Section 106 Responsibilities on Split Estate

I. Leasable, Locatable and Saleable Mineral Activities

A. Leasable Minerals. In split estate situations where the surface is privately owned and the mineral estate is Federal, the Bureau has the authority to take reasonable measures to avoid or minimize adverse environmental impacts that may result from mineral leasing activities authorized by BLM. Decisions made by BLM in such cases are subject to compliance with Section 106 of the National Historic Preservation Act.

B. Locatable Minerals. 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 except in the following instances:

1. <u>In split estate situations where the surface is Indian trust lands</u>, locatable minerals are handled as though they were solid leasable minerals and are administered under the 43 CFR 3590 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.

2. <u>On split estate lands patented under the Stockraising Homestead Act of 1916</u>, 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.

C. Saleable Minerals (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). 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.

II. Geophysical Operations

A. 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 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.

B. 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.

C. 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.

D. 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.

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, 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. As stated above, 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.

IV. Land Exchanges Involving Split Estate

BLM has the authority to approve and regulate the extraction of leasable and saleable minerals on split estate lands. This means that if the Federal mineral estate on split estate lands is to be exchanged out of Federal ownership, private surface resources like cultural resources would lose the protection afforded by Federal laws. Such exchanges would, therefore, be subject to compliance with Section 106.

This is obvious for split estate lands patented under the Stockraising Homestead Act of 1916, as BLM has some discretionary authority over the mining of locatable minerals on those lands, as well as leasable and saleable minerals. It is less obvious, but equally true, for split estate lands patented under other laws.

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.

V. Private Landowner Consent

BLM and its lessees have a right of access to conduct cultural resource inventories on split estate with private surface and Federal minerals 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.

On split estate, BLM has the duty and legal authority to comply with the National Environmental Policy Act and the National Historic Preservation Act before proceeding with an action that will affect the private surface. BLM may not condition its compliance with applicable Federal law on the consent of the surface owner.