

CATEGORICAL EXCLUSION CHECKLIST

Project Name: Frey Ranch LLC, Carson Lake Branch 3 Drain Piping, Newlands Project, Nevada.

CEC Number: LO - 2012-1031

Cost Authority: A20-1912-4999-100-00-0-0

Date: August 20, 2013

Exclusion Category: *516 DM 14.5 D.1* – Maintenance, rehabilitation, and replacement of existing facilities which may involve a minor change in size, location, and/or operation.

Nature of Action: The Applicant, Truckee-Carson Irrigation District (District) has requested Lahontan Basin Area Office (LBAO) consent to pipe approximately 4,200 feet of the Carson Lake Branch 3 Drain running through the Frey Ranch LLC property, located approximately 10 miles south of Fallon, Churchill County, Nevada. The purpose of the piping of the drain is to reduce hazardous conditions from the drain continually sloughing.

The proposal includes placing 36" diameter ADS plastic drainage pipe in the bottom of the drain. Earthen fill would be placed on top of the pipe and compacted, which will reduce the drain from sloughing. The new pipe will have manholes every 400 feet or at every bend in the pipe for future maintenance activities.

Reclamation engineering has reviewed the proposed design for the crossing and concluded it is adequate for project purposes. Responsibility for operating and maintaining the drain would remain with the District.

The applicant has indicated they would like to begin construction at the end of the irrigation season in November 2013.

Reclamation's action is to review and authorize the District to proceed with the proposed action.

File Code	<i>LND-6.00</i>
Project	<i>29</i>
Control No	<i>13039203</i>
Folder ID	<i>1257245</i>

Location: The project site is located in the Newlands Project Area, approximately 10 miles south of Fallon, Churchill County, Nevada. W ½ of Section 5, T17N, R29E M.D.M; USGS 7.5 Minute Quad Map: South of Fallon, Nev. (See Attached maps)

Evaluation of Criteria for Categorical Exclusion

1.	This action would have a significant effect on the quality of the human environment. (40 CFR 1502.3).	No ☒ Uncertain__ Yes__
2.	This action would have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA Section 102(2) (E) and 43 CFR 46.215 (c)].	No ☒ Uncertain__ Yes__
3.	This action will have significant impacts on public health or safety (43 CFR 46.215(a)).	No ☒ Uncertain__ Yes__
4.	This action would have significant impacts on such natural resources and unique geographical characteristics as historic or cultural resources; parks, recreation and refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principle drinking water aquifers; prime farmlands; wetlands (E.O. 11990); floodplains (E.O. 11988); national monuments; migratory birds; and other ecologically significant or critical areas (43 CFR 46.215 (b)).	No ☒ Uncertain__ Yes__
5.	The action would have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risk (43 CFR 46.215 (d)).	No ☒ Uncertain__ Yes__
6.	This action would establish a precedent for future actions or represent a decision in principle about future actions with potentially significant environmental effects (43 CFR 46.215 (e)).	No ☒ Uncertain__ Yes__
7.	This action would have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects (43 CFR 46.215 (f)).	No ☒ Uncertain__ Yes__

8.	This action would have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau (in coordination with a Reclamation cultural resources professional, RM LND 02-01 D(1)(a)) (43 CFR 46.215 (g)).	No ☒ Uncertain ___ Yes ___
9.	This action would have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species (43 CFR 46.215 (h)).	No ☒ Uncertain ___ Yes ___
10.	This action would violate a Federal, State, local, or tribal law or requirement imposed for protection of the environment (43 CFR 46.215 (i)).	No ☒ Uncertain ___ Yes ___
11.	This action would have a disproportionately high and adverse effect on low income or minority populations (E.O. 12898) (43 CFR 46.215 (j)).	No ☒ Uncertain ___ Yes ___
12.	This action would limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (E.O. 13007 and 43 CFR 46.215 (k)).	No ☒ Uncertain ___ Yes ___
13.	This action would affect Indian Trust Assets. (To be completed by Reclamation official responsible for ITAs) (S.O. 3175; Policy Memorandum dated 12/15/93).	No ☒ Uncertain ___ Yes ___
14.	This action would contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act, E.O. 13112, and 43 CFR 46.215 (l)).	No ☒ Uncertain ___ Yes ___

NEPA Action Recommended: Categorical Exclusion ☒ EA ___ EIS ___

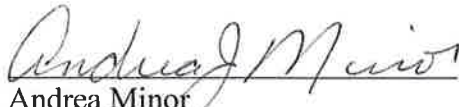
Environmental commitments, explanation, and/or remarks:

See the attached correspondence from Patricia Rivera regarding Item 13 (Indian Trust Assets).

