

INTERIOR BOARD OF LAND APPEALS

Wade Patrick Stout, et al.

153 IBLA 13 (July 13, 2000)

(Note: The date shown on the decision below is *June* 13, 2000. Because that date appeared to be incorrect, a signed paper copy of the decision was consulted. The signed copy showed the correct date to be July 13, 2000.)

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WADE PATRICK STOUT, ET AL.

IBLA 2000-18

Decided June 13, 2000

Appeal from a decision of the Field Manager, Hollister Field Office (California), Bureau of Land Management, approving land exchange. CACA 24896F8.

Affirmed.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM may dispose of lands by exchange under section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), where it determines that the public interest will be well served by making that exchange. BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination. A decision approving a land exchange will be affirmed where the exchange will result in more logical and efficient management of the BLM lands in the area and is in accordance with existing land-use planning documents.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), the adequacy of an EA must be judged by whether it took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, and considered all relevant matters of environmental concern. In general, the EA must fulfill the primary mission of that section, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action.

APPEARANCES: Wade Patrick Stout and Lesley Gates Stout, pro sese; Robert E. Beehler, Field Manager, Hollister Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Wade Patrick Stout and Lesley Gates Stout (appellants or Stouts) have appealed the August 23, 1999, decision of the Field Manager, Hollister Field Office (California), Bureau of Land Management (BLM), approving a land exchange with Donald G. Trincherro and Elizabeth A. Trincherro (Trincherros) as facilitated by CAL-BLMX, Inc., a contractor hired to facilitate "land tenure adjustments pursuant to direction from the Hollister Resource Management Plan [RMP] of 1984." (Environmental Assessment (EA) at 1.) Appellants also requested a stay of the effect of BLM's decision pending our consideration of their appeal. The Petition for Stay was denied in an Order issued by the Board on November 5, 1999.

A synopsis of the dispute is set out in appellants' Petition for Stay (Petition) dated October 15, 1999, and BLM's October 28, 1999, response (Response) to appellants' Petition. In their Petition, appellants had expressed both concern over the loss of income from woodcutting and other activities on the public land if the land was transferred to private ownership (other than them), as well as a concern that the prospective transferee, Mr. Trincherro, would engage in land clearing activities that would be environmentally hazardous. See Petition at 2-4. In its Response, BLM stated:

There are no lands available for wood cutting within the Hollister Field Area and BLM has been unaware of the Stouts' wood cutting activity on the public land until now. If in fact the Stouts have been operating a commercial wood cutting enterprise on the public land, they have been doing so in trespass and will be cited for trespass to cease that activity. These lands are not timber lands, being composed primarily of chamise and mixed chaparral, having very low wood products value.

The appellants state that there will be the loss of existing non-wood cutting income opportunities and refer to the loss of non-specified income opportunities. If in fact non-wood cutting activities are being conducted on the land the appellants are not authorized to conduct activities since they have not been issued permits or authorization for their undisclosed activities. The traditional uses of the land have been grazing, mining, hunting, and various recreational activities, primarily OHV use. There is also an existing grazing lease on the land assigned to another private individual. The lands have been segregated from mineral entry since 1996, and this segregation will remain in effect for five years so long as the lands are retained in federal ownership. Therefore the Stouts will not be able to develop the public land to produce income for themselves even if this is a desirable public goal.

The appellants state that there will be significant loss of real property value if the land is sold. Property values can be affected by public land disposal. Landlocked public lands are generally recognized as a valuable resource and asset by those that border the public land and/or have access to the public land. Landowners may also view public lands as a nuisance because of increased congestion, trespass, target shooting, litter, etc. The lands in question are not composed of high resource values and are currently being used for grazing, minimizing any adverse impact to the appellants' property value. This exchange would have minimal impact on the appellants' property value because the appellants' lands are adjacent to a block of public land lying southeast of the Stout property containing over 4,100 acres that will be retained in public ownership.

