

Meg VanNess/R6/FWS/DOI  
08/11/2008 04:05 PM

To Cathey Willis/R6/FWS/DOI@FWS, Bud  
Oliveira/R6/FWS/DOI@FWS, Rick  
Coleman/R6/FWS/DOI@FWS, Mike

cc

bcc

Subject Baca EA - Suggested Cultural Resource Changes

Good Afternoon-

As requested, I have pulled together a brief history of issues concerning cultural resource issues with the Baca EA (attached). I tried to summarize some of the major discussions and also did a table with suggested revisions. I now have a rather huge file on this subject so let me know if you would like more information or if you have any questions or concerns.

Thanks,

Meg



07-CO-BAC-003 (Lexam EA) Requested Changes to Draft - Aug. 2008.doc

Draft Environmental Assessment of Planned Gas and Oil Exploration, Baca National Wildlife  
Refuge, Saguache County, Colorado (January 2008 Draft)

Cultural Resource Issues  
11 August 2008 Meg Van Ness

I reviewed many of the drafts for the EA and spoke to various people during the creation of the document. The last draft I reviewed was the October 2007 draft and it looked fine to me. Then, on February 8<sup>th</sup> I received a phone call from the Colorado State Historic Preservation Office (SHPO) concerning the January 2008 version of the EA and the statements in it concerning the Section 106 of the National Historic Preservation Act (NHPA). The EA stated that Section 106 did not apply to the Lexam activities at the Baca. I called Mike Blenden to discuss the issue and he was also surprised at the revised wording in the EA. Neither of us had seen that wording before and it is in contradiction to the wording in the October 2007 draft. Please see the attached copy of a February 11, 2008 e-mail that I sent summarizing the situation.

On February 27, 2008 I received a letter from the Colorado SHPO stating their disagreement with the conclusion that Section 106 did not apply (see attached). Also attached is a copy of my February 28, 2008 e-mail summarizing my concerns.

There have been many conversations and e-mails concerning this issue. In particular, Janine Van Norman (USFWS National Energy Coordinator) was asked for some guidance. On February 20, 2008 she sent an e-mail that said (her emphasis):

Yes, regardless of whether or not an SUP has been issued, they still must comply with NHPA.

This is what we have on NHPA in the Oil and Gas handbook:

*Mineral Ownership and Cultural Resource Clearances*

Oil and gas exploration *and* production activities on federal and tribal lands must comply with the Archaeological Resources Protection Act of 1979 (ARPA), National Historic Preservation Act of 1966 (NHPA) and the American Antiquities Act of 1906, whose purpose is to preserve and protect historically significant buildings, structures and archaeological sites.

**There must be compliance with ARPA and NHPA on all federal and tribal fee-title lands, including NWRs and WPAs, regardless of mineral ownership and whether or not a Special Use Permit (SUP) is required or a voluntary SUP is issued.** Refuge and WMD managers should inform their regional archaeologist of any planned oil or gas activities. The Service's cultural resource staff, in consultation with the appropriate state historic preservation officer and/or tribal historic preservation officer, will complete a cultural resource review. If this review leads to the recommendation for a cultural resource inventory study, the oil or gas company will contract with a Service-approved cultural resource firm to conduct the necessary studies. The oil or gas company must submit the cultural resources report to the Service, and the proposed activity requires approval by Service cultural resource staff before the company can begin ground-disturbing activities. In situations involving the extraction of federal minerals, BLM is responsible for cultural resource compliance and coordinating with the Service's cultural resource staff.

ARPA does not apply to NWRS easement tracts on private or state lands, however the American Antiquities Act of 1906 does apply. On easement tracts, FWS has acquired various interests in the surface estate. However, these lands are generally owned by private individuals, businesses or other nonfederal entities and are not considered federal lands for ARPA purposes. The pertinent regional archaeologist should be contacted to determine whether a cultural resource assessment will be necessary. These assessments require an Antiquity Act Permit (rather than an ARPA Permit.) **If oil and gas activities on easements require a permit or preapproval by the Service, a "federal action" is the impetus that triggers NHPA. Voluntary agreements or permits to minimize resource impacts are not considered a federal action. As such, there are no NHPA requirements.**

On July 22, 2008 Ms. Van Norman further clarified the wording noted above (her emphasis):

I can see your confusion and that section clearly warrants some subheadings (I believe I had the exact same question when I was editing the handbook). The first paragraph refers to **fee title** lands which does apply to Baca. The second paragraph refers to **easements**, which does not. Bottom line is that NHPA **is triggered** by Baca.

On Wednesday, July 30, 2008 I spoke with Nancy Brown at the Advisory Council on History Preservation (ACHP) in Washington D.C. ACHP plays a major part in the Section 106 process and is often asked to participate when there is a difference of opinion. I briefly explained the situation and she said that there is no question that Section 106 applies. She also said that their solicitors have dealt with this issue numerous times.

**February 11, 2008**

Meg VanNess/R6/FWS/DOI

To Mike Blenden/R6/FWS/DOI, Ron 7 Garcia/R6/FWS/DOI

cc Michael Spratt/R6/FWS/DOI@FWS, Bud Oliveira/R6/FWS/DOI@FWS

Subject Baca EA - Some Cultural Resource Issues

Good Afternoon-

I just thought I'd update you folks on a couple of conversations I've had about the cultural resource sections of the Baca EA. I talked to Mike Blenden briefly about some of this and just don't want you to be blind-sided if this comes up in the public meetings. I'm not sure I have the whole picture but this is what I know at this point.