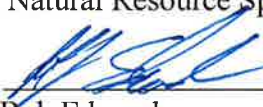
In accordance with the attached Memorandum, dated September 30, 1993, Subject: Request for Solicitor's Opinion concerning Bureau of Reclamation Responsibilities Under the National Historic Preservation Act for Lands Covered by Easements Within the Middle Rio Grande Conservancy District, it has been determined that since in this instance, Reclamation only holds an easement and holds no authority to grant any rights or actions across these lands, and therefore has no obligation to perform cultural resource surveys on the lands involved. Accordingly, Item 8 (cultural resources) on this checklist will not be addressed.

Prepared by: 
Peter J. Neugebauer

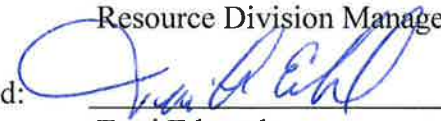
08/23/2013
Date

Recommended: 
Andrea Minor
Natural Resource Specialist

8/23/13
Date

Concurrence: 
Bob Edwards
Resource Division Manager

8/23/2013
Date

Approved: 
Terri Edwards
Deputy Area Manager

8/23/13
Date

Re: ITA request for Frey Drain piping

1 message

RIVERA, PATRICIA <privera@usbr.gov>

Thu, Aug 22, 2013 at 7:09 AM

To: Andrea Minor <aminor@usbr.gov>

Andrea,

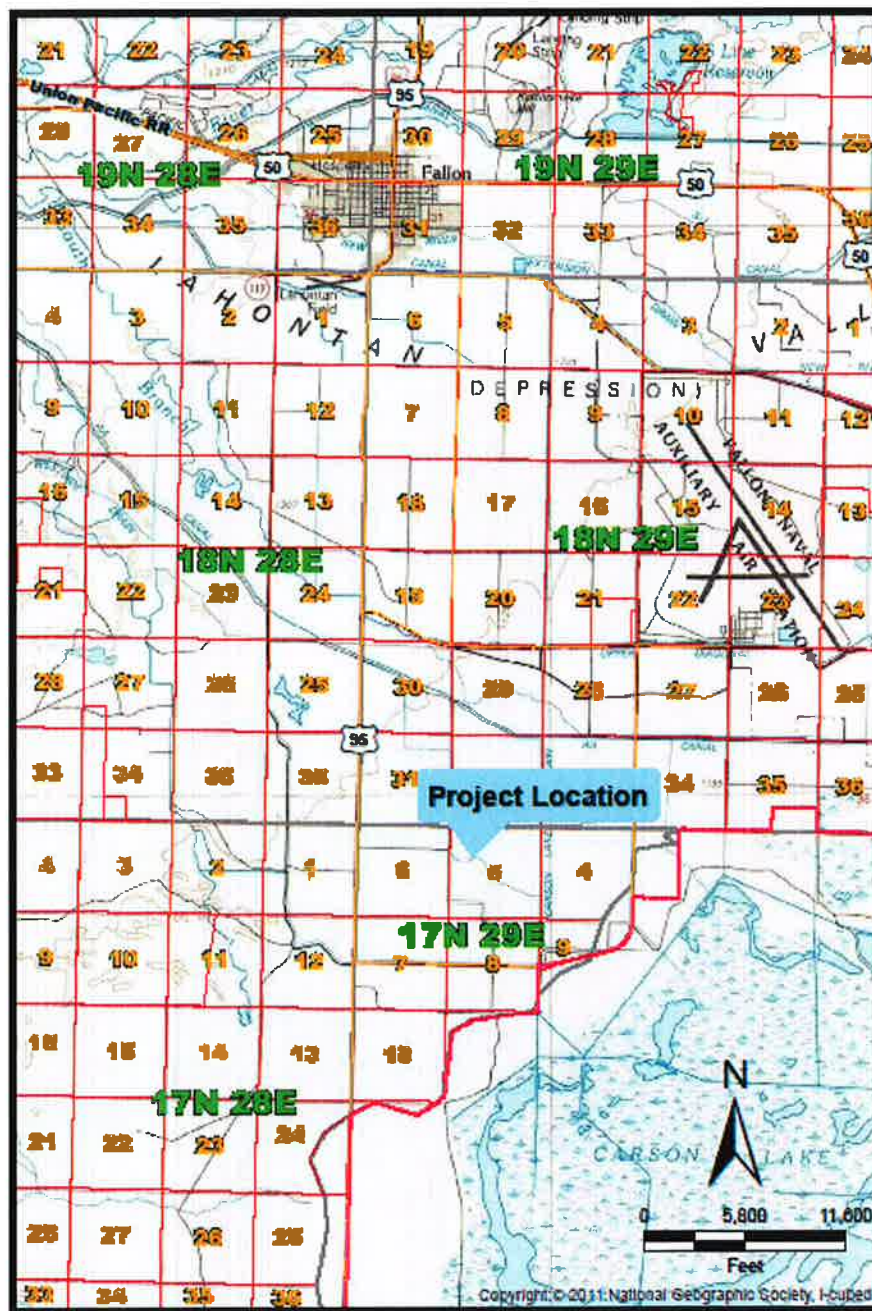
I reviewed the proposed action to approve the Applicant, Truckee-Carson Irrigation District's (District) request to pipe approximately 4,200 feet of the Carson Lake Branch 3 Drain running through the Frey Ranch LLC property. The purpose of the piping of the drain is to reduce hazardous conditions from the drain continually sloughing.

