

## **Cultural Resource Compliance when Managing Minerals on Split Estate Transcript**

Hello, I'm Gary Stumpf. Welcome to another module in the "Fundamentals for Managing the Cultural Heritage Program" series. One of the other training modules in this series discusses BLM's Section 106 compliance responsibilities for cultural resources on non-Federal lands.

To illustrate that issue, it explores some case studies focusing on linear rights-of-way and a proposed power project. In this module, I would like to build on what is presented in that other module.

We are going to look at another aspect of compliance responsibilities for cultural resources on non-Federal land. But in this case we are going to discuss split estate, using minerals management as an example.

The objective of this training is for you to be able to meet the requirements for Section 106 compliance pertaining to minerals management on split estate lands. By the end of this session, you will know:

The different kinds of split estate

BLM's authority and responsibilities for cultural resources affected by mineral leasing and mineral sales on split estate

BLM's authority to access private surface for the purpose of complying with Section 106 when cultural resources may be affected by BLM mineral leasing and mineral sales

Section 106 compliance responsibilities when managing locatable minerals on split estate, including Indian trust land and surface patented under the Stockraising Homestead Act

Section 106 compliance responsibilities on split estate with BLM surface and state minerals, and

Section 106 compliance responsibilities when transferring mineral estate out of federal ownership

We are using minerals as our example because split estate issues relating to Section 106 compliance arise most frequently, and most intricately, when we are dealing with minerals activities. Also, minerals management involves all of us as cultural heritage specialists, whether we are in so-called energy states or not. No matter where you work in BLM, you will be dealing with minerals as an important part of your workload.

When I speak of split estate, this includes lands where the surface is privately owned, but the mineral estate is Federal, and lands where the ownership is the other way around, i.e., the surface is Federal but the mineral estate is privately owned.

Most split estate lands with private surface were patented under the Act of July 17, 1914, the Taylor Grazing Act of 1934, and the Stockraising Homestead Act of 1916. Under each of these laws, the surface became private, but the mineral estate was reserved by the Federal Government.

As we go through this discussion about split estate, I will make it clear which kind of split estate I am talking about. i.e., whether it is private surface with federal minerals, or the other way around, with federal surface and private minerals.

When we are trying to determine our Section 106 compliance responsibilities pertaining to minerals on split estate lands, it is important not to confuse Federal lands with Federal actions. They are two different things.

Some of the laws that BLM follows apply to Federal land, and some of the laws apply to Federal actions. Some of the laws apply only to Federal surface, and some apply to Federal mineral estate even when the surface is not Federally owned.

The key point for us to remember as cultural heritage specialists is that the National Historic Preservation Act applies to Federal actions, regardless of who owns the land surface and the cultural resources on that surface.

First, let's look at Section 106 compliance for leaseable minerals like oil and gas. In split estate situations where the surface is privately owned and the mineral estate is Federal, BLM has the authority and the responsibility to take reasonable measures to avoid or minimize adverse impacts on cultural resources that may result from mineral leasing activities authorized by BLM.

Decisions that BLM makes in such cases are subject to compliance with Section 106 of the National Historic Preservation Act. They are also, by the way, subject to compliance with NEPA and the Endangered Species Act.

The fact that impacts will occur on private surface does not diminish BLM's responsibility to consider alternatives that might avoid those impacts, nor does it diminish BLM's authority to impose mitigation measures to avoid those impacts. Why? Because those impacts will occur as a direct consequence of activities approved by BLM.

What about geophysical operations? BLM approval is required for geophysical exploration on split estate where the surface is Federal and the mineral estate is privately owned if the exploration activities exceed casual use.

Casual use means activities that ordinarily result in no disturbance or negligible disturbance of the land or resources. These would be activities that do not involve the use of heavy equipment or explosives or use of vehicles off of established roads. BLM approval of geophysical operations on Federal surface, exceeding casual use, is subject to Section 106 compliance.

