CLARIFICATION OF AUTHORITIES AND RESPONSIBILITIES FOR IDENTIFYING AND PROTECTING CULTURAL RESOURCES ON THE OUTER CONTINENTAL SHELF*

M-36928 *November 24, 1980*

Outer Continental Shelf Lands Act: Generally

Apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting mineral resources on the OCS.

National Historic Preservation Act: Generally

Sec. 106 of the National Historic Preservation Act places a duty upon the Department to insnre that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council on Historic Preservation the opportunity to comment. A rule of reason applies to the extent of the OCS lands to be studied and the degree of effort required.

National Historic Preservation Act: Generally

Archival research is first required to determine whether significant cultural resources may be affected by activities on an OCS lease or right-of-way.

National Historic Preservation Act: Generally

Cultural resource surveys should only be undertaken when the results of archival research indicate the likelihood that a significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort.

*Not in chronological order.

National Historic Preservation Act: Generally

When cultural resources are identified on the OCS, it is appropriate to consider them for nomination to the National Register of Historic Places.

National Historic Preservation Act: Generally

Sec. 106 of the National Historic Preservation Act authorizes the Department to require either by regulation or by stipulation in an OCS lease or right-of-way that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that information discovered be made available to the Department.

Outer Continental Shelf Lands Act: Generally—National Historic Preservation Act: Generally—National Environmental Policy Act of 1969: Generally

The National Historic Preservation Act, Outer Continental Shelf Lands Act and National Environmental Policy Act authorize a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is discovered by an OCS lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study.

National Historic Preservation Act: Generally

The Outer Continental Shelf is not within the jurisdiction of a State Historic Preservation Office (SHPO). However, as a matter of comity, the recommendations of a SHPO as to OCS cultural resources should be carefully considered.

To: Director, Bureau of Land Management Director, Geological Survey
From: Solicitor
Subject: Clarification of Authorities and Responsibilities for Identifying and Protecting Cultural Resources on the Outer Continental Shelf

This memorandum is in response to your joint request dated May 2, 1980, for an option clarifying the authorities and responsibilities of your agencies for identifying and protecting cultural resources on the Outer Continental Shelf (OCS).

I. The Responsibilities of BLM and the USGS Toward Cultural Resources on the OCS are Limited to Impacts of Mineral Activities

Recent case law has demonstrated that apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting cultural resources on the OCS. In *Treasure Salvors* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (5th Cir. 1978), the court of appeals held that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, extended the sovereignty of the United States to exploitation of the mineral resources of the OCS, but not for other purposes. This limited construction is consistent with Article 2 of the Convention on the Continental Shelf.[1] *See United States* v. *Ray*, 423 F. 2d 16 (5th Cir. 1970). Article 2 reads in part as follows:

> The Coastal state [nation] exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.[2]

The court noted that interpretations of the Convention by legal scholars reached similar conclusions over the nature of control of a coastal nation over its continental shelf and quoted the following comments of the International Law Commission:

> [The Commission] was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. * * * [T]he text as now adopted leaves no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf.
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> * * * * * *
>
> It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil. 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. A/3159 (1956) (footnotes omitted), cited in 569 F. 2d at 340.

Accordingly, the court concluded that the United States did not have control over the wreck in question. Similarly, in *United States* v. *Alexander*, 602 F. 2d 1228 (5th Cir. 1979), the court of appeals held that OCSLA did not give the Secretary of the Interior authority

[1] Convention on the Continental Shelf, *done* Apr. 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, in force June 10, 1964.

[2] Natural resources are defined in Article 2 as "the mineral and other non-living resources of seabed and subsoil together with living organisms belonging to sedentary species."

to promulgate conservation measures regulating activities on the OCS having nothing to do with mineral leases. There the court struck down a conviction for damaging a coral reef where the defendant was conducting salvage operations on a sunken wreck.

These cases establish that the Department lacks the power to protect the cultural resources of the OCS by regulation of private individuals apart from any involvement with mineral activities authorized by OCSLA. Accordingly, no regulatory program for long term protection of cultural resources on the OCS can be established independent from activities necessary to insure that mineral activities do not damage these resources.[3]

In this regard, we have examined the cultural resource responsibilities of BLM and USGS set forth, in the Departmental Manual, 655 D.M. 1 (Sept. 29, 1980), and have examined the current regulations appearing at 43 CFR Part 3300 and 30 CFR Part 250. Since the responsibilities created by the manual and regulations arise out of the regulation of mineral resources on the OCS, they are a proper exercise of Secretarial authority. We do not believe that there is any legal requirement to expand them further.

