Fundamentals for Managing the Cultural Heritage Program

Cultural Resource Compliance When Managing Minerals on Split Estate

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Split estate 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.

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.

I. Leasable and Saleable Minerals

A. Mineral leasing (e.g., oil and gas, geothermal, coal, coalbed methane).

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 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.

B. Geophysical Operations

1. Split estate with Federal surface and private minerals. BLM approval is required for geophysical exploration on split estate where the surface is Federal and the mineral estate is privately owned <u>if</u> 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.

2. Leased split estate with private surface and Federal minerals. 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.

3. Requirements for inventory. 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 will be conducted off established roads and jeep trails and/or will involve blading or other land disturbance,
- Other serious damage or disturbance to the land will occur, or
- Vibrations from the use of explosives or other methods would endanger cultural resources such as standing structures.

4. Unleased split estate with private surface and Federal minerals. 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.

C. Mineral material sales (e.g., sand and gravel). 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.

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

When Onshore Oil and Gas Order No. 1 (Federal Register, Vol. 48, 56226, 12/20/83) was issued in 1983, it created some confusion about BLM's authority to enter private surface for the purpose of conducting cultural resource work. This Order, which defines responsibilities for lessees and operators of Federal oil and gas leases, says:

> "Historic and cultural resource work on privately owned surface shall be undertaken only with the consent of the private surface owner."

Does this mean that if a private surface owner refuses access, BLM can ignore the requirements of Section 106 and approve an Application for Permit to Drill anyway? Or can BLM force the issue and gain access to the private surface regardless of the surface owner's objections? The Rocky Mountain Region Solicitor's Office addressed this question in 1999 (2/3/1999). In the first place, the solicitor pointed out, Onshore Oil and Gas Orders are binding on lessees and operators, they are not intended to define the rights and duties of the BLM, nor can they in any way amend any laws or regulations that apply to the BLM.

The solicitor also said that BLM and its lessees have a right of access to conduct cultural resource inventories on split estate even if the surface owner refuses entry. When the private surface was patented, the laws that reserved the mineral deposits to the Federal Government also reserved to the government and its lessees the right to reenter and use as much of the private surface as is needed to do what is reasonably necessary to mine and remove the mineral deposits. This is true regardless of whether the surface was patented, with minerals reserved to the United States, under the Act of July 17, 1914, the Taylor Grazing Act or the Stockraising Homestead Act.

The BLM must comply with the NHPA before it can approve an application for permission to drill, and in some cases, an on-the-ground survey will be necessary to comply with that law. Therefore, the BLM, or someone it authorizes, has the right to enter the private surface to conduct the cultural resource inventories. If the private surface owner does not voluntarily give consent to enter, the BLM can get a Federal court order to obtain that consent. The provision of Oil and Gas Order No. 1 that says cultural resource work on privately owned surface "shall be undertaken only with the consent of the private surface owner" is consistent with the law. Consent is necessary, but that isn't the question. The question is how that consent will be given. Will it be given voluntarily, or as a result of a court order? Either way, BLM has the right to access the private surface.

We should recognize that resorting to a court order is an extreme measure that should be avoided if at all possible. We should not overlook the fact that the lease holder has a vested interest in being allowed to drill at a particular location. The lease holder should be encouraged to work with the private surface owner to ensure that BLM can comply with the NHPA (and NEPA and the Endangered Species Act) so that BLM can process the lessee's application for permission to drill.

Onshore Oil and Gas Order No. 1 goes on to say:

> "If the private surface owner refuses entry for that purpose, the lessee or operator shall use its best efforts to conduct approved operations in a manner that avoids adverse effects on any properties which are listed, or may be eligible for listing, in the NRHP."

Some people have interpreted this sentence as implying that a lessee or operator may conduct operations without a cultural resource survey if a private surface owner refuses entry for a survey to be conducted. The solicitor made it clear that such an interpretation is inconsistent with the law. This sentence in Onshore Oil and Gas Order No. 1 refers to "approved operations," and there can be no approved operations until the requirements of the NHPA have been met. Therefore, an operator's "best efforts to conduct approved operations in a manner that avoids adverse effects" can be possible only if those efforts are preceded by full compliance with the NHPA before the operations begin.

The bottom line is that on split estate, BLM has the duty and legal authority to comply with the NHPA before leasing minerals, approving leasable mineral operations, or selling mineral materials, and BLM may not use the surface owner's refusal of access as a reason for not complying with the law.

II. Locatable Minerals (e.g., gold, silver, copper, uranium)

Locatable minerals are administered under 43 CFR 3809, which applies only to lands in which BLM administers *both* the surface and mineral estates. When Federal locatable minerals are located under private surface, BLM ordinarily exercises no regulatory authority over mining activities and has no responsibilities under Section 106 of the National Historic Preservation Act. This is true for all split estate patented under the 1914 Act and the Taylor Grazing Act. However, there are two instances in which BLM does have regulatory authority over locatable minerals on split estate:

A. Surface is Indian trust land. 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 (over the BIA) for Section 106 compliance.

B. Surface patented under the Stockraising Homestead Act. On split estate lands patented under the Stockraising Homestead Act of December 29, 1916, where the mineral estate remains in Federal ownership, the 1993 amendments to that Act (in Public Law 103-23) 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 consent, BLM must approve the mining plan before operations can proceed, and BLM's decision is subject to compliance with Section 106.

III. Split Estate with State Minerals and BLM Surface

On lands where a state owns the mineral estate under BLM surface, BLM has no authority to approve or disapprove mineral development activities. In some states (perhaps all?), the operator must submit a mining plan to the state land department for approval, but BLM has no discretion over how the minerals are developed and plays no part in approving the mining plan. The 43 CFR 3809 regulations apply only to lands in which BLM administers *both* the surface and mineral estates. Therefore, unless a right-of-way across BLM surface is needed, mineral development on split estate where a state owns the minerals does not constitute an undertaking requiring compliance with Section 106.

You should check whether your own state land departments follow 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 eligibility of, and effects on, BLM-administered cultural resources that might be impacted by the proposed development of State-owned minerals.

IV. Transferring Mineral Estate out of Federal Ownership

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 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. You should discuss this issue with your SHPO and agree on a reasonable approach to compliance in such cases within the framework of your State protocols.