On split estate lands with private surface and *leased* Federal minerals, BLM authorization is not required for oil and gas geophysical exploration unless the surface owner denies access to the lessee or its operator. If the surface owner denies access, BLM will authorize the exploration activities by approving a Notice of Intent under the 43 CFR 3150 regulations. Approval of the Notice of Intent is subject to Section 106 compliance.

In meeting its responsibility to identify cultural properties before approving geophysical operations, the BLM may require a geophysical operator to conduct a cultural resource inventory if:

The proposed geophysical operations (a) will be conducted off established roads and jeep trails, (b) will involve blading or other land disturbance, (b) other serious damage or disturbance to the land will occur, or (c) vibrations from the use of explosives or other methods would endanger cultural resources such as standing structures.

BLM approval is not required to conduct geophysical exploration operations on *unleased* split estate lands with private surface and Federal minerals. Such operations are, therefore, not subject to Section 106 compliance.

The principles governing BLM's responsibility for cultural resources apply to saleable minerals on split estate as they do for leasable minerals.

Even though sand and gravel may physically be part of the land surface, they are ordinarily part of the mineral estate (in some cases, the Federal Government's reservation of the minerals did not include sand and gravel, but this is rare). So if the Federal Government owns the mineral estate, it usually owns the sand and gravel even if the surface is privately owned.

Decisions BLM makes about selling sand and gravel on split estate lands with private surface are subject to Section 106 compliance. The fact that the cultural resources that might be affected are privately owned does not diminish BLM's responsibility to identify them, evaluate them, and take other actions required under Section 106.

What if the private surface owner refuses to allow BLM access to conduct a cultural resource survey to comply with Section 106 before selling mineral materials or approving leasable mineral development?

Now let's look at locatable minerals. Locatable minerals like gold, silver, copper and uranium, are administered under the 43 CFR 3809 regulations. Those of you who have been with the Bureau for a while know that the old 43 CFR 3809 regulations applied only to lands in which BLM administered *both* the surface and mineral estates.

The new 43 CFR 3809 regulations, however, apply to all operations authorized by the mining laws on public lands where the mineral interest is reserved to the United States. This is true even when the surface is not federally owned.

That said, it's important to note that the 3809 regulations do not apply to national parks, national forests, national wildlife refuges, acquired lands, or lands administered by BLM that are under wilderness review. They also do not apply to mining claims in the California Desert Conservation Area patented before October 21, 1976.

When Federal locatable minerals are located on lands managed under the 43 CFR 3809 regulations, even when the surface is privately owned, BLM has regulatory authority over mining activities. For operations exceeding casual use, the claimant must submit a mining plan for BLM's approval before beginning operations, and BLM's decision is subject to compliance with Section 106.

On lands patented under the Stock Raising Homestead Act of 1916, however, the situation is slightly different. On Stock Raising Homestead Act lands, where the mineral estate remains in Federal ownership, the 1993 amendments to that Act require a mining claimant to submit a plan of operations for all activities other than casual use unless the surface owner consents in writing to the mining activities.

This includes even notice-level activities that would not require a mining plan on BLM surface. If the claimant does not obtain the surface owner's written consent, BLM must approve the mining plan before operations can proceed, and BLM's decision is subject to compliance with Section 106.

In split estate situations where the surface is Indian trust lands (i.e., Indian reservation land held in trust by the United States Government as opposed to lands that may be privately owned by a tribe), locatable minerals are handled as though they were solid leasable minerals and are administered under the 43 CFR 3590 regulations.

Under those regulations, the operator must submit a mining plan for BLM's approval, which BLM reviews in consultation with the Bureau of Indian Affairs and the involved tribe. Since the BLM has the authority for approving the mining plan, it has lead responsibility for Section 106 compliance.

What about split estate with state or private minerals and BLM surface? On lands where a state or another entity owns the minerals under BLM surface, the 3809 regulations do not apply. Mining activities for state or private minerals under BLM surface should be permitted under either the 2800 or 2900 regulations depending on the nature of the proposed activity.

Under those regulations, BLM can place reasonable stipulations on the mineral development activities, and BLM's decisions would be subject to Section 106 compliance. But it's important to remember that in most states, the mineral estate has primacy and this will affect BLM's ability to protect surface resources.

In most cases where a state owns the minerals, the operator must submit a mining plan to the state for approval, but BLM has no discretion over how the minerals are developed and plays no part in approving the mining plan.

However, I would encourage you to check whether your own state follows any procedures that may give BLM an opportunity to participate in the approval of mining plans for state-owned minerals underlying BLM surface. Arizona, for example, has a State Historic Preservation Act that requires State agencies to consult with the State Historic Preservation Officer before initiating or authorizing activities that could impact cultural resources.

This is a State compliance process that parallels the Federal Section 106 process. The State Land Department consults with BLM, as part of its efforts to comply with the State Historic Preservation Act, before approving mining plans on split estate lands with BLM surface.

This affords BLM an opportunity to comment on the eligibility of, and effects on, BLM-administered cultural resources that might be impacted by the proposed development of State-owned minerals.

What if we are proposing to transfer mineral estate out of Federal ownership? We have seen that BLM has the authority to manage leasable and saleable minerals on split estate lands where the surface is privately owned and the minerals are Federal. Because of this, resources that are part of the private surface estate enjoy some protection afforded by Federal laws, such as the protection afforded to cultural resources by NEPA and the NHPA.

If the Federal mineral estate is to be exchanged out of Federal ownership, the private surface resources would lose that protection. Such exchanges could, therefore, affect historic properties and would be subject to compliance with Section 106.

While land exchanges involving private surface and Federal minerals are subject to Section 106 compliance, BLM should be reasonable in requiring cultural resource work on split estate where only mineral estates will be exchanged. If there is high potential for mineral development or sale, cultural resource inventory and mitigation may be appropriate.

Where potential for mineral development or sale is only moderate or low, an existing data review to characterize the cultural resource potential of the area may be all that is necessary because there is no way to predict where, or if, any impacts to cultural resources will occur in the future. It would be wise to discuss this issue with your SHPOs and agree on a reasonable approach to compliance in such cases within the framework of your State protocols.

We have talked about cultural resource compliance when managing minerals on split estate. Now I'd like to discuss three case examples that illustrate some of those compliance responsibilities.

In our first case, depicted on this slide, Exxon has applied for a right-of-way from BLM to access Section 16, T17N, R113W. The proposed access road begins on and crosses BLM land shown in yellow, and ends in Section 16.

The surface of Section 16 is privately owned. Exxon is applying for the ROW for the purpose of conducting geophysical explorations in Section 16 involving explosives and vibroseis trucks off established roads.

The first question is, “If Section 16 is private surface with leased Federal minerals, what are BLM’s Section 106 responsibilities pertaining to the exploration activities proposed in Section 16?”

The second question is, “If Section 16 is private surface with unleased Federal minerals, what are BLM’s responsibilities under Section 106?”

BLM approval is not required to conduct geophysical exploration operations on unleased split estate lands with private surface and Federal minerals. Such operations are, therefore, not subject to Section 106 compliance.

However, in this case, Section 16 is completely surrounded by BLM land and cannot be accessed without the ROW across BLM land that Exxon is applying for. Because the exploration activities within Section 16 cannot take place unless BLM grants the ROW across BLM land, BLM should consider the effects of the exploration activities when complying with Section 106 before issuing the ROW.

Let’s look at a second case with the same land ownership. Here, Exxon is applying for a ROW across public land to access Section 16 for the purpose of drilling to extract leased minerals. Exxon is also submitting an Application for Permit to Drill. The proposed well is 1 ½ miles from the Mormon Pioneer National Historic Trail and will be visible from the trail.

After the well is drilled, the drilling rig will be removed and a 12 foot-tall storage tank will be installed on site. Approximately 75 meters west of the proposed well development, the terrain drops 13 feet.

The first question is, “If Section 16 is private surface with leased Federal minerals, what are BLM’s responsibilities under Section 106? And what conditions, if any, should BLM place on the proposed activities?”