The appellants state that they will be denied opportunity to purchase land and consequently denial [sic] of potential income. The land exchange program between the Hollister Field Office and CAL-BLMX, Inc. has been in progress for over ten years with hundreds of scattered parcels exchanged. It is uncommon for a rural resident living near public land in this area to be unaware of the land exchange program. BLM followed the regulations as required. Persons new to an area have the responsibility to investigate the public records and query neighboring residents, i.e., Mrs. Stout, as to the suitability of their plans in relationship to long term land use planning and decisions for the area.

The appellants state that there will be the threat of potential asbestos contamination of both persons and property if the proposed recipient of the land continues with hazardous land-clearing practices. This statement by appellants on the point of "potential asbestos contamination" is the first time the issue of asbestos contamination has arisen.

(Response at 4-5.)

In their statement of reasons for appeal (SOR), appellants reiterate and expand upon the objections raised in their Petition. In pertinent part, they urge: (1) that they will suffer great economic loss from the loss of wood cutting revenue if the exchange is consummated (SOR at 7-8); (2) that they will lose potential income from their inability in the future to charge those desiring to traverse their property to access public land for recreational purposes (SOR at 9-10); (3) that they will lose personal access themselves to hunt on the public land when it is privatized (SOR at 11); (4) that their "civil rights" were violated in that they were not given the opportunity to bid on the public lands as a result of inadequate BLM notification (SOR at 12); (5) that they will suffer a loss of property value to their own adjoining land when the Federal parcel is sold (SOR

at 12-13); (6) that the decision to approve the exchange is "in direct contradiction to the [National Environmental Policy Act of 1969 (NEPA)] requirements as appellants stated in their Petition for Stay * * *" (SOR at 14); (7) that consultation with Federal and state agencies concerning the exchange has been inadequate because "there has been no recent review by Bureau staff of the status of the exchange program in Hollister," (SOR at 14-15, quoting EA at 4); (8) that there has been an inadequate BLM review of how threatened and endangered species will be affected by the exchange, especially the kit fox, the kangaroo rat, and the mountain lion (SOR at 15); (9) that there has been inadequate consultation with the State Historic Preservation Officer (SHPO) concerning cultural resources impacted by the exchange (SOR at 15); (10) that there has been inadequate consultation on Native American religious and heritage issues because Lesley Gates Stout is part Native American and she has not been consulted (SOR at 16); (11) that there has been inadequate coordination with local landowners (SOR at 16-18); and (12) that the EA inadequately addresses the threat posed by asbestos to appellants and other local residents (SOR at 22-28).

In its Answer dated December 17, 1999, BLM responded that its decision was supported by EA No. CA-019-1988-034 for the Gates Land Exchange and the Hollister Field Manager's Decision Record (DR) of August 23, 1999. It argues that the exchange, in addition to being supported by those documents, is consistent with BLM planning recommendations outlined in the Hollister RMP of 1984. In BLM's Response to appellants' Petition for Stay, BLM noted that

[t]he RMP of 1984 addresses the Field Area's dispersed land pattern which consists primarily of small scattered isolated parcels that have little or no public or administrative access and a land pattern difficult and inefficient to manage. Since completion of the RMP, BLM has been making a concerted effort to exchange the scattered isolated pattern of public land for private lands adjacent to or within the exterior boundary of Hollister's management areas.

(Response at 2.)

BLM notes in the Response that the Gates exchange lands are identified in the RMP for disposal and are specifically described in the EA and DR. Id. BLM further explains:

The specific public land under appeal that appellants do not want exchanged is known as Parcel 03 containing 474 acres of landlocked public land in San Benito County. The subject parcel provides a convenient "backyard" for adjacent landowners, but not necessarily to the general public. Current recreational use on the Gates exchange lands is restricted to adjacent landowners and their guests and appears to primarily be related to hunting and wildlife viewing.