The proposal includes placing 36" diameter ADS plastic drainage pipe in the bottom of the drain. Earthen fill would be placed on top of the pipe and compacted, which will reduce the drain from sloughing. The new pipe will have manholes every 400 feet or at every bend in the pipe for future maintenance activities.

Reclamation's action is to review and authorize the District to proceed with the proposed action.

The proposed action does not have a potential to impact Indian Trust Assets. The nearest ITA is the Fallon Colony approximately 8 miles Northwest of the project locations.

Patricia Rivera
Native American Affairs Program Manager
US Bureau of Reclamation
Mid-Pacific Region
2800 Sacramento, California 95825
(916) 978-5194



Carson Lake Branch 3 Drain Piping Project

LO-2012-1031

08/20/2013

RECLAMATION
Managing Water in the West

Lahontan Basin Area Office
705 N. Plaza Street, Carson City, NV 89701

COLBY FREY
1045 Dodge Lane
Fallon, NV 89406



Legend

plat 2019-0011

Pipe TxD drainage ditch

0 800 1600 2400 Feet





ORIGINAL

United States Department of the Interior

OFFICE OF THE SOLICITOR

SUITE 6201, FEDERAL BUILDING
125 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84138

September 30, 1993

RECEIVED BOR SLCU
OFFICIAL FILE COPY

OCT 04 1993

Class	ENV 3.00
Pri	GF
Case #	93020918
File #	11578
Keyed	✓
State	Initials To
Upper	700

MEMORANDUM

To: Chief, Planning and Environmental Office,
Colorado Region, Bureau of Reclamation

From: Regional Solicitor, Intermountain Region

Subject: Request for Solicitor's Opinion Concerning Bureau
of Reclamation Responsibilities Under the National
Historic Preservation Act for Lands Covered by Easements
Within the Middle Rio Grande Conservancy District
(Cultural Resources)

This responds to your request on behalf of the Albuquerque Projects Office for a legal opinion on the above subject. We also address the issue of whether the Bureau of Reclamation should issue crossing permits inasmuch as the Bureau, while possessing an easement or right-of-way interest, is not the fee owner of the underlying land.

