

WESTERN SLOPE GAS CO.

IBLA 78-597

Decided April 18, 1979

Appeal from a decision of the Colorado State Office, Bureau of Land Management, requiring a right-of-way applicant to conduct a cultural resources inventory on all non-Federal land traversed by a proposed pipeline as a condition precedent to a grant of a right-of-way across Federal land. C-23293 RW.

Set aside and remanded.

1. Act of October 15, 1966—Rights-of-Way: Conditions and Limitations

The grant of a right-of-way to cross Federal land for a proposed pipeline which is neither Federally authorized nor funded is an "undertaking" within the meaning of the National Historic Preservation Act, as amended, 80 Stat. 915, 16 U.S.C. § 470 et seq. However, construction of segments of the pipeline which do not cross Federal land, and which are neither Federally licensed nor funded, is not an "undertaking" under that Act, and the provisions of that Act do not apply to such segments.

2. Rights-of-Way: Conditions and Limitations

The Department of the Interior may condition approval of a right-of-way application for the construction of a gas pipeline by requiring acceptance of conditions for the protection of the public interest so long as such conditions are neither inconsistent with nor tend to unreasonably burden the proposed right-of-way.

APPEARANCES: Timothy J. Flanagan, Esq., Kelly, Stansfield & O'Donnell, Denver, Colorado, for appellant; Paul B. Smyth, Esq., Office of the Solicitor, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Western Slope Gas Company has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated July 28, 1978, requiring it to conduct a cultural resources inventory on all non-Federal land traversed by a proposed pipeline as a condition precedent to the grant of a right-of-way across Federal land. The proposed pipeline, known as the West-East Intertie Project, entails a high pressure natural gas pipeline over 200 miles long from Meeker, Colorado, extending to Fraser and Frisco, Colorado. Approximately 38 percent of the pipeline would be situated on Federal land, for which the right-of-way is sought.

Formal consultation between appellant and the Federal Government commenced on October 15, 1975, when appellant filed a "Letter of Intent" with the Colorado State Director, BLM, with a copy to the Regional Forester, Department of Agriculture, delineating the need for the pipeline and showing three proposed routes. All three crossed both BLM and Forest Service land.

On August 20, 1976, appellant filed its formal application for a right-of-way with BLM, which was assigned serial number C-23293. Various negotiations thereupon ensued between BLM, Forest Service, the applicant, and interested State governmental entities as well as private individuals. On May 18, 1977, the final environmental analysis report was approved by the Craig District Manager. In the section on "Mitigating Measures" a total of nine specific measures were mentioned relating to archaeological, historic, and paleontological resources (Nos. 1-6, 45-47). While it was intended that these provisions be included as stipulations in any right-of-way that would issue (see Summary, final EAR, at 101), these provisions were limited in their application only to the Federal land traversed by the right-of-way.

A copy of the draft EAR had been sent to the State Historical Society of Colorado for review and comments pursuant to the provisions of the National Historic Preservation Act, 80 Stat. 917, 16 U.S.C. § 470f (1976). By letter of April 13, 1977, the Colorado State Historic Preservation Officer described certain deficiencies which he felt existed in the draft. In reply, the Craig District Manager stated, in a letter dated April 28, 1977:

Your comments as they apply to Federal lands have been carefully considered. It is our feeling that they have been adequately addressed in the EAR by the District Specialist. The comments as they apply to private lands cannot be incorporated in this Federal action as no authority exists to impose restrictions and/or requirements on private land owners.

The Curator, Historic Preservation, of the State Historical Society, also wrote a letter to the Director, Colorado Division of Planning, in reference to this matter. That letter stated, in relevant part:

We also note that in the description of the survey, it is stated that "only the Federal land traversed by the proposed pipeline has been surveyed . . ." (p. 21). Since the proposed pipeline will cross land which is not Federally owned, the project has potential to affect cultural properties which are located on private land. The responsibilities of the Bureau of Land Management (BLM) cannot be fulfilled until all architectural and historical properties that may be affected by this project have been adequately identified and considered, whether they are located on federal or non-federal land. [Emphasis supplied.]

A copy of this letter was forwarded to the Colorado State Director, BLM.