Id. In its Answer, BLM explains a further purpose of the exchange:

One purpose of the land exchange program is to provide the public with access to public lands and not to protect an individuals opportunity to charge trespass fees. We have stated in the EA and in our response to the appellants' Petition for Stay that the parcel in question is not large enough to sustain a commercial hunting operation, nor add substantial value to any adjacent operation. The hunting pressure from a commercial operation on such a small parcel of land (474 acres) and the other activities the appellants have proposed would most likely drive out whatever game exists negating the possibility of potential income. Trespass conflicts would likely occur as the parcel is entirely surrounded by the Trincherro property except for the common boundary with the Stout property.

(Answer at 2.)

In response to appellants' concern that transfer of the property to private interests would deprive appellants of access to various activities they have personally enjoyed, BLM states that appellants are adjacent to another parcel of public land containing over 4,100 acres. BLM further points out that although the land abutting theirs may be too rugged for entry on the boundary with their land, several public access points to the 4,100-acre parcel are available only a short distance from appellants' property. Moreover, BLM explains, appellants reside within a short distance of the Clear Creek Recreational Area. (Answer at 3.)

The parcel whose exchange is challenged by appellants is one of four parcels included in the Gates Land Exchange, which totals 1,944.67 acres in the Call Mountain-Hernandez Management Area. The alternatives considered by BLM in its EA relating to disposition of these parcels included the proposed action, which would result in outright disposition of the 1,944.67 acres of public land. (EA at 2.) The Partial Exchange Alternative would dispose of all but 378.13 acres, in two separate parcels, of the total described in the proposed action. Under the Partial Exchange Alternative, the 378.13 acres would remain in Federal ownership in order to protect cultural resources (20 acres) and riparian habitat (358.13 acres). (EA at 3.) The Conservation Easement Alternative, similar in affect to the Partial Exchange Alternative, would result in transfer of ownership of all 1,944.67 acres described in the proposed action, but would retain Federal development rights through an easement granted to BLM for the 378.13 acres requiring cultural resource protection and protection as riparian habitat. Id. Under this alternative, the two parcels would be transferred with the requirement that no development or habitat modification take place, to preserve in perpetuity the cultural and riparian values. Id. A No-Action Alternative was also considered in which the land would remain in Federal ownership. This alternative was rejected because the purposes outlined in the RMP would not be met. Specifically, there would be continued trespass

on private lands adjacent to isolated public parcels; public use of these isolated parcels would continue to be under the control of adjacent landowners with no access available for other local citizens; and effective land management by BLM would be minimal. (EA at 4-5.)

In his August 23, 1999, decision, the Hollister Field Manager selected a Combined Alternative incorporating both the Partial Exchange Alternative and the Conservation Easement Alternative. (DR at 1.) Under the Combined Alternative, the 20-acre cultural site would be retained in Federal ownership while the remaining 1,924.67 acres would be transferred into private ownership, with the 358.13-acre riparian area becoming the subject of a permanent conservation easement that would protect those resources. Id. The decision further implemented the mitigation measures identified within the proposed action, which are to target future acquisitions surrounding the serpentine block within the Clear Creek Management Area, as well as areas known as key habitat for rare species in the San Joaquin Valley. Id.

[1] The Federal Land Policy and Management Act of 1976 (FLPMA), in section 206(a), provides:

A tract of public land or interests therein may be disposed of by exchange by the [Secretary of the Interior] under this Act * * * where the Secretary * * * determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary * * * shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary * * * finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1994). BLM, as the authorized officer of the Department, determines what is in the public interest. In doing so, it is required to fully consider

the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land

use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that * * * [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b); Anthony Huljev, 152 IBLA 127, 134-135 (2000); Donna Charpied, 150 IBLA 314, 331-32 (1999) (appeals filed, National Parks and Conservation Ass'n v. BLM, No. EDCV 00-0041 VAP (JWJx) (Jan. 27, 2000 C.D. Ca.); Donna Charpied, et al. v. USDI, No. EDCV 99-0454 RT(MCx) (Dec. 22, 1999 C.D. Ca.)); see City of Santa Fe, 103 IBLA 397, 399-400 (1988).