II. The Requirements of Section 106 of the National Historic Preservation Act Apply to Issuance of Mineral Leases and Pipeline Rights-of-Way on the OCS.

Your memorandum specifically raises the question of the applicability of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* (1976), to activities conducted by your agencies on the OCS.

Sec. 106 on NHPA reads as follows:

> 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 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 470m of this title a reasonable opportunity to

[3] However, we are of the view that the Secretary may establish programs that assist in the preservation of cultural or natural resources on the OCS where authorized to do so and where the program does not involve the regulation of private activities apart from mineral development. For example, the Secretary is authorized to list OCS properties on the National Register of Historic Places pursuant to the National Historical Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (1976), and is authorized to designate National Historic and National Natural Landmarks on the OCS pursuant to the Historic Sites Act of 1935, 16 U.S.C. 461 (1976). These programs place no restraints on private activities but only require planning considerations on the part of federal agencies when taking actions which may affect designated sites.

comment with regard to such undertaking. 16 U.S.C. § 470f (1976) (Italics added).

The Secretary of the Interior is clearly the head of a federal department having authority to issue OCS leases or rights-of-way, and issuance of an oil and gas lease or pipeline right-of-way on the OCS clearly fits the definition of "undertaking" as defined by the Advisory Council on Historic Preservation:

"Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-federal action, activity, or program, 36 CFR 800.2(c) (1979).

Furthermore, it is the position of this Department that a cultural resource on the OCS may be "included in or eligible for inclusion in the National Register" because there is no provision in NHPA limiting its applicability to the proprietary or territorial jurisdiction of the United States. Section 101 (a) of NHPA states that the Secretary of the Interior is authorized to include on the National Register any site or object which is significant in American history, architecture, archeology, and culture, 16 U.S.C. § 470a(a) (1976).

Therefore, sec. 106 of NHPA places a duty upon the Department to insure that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council the opportunity to comment. Since the Department's authority to issue leases or rights-of-way extends to the geographic limits of the OCS, 43 U.S.C.A. § 1331(a) (1980 Supp.), its duties under NHPA extend to those limits.[4]

Sec. 106 has been implemented by the Advisory Council on Historic Preservation through regulations which are binding on all federal agencies in the absence of counterpart regulations promulgated under 36 CFR 800.11. The regulations implementing sec. 106 require:

[E]ach Federal agency to identify or cause to be identified any National Register or eligible property that is located *within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.* 36 CFR 800.4(a) (1979) (Italics added).

This statement defines the area within which the identification and other requirements of sec. 106 must be met. *See* 36 CFR 800.4(a) and (b). It is clear from the foregoing that two conditions must exist before sec. 106 duties apply: that the National Register or eligible prop-

[4] In addition to sec. 106 of NHPA, the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1976) (NEPA), imposes an obligation upon the Department regarding cultural resources. Sec. 101(b) of NEPA provides in part:

"[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal Plans * * * to the end that the Nation may * * * (4) Preserve important historic, [and] cultural * * * aspects of our national heritage." 42 U.S.C. § 4331(b) (1976).

Regulations implementing NEPA issued by the Council on Environmental Quality require discussion of the effects upon historic and archeological resources in environmental impact statements (EIS's). 40 CFR 1502.16(g) (1979). The regulations also require that to "the fullest extent possible" EIS's be integrated with other required analyses including those under NHPA. 40 CFR 1501.7(a)(6) and 1502.25(1979).

erty be within the area of the potential environmental impact *and* that it may be affected by the undertaking.

The question then becomes the extent of the area subject to sec. 106 procedures for the undertaking's potential environmental impact, defined as follows:

> "Area of the undertaking's potential environmental impact" means that geographic area within which *direct and indirect effects generated by the undertaking could reasonably be expected to occur.* 36 CFR 800.2(o) (1979) (Italics added).

Therefore, the "area of the undertaking's potential environmental impact," as defined, determines the extent of the OCS where sec. 106 responsibilities may arise. The regulations limit the effects to be studied to those which "could reasonably be expected to occur" as a result of the federal action. 36 CFR 800.2(o). Thus the regulations explicitly adopt a rule of reason, which requires that only reasonably foreseeable effects be studied for potential impact on cultural resources.

In the OCS context, we believe the rule of reason first requires archival research to determine whether significant known cultural resources may be affected by activities on a lease or right-of-way. This research includes an examination of the published lists of the National Register and eligible properties, available literature, public records, and advice from individuals or organizations with historical and cultural expertise, as appropriate, to determine whether historic and cultural properties are known or likely to exist that may be affected by OCS activities.

After completion of the research, further decisions as to the type of site-specific cultural resources surveys, if any, should be made. Generally, these surveys should be only undertaken when the results of archival research indicate the likelihood that a significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort. For example, if research indicates that a significant shipwreck is likely to exist on a certain lease tract or adjacent lease tracts and that it can be detected, reasonable survey efforts to assure that mineral activities will not disturb the shipwreck should be undertaken.

Difficulty exists with anomalies which may indicate the presence of a cultural resource when further surveys or studies to determine their true character are prohibitively expensive. Under these circumstances, we believe that it would not exceed the Department's authority under OSCLA and that it would be consistent with its cultural resource responsibilities to include stipulations in a lease or right-of-way to insure avoidance of any

adverse impact upon an anomaly. The identification and consultation requirements of sec. 106 are only triggered when the federally authorized activity will have an effect upon a cultural resource. *See* 16 U.S.C. § 470f (1976). Avoidance under these circumstances eliminates any effect and therefore the requirements.

Where anomalies which may be cultural resources are discovered through environmental or geological and geophysical studies of OCS tracts, either by the government or by lessees, further steps should be taken to identify them if they may be affected by operations on a lease or right-of-way. For example, cultural resources that no archival research could identify may be identified in other studies which are currently conducted on a site-specific basis for bottom-founded structures.

Finally, we feel that the rule of reason approach precludes a responsibility to physically survey lease tracts or rights-of-way for cultural resources not identified as described above. To carry out a detailed seabed survey on the premise that a cultural resource might exist, unsupported by clear historical or scientific evidence would in our opinion constitute an unjustifiable expenditure of time and resources. Conversely, if clear evidence is provided by historians, archeologists, or scientists to the effect that an historically important underwater site might suffer damage from drilling or other form of seabed exploitation, then the site should be subjected to a survey prior to the commencement of any activities that could adversely affect it or the resource should be avoided entirely.

In cases where eligible sites are identified, it should then be determined if proposed activities will affect the sites and whether that effect will be adverse. If there is no adverse effect expected, this finding should be forwarded to the Advisory Council for its concurrence. If adverse effects are expected, a report should be forwarded to the Advisory Council, for its comments. Depending on the response of the Advisory Council, treatment of the sites may be resolved by a Memorandum of Agreement with the Council staff or may require full consideration by the Advisory Council. In any event, once the Council comments have been reviewed and considered, the activities may proceed in accordance with any mitigation measures adopted. The procedures set forth in this paragraph summarize the applicable regulatory requirements found in 36 CFR Part 800 and which are to be followed in the process.

The rule of reason provides the agency decisionmaker with the opportunity to exercise judgment in complying with the NHPA and the regulations. In exercising this judgment, sensitivity to the significance of the cultural resource, possible adverse effects, mitigation options, costs to the Government or industry, and practical alternatives is required.

In accordance with NHPA, when significant cultural resources are identified, it is appropriate to consider them for nomination to the National Register of Historic Places. The shipwrecks *San Jose*, *H. L. Hunley*, *U.S.S. Peterhoff*, *U.S.S. Monitor*, and *U.S.S. Hatteras* are examples of cultural resources discovered offshore which are on, or have been identified as eligible for, the National Register. As described in Part I of this opinion, however, there is no authority over the OCS requiring identification of cultural resources apart from those affected by mineral activities. This limits the application of secs. 2 and 3 of Executive Order 11593 (May 13, 1971) to OCS cultural resources affected by mineral activities.

We recognize that the Advisory Council's regulations did not contemplate the kinds of problems associated with identification of cultural resources on the OCS. We also recognize the difficulties of outlining appropriate procedures in a legal opinion. For these reasons, we point out that the Advisory Council has invited all affected federal agencies to issue counterpart regulations more specifically defining the duties of an agency under sec. 106. 36 CFR 800.11. We strongly recommend that this procedure be followed as promptly as possible by USGS and BLM to reflect their respective responsibilities. It is through this process that we believe the rule of reason can most appropriately be defined.

III. *Authority to Require Collection of Cultural Resource Information*

You also ask whether the Department has the authority to require a lessee to collect information to identify cultural resources on the OCS throughout various stages of development. The Department has the authority to require, either by regulation or by stipulation in a lease or right-of-way, that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that pertinent information discovered during operations be made available to the Department. The authority is sec. 106 of NHPA which places a duty upon the Department to identify cultural resources so affected and to consider such information in authorizing development and production operations. However, the rule of reason applies. In an area where there is no information suggesting the existence of cultural resources or where a lessee chooses to avoid such resources, a requirement to conduct studies may be unreasonable. On the other hand, where historical or scientific data indicates the presence of resources that will be affected by operations, such studies can be required without being so restrictive as to effect a *pro tanto* cancellation of the lease or right-of-way. *See*

Union Oil Co. of California v. *Morton*, 512 F. 2d 743, 751 (9th Cir. 1975).

In some instances, it may be necessary to salvage certain cultural resources where impacts of exploration, development or production operations cannot be avoided. You have asked the question to whom do these resources belong under these circumstances.

The courts have made clear that the provisions of the Antiquities Act, 16 U.S.C. §§ 431–33 (1976), do not apply to objects located on the OCS. *See Treasure Salvors*, *supra*. There is, therefore, no statutory law as to how such cultural resources are to be handled when salvage is necessary. In determining title to property found upon the OCS, courts have applied the common law principle of the law of finds. *Treasure Salvors*, *supra*, at 336–337. Under this principle, title vests in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intention to become its owner." *Rickard* v. *Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968). Absent an agreement to the contrary, resources salvaged by an oil or gas lessee would belong to that lessee. We believe, however, that authority exists under NHPA, NEPA and OSCLA to require a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is encountered or discovered by the lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study.

IV. *The Role of a State Historic Preservation Officer on the OCS*

Finally, the question has been independently raised of the role that a State Historic Preservation Officer (SHPO) plays regarding cultural resources on the OCS. A SHPO is defined as follows:

> "The State Historic Preservation Officer" means the official, who is responsible for administering the Act within the State or jurisdiction, or a designated representative authorized to act for the State Historic Preservation Officer. These officers are appointed pursuant to 36 CFR 61.2 by the Governors of the 50 States, Guam, American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Mariana Islands, and the Mayor of the District of Columbia. 36 CFR 800.3(m).

A SHPO's responsibilities are defined, in part, as follows:

> The State Historic Preservation Officer should participate in the review process established by these regulations whenever it concerns an undertaking located within the State Historic Preservation Officer's jurisdiction. 36 CFR 800.5(a).

A problem arises in that the OCS is not within the jurisdiction of any state or other jurisdictional unit set forth above. As stated earlier, cultural resource regulations appearing at 36 CFR Part 800 did not contemplate problems involving the OCS. This is another example. Again, we feel that counterpart regulations are the appropriate tool to define more accurately the respective roles of the Department and SHPO's in the OCS context.

As interim advice, however, we feel that the SHPO should initially be consulted under 36 CFR 800.4(a)(1) to determine the information which may be available concerning OCS cultural resources within the area of a project's potential environmental impact. This is consistent with the duty to first attempt to identify cultural resources by archival research as set forth above. Consultation should then continue throughout the process provided in the Advisory Council's regulations. With respect to effects upon cultural resources, the regulations do not require that the recommendations of a SHPO must necessarily be followed. Nevertheless, as a matter of comity, the recommendations of a SHPO should be carefully considered.

We hope that this memorandum has provided you with guidance in this difficult area. If you have further questions do not hesitate to contact this office.

CLYDE O. MARTZ
Solicitor

ESTATE OF JESSE J. JAMES

8 IBIA 205

Decided *December 8, 1980*

Escheat determination concerning trnst property on the public domain.

1. Indian Probate: Escheat

The Act of Nov. 24, 1942, 56 Stat. 1022 (25 U.S.C. § 373b (1976)) is not ambiguous. It plainly states that where, as here, a public domain allotment exceeding a value of $2,000 lies adjacent to an Indian community and may be advantageously used for Indian purposes, such allotment shall be held in trust by the United States for such Indians as Congress (not the Secretary of the Interior) may designate, where the owner of the allotment dies intestate without heirs eligible to inherit such allotment.

APPEARANCES: Craig J. Dorsay, Esq., Portland, Oregon, and Sande Schmidt, Esq., Burns, Oregon, for petitioner Burns-Paiute Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Jesse J. James, deceased Burns-Paiute, died intestate without heirs on Jan. 12, 1978, possessed of trust property located on the public domain. The estimated value of decedent's public domain allotment (Indian Joe Allotment No. 144–111) was $9,600 as of Mar. 27, 1979.

The Burns-Paiute Tribe, through counsel, seeks an order from the Board of Indian Appeals, on behalf of the Secretary of the Interior, declaring that decedent's trust property be held in trust by the United States for the benefit of the tribe by operation of escheat. According to the tribe, the Indian Joe allotment lies within the original boundaries of the Malheur Reservation and only 12 miles from present tribal land. The Burns-Paiute Tribe submits that acquisition of