

INTERIOR BOARD OF LAND APPEALS

Mack Energy Corporation

153 IBLA 277 (September 22, 2000)

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MACK ENERGY CORPORATION

IBLA 98-380

Decided September 22, 2000

Appeal from a decision of the New Mexico State Office of the Bureau of Land Management, imposing preservation stipulation on approval of an Application for Permit to Drill. (NM) SDR 98-003.

Affirmed.

1. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability

An appellant's concessions of the existence of stone and ceramic prehistoric artifacts on the site of a potential drill pad prevent the Board from reversing a decision to attach a stipulation to an Application for Permit to Drill, designed to test and survey the impacts of drilling on the artifacts, without a record showing that the artifacts are outside the coverage of the National Historic Preservation Act, and its implementing regulations.

2. National Historic Preservation Act: Generally: National Historic Preservation Act: Applicability--Oil and Gas Leases: Drilling

Where the record substantiates that a site has a potential to yield information significant to prehistory, the Board will not invalidate a cultural resources stipulation attached to an approval of an Application for Permit to Drill, without finding that the record controverts the agency's and State Historic Preservation Officer's finding that they had reason to believe in the potential eligibility of the site.

3. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Administrative Procedure: Standing

The Board cannot consider (a) general complaints against 20 years of implementation of a statute involving parties, facts, and evidence not in the

record; (b) matters of general interest to the appellant which do not adversely affect it; or (c) challenges to acts of Congress, which are properly brought to the judicial branch.

4. Administrative Authority: Generally--National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability

The Board cannot exempt a party from the operation of the National Historic Preservation Act, and its implementing regulations, on grounds that the challenged BLM decision did not consider, correctly or at all, all issues raised by the appellant in its request for review, when the record nonetheless shows that the BLM had a reasonable belief that the subject property contained potential eligible artifacts.

5. Administrative Procedure: Burden of Proof--National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability--Oil and Gas Leases: Drilling

The burden of proof is on the appellant to present evidence to support its contentions regarding costs of a project, when it presents arguments regarding costs to the Board. It is not unreasonable to impose testing and survey stipulations on an approval of an Application for Permit to Drill. In the absence of standards to determine whether the costs of a cultural resources stipulation for testing and survey are excessive, evidence to support the costs, evidence describing the value or cost to the appellant of the drilling project, or findings from the testing and surveying required by the stipulation, the Board has no basis upon which to make findings regarding the nature of the alleged costs or whether they exceed reasonableness.

APPEARANCES: Dan Girand, Regulatory Affairs, for appellant Mack Energy Corporation; Grant Vaughn, Office of the Solicitor, Southwest Region, Santa Fe, New Mexico, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEMMER

Mack Energy Corporation (Mack) appeals from an April 30, 1998, decision of the Deputy State Director (DSD) of the New Mexico State Office of the Bureau of Land Management (BLM). The challenged decision (DSD decision) upheld the Roswell Field Office Manager's attachment of

stipulations to the March 11, 1998, approval of Applications for Permits to Drill (APD's) two wells on Federal oil and gas lease NMLC028731A. The stipulations for both wells, the Pinon Federal # 2 and Pinon Federal # 3 (Pinon 2 and 3), required Mack to conduct certain field testing for prehistoric objects, and mitigation if any were found, prior to drilling.

Mack appeals BLM's imposition of both stipulations. According to the Statement of Reasons (SOR), however, Mack conducted testing required by the Pinon 2 well stipulation. (SOR at 5.) Because "nothing of significance was found," Mack proceeded to drill the well. Id. While Mack challenges the entire DSD decision, the SOR asks that the "stipulation requiring archeological excavations on the Pinon Federal #3 be voided and Mack allowed to drill this well." Id. Accordingly, we construe Mack's appeal to be limited to the stipulation attached to the approval of the APD for the Pinon 3 well. 1/

#### Legal and Factual Background

This dispute arises from BLM's implementation of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 - 470w-6 (1994 and 1998 Supp. IV). The NHPA creates a National Register of Historic Places (National Register) to be established by the Secretary of the Interior. 16 U.S.C. § 470a(a)(1)(A) (1994). Section 106 of the NHPA provides that a Federal agency

having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and \* \* \* having authority to license any undertaking shall, \* \* \* prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The \* \* \* agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f(1994).

The Advisory Council for Historic Preservation (Advisory Council) established rules at 36 C.F.R. Part 800, for implementation of NHPA section 106. 2/ The purpose of these rules was to "seek[] through the

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1/ According to the DSD decision, Mack also submitted APD's for two other wells on the same lease. The Pinon 1 and 4 wells were surveyed for archeological finds and APD's were apparently approved without controversy. (DSD decision at 1.)  
2/ The Advisory Council is an independent Federal agency composed of 20 individuals, including Federal, state, and local representatives, as well as experts in the field of historic preservation. 16 U.S.C. § 470i (1998 Supp. IV). The Secretary of the Interior is a member. 16 U.S.C. § 470i(2) (1994).