In its consideration of the broad range of factors it is required to review in determining whether the public interest will be well served by the exchange, BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination. Anthony Huljev, 152 IBLA at 135; Donna Charpied, 150 IBLA at 332; see National Coal Ass'n v. Hodel, 825 F.2d 523, 532 (D.C. Cir. 1987); Lodge Tower Condominium v. Lodge Properties, Inc., 880 F. Supp. 1370, 1380 (D. Colo. 1995); National Coal Ass'n v. Hodel, 675 F. Supp. 1231, 1245 (D. Mont. 1987), aff'd, 874 F.2d 661 (9th Cir. 1989); Burton A. McGregor, 119 IBLA 95, 103 (1991); John S. Peck, 114 IBLA 393, 397 (1990). We find that BLM has properly exercised that discretion here. 1/

BLM's rationale for approving the Gates Land Exchange was set out as follows in its DR:

Selection of the combined Partial Exchange Alternative #1 / Conservation Easement Alternative #2, would result in increased efficiency in management of public lands through

1/ Section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (1994), requires that the value of the public lands transferred in the exchange be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value, failing in which the BLM appraisal is properly upheld. Appellant has not challenged BLM's valuation of the entire 1,924.67 acres included within the exchange, or the 474-acre parcel adjacent to appellants' property, and thus we do not address that issue.

elimination of isolated parcels, yet would retain in perpetuity for protective management a parcel with highly sensitive resource values. The application of a permanent Conservation Easement on 358.13 acres would provide protection for riparian resource values, yet also facilitate management of this parcel by the private owner. The Easement * * * would disallow development on or within the riparian zone, as well as preclude creek channel destruction or mechanical disturbance. Disposal of the non-sensitive parcels would generate revenue to the BLM, which would in turn facilitate BLM's continuing efforts to acquire and consolidate lands with public access and rare species and/or community assemblages. Upon review of the merits of the comment letter received [Stouts' letter], it is my decision that disposal of the parcel in question would not adversely affect the private landowner, particularly since it is not BLM's mission to maintain public land for the enhancement of private property values. Federal requirements relative to land exchange have been met.

(DR at 1.)

The subject BLM tracts included within the Gates Land Exchange are isolated BLM parcels that are difficult to manage and lack public or administrative access. Transfer of the 1,924.67 acres into private ownership will result in more logical and efficient management of the BLM lands in the area. Exchange of this isolated acreage is in accordance with existing land-use planning documents. The exchange would provide significant benefits to the public in terms of securing resources to acquire land with public access more suitable for general recreation, wilderness management, riparian resources, and cultural resources. No significant impacts to the socio-economic aspects of the local community have either been raised or are expected, other than the impact on the wood-cutting revenues and trespass surcharges desired by the Stouts, and these are unauthorized uses that BLM has not sanctioned. The intended future use of the Federal lands (grazing) is not expected to significantly conflict with the established management objectives on adjacent Federal lands. The record shows that BLM carefully evaluated the controlling question whether the public interest will be well served by the exchange, and properly considered whether Federal land management would be improved by approving it. Appellants have failed to show that BLM improperly exercised its discretion in deciding that the exchange should proceed. We find that BLM has complied with its obligations under section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994).

[2] Appellants also complain that BLM did not properly evaluate the environmental consequences of the transfer of the Gates' land from Federal ownership to the Trincheros. Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), the adequacy of an EA will be judged by whether BLM has taken a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, and considered all relevant matters of environmental concern. Colorado Environmental Coalition, 142 IBLA 49, 52 (1997), and cases there cited. In

general, the EA must fulfill the primary mission of that section, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action, that the resource values to be lost by the deeding of Federally-owned lands are balanced against the values to be gained from the transfer of the acreage, and that the transfer has not violated any provision of NEPA, supra. Donna and Larry Charpiel, 150 IBLA 314, 321 (1999).

In determining whether an EA promotes informed decisionmaking, a "rule of reason" will be employed. See County of Suffolk v. Secretary of the Interior, 562 F.2d 927, 929 (9th Cir. 1987). The query is whether the EA contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and the alternatives thereto. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). In those instances where BLM has satisfied the procedural requirements of section 102(2)(C) of NEPA by taking a "hard look" at all the likely significant impacts of a proposed action, in this case the Combined Alternative, it will be deemed to have complied with the statute, regardless of whether a different substantive decision could have been reached by some other decisionmaker. See Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1990).