The National Historic Preservation Act (NHPA), 16 U.S.C. §§. 470, et seq., is for the primary purpose of encouraging the preservation of various historic sites and structures, and "discouraging federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control." Lee, et al. v. Thornburgh, et al., 877 F.2d 1053, 1056 (D.C. Cir., 1989). The court concluded:

Federal agencies . . . are commanded to value preservation, and are subject to certain requirements - but only in relation to projects or programs they initiate or control through funding or approvals.

Id., at 1058.

Section 470f of the NHPA provides:

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 issuance of any license . . .

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

16 U.S.C. § 470f.

Similarly, section 470h-2(a)(1) provides that:

The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.

16 U.S.C. § 470h-2(a)(1) (emphasis added).

Thus, § 470f is the basis for the requirement for cultural resource studies prior to federal undertakings, and 470h-2(a)(1) requires federal agencies to preserve historic properties they own or control.

CULTURAL RESOURCE STUDIES PURSUANT TO § 470F

In addition to the issuance of a license, specifically mentioned in the text of the statute, the issuance of an individual permit has been found sufficient by the courts to trigger the provisions of § 470f of the NHPA. Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown, et al., 948 F.2d 1436 (5th Cir., 1991). See also, Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245-46 (7th Cir. 1976) (where demolition of a privately owned bank not federally funded and did not require federal permits, NHPA not involved). The courts' reasoning is consistent with section 470h-2 of the NHPA, which provides:

Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this sub-chapter and, give consideration to programs and projects which will further the purposes of this subchapter.

16 U.S.C. § 470h-2(d) (emphasis added).

Thus, when a federal agency which has authority to do so grants a license, permit, or other form of official approval, that agency must attempt to preserve the historic qualities in the site or structure under its direct or indirect jurisdiction. However, the issuance of a license or permit by an agency would normally

seem to be evidence of jurisdiction for purposes of the statute. This should not pose a problem in the context of the circumstances presented by your question, because for reasons discussed below, it is our opinion that in instances where the Bureau of Reclamation is not the fee title owner of the underlying land but merely has an easement interest, it generally has no authority to issue a license or permit authorizing a third party to use the land; that prerogative remains with the owner of the underlying fee. Thus, we are of the opinion that the lands underlying the Bureau's easements are not under the direct or indirect jurisdiction of the Bureau for purposes of assessing the applicability of the NHPA, and certainly are not under the Bureau's ownership.

A number of courts have addressed the issue of what type of governmental action constitutes a "federal undertaking" or "federally assisted undertaking" as contemplated by the language in section 470f of the NHPA for the purpose of determining whether a cultural resource study must be performed. The majority of such courts have concluded that the NHPA "by its terms has a narrow reach and is triggered only if a federal agency has the authority to license a project or approve expenditures for it." Sugarloaf Citizens Association v. Federal Energy Regulatory Commission, 959 F.2d 508, 515 (4th Cir. 1992), quoting Lee v. Thornburgh, 877 F.2d 1053, 1055 (D.C. Cir. 1989). Some courts have found that "undertaking" under the NHPA may be equated with "major federal action" under the National Environmental Policy Act (NEPA). See, e.g., Ringsred v. City of Duluth, 828 F.2d 1305, 1309 (8th Cir. 1987). However, that analysis was specifically rejected by the Vieux Carre court, Vieux Carre Property Owners, Residents and Associates, *supra*. While the concepts of "major federal action" under NEPA and "federal undertaking" are similar in nature, they derive from different statutes and must each be interpreted within the context of their respective statutes and legislative histories. The NHPA standard is that enunciated in Sugarloaf and Thornburgh, *supra*, namely that a federal undertaking or federally assisted undertaking giving rise to a requirement for NHPA compliance only occurs when the "federal agency has authority to license a project or approve expenditures for it."

The issue, then, seems to come down to the Bureau of Reclamation's authority or responsibility to issue licenses or permits on lands where it only holds an easement interest rather than the fee.

