

April 9, 2018

The Honorable Ryan Zinke  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington D.C., 20240

RE: Policy Recommendations and Guidance Concerning Private Surface and National Historic Preservation Act Compliance

Dear Secretary Zinke:

The Campbell County Board of Commissioners, Wyoming Association of Conservation Districts (WACD), Wyoming Stock Growers Association (WSGA), Wyoming Wool Growers Association (WWGA), Wyoming Farm Bureau (WFB), Wyoming Mining Association (WMA), and the Wyoming Business Alliance (WBA), collectively the "Organizations," support the Petroleum Association of Wyoming's (PAW) policy recommendations and guidance concerning private and federal surface and National Historic Preservation Act (NHPA) compliance, which was submitted to you on February 2, 2018 and is attached for your convenience.

The Organizations represent a significant percentage of landowners, grazing permittees, and energy operators doing business on private and federal lands in Wyoming. We continue to be faced with challenges in finding a balance between respecting and protecting private property, promoting energy development and abiding by NHPA, including the requirement to conduct tribal consultation. While we are strong advocates for the preservation of the history of our state, we promote policies that are implemented by the federal land management agencies in an efficient and effective manner which respects the protection of private property rights.

The Organizations assert that Bureau of Land Management (BLM) policy guidance is critically needed with regard to the appropriate legal and jurisdictional limitations of National Historic Preservation Act (NHPA) and Section 106 tribal consultation requirements. Policy overreach, ambiguity and a lack of

guidance regarding the appropriate scope of consultation, clearly defined timelines and other factors have led to the inconsistent application of NHPA procedures among BLM field offices.

We appreciate your thoughtful consideration for PAW's policy recommendations and guidance regarding this matter and we remain confident that NHPA requirements and tribal consultation can occur in a manner that respects the rights of all parties. We urge you to provide the appropriate guidance to BLM field offices as soon as possible in order to achieve this outcome.

Sincerely,



Chairman Mark A. Christensen  
Campbell County Board of Commissioners



Bobbie Frank, Executive Director  
Wyoming Association of Conservation Districts



Jim Magagna, Executive Director  
Wyoming Stock Growers Association



Amy Hendrickson, Executive Director  
Wyoming Wool Growers Association



Ken Hamilton, Executive Director  
Wyoming Farm Bureau



Travis Deti, Executive Director  
Wyoming Mining Association



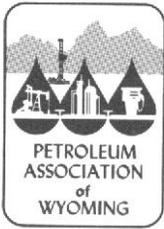
Esther Wagner, Vice President  
Wyoming Petroleum Association



Cindy DeLancey, Executive Director  
Wyoming Business Alliance

Attachment

xc: Governor Matt Mead  
United States Senator Mike Enzi  
United States Senator John Barrasso  
United States Congressman Liz Cheney



# PETROLEUM ASSOCIATION OF WYOMING

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## NATIONAL HISTORIC PRESERVATION ACT – PROPOSED INSTRUCTIONAL GUIDANCE

Industry is in need of relief from the inconsistent application and policy overreach applied by the Bureau of Land Management (BLM) based on the ambiguous nature of the National Historic Preservation Act (NHPA) and the Section 106 process for tribal consultation. PAW strongly recommends guidance in the form of an instruction memorandum (IM) be provided to BLM field offices detailing the process that needs to take place in order to properly conduct tribal consultation on private surface. The IM should outline a reasonable process that honors private property rights and seeks efficient approvals of oil and gas activities during BLM's implementation of the Section 106 process. While we understand BLM is mandated under Section 106 of the NHPA to take into account the effect of any federal undertaking on properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP) and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on those undertakings, we also understand the standard to which BLM is held to identify properties is a *reasonable and good faith effort*. There is significant ambiguity in the rules outlining what actions constitute a reasonable and good faith effort and this is oftentimes what causes delays and denials in project and application for permit to drill (APD) approvals. This and other necessary clarifications regarding tribal consultation on private surface can be accomplished through guidance in an IM as follows:

- I. **Private Property Rights and BLM's Limited Jurisdictional Authority over Cultural Resources on Private Surface**
  - A. Private surface owners own historic property located on their property.<sup>1</sup> Consistent with their ownership, private surface owners can deny access for tribal consultation purposes.<sup>2</sup>
  - B. BLM's NHPA jurisdiction on private surface is limited to an analysis of the potential effects of a federal undertaking on NRHP eligible historic properties within the area of potential effect (APE).
  - C. NHPA does not authorize BLM to compel private surface owner compliance with mitigation measures designed to protect privately owned historic property.
  - D. BLM's access to private surface is limited to the footprint of the surface disturbance associated with oil and gas operations.<sup>3</sup>
  - E. NHPA is a procedural statute that does not dictate substantive outcomes; accordingly, NHPA does not authorize BLM to delay permits in attempt to compel substantive outcomes.<sup>4</sup>

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<sup>1</sup> *United States v. Gerber*, 999 F.2d 1112, 1116 (7th Cir. 1993) (citing *Allred v. Biegel*, 219 S.W.2d 665, 666 (Mo. Ct. App. 1949)) (Historic property embedded in the soil is presumed to be possessed by the owner of the *locus in quo*).

<sup>2</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d at 4, 33 (D.D.C. 2016).

<sup>3</sup> 43 C.F.R. § 3162.1(b) – (c).

<sup>4</sup> *The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 347 (2005).

## **II. Procedures upon Denial of Access to Private Surface**

- A. Consultation procedures for use when BLM and tribal requests to access the APE on private surface for tribal consultation are denied:
1. APD applicant will provide a letter to BLM, signed by both the applicant and the private surface owner, documenting the private surface owner's denial of BLM and tribal access to the private surface for tribal consultations within the APE.
  2. BLM will timely conduct consultation based on the best available information about potential historic properties within the APE on private surface (*i.e.*, existing survey data, literature research, etc.).
  3. If appropriate, BLM will follow consultation procedures for denial of access to a tribe's request for access to private surface, set forth in Section II.B below, except that BLM will not access the private surface. Instead, BLM will use the best available information about potential historic properties within the APE on private surface to complete tribal consultation.
- B. Consultation procedures for use when a tribe's request for access to an APE on private surface for tribal consultation is denied:
1. APD applicant will provide a letter to BLM, signed by both the applicant and the private surface owner, documenting the private surface owner's denial of a tribal access to private surface within the APE.
  2. BLM will conduct tribal consultation, to identify historic properties of religious and cultural significance to tribes, without tribal access to private surface within the APE, as outlined below:
    - a. If consultation with tribes or other resources provides information to suggest that historic properties of religious and cultural significance to tribes may be present within the APE, BLM will share any existing survey information with tribes to more succinctly identify the location and significance of resources.
    - b. Based on tribal input and granting of landowner access, BLM may visit the APE to photograph, observe and evaluate the historic property for potential impact and religious/cultural significance. If BLM access to the APE on private surface is denied, BLM will use the best available information to complete tribal consultation without access to the private surface.
    - c. As necessary, BLM will share information found during its initial onsite investigation with tribes as part of continuing consultation.
    - d. If BLM's exchange of information gathered during the initial onsite investigation with tribes identifies the tribes' need for additional photographs or information, BLM can return to the APE to gather such information and exchange it with the tribes, subject to private surface owner permission.

## **III. Procedures and Timeframes for Timely Completion of Tribal Consultation on Private and Federal Surface**

- A. Allow for the option for applicant to request BLM review of historic property information before Notice of Staking (NOS) or APD submittal and onsite visit.
1. At least 45 days before the NOS/APD submittal, applicant requests through a letter to BLM for review of historic property/cultural resource survey information.