For the Stouts to overcome BLM's decision to proceed with the Gates Land Exchange, appellants must carry the burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. See Colorado Environmental Council, 142 IBLA at 52.

Appellants' principal environmental concern relates to their claim that a significant serpentine deposit laden with chrysotile asbestos crystals is present on the 474-acre parcel (parcel 3) scheduled for exchange, and that the action by the adjacent landowner, Mr. Trincherro, in disturbing the serpentine on his land abutting that scheduled for exchange, poses an airborne and waterborne asbestos health risk to area residents. (SOR at 18-19.) Unfortunately, however, appellants ignored this concern when asked for comments concerning the proposed exchange in the April 23, 1999, letter from BLM, prior to issuance of the EA. In their May 20, 1999, response, appellants never addressed their environmental concerns with asbestos. In fact, the required period for such comment had long passed, the Notice of Realty Action having been promulgated by BLM in the Federal Register on Friday March 30, 1990, providing a 45 day comment period. See 55 Fed. Reg. 12060 (Mar. 30, 1990). Moreover, Mrs. Stout, the owner of the adjacent property, and her then-husband, Hans Schindeler, had been personally advised by mail in a letter dated April 13, 1990

(a letter that Mrs. Stout concedes in their SOR was received), that comments on the proposed exchange were to be submitted to the Area Manager, Hollister Resource Area, by May 15, 1990. No comments were submitted. ^{2/}

We find no merit in appellants' after-the-fact contention in their Petition for Stay and SOR that an asbestos threat to health exists and was not fully considered by BLM, when appellants had every chance to raise it, and were invited to do so in BLM's April 23, 1999, letter, mere months before the EA was finalized. We are properly skeptical of appellants' motives regarding the serpentine deposit considering appellant Wade Patrick Stout, an amateur geologist, claimed in the May 20, 1999, response to BLM: "We fully intend to claim this deposit some years down the road * * *." (May 20, 1999, letter at 2.) Moreover, appellant Wade Patrick Stout was obviously not concerned with any personal danger arising from physical contact with the serpentine when he stated in the SOR:

Appellant Wade Stout also plans that, after all of the appropriate environmental documents have been filed * * *, I, appellant Wade Patrick Stout, will remove, by hand, during the rainy seasons, select specimens of serpentine containing chrysotile asbestos as well as specimens of ultramafic rocks containing amphibole asbestos, both types of which I will then label with the proper consumer warning requirements for asbestos and sell to gem collectors, to government agencies for educational display (See Appendix H: Naturally-Occurring Asbestos to El Dorado County), and to the general public. After all, serpentine is the state rock of California.

(SOR at 10-11.) We simply find no merit in appellants' after-the-fact environmental concern for the serpentine deposit outcropping throughout the Gates Land Exchange area when appellant Wade Patrick Stout himself has every intention of fully exposing himself to the mineral material within the deposit, without apparent regard to the so-called personal risks.

Appellants also claim the EA was inadequate because it failed to address three key species during the consultation process:

Three species, the kit fox (*vulpes vetox*), the kangaroo rat (*dipodomys* sp.) and the mountain lion (*felis concolor*) are indigenous to this region of California and therefore to the CAL-BLMX "Gates" Land Exchange CACA 24896 F8. Appellants have personally witnessed, on numerous occasions, the existence of

^{2/} Appellants have provided absolutely nothing to support their contention that BLM published inadequate notice of the exchange. Mrs. Stout and her then-husband received personal notice by letter from BLM as well as a copy of the Federal Register notice. Mr. Stout was not even living in the area at the time.

these species in this area and other species such as the desert night snake, which is rare, although appellants are unaware of the status of its listing. None of the above species were referred to in the EA (See EA, page 7, paragraph Wildlife and Botanical Resources) nor was any impact upon said species or upon the people who live near them considered in the Environmental Impacts section of the EA (see EA, page 9, paragraph Proposed Action - Impacts, chart).

