicable while protecting sensitive information (such as sites afforded protection under Section 304 of the NHPA); and
- Review past lease sales and document potential indirect and cumulative effects of these sales, especially where effects to resources such as National Historic Landmarks, Cultural Landscapes,

National Historic Trails, Traditional Cultural Properties, and other landscape-level historic properties are possible.

Thank you for the opportunity to comment on this matter regarding potential effects to historic properties. If we may be of further assistance, or you would like to discuss this matter, please contact Bill Marzella, ACHP Liaison to the BLM, at (202) 517-0209, or via e-mail at bmarzella@achp.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Reid J. Nelson", with a long horizontal flourish extending to the right.

Reid J. Nelson
Director
Office of Federal Agency Programs

Enclosure