2. The letter will include:
    - a. Available conceptual details of the proposed development (*i.e.*, description of operations, proposed location of infrastructure, description of infrastructure and facilities required, and scope of proposed project) necessary for BLM to identify the APE;
    - b. Estimated NOS/APD submittal date; and,
    - c. All information applicant has pertaining to the need, or lack thereof, for tribal consultation, including the applicant's historic property survey report, if available.
  3. BLM will notify applicant within 7 working days of receipt of applicant's letter with a decision on whether BLM will initiate tribal consultation.
  4. Consultation, if necessary, will proceed consistent with timelines set forth in Section III.C below.
- B. Timeframe for notifying applicant regarding the need for tribal consultation absent a Section III.A request.
1. BLM will notify applicant within 7 working days of receipt of the cultural report with a decision on whether BLM will initiate tribal consultation.
  2. Tribal consultation, if necessary, will proceed consistent with timelines set forth in Section III.C below.
- C. Timeframes by which BLM must complete tribal consultation.
1. Within 7 working days of BLM's notification to the applicant indicating the need for tribal consultation, BLM will initiate tribal consultation by letter. The letter will request information about the potential presence of historic properties with religious and cultural significance to Indian tribes within the APE.
    - a. BLM will provide tribes 60 days from the date of the tribe's receipt of the letter to respond to the initial consultation letter.
    - b. BLM will make additional attempts to contact tribes, during the 60 day response period, through email, public meetings, and/or phone calls.
    - c. If no response is received from the tribe within 30 days after the tribe's receipt of the first letter, BLM will send a second letter reiterating its request and stating that if no response is received within 30 days, BLM will assume consultation is not desired.
  2. Within 5 working days after the 60 day response period, BLM will document in the administrative record which tribes and individuals did not respond to BLM's consultation request(s).
  3. Within 30 days of a tribe's response to BLM's letter(s), BLM will complete consultation with the tribe(s) regarding the potential effects to historic properties with religious and cultural significance to Indian tribes within the APE.
  4. Within 30 days of completing tribal consultation on the potential effects to historic properties with religious and cultural significance to Indian tribes within the APE, BLM will complete consultation with tribes regarding alternatives, avoidance, mitigation and other protective measures for historic properties identified within the APE that may be affected.

- D. BLM will document tribal consultation efforts as follows:
  - 1. Assemble the following:
    - a. All communications with tribes (calls, letters, emails, meetings) including copies of all written communications, meeting agendas, minutes, etc. For telephone communications, document the date and time, the party initiating the communication, the party receiving the communication, and written summaries of telephone messages and conversations;
    - b. All information BLM considered and relied upon to determine whether consultation is required; and
    - c. Any reason the field office believes consultation is not required.
  - 2. Promptly provide all information assembled in Section III.D.1, above, to the SHPO, THPO and/or ACHP.

#### **IV. Limits on Area of Potential Effects**

- A. For fee/fee/fed situations 1 and 2, as defined in IM 2009-078, the APE is limited to downhole operations only.
  - 1. IM 2009-078 states that cultural surveys are not required unless the act of drilling, completing, and/or operating the federal well has the potential to impact the protected resource.
  - 2. Specifically, the APE is limited to the downhole operations and does not include potential effects from surface operations (*i.e.*, viewshed).
- B. For APE limits on fee/fee/fed Scenario 3, as defined in IM 2009-078; fee/fed/fee; and traditional split estate scenarios.
  - 1. The default survey boundary for oil and gas development (wells and other ancillary facilities such as roads, pipelines and powerlines) should extend 100 feet from the edges of the surface disturbance.
  - 2. If the applicant provides a buffer of 300 feet from non-unique features such as rock cairns or stone circles, these features will be considered avoided and no further consultation or mitigation will be required with respect to such features.
- C. BLM will document the scope and basis for the APE.
  - 1. Documentation should include:
    - a. APE scope and the basis for the scope;
    - b. Any changes to APE scope and the basis for those changes; and
    - c. An explanation of how the proposed undertaking might alter the historic property's National Register qualifying characteristic(s).
- D. Potential effects should not dictate the APE scope where potential effects are not specifically tied to a NRHP qualifying characteristic.
  - 1. NRHP qualifying characteristics must be tied to the National Register Eligibility Criteria for Evaluation including, in relevant part, the quality of significance in American history and culture is present in sites, buildings, structures, and objects that possess integrity of location, design, setting, feeling, and association and that:
    - a. Are associated with events that have made a significant contribution to the broad patterns of our history; or
    - b. Are associated with the lives of significant persons in the past; or

- c. Embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
  - d. Have yielded or are likely to yield information important in history or prehistory.
2. BLM's documentation of the APE shall be publicly available consistent with 54 U.S.C. § 307103.

**V. Standards for Class III Surveys**

- A. Use Class III surveys when historic properties of religious and cultural significance to tribes are identified or known to be within the APE.
- B. Do not use Class III surveys to determine whether historic properties with religious and cultural significance to tribes might be within the APE absent information to suggest such properties might be present.