(SOR at 15.)

As BLM states in its Answer, a determination was made by the Authorized Officer that the Gates Land Exchange would not affect any listed species, based on the recommendation of the Bureau's staff wildlife biologist and botanist as well as the report summarizing recent biological surveys of the subject parcels conducted by a biological consultant. See Answer at 4. More specifically, BLM explains:

The appellant specifically mentions three species of animal and one species group, kangaroo rats, as being or potentially being protected by the ESA [Endangered Species Act] and that they "are indigenous to this region of California and therefore to the CAL-BLMX 'Gates' Land Exchange CACA 14896 F8." The San Joaquin kit fox (*Vulpes macrotis mutica*, *vetox* [sic]) is the only species the appellant mentions that is actually protected by the ESA. This species occurs primarily in the San Joaquin Valley with low densities of occurrence in Salinas and Pajaro River drainages (USFWS [U.S. Fish and Wildlife Service] 1997). The species is desert-adapted and it and its prey occupy open habitats with flat or gentle slopes. The closest documented occurrences of the species to the subject parcels are in the Bitterwater Valley (USFWS 1997). The steep-sloped, chaparral covered slopes characteristic of the subject parcels are excellent habitat for the common gray fox, referred to colloquially as kit fox, but are entirely unsuitable for the San Joaquin kit fox. No critical habitat has been designated for this species by the USFWS so none would be impacted.

While kangaroo rats occur within chaparral of the subject parcels, no listed species of kangaroo rat does. The giant kangaroo rat (*Dipodomys ingens*), a desert-adapted species of the western San Joaquin Valley is the closest occurring protected kangaroo rat to the subject parcels. The closest occurrence of this grassland and desert scrub-inhabiting species is on the eastern side of the Panoche Valley (USFWS 1997). Again, the subject parcels are not within the range of the species and the habitat is unsuitable. No critical habitat has been designated for this species by the USFWS so none would be impacted.

(Answer at 4-5.) Section 7 of the ESA, 16 U.S.C. § 1536 (1994), requires that BLM consult with the U.S. Fish and Wildlife Service (FWS)

to evaluate the project's potential impacts on threatened and endangered species. The EA reflects that BLM did consult with the Endangered Species Office of FWS. (EA at 10.) The EA made clear that even species that only potentially might reside within the four parcels were researched during the assessment. For example, the San Benito evening primrose (*Camissonia benitensis*), a Federally threatened plant that is known to occur in two nearby locations, was the subject of a search to determine its presence, without avail. See EA at 5. Therefore, BLM botanists concluded "the proposed action would constitute a no effect relative to listed species." *Id.* The record amply demonstrates that BLM took the requisite "hard look." Appellants have failed to meet their burden with regard to this issue.

Finally, appellants contend that there has been inadequate consultation with the SHPO concerning cultural resources impacted by the exchange. (SOR at 15.) We find otherwise. In fact, it was the specific concern with a 20-acre cultural site within the acreage proposed for exchange that provided the impetus for BLM to select an alternative that would retain this cultural site in Federal ownership. BLM specifically noted in the EA:

As the portion of land proposed to be withheld from exchange under this alternative includes the archeological site, there are no foreseen impacts to paleontological and/or cultural resources within the proposed limits of the exchange. No further archeological assessment would be necessary at this time.

(EA at 9.) BLM further explains in its Answer that the final decision to withhold the archeological site from the realty action preempted any necessary consultation between the SHPO and BLM pursuant to the California BLM/SHPO Programmatic Agreement of 1998 (VI. Thresholds for SHPO Review And Required Consultation.) (Answer at 5.) The Board finds that establishment of this protocol is permitted by 36 C.F.R. § 800.7 (Agreements with States for section 106 reviews).

To the extent not specifically addressed herein, appellant's remaining arguments have been considered and rejected as being without merit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge