

## Decision Memorandum

**Regarding: Remand of the 2009 Decision Removing the Blair Mountain Battlefield from the National Register of Historic Places**

### I. Background

The Blair Mountain Battlefield (Blair Mountain or the Battlefield), a historic district, was first nominated by West Virginia State Historic Preservation Officer (WV SHPO) to the National Register of Historic Places (National Register) on July 21, 2005. The nomination was returned to the WV SHPO by the Keeper of the National Register (Keeper), an official within the National Park Service (NPS), due to inadequate documentation. The WV SHPO resubmitted the nomination on April 17, 2008. However, on July 1, 2008, the WV Deputy SHPO requested withdrawal of the nomination due to a mapping error. The WV SHPO again resubmitted the nomination to the Keeper on January 13, 2009. The WV SHPO's signature on the nomination form certified that all procedural requirements for the nomination were met, that the nomination form was adequately documented, technically and professionally correct and sufficient, and that in the WV SHPO's opinion, Blair Mountain met the National Register Criteria for Evaluation. 60 C.F.R. § 60.6(o). The WV SHPO further represented that a minority of private property owners objected to listing.

On February 27, 2009, Jackson Kelly, PLLC (Jackson Kelly), submitted a petition requesting an extension of the comment period; the request was based, in part, on the law firm's assertion that a majority of owners had timely objected to the nomination and its assertion the WV SHPO's list of owners was inaccurate. At the request of the Keeper, the WV SHPO confirmed in a letter dated March 26, 2009, that its mapping of the Battlefield was accurate and explained the owners identified were based on October 2008 research conducted by the West Virginia Attorney General's office. After the Keeper's Office received this response, additional objections were also received, though some of these objections were repeat objections by owners that previously objected, and some were from persons who were not owners of property within the Battlefield. The Keeper's Office requested the WV SHPO to recalculate its count of owners and objections based on the new objections. In this recalculation, the WV SHPO found that there were 57 owners and 22 objections submitted. This meant that, at that time, only 39% of owners objected.

Via a letter dated March 30, 2009, and received by the Keeper's Office on March 30, 2009, the Deputy WV SHPO submitted a recalculated list that had considered eight objections the NPS received after WV SHPO's March 26, 2009 list of owners and objections was submitted. In the March 30 letter, it was noted that the WV SHPO only considered three of the objections valid; five were from individuals who were not on the SHPO's most recent property owners list (March 26, 2009), which was based on the SHPO's property research from October 2008 and Jackson Kelly's "yellow list"—so referenced on page 4 of Jackson Kelly's February 27, 2009, letter. One of the three objections had already been counted; the two new objections increased the number of objections to 24, which meant that 42% of the owners within the historic district objected. Blair Mountain was listed in the National Register on March 30, 2009.

Prior to submitting the nomination to the Keeper, WV SHPO was required by NPS regulations to publish a general notice in one or more local newspapers, 30 to 75 days in advance of the State Review Board meeting where Blair Mountain was to be discussed. During this period—and up until a property is listed in the National Register—owners of private property can submit “a notarized statement certifying that the party is the sole or partial owner of the private property . . . and objects to the listing.” 36 C.F.R. § 60.6(g). During the nomination process the Keeper can be petitioned “to accept or reject a nomination.” 36 C.F.R. § 60.6(t). Such a petition results in a substantive review of the nomination by the Keeper and extends the 45-day review period for 30 days from the date of the petition “to allow the petitioner to provide additional documentation for review.” 36 C.F.R. § 60.12(a). When a nomination is received by the Keeper, notice is published in the *Federal Register* that the property is being considered for listing and 15-day comment period from the date of publication in the Federal Register is provided. 36 C.F.R. § 60.13(a). This period is within the above-mentioned 45-day review period.

Several opportunities to submit comments or objections were available with respect to the Blair Mountain nomination prior to its listing in the National Register. During the periods available for public comment, comments were received by the WV SHPO and by the Keeper both supporting and opposing the nomination.

1. Public notice regarding the Blair Mountain nomination was published in the *The Logan Banner* between 30-75 days prior to May 2005 meeting of the West Virginia Archives and History Commission (Commission) at which the nomination was reviewed, inviting public comment prior to the date of the Commission’s meeting.
2. On August 12, 2005, the Keeper published a notice of receipt of the Blair Mountain nomination in the Federal Register advising that comments should be submitted by August 29, 2005. This comment period was extended for 30 days until September 26, 2005 due to a petition submitted by Jackson Kelly.
3. After the Blair Mountain nomination was returned to the WV SHPO in order to afford the WV SHPO an opportunity to address deficiencies, public notice was published in *The Logan Banner* on January 21, 2008 and January 23, 2008, inviting the public to comment on the nomination in advance of the Commission’s February 22, 2008 meeting. The notices stated said that notarized letters “objecting to the May 2005 nomination will be considered by the Keeper of the National Register if the current property owners for that parcel are the same. To recant or update an objection made in 2005, a new notarized statement can be made...”
4. After the WV SHPO submitted the nomination to the Keeper on April 23, 2008, the Keeper published a notice of receipt of the Blair Mountain nomination in the *Federal Register* on May 12, 2008, advising that comments should be submitted by May 27, 2008.
5. After the nomination was withdrawn by the WV SHPO on July 1, 2008, the WV SHPO corrected the nomination, and published notice in *The Logan Banner* providing a public



comment period from November 24, 2008, to December 29, 2008. On January 13, 2009, the nomination was resubmitted to the Keeper.

6. On February 27, 2009, Jackson Kelly, on behalf of Natural Resource Partners, LP, Arch Coal, Inc., and Massey Energy Company, submitted a petition requesting substantive review of the Blair Mountain nomination by the Keeper and an extension of the comment period for 30 days. The Keeper granted the request, extending the comment period to March 30, 2009.

Subsequent to Blair Mountain's listing, the WV SHPO questioned the number of property owners identified when the WV SHPO submitted the nomination to the Keeper on January 13, 2009, and the number of objections counted. The WV SHPO, ultimately determined that he neglected to count and submit all valid objections. The WV SHPO submitted six additional objections to the Keeper on April 6, 2009. This increased the number of owners that objected to the nomination from 24 to 30, while the total number of owners remained unchanged at 57. If, as the WV SHPO represented, a majority of owners (52%) of owners had objected prior to Blair Mountain's listing, this would have been an administrative error in the nomination process.

On July 9, 2009, the Keeper published a notice in *The Logan Banner* notifying the public that due to a procedural error Blair Mountain would be removed from the National Register. Comments were invited for the next 30 days. In a letter dated July 30, 2009, and received by the Keeper on August 4, 2009, Karen Carper of the Preservation Alliance of West Virginia requested an extension to the comment period for 45 days. On August 7, 2009, notice of the extension to the comment period was published in *The Logan Banner*, extending it to October 14, 2009.

Both before and after listing, two private parties expressed particular concern about the number of owners and the number of objections calculated by the WV SHPO. The concerns of each are briefly described:

1. In a letter dated February 27, 2009, and received by the Keeper on March 2, 2009, Jackson Kelly petitioned the Keeper to extend the comment period and refrain from listing the battlefield in the National Register. Jackson Kelly outlined a number of alleged deficiencies, particularly with respect to the identification of parcels within the nominated area and the owners of those parcels. Jackson Kelly submitted a revised parcel and owner list, together with clarification. Jackson Kelly referred to its clarification documents as the "Green List" and the "Yellow List" (referring to the color coding). The petition filed complied with National Register regulations 36 C.F.R. § 60.6(t).
2. During the above-mentioned extended comment period, on September 14, 2009, the Keeper received a document setting forth research conducted on "Owners of Various Properties on the site of the Battle of Blair Mountain" by John Kenneth Bailey, PLLC. Mr. Bailey examined the record title of various tax parcels in Logan County that had been identified as part of the Blair Mountain Battlefield by the WV SHPO on a list dated May 21, 2009 (the "SHPO list"). Mr. Bailey noted 10 parcels that he

considered to contain errors in regard to ownership on the SHPO list. His sources were limited to records in the Land Office of Logan County, West Virginia. Mr. Bailey's research was presented to the Keeper by Harvard Ayers for the Friends of Blair Mountain, with an accompanying letter dated September 9, 2009.

Under the National Historic Preservation Act, 54 U.S.C. § 302105, and NPS regulations, 36 C.F.R. § 60.6(g), if a majority of property owners object to listing, the property cannot be listed, although the Keeper is required to determine whether it is eligible for listing. Relying on the information submitted by the WV SHPO, in particular letters from the Deputy SHPO received by the Keeper on April 6, 2009, and April 29, 2009, as well as the SHPO's revised owner list dated May 21, 2009, the Keeper found that a majority of owners had objected prior to listing, and that Blair Mountain had been erroneously listed in the National Register.<sup>1</sup> Accordingly, Blair Mountain was removed from the National Register on December 30, 2009, due to the procedural error, and determined eligible for listing in the National Register. 36 C.F.R. § 60.15(4).

In September 2010, the Sierra Club, the Ohio Valley Environmental Coalition, Friends of Blair Mountain, Inc., West Virginia Labor History Association, National Trust for Historic Preservation in the United States, and West Virginia Highlands Conservancy (Plaintiffs) filed a complaint in the United States District Court for the District of Columbia against the Keeper, the Secretary of the U.S. Department of the Interior, and the National Park Service challenging the December 30, 2009, removal of Blair Mountain from the National Register. The United Mine Workers of America and the West Virginia Coal Association participated in the litigation as *amicus curiae*.

On April 11, 2016, the district court granted summary judgment to Plaintiffs, holding that the Keeper's 2009 decision to delist Blair Mountain was arbitrary and capricious in violation of the Administrative Procedure Act. Sierra Club v. Salazar, 177 F. Supp. 3d 512, 541 (D.D.C. 2016). The court vacated the 2009 delisting of Blair Mountain, and remanded the matter to the Keeper "for 'the exercise of reasoned decisionmaking.'" Id. (quoting Am. Trucking Ass'ns v. EPA, 600 F.3d 624, 631 (D.C. Cir. 2010)). The court further directed the Keeper "to address any issues raised [in this opinion], and any other arguments that may be advanced [on remand], and to provide a rational and reasoned explanation for the ultimate disposition of this issue" Id. (quoting Wis. Gas Co. v. FERC, 770 F.2d 1144, 1165 (D.C. Cir. 1985)).

## **II. Reconsideration of the 2009 removal decision pursuant to the Court's April 11, 2016, remand decision.**

The Keeper's Office, in consultation with the Solicitor's Office for the U.S. Department for the Interior, identified key issues raised by Judge Walton, Mr. Bailey, Jackson Kelly and John Dalporto with the West Virginia Attorney General's office. The issues primarily related to the ownership of specific parcels within the historic district, although there were also questions about the validity of objections submitted by people who had life estates. In order to address

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<sup>1</sup> The May 21, 2009, list reflected objections not counted prior to the March 30, 2009, listing in the National Register.



those issues in a reasoned manner in compliance with the Court's order, and determine whether Blair Mountain was properly removed from the National Register in 2009, the Keeper's Office completed the following steps: (1) determine the parcels within the boundary of the Battlefield; (2) identify owners within the boundary of the Battlefield; (3) identify and count owner objections; and, (4) determine whether a majority of owners objected prior to listing. If a majority of private property owners objected, Blair Mountain would be determined eligible and not be listed in the National Register. 54 U.S.C. § 302105(b)-(c); 36 C.F.R. § 60.6(g). If a majority of private property owners did not object to the listing, the property would be listed.<sup>2</sup>

### **Step 1. Determine the parcels within the boundary of Blair Mountain Battlefield.**

The Keeper's Office first independently verified that the parcels the WV SHPO reported to be within Blair Mountain's boundary were accurately identified. Deidre McCarthy, Chief of the NPS Cultural Resource Geospatial Information System (GIS) Facility, identified the tax parcels inside the boundary by consulting the maps submitted with the nomination, as well as the GIS data set that described the tax parcels in 2009. Ms. McCarthy overlaid the digital tax parcel boundaries and Blair Mountain boundary in ESRI ArcGIS software, to produce an analysis of the parcels that lay within the boundary. Using GIS software tools, Ms. McCarthy produced a table of parcel numbers that represent those within or intersecting the proposed National Register boundary, regardless of size. In several cases only a very small portion of a parcel fell within the district boundary. See Attachment 1, topographic map; Attachment 2, parcel map.

Ms. McCarthy's determination of parcels within or intersecting Blair Mountain Battlefield was an objective analysis utilizing the digital data originally submitted by the WV SHPO. The 63 parcels Ms. McCarthy identified in the district correspond with the parcels identified by the WV SHPO and listed on his spreadsheet dated May 21, 2009, with two exceptions. First, the WV SHPO's May 21, 2009 list included parcel 153-2-39, which Ms. McCarthy determined to fall outside of the district. The owners of parcel 153-2-39 are Leslie

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<sup>2</sup> Prior to April 11, 2016, in attempt to address identified discrepancies, the Keeper's Office undertook the following research:

1. In October and November 2010, Bill Sindelar, Land Acquisition Officer for the NPS Northeast Land Resources office, undertook deed and title research to help identify owners of parcels within Blair Mountain Battlefield that raised issues among the various interested parties. Mr. Sindelar was based in Glen Jean, West Virginia, and had extensive experience in researching West Virginia title information.
2. In January 2011, Paul Loether, at the time Chief of the National Register and National Historic Landmarks Program and former Keeper of the National Register, travelled to West Virginia to study land records with the intent of discovering why the land records seemed to present discrepancies. At that time, no single argument regarding ownership seemed to be more persuasive than another. Mr. Loether spent January 10-11 undertaking this research in the Logan County Courthouse, but was unable to resolve any ownership issues at that time.

Adams and Judy Adams; neither submitted an objection. See Attachment 2, which shows parcel 153-2-39 in relation to the district boundary. Second, Ms. McCarthy's list excluded parcel 154-2-4.6, which the WV SHPO noted was "within parcel 154-2-4.1." Ms. McCarthy did not find this parcel, nor did the consultants who did title searches for the NPS. The WV SHPO and Ms. McCarthy essentially reached the same conclusion that the parcel does not exist.

In total 62 parcels were identified as within or intersecting Blair Mountain Battlefield. They are identified on the attached spreadsheet, see Attachment 3, by map number, district number, and parcel identification number.

## **Step 2. Identify the owners within the boundary of Blair Mountain.**

Having determined the parcels within the boundary of Blair Mountain, the Keeper's Office next undertook to identify all owners of parcels within its boundary. The full record, including all ownership lists previously submitted, was reviewed. In addition, one more comment period was provided to the Plaintiffs and other parties to the litigation between September 26, 2017, and October 26, 2017. They were informed that the Keeper was reviewing title research it had undertaken, and that they could submit additional information for consideration during this period.

The Keeper determined that it was necessary to conduct title searches on all parcels for which contradictory information was submitted by the SHPO, Jackson Kelly, or Mr. Bailey. A list of 30 parcels was developed by the NPS. This list included parcels: identified by Jackson Kelly or Bailey as problematic with respect to ownership owners; that Jackson Kelly considered "unrecognized parcels"; where Jackson Kelly offered owner corrections; or that reflected modifications by Mr. Dalporto. The NPS contracted with Ziegler & Ziegler L.C. (Ziegler & Zeigler), based in Hinton, West Virginia, a firm with extensive experience in real estate law and with West Virginia land records, to conduct title investigations on the 30 parcels identified. For the remaining parcels, as to which there were no discrepancies in information submitted, title searches were not considered necessary and not conducted.

Attachment 3 sets forth the my determination as to ownership of each parcel, identifies the owner(s) for each parcel, and explains the documentation I relied on in support of this determination.

Life estates: The NPS' regulations define the terms "owner or owners" as "those individuals, partnerships, corporations or public agencies holding fee simple title to property." 36 C.F.R. § 60.3(k). The NPS' regulations specifically provide that "owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature." Id. Accordingly, persons with only a life estate in the subject property at the time of listing were not counted as owners. Under West Virginia law prior to the abolition of dower interest in 1992, a dower interest was a life estate interest in an undivided 1/3 of the decedent's property. Accordingly, persons with only a dower interest in a parcel were not counted as owners.



Inheritance of property where the owner died intestate: For deceased persons whose name is still associated with title to a parcel and who died intestate, the NPS used the list of heirs determined by Ziegler & Ziegler that corresponds with West Virginia inheritance laws. On June 5, 1992, the West Virginia code was changed to abolish dower/curtesy and entitle the surviving spouse to one-third life estate in the decedent's real estate. The balance is divided among the decedent's surviving children and grandchildren, in the case of deceased children. See W. Va. Code § 43-1-1. The NPS considered ownership in terms of the date of the owner's death—before or after the law changed in 1992. See particularly the parcel owned by Eula Blankenship and the parcel owned by Corbett Craddock.

Identification of heirs to property where the owner died intestate: For some parcels, Ziegler & Ziegler were able to identify the heirs that inherited the property with some confidence. For others, Ziegler & Ziegler searched available public records to determine family ties (for example, to establish a list of probable heirs). If records were not available, Ziegler & Ziegler contacted people known to be associated with a parcel. In addition to the research conducted by Ziegler and Ziegler, extensive additional research was conducted by the (now) Keeper of the National Register. He investigated an array of records in an effort to confirm or augment findings of Ziegler & Ziegler. His research included land records, tax records, vital statistics, military records, cemetery records, and numerous obituaries in order to cross-check and corroborate Ziegler & Ziegler's findings.

No owner identified: For three parcels, Ziegler & Ziegler were not able to identify an owner with any level of confidence, because no owner was on file in the Logan County Courthouse. Consequently, the Keeper was unable to identify an owner for these parcels and did not count any owners for these parcels.

Accordingly, in compliance with NPS regulations, I have determined that there were eighty-three (83) owners of real property within Blair Mountain Battlefield at the time of its March 30, 2009 listing.

### **Step 3. Identify and count owner objections.**

The objections to the 2005 and 2009 nominations of Blair Mountain Battlefield that were received by the WV SHPO or the Keeper prior to its listing on March 30, 2009 were reviewed. The objections were reviewed in order to determine whether the objector was an owner as defined by NPS regulations. To be considered an owner, an objector must have owned a fee simple interest in real property within the boundary of the proposed district at the time of the objection. The objection was further required to be notarized and the objector was required to certify in the objection that the person was the sole or partial owner of the subject property. All objections must have been received by the WV SHPO 30 to 75 days before the Review Board meeting or by the Keeper prior to listing. To determine the number of valid objections, the list of owners was cross referenced with the objections received. The objections received from owners were then reviewed for timeliness and compliance with NPS regulations.

Attachment 3 identifies the objections received by the Keeper and explains my determination as to whether such objections should be counted in determining whether a majority of property owners objected to listing.

Life estates: As noted above, persons with only a life estate in real property are not “owners” as that term is defined in NPS regulations. 36 C.F.R. § 60.3(k). Accordingly, objections signed by persons that owned only life estate interest in real property within the boundaries of the historic district were not considered valid objections and, thus, not counted. As noted above, because dower interests are life estates, the holder of a dower interest is not an owner under NPS regulations, and objections submitted by holders of dower interests were not counted.

Objectors that owned multiple properties within the Battlefield: NPS regulations provide that “[e]ach owner of private property in a district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district.” 36 C.F.R. § 60.6(g). Some owners owned multiple properties within the historic district at the time of listing. They were counted as a single owner and objector.

Objections received in 2005: Several objections were submitted in response to the public comment period in 2005 with respect to the 2005 nomination that was returned to the WV SHPO by the Keeper due to inadequate documentation. Objections received in response to the 2005 public comment periods were considered valid if the parcel subject to the objection was determined by Ms. McCarthy to be within or intersecting Blair Mountain Battlefield as listed in 2009, the objecting owner met the definition of an owner in NPS regulations at the time of the objection, the objecting owner remained an owner at the time of listing, and the objection had not been rescinded.

Objection submitted “for” an owner: In one case, an objection was signed by someone with a notation that they were submitting the objection for someone else, without an accompanying instrument confirming they had power of attorney. The objection submitted by Nellie Craddock “for Corbett Craddock” was not considered valid for two reasons: 1) The person being voted “for” was already dead, and 2) by voting on behalf of someone else, she expressed an opinion that was not her own.

Objections received after Blair Mountain was listed on March 30, 2009: NPS regulations state that “[n]ominations will be included in the National Register within 45 days of receipt by the Keeper ... unless the Keeper disapproves a nomination, an appeal is filed, or...the majority of such owners for a district... objects by notarized statements received by the Keeper prior to listing.” 36 C.F.R. § 60.6(r). The WV SHPO confirmed by a letter dated March 26, 2009 that a majority of owners had not objected to listing Blair Mountain. Thus, the Keeper signed the nomination on March 30, 2009, which was the last day of the comment period. (Note: 45 days is the maximum review and the Keeper does not have to wait for the 45<sup>th</sup> day to sign a nomination.) When an action is taken, in this case the Keeper’s signature on the nomination, a property is immediately listed in the National Register. Such was the case with Blair Mountain. Accordingly, six objections received after Blair Mountain was listed in the National Register on March 30, 2009 were not counted.



Objections received by non-owners: Twenty-one objections were received from people who claimed to be owners but whose names did not appear on any owner lists. People objecting were not required to state the parcel number of the property they owned in the historic district. They simply could state that they were owners, with their identity confirmed by a notary. Thus, these 21 people may have seen the public notice and submitted an objection without knowledge as to whether any property they owned was within Blair Mountain's boundary. These objections are listed on Attachment 4. Because none of these persons were owners as that term is defined by NPS regulations, 36 C.F.R. § 60.3(k), their objections were not counted.

Discrepancies in objector/owner names: In a few instances the name of the individual that signed an objection differed slightly from the name of the identified owner of the parcel. If the name used by the objector appeared to be a commonly used nickname for the owner's name, and the objection otherwise complied with NPS regulations, the objection was counted as valid. Similarly, if the objector used the middle name of the owner, certified that he or she was an owner, and the objection otherwise complied with NPS regulations, the objection was counted as valid. If there was no evidence that the objector and the owner with a similar name were the same person, the objection was not counted as valid.

Objections from stockholders: Objections were received from Dingess-Rum stockholders. Under the NPS' regulations which define the term "owner," corporations that own fee simple title to real property are considered owners; persons who hold stock, and thus an ownership interest in the corporation, are not considered owners. See 36 C.F.R. § 60.3(k).

Accordingly, in compliance with NPS regulations, I have determined that twenty-eight (28) valid objections were submitted by owners prior to the March 30, 2009 listing of Blair Mountain Battlefield.

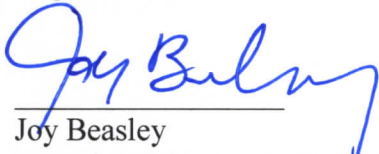
**Step 4. Determine whether a majority of owners objected prior to listing.**

Based on Ms. McCarthy's determination of parcels within the boundary of Blair Mountain Battlefield, the information submitted by the WV SHPO with respect to the Blair Mountain nomination, an analysis of comments submitted by various interested parties, including Plaintiffs, the court's April 11, 2016 opinion, the title opinions received by Ziegler & Ziegler regarding parcels, and after review of the full record, I find that, as of March 30, 2009, there were eighty-three (83) owners within Blair Mountain Battlefield, and twenty-eight (28) valid objections to listing the historic district in the National Register. Thus, a majority of the property owners (66.26%) did not object to the Blair Mountain's listing in the National Register.

**III. Conclusion**

On April 11, 2016, the court vacated the removal of Blair Mountain Battlefield from the National Register and remanded the matter to the Keeper for reasoned decisionmaking. Since that time, the Keeper's Office has worked to independently determine the tax parcels within the boundaries of Blair Mountain Battlefield, the identity of owners where owner identity was called

into question, and the number of objections received prior to listing, in order to determine whether Blair Mountain Battlefield was properly removed from the National Register on December 30, 2009. Having determined that a majority of the private property owners (66.26%) did not object prior to the listing, I have concluded that Keeper's December 30, 2009, decision to remove Blair Mountain Battlefield from the National Register was erroneous, and as of the date of this memorandum, confirm that the Blair Mountain Battlefield is listed in the National Register of Historic Places.



Joy Beasley

Associate Director (acting), Cultural Resources, Partnerships, and Science, National Park Service  
Keeper of the National Register of Historic Places

June 27, 2018