In a reply to the Curator, the State Director, BLM, by letter of May 27, 1977, agreed that the cultural resources survey had been limited to the lands along the Federal right-of-way. He justified this limitation by noting:

Your main concern appears to be that BLM and the Forest Service required the applicant to perform an on-the-ground cultural survey on only the federal lands along the route of the right-of-way. This is correct. In this particular case, we do not feel that the federal obligation to require such surveys extends beyond the federal land boundaries. Bear in mind that approximately 62% of the land involved in the proposed right-of-way is privately owned. The proposed pipeline affects only the surface estate on private lands, as opposed to extraction of federally owned subsurface minerals beneath a private surface estate. The federal government cannot authorize issuance of a right-of-way across private lands. Enforcement of a requirement to survey private lands would be impossible if the landowner objects.

Commencing on April 27, 1977, field work under the direction of Dr. Calvin H. Jennings, Director of the Colorado State University Laboratory of Public Archaeology, was conducted on that part of the pipeline which crossed Federal land and a number of prospective sites were identified and various mitigating procedures were proposed. A draft of this report was sent to the State Historic Preservation Officer.

On September 15, 1977, the Colorado State Director, BLM, received a reply to his letter of May 27, 1977, from the Curator of State Historical Society of Colorado, reiterating the Curator's original views.

On December 12, 1977, the State Director, BLM, requested consultation with the Assistant Director, Office of Review and Compliance, of the Advisory Council on Historic Preservation, for the purpose of determining the effect of the pipeline right-of-way noting that "the attached documentation presents the Bureau's determination that the proposed action will have no adverse effect on the qualities which may qualify the properties for the National Register of Historic Places." (Emphasis in original.) This letter also alluded to the difference in opinion between the BLM and the State Historic Preservation Officer.

On January 4, 1978, the Deputy Executive Director of the Advisory Council on Historic Preservation (ACHP) stated his view that non-Federal lands crossed by the pipeline must be included. The January 4 letter continued: "[the documentation] must indicate that the proposed pipeline and related facilities will not adversely affect such properties and include the concurrence of the State Historic Preservation Officer with such findings."

After this exchange of correspondence, a meeting between the parties was scheduled, but subsequently canceled. On March 23, 1978, the State Director, Colorado, formally responded to the January 4 letter. His position not to require a cultural resources survey on the non-Federal lands was premised on the following seven factors:

1. No Federal authorizations are required to construct, operate and maintain the pipeline on private lands.
2. The proposed pipeline is a private venture in which no Federal funds are involved in the construction, operation and maintenance. This can in no way be considered a Federal undertaking by BLM or Forest Service.
3. It is an intrastate pipeline which requires State of Colorado authorization to construct, operate and maintain. The State of Colorado, through its Public Utilities Commission, has already issued the necessary authorizing document, a certificate of convenience and necessity, to Western Slope Gas to construct, operate and maintain the pipeline. In effect, Western Slope now has the authority to construct the pipeline on private lands.
4. There is no authorization for BLM or Forest Service to control the location or relocation of the pipeline right-of-way on private land. This is mainly a negotiated

matter between the Company and the private landowner. This would present serious difficulties in complying with 36 CFR 800 procedures, especially in instances where the private landowner placed more value on his personal desire for location of the right-of-way than on avoiding or mitigating cultural properties, assuming that there may be cultural resources on the private land.

5. Cultural properties found on private lands are the property of the landowner. Requiring Western Slope Gas Company to identify cultural resources which can be disposed of at the landowner's discretion is unrealistic.

6. There are no actions on the private lands involved in this proposal which necessitate Federal regulation, such as drilling for Federally owned oil and gas beneath privately-owned surface estates.

7. In this particular situation, we are not aware of any authority to either expend Federal funds to inventory private lands or to require the right-of-way proponent to do so.

On April 14, 1978, the Deputy Executive Director, ACHP, wrote to the Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, requesting that the decision of the Colorado State Director, BLM, be reversed. By letter of that same date, the Deputy Executive Director, ACHP, informed the Colorado State Director, BLM, that it did not agree with the State Office's position and was requesting the assistance of the Department in resolving it.

By memorandum of May 2, 1978, from the Colorado State Director to the Director, BLM, the State Office informed the Director of its position, and advised that issuance of the right-of-way would be suspended pending guidance from the BLM Directorate. On July 3, 1978, Acting Director, BLM, informed the Colorado State Office that he did not concur in its position. In that memorandum, the Acting Director noted:

We have met with the Office of the Solicitor, and they have informed us that they do not concur with the position of the Colorado State Office that the extent of the Bureau's responsibility to take into account the effect of its undertaking upon cultural resources is limited to Federal property only. They have also advised that the distinction between intrastate and interstate rights-of-way is of no consequence in this case; rather, it is the matter of Federal involvement with which we should be concerned.

With Federal lands encompassing more than one-third of the area included in the proposed pipeline right-of-way, there is a distinct Federal involvement. The degree of Federal involvement in this case gives the Bureau the responsibility to ensure that approval of the right-of-way grant takes into consideration effects on cultural resources located on non-Federal lands. Existing statutes and regulations do not give us the discretion to pass on this responsibility to the State Government.

Consequently, you should ensure that any right-of-way grant issued to the Western Slope Pipeline Company includes appropriate measures to provide for the identification and protection of both Federal and non-Federal cultural resources. The right-of-way grant should be conditioned to require the grantee to undertake a cultural resource inventory of the right-of-way crossing non-Federal land, and to mitigate direct project effects upon cultural resources.

Pursuant to this instruction, the Colorado State Office, by decision of July 28, 1978, conditioned the grant of the requested right-of-way across Federal land upon the prior completion of a cultural resources inventory on all the non-Federal lands crossed by the proposed pipeline. On August 25, 1978, Western Slope Gas Company appealed the State Director's decision to this Board.

Western Slope makes two discrete arguments on appeal. First, it argues that BLM has no authority to require a right-of-way applicant to inventory cultural resources on non-Federal lands. Secondly, it contends that even were it found that BLM was possessed with the authority to require such a cultural resource inventory, the requirement as applied to appellant in the instant case would constitute an unreasonable economic burden upon Western Slope and create a number of unresolvable questions. The Office of the Solicitor, on behalf of BLM, responds that under the prevailing facts BLM must, as a matter of law, precondition its grant upon the completion by the applicant of a cultural resources survey on the private lands traversed by the pipeline.

Before analyzing these opposing positions, reference must be made to the various statutory and regulatory provisions which appertain to this issue. While various Federal statutes have been enacted generally relating to protection of cultural resources – for example, the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. §§ 431-33 (1976) – it was not until the enactment of the Reservoir Salvage Act of 1960, 74 Stat. 220, as amended, 16 U.S.C. §§ 469-69c (1970), that Congressional concern focused generally on the depredations being made upon the Nation's cultural heritage by Federally funded and authorized projects.

The Reservoir Salvage Act, *supra*, was supplemented in 1966 by the National Historic Preservation Act, 80 Stat. 915, 16 U.S.C. §§ 470-70m (1970). Section 106 of that Act provided:

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 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.

In 1974, the Reservoir Salvage Act, *supra*, was amended to include within its ambit actions on Federal land affecting historic and cultural sites regardless of whether they were related to the construction of dams or water impoundment projects. Thus, the 1974 amendments were applicable to "any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program" which might result in the irreparable loss or destruction of historical or archaeological data. However, under the scheme of that Act, the Secretary of the Interior was obligated to compensate any entity "damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands." Section 1(3) of the Act of May 24, 1974, 88 Stat. 174, *as amended*, 16 U.S.C. § 469a-1 (1976).

In 1976, the National Historic Preservation Act (NHPA) was amended by the addition of the words "or eligible for inclusion in" between the words "included in" and "the National Register." Act of September 28, 1976, 90 Stat. 1320, 16 U.S.C. § 470f (1976). Thus, NHPA's procedures were expanded to apply to historic and archaeological sites which evinced a potential for nomination to the National Register, as well as those already listed thereon.

[1] The threshold question relates to the applicability of the provisions of NHPA to the subject right-of-way and to the entire West-East Intertie Project. A number of arguments are pressed on this point. First and foremost, however, is the simple question whether, since both sides agree there are no Federal expenditures involved, the grant of the right-of-way is an "undertaking licensed" by the BLM within the meaning of section 106 of NHPA. The Office of the Solicitor argues as follows: There is no question that the right-of-way permit is a license to use the land; thus, under the statutory framework the State Office is under an affirmative duty to monitor the

effect the pipeline construction would have upon properties eligible for inclusion in the National Register which are located on non-Federal land traversed by the pipeline; the only way that this can be accomplished is by a cultural resources survey of the non-Federal land. Appellant poses the issue in a different context. The "undertaking" to which the statute refers is only the issuance of the right-of-way across Federal land; the West-East Intertie, to the extent that it does not traverse the Federal domain, is simply not an undertaking licensed by the Federal Government. For a variety of reasons explicated below, we agree.

The regulations adopted by the Advisory Council on Historic Preservation define "undertaking" in relevant part, as follows:

"Undertaking" means any Federal action, activity, or program, or the approval, sanction, assistance, or support of any other action, activity or program, including but not limited to:

* * * * *

(2) New and continuing projects and program activities * * * involving a Federal lease, permit, license, certificate, or other entitlement for use.

36 CFR 800.3(c). 1/ By its terms, the "undertaking" is limited to projects and program activities involving the Federal "lease, permit [or] license." The Federal permit involved herein is for a right-of-way across Federal lands, not the entire West-East Intertie Project. As regards the right-of-way, appellant was properly required to conduct a cultural resources survey to ascertain the effect of the right-of-way on properties eligible for inclusion in the National Register, regardless whether such properties were Federal or were privately owned. 2/ But the remaining segments of the pipeline are

1/ We note that "undertaking" is defined in the Departmental Manual as "any Federal action, activity, or program, or the approval, sanction, assistance, or support of any other action, activity, or program, such as the issuance of a license or permit, the granting of funds, or the development or funding of master of [sic] regional plans." 426 D.M. 1.3K(1). While we see no functional difference between this definition and that of the regulation, we would point out that Manual provisions do not necessarily have the force and effect of law. Morton v. Ruiz, 415 U.S. 199, 235 (1974).

2/ By way of clarification, it is not apparent whether any privately-owned lands were actually examined during the cultural resources survey. If the nature of the construction within the right-of-way was such that it could adversely impact historic sites located on adjacent lands, those lands, whether privately- or Federally-owned, would properly be subject to such a survey, since they would be affected by the licensed undertaking: the right-of-way across Federal lands. It is this possibility to which the text makes reference.

not the subject of a Federal lease, permit, license, certificate, or other entitlement for use. Nor are they financed directly or indirectly by Federal funds. Thus, the provisions of 30 CFR Part 800 are simply not applicable.

In Weintraub v. Rural Electrification Administration, 457 F. Supp. 78 (D. Pa. 1978), the District Court discussed the meaning of the word "licensed" as it is used in the NHPA. Therein the Court stated:

The Court believes that Congress intended the word "license" in that statute have its technical meaning; that is, that it refers to a written document constituting a permission or right to engage in some governmentally supervised activity. For example, the Court believes that the statute clearly applies to licenses issued to TV stations by the FCC. The legislative history supports this interpretation. Originally, 16 U.S.C. § 470f applied only to projects receiving federal funds. An amendment was added in the House of Representatives which according to the report of the House Committee on Interior and Insular Affairs expanded the requirements of 16 U.S.C. § 470f to include federal licensing agencies. U.S. Cong. & Admin. News, 1966 Page 3310. Certainly, the House Report strongly indicates that the amendment was designed to affect only federal agencies which engaged in licensing activities. Congress did not intend to affect every action which required federal approval. [Emphasis supplied.]

457 F. Supp. at 92.

The only instrument which is arguably a license herein is the right-of-way permit. We do not agree that this licensing action can somehow be metamorphosed into a Federal licensing of the entire West-East Intertie Project.

Indeed, the practical ramifications of a contrary decision would be enormous. To take but one example, grazing privileges on the Federal range are awarded through permits, licenses and leases. An individual's grazing rights under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1976), are determined by the lower of the figures derived from (a) dependency by use and (b) commensurability. Midland Livestock Co., 10 IBLA 389 (1973). Commensurability is, in turn, dependent on the carrying capacity of dependent base lands. Thus, an individual's Federal grazing allocation is inevitably constrained by his privately owned lands. Adoption of the position urged by the Solicitor's Office in the instant case would also result in a ruling

that prior to the issuance of a grazing lease BLM was obligated to require the lease applicant to conduct a cultural resources survey of all of his base lands as a condition precedent to the issuance of a grazing lease. This would result inasmuch as the Federal permit to graze relates to a grazing "program" which must include each grazer's private lands. Needless to say, this would encompass a large percentage of privately owned land in the western States. There is no shred of legislative history which would support an argument that Congress intended such a result. ^{3/}

On the contrary, the entire structure of both NHPA and the Reservoir Salvage Act argues for an opposite conclusion. Congress noted in its declaration of policy in the adoption of NHPA that:

[A]lthough the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

^{3/} We would note that to the extent to which the Government's position is premised on the degree of Government involvement, its conclusions are erroneous. The provisions of NHPA, unlike those of the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.* (1976), do not contain threshold criteria such as "major" Federal action which "significantly" affects the environment. Thus, it has been noted:

"Unlike the National Environmental Policy Act, NHPA extends no discretion to Federal agencies to determine whether the activity in question meets a certain threshold of significance. * * * The lack of a qualifying word, such as 'major,' for actions covered by NHPA is characteristic of both the statute and the procedures. The directive is quite clear that any action in which there is a Federal involvement is subject to the section 106 process, if that action affects a National Register property." (Footnote omitted.) The National Historic Preservation Program Today, 94th Cong., 2d Sess. at 70. The fact that 38 percent of the project crosses Federal land is an irrelevancy as far as the applicability of NHPA is concerned. Any Federal involvement would be sufficient.

16 U.S.C. § 470(d) (1976). This policy is clearly supplemented by section 101 of NHPA wherein the Secretary of the Interior is authorized "to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties." 16 U.S.C. § 470a(a)(1) (1976). Under the Reservoir Salvage Act, supra, once a significant scientific, prehistoric, historic or archaeological site is discovered and a finding is made that such a site might be irreparably damaged or destroyed, the Secretary of the Interior may "with funds appropriated expressly for this purpose conduct * * * a survey of the affected site and undertake the recovery, protection, and preservation of such data." 16 U.S.C. § 469a-1(b) (1976).

The Congressional scheme clearly envisages that the economic cost of preserving such cultural resources would, to a large extent, be borne through Federal expenditures. It was not the intent of Congress that private parties, in effect, finance the surveys of private lands on the attenuated possibility that some further action of theirs, neither Federally licensed nor funded, might adversely impact upon cultural resources which might be deemed eligible for inclusion on the National Register.

Thus, we hold that BLM was not required, under the terms of NHPA, to precondition the grant of the right-of-way in issue herein on the completion of a cultural resources survey on private land traversed by the pipeline.

[2] But while we have ruled that nothing in NHPA requires BLM to precondition its grant, there is a subsidiary question concerning whether, as a matter of discretion, BLM can require a cultural resources survey of private land traversed by the entire West-East Intertie Project.

Appellant concedes that BLM may condition a right-of-way upon stipulations that insure the public interest. In Grindstone Butte Project, 24 IBLA 49 (1976), this Board expressly rejected a contention that a stipulation to an application for a right-of-way under the Act of March 3, 1891, 26 Stat. 1101, as amended 43 U.S.C. § 946 et seq. (1976), could not require actions relating to a portion of the irrigation facilities which were not located on Federal lands. Id. at 52, n.3. The Grindstone Butte decision noted, however, that such conditions may not be inconsistent with nor tend to unreasonably burden the proposed right-of-way.

The Colorado State Office originally rejected attempts to require it to include a cultural resources survey of the non-Federal lands crossed by the West-East Intertie Project. It reversed itself because of the view of the BLM Directorate that BLM was required to order a cultural resources survey of the entire West-East Intertie Project.

While we have reversed this rationale, the possibility still exists that, at least for some areas, the dictates of the public interest might necessitate further actions by the appellant. Thus, though the present record indicates the contrary, should it appear that a site already listed on the National Register will be adversely impacted by the West-East Intertie Project it would not be improper for BLM to require various steps towards mitigation and amelioration. Similarly, if specific non-Federal areas crossed by the pipeline can be shown to have a high likelihood of containing historic sites, BLM could require the completion of a cultural resources survey of those areas, provided the imposition of such a requirement is not unreasonably burdensome.

