



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

3480
SL-070645
U-47978
(U-067)

Moab District
P.O. Box 970
Moab, Utah 84532

AUG 10 1988

Lowell Braxton
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Division of Oil, Gas, and Mining
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RECEIVED
AUG 12 1988

DIVISION OF
OIL, GAS & MINING

Dear Mr. Braxton:

Utah Power and Light's (UP&L) 1988 Coal Exploration Plan to drill seven holes inside the Cottonwood/Wilberg permit area was approved by your office on June 30, 1988. This approval was with the consent and stipulations provided by the Bureau of Land Management San Rafael Resource Area office in Price, dated March 21, 1988. The consent and stipulations were for the surface rights for the six drill holes on public land and for the minerals rights to the Federal coal leases on which all seven holes were located.

UP&L had committed in their proposal to obtain surface owner consent for hole EM-68. This hole is located on Federal coal lease SL-070645, but the surface rights are owned by Seely Trust. Negotiations between Seely and UP&L have broken down. While we encourage surface owner consent, we must also protect the rights of the lessee that are quite clear--his right to access the coal within reason.

Enclosed is a copy of a Department of Interior Solicitor's legal opinion on split estate rights. Also, regulations with regard to the Mineral Leasing Act, codified as 43 CFR 3410.3-4(b)(2) and (d) indicate that a sufficient bond be in place before drilling to assure compensation for any damages to the surface when there is an absence of a surface owner agreement with the mineral lessee.

Between the SMCRA reclamation bond for the Deer Creek Mine and the lease bond for SL-070645 of \$1,000,000.00, there is more than adequate security for this one drill hole.

It is our opinion that if negotiations between UP&L and Seely have totally failed, UP&L should be allowed to exercise their right to access the mineral resource and drill EM-68, provided they follow the approved exploration plan and stipulations for operation and reclamation. The BLM has deemed that if

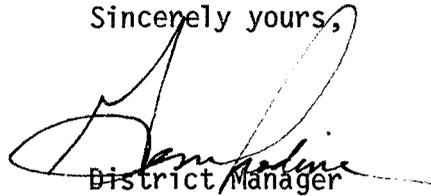
John: What is the operational status of this program to date? LRS 8/15

these requirements are followed, no environmental damage that cannot be reclaimed will occur. UP&L has drilled many holes on East Mountain with successful reclamation, including some holes on Seely's property. As 43 CFR 3410.3-4(d) states, the surface owner has the right to inspect the completed reclamation for adequacy before the lease bond is released by BLM.

We therefore recommend that UP&L be given the right to drill EM-68. This drill hole is a highly desired hole to evaluate the west reserves of the Deer Creek Mine. As always, BLM field inspectors will monitor compliance to the terms of the permit.

Should you have any questions, please contact Brent Northrup of my staff or Stephen Falk of the San Rafael Resource Area staff in Price.

Sincerely yours,



District Manager

Enclosure:
Solicitor Opinion

cc:
SD (U-921), w/o enclosure
UP&L, w/enclosure
Seely Trust, w/enclosure



United States Department of the Interior



OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BLM.ER.0317

SEP 1 1977

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Energy and Resources

Subject: Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands

You have requested an opinion regarding the legal responsibilities of the Bureau of Land Management (BLM) when it issues oil and gas leases and approves lease operations on "split-estate" lands^{1/} under the following statutes:

- 1) the Federal Land Policy and Management Act (FLPMA);
- 2) the National Environmental Policy Act (NEPA);
- 3) the National Historic Preservation Act (NHPA); and
- 4) the Endangered Species Act (ESA).

It is our understanding that, rather than a detailed listing of your responsibilities under each act, you are primarily interested in knowing whether your responsibilities under the above acts are the same on split-estate lands as on federal lands. We will discuss BLM's responsibilities under each of these four statutes separately, and then discuss the authority of the surface owner over access.

At the outset, it is important to distinguish between federal lands and federal actions. Only one of these statutes, FLPMA, ties BLM's responsibilities to the use of federal lands. Under the other three statutes, BLM's responsibilities are triggered by a federal action or undertaking. As many of the cases decided under NEPA, NHPA and ESA demonstrate, federal actions or undertakings within the meaning of these statutes often occur on non-federal property. See, e.g., Watch v. Harris, 603 F.2d 310 (2nd Cir.), cert. denied, 444 U.S. 995 (1979) (urban renewal project funded by HUD involving both private and municipal property); Colorado River Indian Tribes v. March, 605 F. Supp. 1425 (D. Colo. 1985) (Army Corps of Engineers required to comply with NEPA before issuing permit to private developer to place boulders along shore of river to stabilize banks from erosion);

^{1/} "Split-estate" lands are those where the surface estate is owned by one entity and the mineral estate is owned by another. Here, we are discussing non-federal surface and federal oil and gas.

Hall County Hist. Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978) (federal aid to assist state in construction of local bypass must meet NEPA and NHPA requirements); and Save the Courthouse v. Lynn, 408 F. Supp. 1323 (S.D. N.Y. 1975) (urban renewal project funded by HUD to demolish municipal courthouse must meet NEPA and NHPA requirements). The crucial factor under NEPA, NHPA and ESA is thus not whether federal land is involved but whether a federal action or undertaking is involved. The degree of involvement necessary to trigger the requirements varies from statute to statute, but federal leasing activities constitute sufficient federal involvement to bring all three statutes into play.

I. FLPMA RESPONSIBILITIES

Under FLPMA land use planning requirements, BLM is responsible only for "public land." 43 U.S.C. § 1712(a). The term "public land" is defined under FLPMA as "any land and interest in land owned by the United States . . . within the several States and administered by the Secretary of the Interior through the Bureau of Land Management" 43 U.S.C. § 1702(e). On split-estate lands at issue here, the Federal Government owns only the minerals and not the surface. Thus, the private surface is not "public land" subject to the planning requirements of FLPMA. In discharging its FLPMA duties on split-estate lands, the BLM must only consider the planning and management of the federal minerals. Activities and use of the surface are not subject to FLPMA planning requirements, in part because BLM has no authority over use of the surface by the surface owner. However, the impacts on the surface and surface resources of mineral development, including BLM-authorized use of the surface for mineral development, must be considered under NEPA, NHPA and ESA.

II. NEPA RESPONSIBILITIES

BLM's NEPA responsibilities on split-estate lands are basically the same as for federal lands. NEPA requires that federal agencies consider the environmental impacts of their proposed actions and alternatives to proposed actions. This requirement applies to all "major Federal actions, significantly affecting the quality of the human environment." (42 U.S.C. § 4332(2)(c)), whether on privately or federally-owned land. Further, "federal action" within the meaning of NEPA includes not only action undertaken by the federal agency itself but also any action permitted or approved by the agency. Scientists Institute for

^{2/} In its September 22, 1987, decision in National Wildlife Federation v. Burford, Civil No. 82-117 (D. Mont.), the court stated: "the federal interest extends only to the management of mineral resources, including a consideration of how that management would affect the surface resources but not how the surface owner should manage those resources."

Public Information v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973). Therefore, before leasing the mineral estate and before approving an application for permit to drill, BLM must determine whether leasing the mineral estate or drilling on the area in question is a major Federal action significantly affecting the quality of the human environment, the same as it would on federal lands. If it is, then BLM must prepare an environmental impact statement. In this analysis, BLM must consider all impacts of the proposed action, whether those impacts are to surface resources, to use of the land by the surface owner, or to the subsurface.

Mitigation measures for impacts which are identified during your NEPA analysis may be imposed under the general authority set out in sections 30 and 37 of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 187 and 193, and the policies of FLPMA, 43 U.S.C. § 1701, or under a statute such as the ESA which specifically authorizes or prescribes mitigation. The fact that these impacts will occur on private surface does not diminish your authority to impose mitigation measures since the impacts will be caused as a direct consequence of activity approved by BLM and conducted pursuant to a federal oil and gas lease. When you apply the mitigation measures to proposed activity, you should consider the views of the surface owner and the effect on his use of the surface from implementation of the mitigation measures. The imposition on the lessee of stipulations to mitigate impacts on private surface resources from BLM-approved oil and gas activity, and consideration of how the mitigation measures affect surface use, are matters of policy which will be subject to the standards of the Administrative Procedures Act, 5 U.S.C. § 706.

III. NHPA RESPONSIBILITIES

Section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f, places the following requirements on federal agencies for the preservation of historical properties:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or 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 or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

Thus, federal agencies are required, among other things, to take into account the effect of any federally assisted or federally licensed undertaking on properties included in or eligible for inclusion in the National Register of Historic Places. Your question centers on the scope of the word "undertaking" as it applies to split-estate lands.

Both section 106 and the Advisory Council's regulations refer to the issuance of a federal "license" as triggering the application of the NHPA to the "undertaking." 16 U.S.C. § 470(f); 36 C.F.R. § 800.1. In National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), affirmed, 664 F.2d 220 (10th Cir. 1981), the district court considered whether issuance of a coal lease for Indian lands or approval of the mining plan by the Office of Surface Mining, Reclamation and Enforcement constituted the "license" for the federal "undertaking." The court concluded that the mining plan is the license which actuates the mining, not the lease. Id., 501 F. Supp. at 676.^{3/} On a federal oil and gas lease, the permit to drill is the equivalent of a mining plan on a federal or Indian coal lease as described by the court in National Indian Youth Council. Thus, the approval of an application for a permit to drill ("APD") would constitute the issuance of a "license" for "a proposed federal or federally assisted undertaking" subject to section 106.

You have questioned the regulatory definition of "undertaking" at 36 C.F.R. § 800.2(c) as being vague and in excess of the Council's authority. Although this definition has been revised in the Council's amended regulations, 51 Fed. Reg. 31116 (Sept. 2, 1986), 36 C.F.R. § 800.2(o), it still includes federally licensed projects. The House Committee referred to the prior definition in a 1980 Report, as follows:

The Committee also notes that the term "undertaking", as it is used in other sections of the Act, is meant to be used in the same context as described in section 106. The Advisory Council on Historic preservation has adopted an acceptable definition within its regulations, published as 36 C.F.R. § 800.

^{3/} The court also approved site-specific compliance with section 106, that is, encompassing only the area to be mined and not the entire lease. For an oil and gas lease, the area of potential effect would be based on the drilling site, roads, and any other authorized surface use. However, a 6-acre drill site does not require inventory of a 5000, 1000 or even a 40-acre area merely because it is within the same lease.

H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Ad. News 6408. Since section 106 specifically includes the "issuance of any license," approval of an APD would likely be covered by any definition adopted by the Advisory Council.

The legislative history of section 106 indicates that Congress intended the Act apply to a federal undertaking whether on federal property or not.^{4/} The Committee Report on the House version of the bill that became the NHPA, in noting that progress had been made on "nationally significant" historical properties but that protection was lacking for many properties of community, State and regional significance, states:

It is important that they [properties of local or regional significance] be brought to light and that attention be focused on their significance whenever proposals are made in, for instance, the urban renewal field or the public roads program or for the construction of federal projects or projects under Federal license that may involve their destruction.

H.R. Rep. No. 1916, 89th Cong., 2nd Sess. 6 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 3307, 3309. As the earlier cited cases reflect, many, if not most, urban renewal and public roads programs involve non-federal property.

In a June 8, 1966, Senate hearing on the bill that ultimately became the NHPA, a recommendation was made that the requirement in section 202 of the bill that federal agencies take into account the effect of projects on sites of national significance be expanded to include all sites listed on the national register. In responding to this recommendation, which was later incorporated into the bill, Frank E. Harrison, Chief of the Division of Legislation of the National Park Service, responded:

Mr. Chairman, this [section 202 of S. 3098] would apply not only to federally-owned property, but to nonfederally owned property which is involved in a federal assistance program,

^{4/} The agency's responsibilities on split-estate lands are somewhat less than on federal lands. On federal lands, the federal agency has the affirmative duty to establish a program to locate, inventory and nominate for the National Register all properties under its jurisdiction or control which appear to qualify for listing on the National Register. 36 C.F.R. § 60.9(a); Executive Order 11593, § 2(a) (3 C.F.R. § 154 (1971)), reprinted in 16 U.S.C. § 470 note (1982)). No such requirement exists for split-estate lands. The agency official must only make a reasonable and good faith effort to identify historic properties that may be affected by a federal undertaking on nonfederal property.

provided that property is on the national register, whether it be of national significance, local, or State significance only.

And of course--and I should point this out--this does not stop the federal agency from going ahead with its program, but is simply requiring it to consider the historical significance as one aspect of that program.

Hearing on S. 3035, S. 3098 before the Subcommittee on Parks and Recreation of the Senate Committee on Interior and Insular Affairs, 89th Cong., 2nd Sess. (1966) (statement of Frank E. Harrison, Chief, Division of Legislation, National Park Service).

Approval of an application for a permit to drill constitutes an "undertaking" within the meaning of section 106 of NHPA. The fact that the "undertaking" will occur on non-federal surface does not affect the applicability of section 106. Neither the NHPA nor the regulations of the Advisory Council on Historic Preservation, 36 CFR Part 800, prevent BLM from allowing lease activity to proceed. As long as BLM follows the Council's regulations, BLM must only "consider" the Council's comments. 36 CFR § 800.6(c)(2). During this review process, and particularly when making its final decision under 36 CFR § 800.6, the BLM should consider the views of the surface owner.

IV. ESA RESPONSIBILITIES

The Endangered Species Act of 1973 (ESA) directs the Secretary of the Interior to identify threatened and endangered species. 16 U.S.C. § 1533. The consultation provision for activities of the Federal Government is section 7, 16 U.S.C. § 1536. Section 7(a)(2) reads in relevant part that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

This section of the ESA directs federal agencies, in consultation with the Secretary, to insure that no action authorized, funded or carried out by the agency is likely to jeopardize the continued existence of a threatened or endangered species, whether plant or animal, or result in the destruction or adverse modification of the species' critical habitat, as determined by the Secretary. Oil and gas leasing and operations on split-estate lands would constitute an action authorized or carried out by BLM. Thus, the ESA requirements would apply to these lands just as to federal lands.

You have also inquired about the private surface owner's right to use the surface once we have identified an endangered species on the property. While section 7 of the ESA applies only to federal agency actions, section 9 of the Act prohibits the private owner, as well as the federal agency, from taking an endangered species of fish or wildlife. If the private owner takes (e.g., harms, harasses, or kills) an endangered species, he could be subject to criminal or civil penalties or both. 16 U.S.C. § 1538. In many cases, the taking prohibition also applies to threatened species by regulation. See 50 C.F.R. § 17.31.

Onshore Order No. 1, 43 C.F.R. § 3164.1 properly prescribes BLM's duties under the ESA. These responsibilities apply to split-estate as well as federal lands.

V. SURFACE OWNER CONSENT

You have asked what responsibility a federal agency has to comply with the above statutes on split-estate lands where the surface owner does not consent to activities necessary to achieve compliance. The Act of July 17, 1914 (1914 Act), 30 U.S.C. §§ 121-123, allowed homestead entry on lands which were prospectively valuable for certain minerals provided that the patent contained a reservation of the mineral to the United States. The 1916 Stock Raising Homestead Act of 1916 (SRHA), 43 U.S.C. §§ 291-301, required reservation of all minerals to the United States in all patents issued under its provisions. Patents with a mineral reservation under either the 1914 law or the SRHA also reserved the right of surface access:

. . . a patent . . . shall contain a reservation [of mineral] . . . , together with the right to prospect for, mine, and remove the same Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits . . . may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals

30 U.S.C. § 122; see 43 U.S.C. § 299.^{5/} Thus, a lessee of the United States clearly has the right, subject to certain protective provisions of the 1914 law or the SRHA, to enter and use the surface for exploration, recovery and development of the minerals. 30 U.S.C. § 182; Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 504 (1928); see also Vest v. Exxon Corp., 752 F.2d 959, 961 (5th Cir. 1985); Slatter v. Cliff's Drilling Co., 748 F.2d 1275, 1278 (8th Cir. 1984); Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950).

Compliance with applicable federal statutes is a use of the surface reasonably incident to the extraction of the underlying minerals. Western Energy Co. v. Genic Land Co., 195 Mont. 202, 635 P.2d 1297 (1981).^{5/} The mineral owner has the duty and the right to comply with these statutes even though they may not have existed when the surface patent was issued.^{7/} Access for this purpose is of course subject to the surface owner protection provisions of the law under which the minerals were reserved. However, BLM may not condition its compliance with applicable federal law on the consent of the surface owner.

You have asked what happens if the surface owner refuses access. Several courses of action may be available. First, it may be feasible to obtain the information you need without actually going onto the private surface (for example, if the SHPO already has an inventory of historical properties located on the

^{5/} We refer to the 1914 law and the SRHA because they resulted in the largest amount of split-estate land. However, most statutes authorizing mineral reservations contain similar provisions and the following discussion is generally applicable to all split-estate land. E.g., 30 U.S.C. §§ 81, 83-85, 121-123, 524; 43 U.S.C. § 1719.

^{6/} In Western Energy, the Supreme Court of Montana held that the owner of a mineral estate was entitled to conduct a "resource inventory" upon the surface to gather data needed for a surface mine application. The resource inventory activities contemplated by Western Energy included soil, vegetation, wildlife, hydrological, archeological and topographical mapping surveys, air quality monitoring and coal and overburden analysis. These activities are similar to compliance activities which would be conducted under the ESA and NHPA. Therefore, to the extent that compliance with Federal laws such as the ESA and NHPA is reasonably necessary to effectuate the purposes of a Federal oil and gas lease, the United States and its lessee have the right to use the surface consistent with such compliance activities.

^{7/} Compliance with these laws only applies to activities authorized by BLM. The activities and land uses of the surface owner are not affected. Indeed, BLM has no authority over the surface owner's activities and land uses.

surface). This may allow you to comply with the applicable statutes without causing a conflict. If it is necessary to go onto the property to comply with a federal law such as NHPA or ESA, you should make every effort to obtain the surface owner's cooperation. However, the permit to drill may not be approved until all applicable federal statutory requirements have been met. If such efforts are not successful, it may be necessary for the lessee to obtain a court order to be allowed access to the property for the purpose of complying with applicable statutes. The last step should be taken only if all other efforts to negotiate fail.

Tom Sansonetti

Thomas L. Sansonetti