A woman from a San Luis Valley nonprofit notified the Colorado State Historic Preservation Office (SHPO) that the EA was out and that there was some issues about the planned treatment of cultural resources. Greg Wolff, compliance guy at the SHPO, called me and asked about the second sentence in the second paragraph of section 3.7.1: "The proposed action is not considered an undertaking as defined by NHPA and therefore not subject to review". That was a big surprise to me (and to the SHPO). I spoke with Kim Munson (anthropologist at ENSR who worked on the EA) and I guess this was a determination made by Tom Graf, Special Assistant U.S. Attorney, in early January. I don't remember seeing this little gem in the drafts.

There are a few concerns here. First and foremost, oil and gas activities have a good potential to adversely effect archaeological and historical sites at the Baca. I'm also not sure that Lexam's activities don't constitute an undertaking. One of the definitions of "undertaking" is if the agency is "... those requiring a Federal permit, license, or approval..." "Approval" is not defined but if FWS and Lexam have agreed to certain measures (as outlined in 2.2) it might be interpreted as giving approval.

In Section 2.2 it mentions that there will be on-site archaeological monitoring for all ground disturbing activities. That doesn't make a whole lot of sense if there hasn't been a cultural resource survey prior to the start of construction. What are they suppose to do if they find something and under what authority?

The SHPO is going to send a letter asking for further clarification and justification of the determination. I also think the determination needs further review and that this one little sentence has a huge impact

Just a heads-up before your meeting tomorrow. Gosh, wish I could be there with you...

Meg

**February 28, 2008**

**Meg  
VanNess/R6/FWS/D  
01**

To Michael Spratt/R6/FWS/DOI@FWS, Mike  
Blenden/R6/FWS/DOI@FWS, Ron J.  
Garcia/R6/FWS/DOI@FWS, Dean

Subject Baca - Cultural Resource Issues

Good Morning -

Yesterday I received a letter from the Colorado State Historic Preservation Office (SHPO) summarizing their concerns about the Baca EA (see attached). As was expected, they disagree with the conclusion that oil and gas activities on the Baca do not fall under Section 106 of the National Historic Preservation Act (NHPA). I agree with all of the SHPO's concerns and conclusions.

As mentioned in my earlier e-mail, the statement that "The proposed action is not considered an undertaking as defined by NHPA, and therefore is not subject to review" - in section 1.5.2.2 and repeated in sections 3.7.1 and 3.8 - is the main problem. I'm not sure where this came from but I don't think it's correct (for several reasons) and it should be taken out of future drafts. Because it was added sometime late in the process and not thought through, it contradicts other statements in the document and makes the whole handling of cultural resources a jumbled mess of contradictions and silly illogical processes. I just hate silly illogical processes.

So, let me know if you need more information or anything else I can do to help change this.

Meg

7.CO.BAC.00:

OFFICE of ARCHAEOLOGY *and* HISTORIC PRESERVATION

February 22, 2008

Michael Blenden  
San Luis Valley NWR Complex US Fish and Wildlife Service 9383 El Rancho Lane  
Alamosa, CO 81101

Re: Draft "Environmental Assessment of Proposed Gas and Oil Exploration, Baca NWR" (CHS #51875)

Dear Mr. Blenden:

We have recently obtained the draft EA identified above from the US Fish and Wildlife Service (Service) website. As we wish to consult with the Service regarding the potential effects of proposed oil and gas exploration in the Baca National Wildlife Refuge on historic properties please include us on your distribution list for future correspondence regarding this EA.

Upon review of the draft document, we note with concern that the Service has determined that "the proposed action-is not considered an undertaking as defined by NHPA [National Historic Preservation Act], and therefore is not subject to review" (pages 1-8, 3-35, etc.). The issue of allowing access to private subsurface mineral rights notwithstanding, the document does not adequately demonstrate that the proposed action is not an undertaking (36 CFR 800.3(a)).

As stated in the draft EA, "the Service has both the responsibility and the authority to formulate standards and measures for ensuring that the surface estate of the Refuge and its associated resources are not unreasonably impacted" by activities associated with the subsurface estate (p. 1-4). The Service plans to use its authority to meet this responsibility "by establishing stipulations and recommendations to protect the surface estate and other resources of the Refuge from unreasonable damage during all phases of currently planned oil and gas exploration being conducted by Lexam, including the intended drilling of two exploratory gas wells on the Refuge" (page 1-1). Consequently, it is our opinion that the definition of an undertaking as defined in 36 CFR 800.16(y) is met by this Federal action which is under analysis in the EA. As a result, it is our opinion that the Service is required to comply with the NHPA. Compliance with the NHPA by the Service does not deny Lexam the reasonable opportunity to explore for minerals.

We look forward to further consultation with the Service and other consulting parties as appropriate regarding this project. If we may be of further assistance, please contact Greg Wolff, Section 106 Compliance Coordinator, at (303) 866-4674

Sincerely,  
Georgianna Contiguglia

State Historic Preservation Officer GC/GAW