Given the present posture of the case, however, we find ourselves unable to determine what, if any, such conditions might be beneficial. We are not unmindful of the economic costs which have been incurred by appellant because of the pendency of this unresolved matter. Nevertheless, we are constrained to remand this case to BLM with instructions that they expeditiously reexamine this matter to determine what stipulations or preconditions, if any, would be justified.

In view of our disposition of this case, a request by appellant for an oral argument is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case file is remanded for further expeditious action not inconsistent with the views expressed herein.

James L. Burski
Administrative Judge

I concur.

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

To the extent that the National Historic Preservation Act imposes mandatory procedural requirements upon licensees of Federally assisted undertakings, as discussed by Judge Burski, I agree with his conclusion that it is not applicable to the non-Federal lands through which a proposed pipeline will traverse, although it is applicable to the Federal lands crossed by a right-of-way. This does not mean, however, that the broad policy enunciated by the Act to protect historical and cultural resources should not be considered as a factor in the Secretary of the Interior's exercise of discretion to grant a right-of-way across Federal lands where a pipeline will also cross non-Federal lands.

The authority for granting the pipeline right-of-way sought by appellant to carry hydrocarbons is the Act of November 16, 1973, 30 U.S.C. § 185 (1976), amending the Mineral Leasing Act. Under paragraph (a) rights-of-way "may be granted" by the Secretary. Use of the permissive word "may" indicates that the grant is within the discretion of the Secretary. Paragraph (h)(2), in authorizing environmental protection requirements, provides that the Secretary "shall issue regulations or impose stipulations which shall include, but shall not be limited to: * * * (C) requirements designed to control or prevent (i) damage to the environment * * *, (ii) damage to public or private property * * *." In view of this discretionary authority, the Secretary is well-empowered to prescribe reasonable conditions and stipulations for the grant of a right-of-way even though they may pertain in part to non-Federal areas. We have recognized that in the exercise of the Secretary's discretionary authority to lease under the Mineral Leasing Act, as amended, 30 U.S.C. § 181 et seq. (1976), it was proper for BLM to condition the issuance of an oil and gas lease upon the applicant's having a qualified professional archaeologist conduct a survey of areas to be disturbed on a proposed leasehold, even though the surface resources were privately owned. General Crude Oil Company, 28 IBLA 214, 83 I.D. 666 (1976). We there recognized the broader public policy set forth in the National Historic Preservation Act, the Antiquities Act, and the National Environmental Policy Act, and found a national and Departmental policy to protect archaeological values. To implement this policy, we held, in effect, that the Department could impose a contractual term which an applicant could either take as a condition for leasing or, if not, his offer would not be accepted.

Likewise, in Cominco American, Inc., 26 IBLA 329 (1976), also under the Mineral Leasing Act, but involving a modification of an existing phosphate lease, we held that it was proper to require environmental protection stipulations as a condition to modifying the lease, even though the stipulations would apply to privately-owned surface lands overlying the Federally-reserved mineral estate under lease or to privately-owned lands used in conjunction with the lease.

In that case, among other matters, the lessee was required to undertake certain action to preserve water quality on its mining operations on privately-owned lands approximately three-quarters of a mile from the lands to be leased.

As in General Crude and Cominco, supra, BLM here should consider the national and Departmental policy to protect historic and cultural resources. As 30 U.S.C. § 185 (1976) gives discretionary authority, this Department, in the exercise of that discretion, may reasonably condition the granting of rights upon requirements to implement that policy including activities on related private lands. In imposing requirements, however, BLM should consider all aspects of public policy together, not simply one in isolation of other considerations. Thus, the extent to which a burden may be imposed on a proposed grantee of a right-of-way should reflect the public interest in allowing the right-of-way for the purposes sought, as well as the resources sought to be protected. I believe this case should be remanded for BLM and the Department to delineate further the extent to which protective measures shall be imposed in the exercise of discretion, after weighing all aspects of public policy.

Joan B. Thompson
Administrative Judge