section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings." 36 C.F.R. § 800.1(b) (1998). <sup>3/</sup> Part 800 sets forth rules for Federal agencies to follow to implement section 106 by, *inter alia*, allowing Advisory Council review, in approving Federal undertakings. The rules also require the agency responsible for considering a license or permit application and the State Historic Preservation Officer (SHPO) for the relevant state in which the project is located to determine whether a property is eligible for listing on the National Register. 36 C.F.R. § 800.4(c)(2) (1998 and 1999). In such a case, the "property shall be considered eligible \* \* \* for section 106 purposes." *Id.* This determination is to be made under the National Register criteria which specify that eligibility is determined as follows:

*National Register criteria for evaluation.* The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

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

\* \* \* \* \*

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.4. <sup>4/</sup> If a project location contains a site or object determined by the Federal action agency and the designated SHPO to be potentially eligible, they apply "criteria of effect" to determine if the proposed project for which a license or permit is sought "may affect" the resource. 36 C.F.R. § 800.9 (1998).

In the case of an APD, BLM may impose conditions on its approval. 43 C.F.R. § 3162.3-1(h)(1). For drilling permits, Onshore Oil and Gas Order No. 1 (Onshore Order No. 1), 48 Fed. Reg. 48916 (Oct. 1, 1983),

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<sup>3/</sup> This provision is now found at 36 C.F.R. § 800.1(a) (1999). In 1999, the Advisory Council amended the Part 800 regulations. 64 Fed. Reg. 27071 (May 18, 1999). This case arose under the rules published in the 1998 Code of Federal Regulations. Thus, we address the rules in effect at that time, except as noted.

<sup>4/</sup> These "criteria" remain as quoted in the 1999 version of section 60.4. However, the 1999 code cites them at 36 C.F.R. Part 63. Part 63 in the Code volumes is unchanged from 1998 to 1999 and is entitled "Determinations of Eligibility for Inclusion in the National Register of Historic Places." Section 63.2 in volumes for both years apply the "criteria of eligibility" at 36 C.F.R. § 60.6. This section does not remark on the National Register criteria for evaluation in either the 1998 or 1999 volume.

addresses BLM's implementation of statutes relating to cultural resources and specifies that surveys and reports shall be required if the surface management agency has "reason to believe" a site contains eligible resources. 48 Fed. Reg. 48916, 48923 (Oct. 1, 1983).

The following facts in this case are not in dispute. Mack is the operator on lease NMLC028731A in Eddy County, New Mexico. On November 13, 1997, Mack submitted APD's for the Pinon 2 and 3 wells. The BLM Carlsbad Field Office (CFO) had concerns that the APD's proposed placement of the two well pads on locations with documented, archeologically valuable sites. Accordingly, the CFO contracted with the Agency for Conservation Archaeology (ACA) at Eastern New Mexico University to conduct a survey and report on the sites.

BLM received ACA Report F97-113.4 (ACA Report) for the Pinon 2 and 3 wells on February 10, 1998. According to this report:

Two new prehistoric cultural properties and one isolated manifestation of prehistoric activity were identified during the inventory. The cultural properties are prehistoric archaeological sites considered eligible for listing on the State or National Register of Historic Places. LA 120950 is located on the proposed Pinon Federal No. 2 and LA 120949 is located on the proposed Pinon Federal No. 3. In addition, three previously recorded sites were relocated and determined to be outside the project areas. It is recommended that clearance should not be granted for the proposed construction activities. If [Mack] wishes to drill either proposed well, a mitigation plan should be developed and followed to mitigate the adverse effect on the cultural property.

(ACA Report at Management Summary.) BLM conveyed this report to Mack by letter dated February 5, 1998.

Subsequently, in February 1998, BLM conducted site visits and testing from which it concluded that portions of LA 120949 (Pinon 3) would be eligible for inclusion on the National Register of Historic Places, while the historic significance of LA 120950 (Pinon 2) remained indeterminate. BLM alleges (DSD decision at 2), and Mack does not dispute, that by letter to Mack dated February 25, 1998, BLM contacted Mack to advise it of these preliminary conclusions and Mack confirmed to BLM that it could not move the well platforms to avoid the two sites.

On March 9, 1998, BLM conveyed a Record of Review (ROR) to the New Mexico SHPO. This ROR concluded that LA 120949 was eligible for listing for the National Register and that LA 120950 was potentially eligible. According to the ROR, the "[p]ending results of testing as of now" were that drilling may have an adverse effect on eligible deposits. In the ROR, BLM recommended that stipulations be attached to any approval of the APD's, that the lands be surveyed, and that further comments by the SHPO be allowed.

On March 11, 1998, the Roswell Field Office approved the APD's subject to the following stipulations for protecting archeological or historic resources:

PINON #2/LA 120950

Test the site for eligibility using hand-dug trenches in the area of features to determine the presence or absence of intact subsurface cultural deposits. A testing proposal [will] be necessary prior to initiating the testing; this can be a letter and site map with all pertinent information... *one* copy, as this does not require [SHPO] consultation nor concurrence.

If results are negative, the site is to be fully recorded including field analysis of artifacts and collection of diagnostics which will render the site not eligible to nomination to the [National Register] as the data potential has been exhausted.

If the results are positive, full data recovery will be required to mitigate adverse effect. This entails a data recovery proposal which requires a 30 day consultation period plus time necessary for processing... 15 to 30 days.

PINON #3/LA 120949

Test the portion of the site that is on the location using hand trenches to determine if intact subsurface deposits are present.

If the location lacks buried intact deposits, then clearance will be granted under the condition of approval that the adjacent intact portion of the site is mitigated through full data recovery within this time frame: Data Recovery Proposal submitted within 30 days of conditional approval and Data Recovery completed within one year. This mitigation will be necessary due to the proximity of the well location to the intact portion of the site and the adverse impacts which occur during construction and which continue due to greater accessibility. Prior to construction and until completion of data recovery, there is to be a permanent fence erected on the east and north edge of the 400' by 400' location. There is to be no trespassing on to the site; the site is to be avoided by all except the archeologist(s) completing the data recovery.

If there are buried deposits on the well location, full data recovery will be necessary prior to approval. The time frame will be the same as discussed under Pinon #2.

On March 26, 1998, Mack sought Mew Mexico State Director Review of the attachment of the APD stipulations. The New Mexico SHPO concurred in

the ROR's "adverse effect" conclusion, and with the above stated stipulations, on April 27, 1998. On April 30, 1998, the DSD affirmed the Roswell Field Office's decision to attach this stipulation. Subsequently, Desert West Archaeological Services conducted a "Cultural Resources Examination" of the Pinon 2 site LA 120950, and concluded that this site is not eligible for listing on the National Register. BLM filed an updated site form for this site on May 15, 1998, and the parties agree that, with approval, Mack then drilled the Pinon 2 well.

With respect to the Pinon 3 well stipulation, however, Mack's Notice of Appeal to this Board sought relief from its terms. Mack filed its SOR on July 13, 1998. BLM filed its Answer on August 17, 1998.

#### Analysis

Mack presents two enumerated arguments. First, Mack alleges that "BLM did not follow its own rules in requiring an archeological survey and did not follow the standards and criteria for determining if a cultural property is eligible for the National Register of Historic Places." (SOR at 2.) Second, Mack alleges that BLM inadequately responded to its appeal to the State Director. Id. As noted above, the relief Mack seeks from this Board is that the "stipulation requiring archeological excavations on the Pinon Federal #3 be voided and Mack allowed to drill this well." Id.

Mack's SOR suffers from misapprehensions so profound as to defeat its claims. As we detail below, the central theses of Mack's SOR are (1) that the DSD's alleged failures to contradict Mack's views constitute evidence in favor of Mack that may be cited against BLM and exempt the company from the NHPA, and (2) that this Board has powers to reconsider general Departmental regulations and Orders to implement a statute, or to discard statutory authority at will to exclude an appellant from its operation, and (3) that this Board may unilaterally declare a site with admitted historic artifacts "ineligible" for listing on the National Register, prior to testing or survey of the site to confirm or refute eligibility. We sympathize with Mack for its obvious distress over what it sees as an impediment to its plans, as well as significant difficulty determining the relevance of multiple agency documents and authority regarding the NHPA. Nonetheless, the majority of Mack's arguments present requests for action from this Board outside of its purview; the remainder misapprehend the difference between evidence and argument and the consequence of this difference on Mack's burden to prove its case. We address these difficulties in focusing on each of Mack's stated issues below.

[1] First, we address the primary thrust of Mack's appeal which is its desire to drill, freed from the Pinon 3 well stipulation. Based upon BLM and Advisory Council regulations, however, the only way the Board could grant such relief would be to determine that the site contains nothing that is potentially eligible for listing, and BLM had no reason to believe otherwise. Onshore Order No. 1, Part III.E, states conditions under which BLM requires cultural resource surveys.

Survey work and a related report shall be required only if the involved [Surface Management Agency] has reason to believe that properties listed, or eligible for listing, in the National

Register of Historic Places [NRHP] are present in the area of potential effect.

48 Fed. Reg. 48923 (1983) (emphasis added). <sup>5/</sup>

Ironically, Mack's SOR largely repudiates the conclusion that Mack seeks from this Board. Mack concedes that the site for the Pinon 3 well "contain[s] cultural items," has "flaked and ground stone artifacts and ceramic artifacts," and that Mack cannot change the well site to mitigate effects. (SOR at 1.) Moreover, Mack argues that distinctions between the Pinon 2 and 3 locations are so significant that costs of surveys and artifact data collection differ between the two by a factor of 10 to 15, in claiming that it expected costs of collection for the Pinon 2 to be between \$4,000 and \$6,000, while the costs for Pinon 3 would exceed \$60,000. (SOR at 3.) The relief Mack seeks would require us to determine *de novo* that the stone and ceramic artifacts to which Mack refers cannot justify BLM's "reason to believe" in their potential eligibility. Such a determination would require the Board to survey the sites and artifacts to decide their significance. This is not the Board's role; nor are we delegated that professional responsibility by law. *See* 36 C.F.R. Part 800. We cannot entertain a requested statutory release from the NHPA – the entire point of which is to minimize impact to specified historic resources – in the face of party admissions suggesting that the site's or object's eligibility may be verified without the release.