The answer is that in split estate situations where the surface is privately owned and the mineral estate is Federal, BLM has the authority and the responsibility to take reasonable measures to avoid or minimize adverse impacts on cultural resources that may result from mineral leasing activities BLM authorizes. Decisions that BLM makes about leasing activities in such cases are subject to Section 106 compliance.

BLM may require the operator to complete a cultural resource survey of the areas that will be affected in Section 16 and to carry out mitigation for cultural resources that cannot be avoided. In this case, because the drilling activities in Section 16 will be visible from the National Historic Trail, BLM may want to place conditions on the activities that will reduce their visual impact from the trail.

One condition that might be considered is requiring the 12 foot-tall storage tank to be placed 75 meters to the west of the proposed well where the ground surface is 13 feet lower, thereby placing it out of sight from the trail.

In this situation with private surface and leased federal minerals, the operator has the right to access the property in order to conduct a cultural resource survey before developing the minerals. He is responsible for making access arrangements with the surface owner before entering the property for the purpose of doing the survey, and he is responsible for notifying the private surface owner when the survey is to be conducted.

The operator is also responsible for ensuring that company personnel do not collect artifacts and that company staff report the discovery of artifacts to the authorized BLM official.

The private surface owner must allow for a cultural resource survey and other cultural resource work that BLM determines is necessary, including data recovery. However, the surface owner owns the cultural resources on his property and has the right to request that artifacts be returned to him after they are studied.

Of course, BLM would encourage the surface owner to donate the artifacts to a museum and to keep information about cultural resource locations on his property confidential. One way to encourage conservation is to give the surface owner a copy of the cultural resource survey report, and the data recovery report if there is one, pertaining to his property.

In addition to addressing potential impacts in Section 16, BLM would also be responsible for effects on cultural properties resulting from authorizing the right-of-way across public lands leading to Section 16. BLM may require the operator to complete a cultural resource survey along the proposed route and carry out any mitigation that might be necessary for historic properties that would be affected.

Now let's look at our third case. This one involves locatable minerals. A mining company has submitted a Plan of Operations to BLM for exploration activities and development of an open pit gold mine and cyanide heap leach facility.

Land status in the proposed project area is a mix of public, state and private surface ownership.

The first question is, "What potential effects should BLM consider when complying with Section 106?"

The answer is that BLM must consider the effects of its actions on cultural resources regardless of land ownership, i.e., regardless of where those cultural resources are located. That would include all effects that could result from BLM authorizations.

BLM must approve a Plan of Operations before the proposed mining activities can proceed, and the approval of a Plan of Operations is an undertaking subject to Section 106 compliance.

The Area of Potential Effects for purposes of Section 106 compliance would include all areas that would be disturbed under the Plan of Operations, including the proposed open pit mine area, locations for the exploration holes, the routes of any proposed new road construction or improvement, and all areas that would be affected by development and use of the heap leach facilities on BLM, state and private land.

The second question is, “What if all the proposed mining and exploration activities were to be located on private or state surface, but BLM owned the mineral estate?”

The answer is that the new 43 CFR 3809 regulations give BLM the authority to regulate mining operations on public lands where the mineral interest is reserved to the United States, including lands with private or state surface. BLM would require a Plan of Operations for the exploration activities and development of the mine and heap leach facility. Before approving the mining plan, BLM would consider the effects of all activities covered under the plan when complying with Section 106, regardless of surface ownership.

This concludes our training module on cultural resource compliance when managing minerals on split estate. In this module, we discussed the different kinds of split estate, BLM’s authority and responsibilities for cultural resources affected by mineral leasing and mineral sales on split estate, and BLM’s authority to access private surface for the purpose of complying with Section 106 when cultural resources may be affected by BLM mineral leasing and mineral sales.

We also discussed Section 106 compliance responsibilities when managing locatable minerals on split estate, and how those responsibilities differ on Indian trust land and surface patented under the Stockraising Homestead Act.

And finally, we looked at Section 106 compliance on split estate with BLM surface and state or private minerals, and BLM’s Section 106 responsibilities when transferring mineral estate out of federal ownership.

Thank you for attending. If you would like more information about these topics, please contact your Deputy Preservation Officer.