It is axiomatic in our legal system that the owner of an easement holds only the right of use of the land of another, and that this right of use extends only to the extent necessary to provide the actual benefit intended by the easement. The right of use does not include within it the right to grant or otherwise authorize third parties to use the land; that right is retained by the owner of the underlying fee interest in the property. United States v. Gates of the Mountain Lakeshore Homes, 732 F.2d 1411 (9th

Cir. 1984).

The Bureau has an established practice of issuing "crossing permits" to third parties desiring to cross the Bureau's easement with a power line or the like. The fact that these documents are called "permits" is a bit of a misnomer, and may well have given rise to the question you have posed, for the word "permit" is normally used to imply that the issuing party has authority to grant such a right. In fact, however, the Bureau only holds an easement, albeit exclusive of interfering uses. Only the fee owner can authorize a separate right to use his or her land; the Bureau's action legally only means that Reclamation agrees that the proposed new use does not interfere with its use of its easement for the canal or such. In other words, the Bureau, as the owner of an exclusive easement, has the right to object to a new use of the owner's land if the new use would in some way interfere with the Bureau's use. The "permit" does not authorize or grant the use; it simply means that the Bureau has examined the proposed new use and found that it does not interfere with the Bureau's use.¹

Under these circumstances, it is the opinion of this office that the Bureau's action in issuing a "crossing permit" does not rise to the level of a "federal undertaking" or a "federally assisted undertaking" under § 470f of the NHPA, since the Bureau is not actually authorizing the new use nor is it providing or authorizing federal expenditures therefor. The Bureau does not have the legal right to grant or authorize the new use. It can merely examine and confirm whether the proposed new use to be granted or authorized by the fee owner interferes with project uses of the land. Accordingly, there is no obligation for the Bureau to perform cultural resource surveys on the lands involved.

We emphasize that the above holds only for lands where the Bureau owns an easement only. If the Bureau owns the fee, then it would be in a position of actually authorizing the new use, which, of course, would then entail compliance with the § 470f requirement that the effects of this "federal undertaking" on historic resources be taken into account before deciding whether to issue the authorization.

PRESERVATION OF HISTORIC PROPERTIES
"OWNED OR CONTROLLED" BY THE BUREAU

Finally, the materials enclosed with your opinion request also raise the question of whether the Bureau is obligated under § 470h-

¹ Given the confusing connotations of the word "permit," we suggest that you use a different designation than "crossing permit," for these actions. Perhaps "statement of non-interference" or "statement of non-objection" would be more appropriate.

2(a)(2) to "establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control . . . that appear to qualify for inclusion on the National Register," given possibility that the canals themselves potentially qualify to be designated and listed as historic properties. Should that be the case we would observe that 16 U.S.C. § 470h-2(a)(1), quoted above, is the legal requirement that you take the necessary steps to nominate them for reservation, for the canal easements themselves certainly are property "owned or controlled" by your agency.

We are aware that the Rio Grande Water Conservancy District, by contract with the Bureau, is entirely responsible for the operation and maintenance of the canals. Nevertheless, the Bureau does own the easement and the canal structures, and exercises oversight on the district's operations and maintenance. Furthermore, under the contract the Bureau is authorized to retake operation and maintenance should the district not perform properly.

The legislative history was not helpful in enhancing our understanding of the meaning given by the word "control" in the statute, but given its commonly understood meaning, it appears that the Bureau's overall interests in the canal easements are sufficient to warrant a reading of the statute to include them. Particularly since the wording of the statute is "ownership or control," control does not equate to ownership.

We conclude that the Bureau's interests are sufficient in the way of control to be included within the meaning of § 470h-2(a)(2). You should therefore see that the canal structures and easements owned by the Bureau are inventoried and nominated for inclusion in the National Register, as appropriate under the federal regulations. Whether and how such listings might affect the ability of the underlying fee owner of such land to grant authority for crossings of the canal in the future are questions to be determined later on the facts as they will then exist.

If you have any other questions or comments on any of these matters, please contact Scott Loveless of this office at (801) 524-5677.

LYNN R. COLLINS
Regional Solicitor

By



A. SCOTT LOVELESS
Attorney-Advisor

ASL:dib:09/30/93:Loveless:Cultural:ALB