Mack's concession of the existence of artifacts would appear to corroborate the stipulation. We cannot decide the outcome of testing or survey and decide that the artifacts admittedly there are not worth protecting in some manner. Considering Mack's assertions in the absence of a record detailing the results at least of the testing required by the stipulation makes this determination premature. *State of Alaska*, 85 IBLA 170, 172 (1985); *Lone Star Steel Co.*, 77 IBLA 96, 97 (1983).

[2] With its own admissions as to the existence of artifacts and cultural items, Mack is left to prove that BLM misjudged the potential for eligibility for any part of the Pinon 3 site, for some reason related to site conditions verified in the record. But Mack fails in this context to comprehend its burden to show error in the DSD decision. (SOR at 4.) An appellant must demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis. *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999); *John Dittli*, 139 IBLA 68, 77 (1997). A difference of opinion is insufficient to establish error on BLM's part. *Blue Mountains Biodiversity Project*, 139 IBLA 258, 267 (1997). Mack's analysis fails to identify a provision in law, regulation, or Instruction Memorandum (IM) violated, and equally fails to proffer "evidence" that BLM's finding of potential eligibility was wrong.

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<sup>5/</sup> Mack asserts that "only where a National Register site exists, do BLM rules require archeological surveys on every project." (SOR at 5.) To the extent this wording suggests that surveys are only required on sites already listed on the National Register, this plainly contravenes NHPA section 106, 16 U.S.C. § 470f (1994), and Onshore Order No. 1.

Mack's theory is that BLM erred in concluding that its drilling pad could adversely affect the site because the site's character "has changed substantially due to weather and will not be changed by [Mack's] wells." (SOR at 4.) <sup>6/</sup> Mack argues that the sites "no longer have the required integrity" because the sites have been the subject of amateur collectors and the general site locations were subject to past human activity including road construction and local oil and gas operations. Id. From this, Mack states that the record is "uncontroverted" that "the sites are not eligible for inclusion in the National Register." Id.

This conclusion comports neither with authorities regarding adverse effects or eligibility, nor with the facts. <sup>7/</sup> The Advisory Council rules contain no exception from a finding of adverse effects for lands affected over time by weather, or by amateur collectors, nor do the Secretary's rules defining National Register criteria, 36 C.F.R. § 60.4, or eligibility determinations, 36 C.F.R. Part 63, exclude sites from eligibility in that manner. The Advisory Council rules governing adverse effects suggest otherwise:

(a) An undertaking has an effect on a historic property when the undertaking may alter the characteristics of the property that may qualify the property for inclusion in the National Register. For purposes of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered.

(b) An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include but are not limited to:

(1) Physical destruction, damage or alteration of all or part of the property.

36 C.F.R. § 800.9 (1998). <sup>8/</sup>

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<sup>6/</sup> We cannot guess the basis for Mack's claim that a drilling pad and drilling operation will not affect the surface, and Mack does not explain why this might be true.

<sup>7/</sup> Mack transforms the DSD decision rejecting the company's arguments into "uncontroverted evidence" of the veracity of Mack's claims. The DSD decision is not a stand-in for record evidence regarding artifacts; likewise, the Board has de novo authority to review the entire record. See 43 C.F.R. § 4.1; Mabel M. Sherwood, 130 IBLA 249, 254 (1994).

<sup>8/</sup> The 1999 Code recodifies and revises the assessment of adverse effects at 36 C.F.R. § 800.5(a)(1) (1999), largely restating the above critical elements.

We see nothing in these regulations or any document Mack cites (SOR at 2) to suggest that enduring alterations from weather or amateur collection deprives an approved Federal action of any "effect" on a site, or dispels the site of any potential eligibility. We find it hard to envision a site on the planet where the effects of weather are not relevant to the surface. We find no basis on which to issue the controversial proposition that decades of weather impacts deprive prehistoric artifacts, objects or sites of their eligibility for inclusion in the National Register – a result which would categorically exempt surface sites from prehistoric value. Such a general rule about amateur collection could equally disturb decisions on other important sites. See also George Youngmans, 135 IBLA 251, 253-54 (1996) (BLM decision based on finding of site eligibility under 36 C.F.R. § 60.4, affirmed even though site "had undergone severe damage due to mining activity.")

We do not rule out cases where weather or object collection has so powerfully affected a site that its potential for listing on the National Register is defeated. To render such a conclusion would require site-specific factual proof. Indeed, the IM to which we believe Mack refers on these topics is IM No. NM-84-134. This New Mexico IM for "Implementation of Onshore Oil and Gas Order No. 1," surgically addresses the impacts of weather and human interference in a way which defeats Mack's treatment of the issue. <sup>9/</sup> It states that BLM will not require a survey if "one or more" of the following conditions prevail:

A. Previous natural ground disturbance has modified the surface so extensively that the likelihood of finding cultural properties is negligible.

B. Human activity within the last 50 years has created a new land surface to such an extent as to eradicate traces of cultural properties.

IM No. NM-84-134 (emphasis added).

Such facts do not pertain here. Contrary to Mack's claim that it is "uncontroverted" that such factors as weather and human activity deprive the Pinon 3 well site of potential eligibility, Mack itself cites the existence of artifacts. (SOR at 1.) We must presume that, if they are there, they were not removed from the site by amateurs. The Board has no basis upon which to determine whether their intrinsic prehistoric value was destroyed by weather. Unlike the emphasized terms of the IM, traces were not "eradicated" and the "likelihood of finding" artifacts has been substantiated. Moreover, under Onshore Order No. 1, a survey shall be required if "reason to believe" exists. Acknowledgment by both parties of the artifacts verifies "reason to believe" absent evidentiary contradiction. Until testing is complete on the site, the uncontroverted fact is that artifacts are there.

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<sup>9/</sup> The IM was in effect during 1984-85, and it appears from BLM's Answer that BLM may have informally continued its effect.

Finally, we also return to the record facts stated in the background to this decision. The conclusion that the Pinon 3 site was potentially eligible was reached, consistent with Advisory Council rules at 36 C.F.R. § 800.4, based on recommendations of the SHPO, a BLM site survey, and a report of the ACA at Eastern New Mexico University. The ACA Report at 2 and the ROR acknowledge the existence of prior human activity but nonetheless identify "a wide variety of artifacts" (ROR) that lead to potential eligibility. ACA Report maps of the Pinon 3 well site show two areas of artifact concentration within the area but on the edge of well pad coverage. (ACA Report, Figures 3 and 6.) The Report details its findings of significant artifacts within the well site location covered by LA 120949, ACA Report at 9-12, fully acknowledging prior construction and pipeline activities and a collectors' mound, as well as erosion. Id. Despite these acknowledgments, the Report details extensive findings and concludes at page 12:

LA 120949 contains surface and subsurface cultural materials that can contribute significantly to the understanding of regional prehistoric cultures. Subsurface probing indicates a high probability of intact cultural deposits at least 20 cm deep. There appears to be a strong possibility that the buried cultural deposits have good integrity. The numerous thermal features provide evidence that materials for dating the site are abundant. In addition, the combination of these features with an extensive lithic and ceramic assemblage gives a strong indication that the materials to analyze prehistoric use of the regional landscape are abundant and perhaps spatially organized. The data potential of LA 120949 is quite high, and the site is considered eligible for listing on the National and State Registers of Historic Places.

Id. at 12; see also Report at 15.

We acknowledge that the conclusion of BLM and the SHPO declaring the LA 120949 site to be "eligible" (ROR at 1-2), did not separately find whether the Pinon 3 well site, which intersects and contains part of, but is not coextensive with, LA 120949, is eligible. Moreover, BLM's finding of "eligibility" could have been more clearly expressed by reference to the National Register eligibility criteria in 36 C.F.R. § 60.4.

Nonetheless, under 36 C.F.R. § 800.4(c)(2) (1998 and 1999), "property shall be considered eligible \* \* \* for section 106 purposes" if the SHPO and BLM agree on this. Further, the problem for this Board in invalidating the stipulation is that the standard for BLM's requiring an APD survey is whether it and the SHPO have "reason to believe" a potentially eligible site exists, as detailed above in Onshore Order No. 1. Likewise, the National Register criteria for evaluation ensure that "districts, sites, buildings, structures and objects" may be eligible if they "may be likely to yield, information important in prehistory." 36 C.F.R. § 60.4(d) (1998 and 1999). Accordingly, to invalidate the stipulation we must determine

that this record presented BLM no reason to believe in the potential eligibility of the Pinon 3 site, based on its possible value to prehistory. On this record, based on the clear information and maps located in the ACA Report, we cannot make such a finding.

Mack fails to present anything that would justify our disagreement with these record conclusions. Mack does not present any evidence or contrary information to refute the ACA Report and we cannot manufacture it. We agree in one respect with Mack that "this is not a case of professionals disagreeing." (SOR at 4.) Mack submits nothing to controvert the professional opinions expressed in these documents. Glenn B. Sheldon, 128 IBLA 188, 191 (1994). Mack submits nothing to meet its burden of proof.

[3] While this discussion completes our analysis of Mack's requested relief, it does not address all of Mack's arguments or its stated frustration with the DSD for not doing so. Because Mack appears not to understand the DSD's (unstated) logic, we respond here to arguments presented in Mack's Request for State Director Review and repeated in its SOR. The result, however, is to reinforce that Mack's ability to prevail must turn on the company's arguments that BLM had no reason to believe in the Pinon 3 site's potential eligibility – a conclusion we cannot reach for reasons stated above.

We turn first to Mack's general complaint against the NHPA and BLM's past implementation of it. Mack claims that BLM violates its own procedures and rules by requiring

those operating on federal lands to obtain an archeological clearance for any and all disturbances on Federal lands under their control. Pipelines, electric lines, roads, locations, seismic surveys, flow lines, and even re-entry on existing old locations and roads all require archeological surveys. When a project covers other lands and federal lands, the entire project is subject to an archeological survey. This procedure is not described in BLM rules.

(SOR at 4.) Mack argues that "BLM has violated the intent and spirit of federal law, and 36 CFR [Part] 800 and of its own internal rules by requiring Mack and all operators to conduct archeological surveys on every project with even a single foot of federal land." Id. Mack claims, id. at 5, that BLM has required "14,500 surveys covering about 72,000 acres" since 1980 and that all of this information is "locked away in BLM file cabinets." 10/

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10/ Mack made these claims in its Mar. 26, 1998, Mack Request for State Director Review at 4:

"There is a tremendous amount of gray information in file cabinets at various federal agencies. The information does not appear in the traditional literature and has not been studied or organized. The private sector has been paying for the collection of archeological data for nearly 20 years. This gray information languishes in file cabinets."

It is clear that Mack objects to the broad picture presented by BLM's implementation of the NHPA and the Part 800 rules, and may even protest the goals and purposes of the NHPA and the manner in which it directs preservation action. But to the extent Mack challenges BLM's (or the New Mexico State Office's) general manner and policy of implementing the NHPA and the Advisory Council regulations, 36 C.F.R. Part 800, with respect to all prior applicants before it, rather than presenting specific charges against BLM's stipulations covering the lease at issue here, such challenges are beyond the scope of this appeal. We do not have jurisdiction to rule on the policy or legislative questions inherent in this aspect of Mack's appeal, and Mack does not have the status under our regulations to challenge the broader questions to this Board. The DSD operated under similar constraints with respect to these issues.

Our jurisdiction and an appellant's ability to appeal to this Board begin with rules governing such appeals. "Any party to a case who is adversely affected by a [BLM] decision \* \* \* shall have a right of appeal to the Board." 43 C.F.R. § 4.410(a). In Western Shoshone National Council, 130 IBLA 69, 70 (1994), we stated that a "party to a case is the responsible party who \* \* \* is the object of that decision \* \* \*."

While Mack has a clear right to appeal the DSD decision with respect to the Pinon 3 well stipulation, the authorities do not confer on Mack a right to appeal the alleged manner in which BLM implemented the NHPA for all parties appearing before it in New Mexico. An appellant's "deep concern for [the] issues, absent colorable allegations of adverse effect, is insufficient to confer standing." Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). The corollary of this is that the Board's authority is not coextensive with the general delegated authority of the BLM Director to make abstract policy decisions as to the agency's methods for implementing a particular statute or subject matter. While the Board has jurisdiction to consider appeals of BLM decisions, see 43 C.F.R. § 4.1, it does not have authority to consider any matter a party may wish to raise with the Secretary.

Similarly, the appeal regulation at 43 C.F.R. § 4.410(a) incorporates within the a party's right to appeal the condition that the decision have an "adverse affect" on that party. To be adversely affected by a decision, the record must show that appellants have a legally cognizable interest \* \* \*." Wildlife Damage Review, 150 IBLA 362, 364 (1999), citing Donald Pay, 85 IBLA 283, 285-86 (1985); Friends of the River, 146 IBLA 157 (1998); Colorado Environmental Coalition, 125 IBLA 287 (1993); Sharon Long, 83 IBLA 304, 308 (1984).

Mack's adverse effect stems from its "legally cognizable interest" in the APD stipulation, not from BLM actions of the last two decades with respect to other persons or entities on Federal lands on which Mack has no matter pending. Nor does Mack's standing arise from the existence or

maintenance of data in BLM files. <sup>11/</sup> Thus, Mack may not prevail on this Board to reconsider BLM's general implementation over the last 20 years of the NHPA and intervening Advisory Council rules.

The logic of the "adverse effect" requirement is easily revealed by the practical problems with trying to consider Mack's general challenges in the case. We have no record on which to consider all or any of the alleged 14,500 surveys Mack claims to have been required over the last 20 years. Nor do we have, for comparison, records of BLM actions in cases where surveys were not required. We do not have the alleged gray files or evidence of the BLM's use of it. We simply have no facts on which to reach conclusions or base a decision.

Finally, we are not empowered with authority to reconsider an act of Congress. The Board's authority derives from the executive; it does not coincide with that of the judicial branch. In Amerada Hess Corp., 128 IBLA 94, 98 (1993), we described the long-held distinction between the powers of this Board and of the judiciary with respect to Federal statutes:

Appellant also challenges the constitutionality of the statutory denial of interest \* \* \* on equal protection grounds. This Board has no authority to declare [this] or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare. Ptarmigan Co., 91 IBLA 113 (1986), aff'd sub nom., Bolt v. United States, No. A87-106 (D. Ak. Mar. 30, 1990), aff'd, 944 F.2d 603 (9th Cir. 1991).

See also William B. Wray, 129 IBLA 173, 178 (1994). To the extent Mack opposes the NHPA, this would be a judicial matter, not one before a department of the executive branch.

[4] This latter point presents the second constraint on our authority. As we noted above, we cannot consider Mack's request for relief, because of its own concessions and the record. But Mack further misunderstands the basis for our authority to untangle the Pinon 3 APD from the NHPA. Mack asks that because the DSD decision allegedly disregarded the company's arguments, or erred in its conclusion with respect to them, we should void the stipulation requiring archeological excavations on the Pinon 3 well and permit Mack to drill.

We cannot order this relief. The executive branch must enforce the NHPA and not create exemptions from it as punishment for a purportedly bad

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<sup>11/</sup> BLM has set forth requirements for cultural resource data collection, and for maintenance and use of such data, within BLM State and district offices. See BLM Manual at Part 8111. While the BLM Manual is not binding, this case gives us no reason to consider these Manual provisions and Mack does not cite a Manual provision that has been "violated" in this respect.

decision. If the DSD erred, we must remand for proper consideration of the statute and rules unless the record shows unequivocally that there is no conceivable reason for BLM to have imposed the stipulation in the first place. To make that decision, we (like BLM) are constrained by BLM regulations which allow BLM to impose conditions on APD approvals, 43 C.F.R. § 3162.3-1(h)(1), the NHPA, 16 U.S.C. § 470f (1994), the Advisory Council and BLM rules.

Thus, contrary to Mack's proposed relief, this Board cannot reward Mack with noncompliance with the NHPA as a result of the DSD's allegedly errant response. Even if we were to find that BLM erred in failing to sustain its conclusion, the proper outcome considering this record would be for us to remand for proper consideration of the stipulation in light of the existence of these artifacts. Mack errs in suggesting that the DSD's alleged failures to address correctly Mack's points would gain the company an exception from the NHPA.

[5] Finally, Mack argues that we must declare the costs of implementing the stipulation excessive or unnecessary. Mack alleges that the DSD erred in failing to follow BLM IM's, which, according to Mack, "direct local BLM offices [to] avoid unnecessary costs to operators." (SOR at 3.) Both in the SOR at 3, and in its request for State Director Review (at 2), Mack alleges a potential cost of at least \$60,000 for testing required by the Pinon 3 site stipulation. Citing unspecified "BLM IM's, supra," (SOR at 3), Mack asserts that "the costs are onerous and place requirements on [Mack] not contemplated in statutes or regulations." Id.

In neither instance does Mack cite to a specific authority or IM we are to consider in this matter, leaving us to surmise the authority allegedly violated. Mack does not appear to challenge BLM's ability to impose costs of cultural preservation activities on an operator. Such an argument would be answered by NHPA section 110, which states that "reasonable [preservation] costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit." 16 U.S.C. § 470h-2(g) (1994). 12/ See also Beartooth Oil and Gas Co., 85 IBLA 11, 20-22, 92 I.D. 74 (1985) (costs to mitigate vandalism to cultural site properly imposed on operator pursuant to APD stipulation). 13/

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12/ We note also that under separate statutory authority at 16 U.S.C. § 469c-2 (1994), issuance of Federal permits may be conditioned on "reasonable costs" charged to the permittee for identification of survey, evaluation, and data recovery. In this context, the Board has upheld stipulations attached to land use authorizations for surface disturbing activities. See Old Ben Coal Co. v. OSMRE, 109 IBLA 362, 372 (1989); Cecil A. Walker, 26 IBLA 71, 75-76 (1976).

13/ To the extent Mack relies on Onshore Order No. 1, Part III.E, which states that surveys "shall be required only if the involved [Surface Management Agency] has reason to believe that properties listed, or eligible for listing" are present, 48 Fed. Reg. 48923 (1983) (emphasis added), this argument can solely be predicated on Mack's prevailing on its separate argument BLM erred in concluding that the Pinon 3 site is potentially "eligible for listing." (SOR at 4.) This is a record-based conclusion addressed above.

But to the extent Mack relies on the word "reasonable" in NHPA section 110, 16 U.S.C. § 470h-2(g) (1994), contrary to Mack's assertion, none of Mack's citations provides authority for the Board to conclude that conducting testing and survey on a site is not a "reasonable" expense, even if a site is eligible. BLM has not ordered Mack to take unusual measures such as building an on-site museum. In light of the fact that the only cost issues before us relate to what Mack agrees are all too common testing and survey stipulations, which are permitted by regulation and statute, we find no authority to determine the stipulation "unreasonable." Nor can we find any express standard against which to decide what costs are too much for Mack to spend in order to receive an APD, and no evidence against which to make our own comparison.

To the extent the question is "how much is too much?" for testing and survey, that would appear to be a decision Mack must make in determining whether or not to accept the APD stipulation. BLM has authority, unopposed here, to attach conditions, as noted above. NHPA section 110, 16 U.S.C. § 470h-2(g) (1994); 43 C.F.R. § 3162(h)(1). If the cost-benefit analysis is too great, Mack can reject the APD stipulation and pursue available legal options, or undertake procedures to seek a modification or waiver of lease or unit terms, if such were to be necessary. See 43 C.F.R. Part 3100. 14/ Presumably, Mack believes the Pinon 3 well to have significant potential. And, presumably, if Mack thought a well was likely to produce, it would land on some point on the cost-benefit spectrum where the cost would be judged to be acceptable. But with nothing regarding the value of the APD (which is obviously significant to Mack), no information on Mack's expenses and returns from this lease, and no idea of the value of any cultural resources that might be found, we would have no relative values against which to consider the issue. The absence of such a statutory or regulatory standard to do so verifies the impossibility of rendering judgments about data not before us.

This difficulty is complicated by the timing of this case. The point of the survey is to determine what is there and mitigate accordingly. We cannot speculate as to the outcome or costs of such a procedure here, given that testing has not been completed. Despite the fact that much has been found on LA site 120949, the stipulation requires testing only on the "portion of the [Pinon 3] site that is on the location." (Stipulation for PINON #3/LA 120949.) According to maps in the ACA Report, the critical areas of this location, to the extent they coincide with the Pinon 3 site are two small areas on the edge of the proposed well platform site. (ACA Report Figures 3 and 6.) There is nothing in the record to verify that these points will cost \$60,000 either to study or mitigate, or that this figure relates to these two areas. This is particularly true considering

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14/ Mack has been granted APD's for at least three other drilling operations on the same lease. We have insufficient information to determine whether or how unitization or spacing orders may affect existing drilling operations on this lease.

Mack's contradictory argument that it should be freed from the NHPA altogether; the predicate for this result would be a finding that nothing of significance is located on the well site. 15/

Moreover, any review of the actual cost figures in this record is complicated by the fact that Mack fails to understand its burden to prove something about them with evidence. The figures are within Mack's control; BLM did not establish cost figures. For its own benefit, Mack would surely obtain competitive bids on a \$60,000 project. But Mack provides nothing to substantiate even that cost claim. Thus, Mack prevails on the Board to review an abstract cost prediction in a context in which Mack has an incentive to inflate the figure. Relying on page 2 of its request for State Director Review, Mack states that it "presented quotes indicating costs for the work on the [Pinon 2] to be \$4,000 to \$6,000, but if something of significance was found, then costs could not be determined. Costs on the [Pinon 3] were quoted at about \$60,000 but this too was open-ended." (SOR at 3.) Mack goes on to argue that since the DSD decision did not refute this claim, "the only evidence on the record is that the costs are onerous." Id.

Mack confuses argument with evidence. There is no cost "evidence" in this record regarding a bid or a contract for the job with respect to either the Pinon 2 or 3 well. Notably, while the Pinon 2 testing was completed prior to the filing of the SOR, Mack does nothing but reiterate prior predictions to the State Director, carefully avoiding any evidence as to its actual costs for the Pinon 2 testing, against which to verify its earlier predictions. 16/

Thus, Mack argues numbers without substantiation, and asks us to rule that its conjectures, were they to be realized, are excessive. Argument does not convert to evidence with the passage of time or by virtue of the DSD's ignoring it. While normally the burden is on an appellant to show

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15/ The regulations also provide another stepping-stone for decision-making regarding the extent to which mitigation may be accomplished or required. See 36 C.F.R. §§ 800.8(d) and 800.11. To the extent high costs could be substantiated, as compared to drilling costs and other data not before us, we would presume that the "costs" of mitigation and potential legal action would be considered by BLM, the SHPO and the Advisory Council at that juncture in relation to the relative values of the project and prehistoric resources. The 1999 rules have substantially changed these provisions and, thus, we do not address them further.

16/ BLM speculates that the actual costs expended by Mack for the Pinon 2 testing were between \$500 and \$1,000. (Answer at 3.) BLM does not substantiate this and Mack does not refute it. Elsewhere, Mack claims without substantiation that it spent \$4,000 on implementing the Pinon 2 stipulation. (SOR at 5.)

its case against BLM figures by a preponderance of the evidence, Kelly E. Hughes, 135 IBLA 130 (1996); Uno Broadcasting Corp., 120 IBLA 380 (1991), Mack has put its own figures at issue. Mack's first step would be to submit evidence for us to determine what it means. No such evidence is necessary here, though, in a context in which we have no standards against which to judge their reasonableness.

Finally, to the extent Mack would argue that it cannot present evidence of costs until the testing is complete and a more accurate bid or figure may be obtained, this would merely verify our problem with consideration of Mack's appeal. Where an appeal is contingent upon some future or hypothetical occurrence, it is premature for this Board to decide the matter. State of Alaska, 85 IBLA at 172; Lone Star Steel Co., 77 IBLA at 97.

### Conclusion

The heart of Mack's argument constitutes its own demise. At its core, Mack's point is that the company should not be required to follow the Pinon 3 stipulation because we cannot ensure that the survey will reveal something eligible for listing under the NHPA. Mack also implies that so many potential artifacts exist on the Pinon 3 site that Mack fears a survey will verify eligibility. A central function of the NHPA is to find just such eligible properties and, as noted, it is not within our purview to disagree with Congress on this. We find that the record proves that BLM had reasonable belief that the Pinon 3 well pad site had a potential basis for listing on the National Register and do not reverse the stipulation.

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 is affirmed.

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Lisa Hemmer  
Administrative Judge

I concur:

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James P. Terry  
Administrative Judge